CONNECTICUT REPORTS:

BEING REPORTS OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ERRORS

OF THE

STATE OF CONNECTICUT.

VOL. LX.

BY JOHN HOOKER.

PUBLISHED FOR THE STATE OF CONNECTICUT,
BY BANKS & BROTHERS,
144 NASSAU STREET, NEW YORK.
1891.

M917.

JUDGES

OF THE

SUPREME COURT OF ERRORS

DURING THE TIME OF THE WITHIN DECISIONS.

HON. CHARLES B. ANDREWS, CHIEF JUSTICE.
HON. ELISHA CARPENTER.
HON. DWIGHT LOOMIS.
HON. EDWARD W. SEYMOUR.
HON. DAVID TORRANCE.

JUDGES OF THE SUPERIOR COURT.

HON. EDWARD I. SANFORD.
HON. JAMES PHELPS.
HON. AUGUSTUS H. FENN.
HON. FREDERICK B. HALL.
HON. SAMUEL O. PRENTICE.
HON. JOHN M. HALL.
HON. JOHN M. THAYER.
HON. SILAS A. ROBINSON.

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

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

TABLE OF THE CASES REPORTED.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ERRORS

OF THE

STATE OF CONNECTICUT.

THE NEW YORK & NEW ENGLAND RAILROAD COMPANY *vs.* THE CITY OF WATERBURY.

Hartford Dist., Oct. T., 1890. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

It is provided by Gen. Statutes, § 3481, that whenever a new highway is laid out across a railroad, it shall pass over or under the railroad track as the railroad commissioners shall direct; and that the railroad company shall construct the crossing, bearing half the expense of it, and being reimbursed for the other half by the town, city or borough. A new street was laid out in a city across a railroad, the land occupied by which was owned in fee by the railroad company, and the crossing was constructed by the company. Held that the railroad company was not entitled, in addition to reimbursement for half the cost of the crossing, to payment by the city of the remaining half of the cost as damage to which it had been subjected by the taking of its land for the highway.

The railroad company was incorporated under a charter which did not impose the burden of making such crossings, but its charter was subject to amendment. Held that the statute above mentioned constituted such an amendment.

All general laws and police regulations affecting such corporations are binding on them without their assent.

It is not a taking of its property to compel a railroad company to pay half the cost of building a bridge to protect the public, nor damage incident to the taking of property within the true meaning of the term.

[Argued October 15th, 1890—decided January 5th, 1891.]

APPLICATION for a re-assessment of damages for land

taken for a highway by the defendant city; brought to the Superior Court in New Haven County, and heard before *Fenn, J.*

The court made a finding of the facts, which, after stating that the highway in question was laid out by the city of Waterbury across the land owned in fee and occupied by the railroad company, and that the board of compensation of the city had assessed the damages for the land taken at $198, proceeded as follows:—The highway constructed upon the land so taken crosses the lay-out of the applicants, and by direction of the railroad commissioners is made to pass under the railroad. The applicants constructed the crossing to the approval of the commissioners, the expense of such crossing being $7,755.19. One half of said sum has been paid to said company by said city, but the company also has demanded the other half, and claims to be entitled thereto, being $3,777.59. And I find that if said one half of said cost of conveying said railroad over said highway, which has not been paid to said company by said city, is to be taken into account and allowed in estimating the damage to which said company is entitled, said damages are $4,027.59. Otherwise I find said damages to be $250.

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

E. D. Robbins, for the plaintiff.

1. The law of eminent domain requires that the compensation awarded shall cover not merely the value of the land taken, regarded by itself, but all direct damage and loss to its owner resulting from the taking. If a highway divides a farm, the owner receives as compensation the damage to the whole farm. If a factory must be raised or lowered, shored up or moved, in consequence of the taking for a highway of part of the land of a manufacturing corporation, such corporation must be paid enough to make good the expense so necessitated. Lewis on Eminent Domain, §§ 461, 462. In the case at bar the highway has been constructed, pursuant to the charter of the city of Waterbury, pending the

appeal from the award of compensation. The plaintiff has actually built piers and a bridge to carry its railroad over that part of the highway located on the land now under condemnation. The final net cost to it of making these absolutely required re-arrangements has been exactly $3,777.59. This element of damage is neither remote nor difficult of ascertainment, but as direct, immediate and definite as could possibly be conceived. It never was conjectural or contingent, but from the first stage of the proceedings was absolutely certain and capable of exact estimation. It is not pretended that there is a counterbalancing advantage of any nature. A highway under the railroad is and will always remain merely a source of danger and of possible expense. If the claim made below by counsel for the city of Waterbury is sustained, the taking of the plaintiff's land for a public use will have caused it a direct net loss of $3,777.59, for which it receives no compensation. The authorities amply sustain our claim. *Com.* v. *Boston & Maine R. R. Co.*, 3 Cush., 25; *Mass. Central R. R. Co.* v. *Boston, Clinton & Fitchburg R. R. Co.*, 121 Mass., 124; *Matter of Lockport &c. R. R. Co.*, 19 Hun, 38; *Chicago & Grand Trunk R. R. Co.* v. *Hough*, 61 Mich., 507; *Toledo & Ann Arbor R. R. Co.* v. *Detroit, Lansing & Northern R. R. Co.*, 62 id., 564; *Illinois Central R. R. Co.* v. *City of Bloomington*, 76 Ill., 447; *St. Louis, Jacksonville & Chicago R. R. Co.* v. *Springfield & N. Western R. R. Co.*, 96 id., 274; *Lake Shore & Mich. South. R. R. Co.* v. *Chicago & W. Indiana R. R. Co.*, 100 id., 21; *Chicago & W. Indiana R. R. Co.* v. *Englewood Connecting R. R. Co.*, 115 id., 375. In *Old Colony R. R. Co.* v. *Plymouth*, 14 Gray, 155, SHAW, C. J., says—"The petitioners are entitled to recover damages for taking their land for the purposes of a highway, subject however to its use for a railroad; for the expense of erecting and maintaining signs required by law at the crossing; for making and maintaining cattle-guards at the crossing if necessary; and for the expense of flooring the crossing and keeping the planks in repair." In *Flint & Pere Marquette R. R. Co.* v. *Detroit & Bay City R. R. Co.*, 64 Mich., 350, the court held that the

cost of maintaining signals on a crossing system would be elements of damage, though the cost of stopping trains at such a crossing is not. In *Grand Rapids* v. *Grand Rapids & Indiana R. R. Co.*, 58 Mich., 641, the court say:—"The damage done to a railroad by having a highway run across it must necessarily include all the additional expenses entailed by such a crossing, which in a city may involve a considerable outlay in making the crossing safe and providing guards against accident. Under the constitution there must be just compensation, and this cannot be denied by law or by verdict." The appellant is a corporation, and its charter is subject to amendment, but this fact does not in any wise affect its constitutional right to compensation when its property is taken for public use. In *Toledo & Ann Arbor R. R. Co.* v. *Detroit &c. R. R. Co.*, before cited, the court quotes with approval the following language from another case cited:—"Neither the state nor any of its departments or municipalities have or claim any interest in the property or franchises of the company. They neither pay nor contribute towards the purchase of the right of way or keeping it in proper repair afterwards. All this is done by the company itself and through its efforts, and the right thus acquired and paid for by the company is as much its property and of value to it as would be a like right or interest if owned by an individual. In justice, therefore, the corporation should have as clear a right to compensation for injury sustained in consequence of an appropriation or use of its property by another without its consent, as an individual would." There can be no question that the present case comes entirely within the law of these cases. If signboards, planks between rails, and cattle-guards, when required by law at crossings, are proper elements of damage, so clearly in this case are the piers and bridge, which also are absolutely necessary.

2. The charter of the city of Waterbury requires it to pay all damages which shall be done to any person by the taking of his land for a highway. 7 Private Laws, 220. It is sophistry to argue that this requirement has been com

plied with, if, by the laying out of the highway, the landowner suffers a damage of $3,777.59, which was a certain, direct and immediate consequence of that lay-out, because necessitated by statute, and which, in the hearing for the assessment of damages, is capable of easy and exact ascertainment.

3. The constitution of the state provides that the property of no person shall be taken for public use without just compensation therefor. Art. 1, sec. 11. There is no controversy here about the police powers of the state. In some instances where laws have been thought necessary for the public health, safety or morals, which incidentally injured individuals, the claim has been made that the laws were void as violating this constitutional provision. The courts have, however, found that there was no "taking" of property in such cases. In the present instance there is no question whether there is a "taking of property;" the proceeding is avowedly one for that specific purpose. The only question is one which, in the cases above referred to, was never even reached, namely, what is just compensation? It is mockery to call that compensation just which evidently and unavoidably leaves a landowner, as soon as the land is taken, $3,777.59 worse off than he would be if his land were not condemned for the public use.

4. The 14th amendment to the constitution of the United States provides that no person shall be deprived of property without due process of law, nor denied the equal protection of the laws. The plaintiff certainly is denied the equal protection of the laws when every other individual or corporation whose land is taken for this highway receives, not merely the value of the ground condemned, but full compensatory damages for the taking, while the plaintiff receives merely the amount of money which its land would be worth if it were an unoccupied field.

5. The suggestion that section 3481 of the General Statutes forbids the award of compensatory damages is untenable for two reasons. 1st. That statute has no reference to the assessment of damages in condemnation proceedings nor

even to the laying out of the highways. It merely provides that independently of any such proceedings, whether land owned by the railroad company be taken or not, the municipality "constructing" a new highway shall pay half the expense of constructing the railroad crossing.—2d. Any construction of a statute will always be avoided, if possible, which brings it into variance with the constitution of the state or of the United States. *Camp* v. *Rogers*, 44 Conn., 291, 299.

G. E. Terry, for the defendant.

SEYMOUR, J. The legislature in the year 1883 passed an act "concerning the crossing of railroads by highways." It provided, in one of its sections, that "whenever a new highway or a new portion of a highway should thereafter be constructed across a railroad, such highway or portion of highway shall pass over or under the railroad, as the railroad commissioners shall direct. The company or trustee operating such railroad shall construct such crossing to the approval of the railroad commissioners, and may take land, for the purposes of this section, in the manner now provided by law for the taking of land by railroad companies. One half the expense of such crossing shall be borne by the company or trustee constructing the same, and the other half thereof shall be paid to said company or trustee by the town, city or borough which constructs said highway or portion of highway." Gen. Statutes, § 3481.

After the passage of this act the board of road commissioners of the city of Waterbury, upon due notice to, and after hearing, all owners of land proposed to be taken thereby, laid out a highway in said city, called Fifth street; which lay-out crosses the track of the applicant and includes and takes therefor land in which it has the estate in fee. By direction of the railroad commissioners the highway was made to pass under the railroad. The railroad company constructed the crossing to the approval of said commissioners, at an expense of $7,755.19. One half of this sum has

been paid by the city, but the railroad company has demanded the other half and claims to be entitled thereto.

On July 11th, 1887, the board of compensation of Waterbury assessed and determined that the city pay to the railroad company, in full of all damages over and above all benefits accruing to the applicant from the said lay-out and extension of Fifth street, the sum of $198, and made its report accordingly to the court of common council of the city. The report was accepted and duly recorded and said assessment of benefits and damages was confirmed and adopted by the court of common council and approved by the mayor of the city. Thereupon the railroad company brought its application in due form for a reassessment of damages.

The Superior Court finds that if said one half of the cost of conveying the railroad over the highway, which has not been paid to the railroad company by the city, is to be taken into account and allowed, in estimating the damage to which the company is entitled, the damages are $4,027.59; otherwise the damages are $250. The question what judgment shall be rendered upon the facts of the case is reserved for the advice of this court.

The contention of the railroad company is that it is entitled to claim and receive, as part of its damages for the taking of its land for the highway, compensation for the entire expense which it was compelled to incur in constructing the crossing as directed by the railroad commissioners. It insists that the statute dividing the expense is not applicable to this case, and that to apply it and enforce it would be in violation of the provision of our constitution that the property of no person shall be taken for public use without just compensation therefor.

The statute was passed, as is well known, as part of a general plan to diminish the number of grade-crossings. Of course the legislature did not contemplate, when it provided that one half the expense of constructing crossings under its provisions should be borne by the railroad company, that it, in turn, could recover such half from the town, city or borough constructing the highway, under a claim for dam-

ages consequent upon the exercise of the right of eminent domain in taking land of the railroad for highway purposes. The applicant nevertheless claims that the entire expense of constructing the crossing is damage incident to the taking of its land by the condemnation proceedings, to which it is entitled as just compensation. It argues that inasmuch as the law compels it to build the bridge and pay one half of the expense of so building, therefore Waterbury must pay such one half of the expense in addition to its own share, as just compensation for taking the land.

The charter of the New York & New England Railroad Company is not what is called a close charter, but is subject to legislative amendment. All general laws and mere matters of police regulation, affecting corporations, are binding without their assent. *New Haven & Derby R. R. Co.* v. *Chapman*, 38 Conn., 71. The act in question has the effect of an alteration of the charter of a company, previously incorporated by a charter which did not impose the duty, but which contained a provision that it might be altered at the pleasure of the legislature. *Bulkley* v. *N. York & N. Haven R. R. Co.*, 27 Conn., 479.

It was held in *English* v. *N. Haven & Northampton Co.*, 32 Conn., 240, that, under the power to amend a charter, the General Assembly had a right to impose upon the defendant any additional condition or burthen, connected with the grant, which they might justly have imposed originally. In that case the defendant's charter empowered it to construct and use a railroad terminating in the city of New Haven, and provided that the construction and use of that part of the road within the limits of the city should be subject to such regulations as the common council should prescribe. After the defendant had constructed its road and built bridges over the same within the city and to its acceptance, the legislature passed an act authorizing the common council to order the bridges widened in such manner as public convenience might require, and to enforce the order. It was contended by the defendant that the act was unconstitutional as impairing the obligation of the contract of the

state, and as taking its property without compensation therefor. But the court held the contrary and sustained the statute.

This court said, in *City of Bridgeport* v. *N. York & N. Haven R. R. Co.*, 36 Conn., 264—"There have been many decisions where new highways have been laid across railroads and the railroad company have claimed damages for increased liability to accidents at the crossings or for increased expense of ringing the bell or for liability to be ordered by the commissioners to build a bridge over the track or to keep gates or flagmen. All such claims for damages, and all claims that were not direct and immediate burdens, have been uniformly holden too contingent and remote to be the basis of an assessment for damages."

There can be no doubt of the right of the legislature to require railroad companies to bridge their crossings of existing highways at their own expense. The case of *English* v. *The New Haven & Northampton Co.*, *supra*, fully recognizes that right, and it is expressly held in *N. York & N. England R. R. Co.'s Appeal from Railroad Comrs.*, 58 Conn., 532. In the latter case this court says "that such crossings are public nuisances, dangerous to human life, and no man has a vested interest in the creation or continuance of such a nuisance. In the exercise of the power of protecting human life the legislature may at any time and without notice abate it or prevent its existence." The same right is strongly affirmed in *People ex rel. Kimball* v. *Boston & Albany R. R. Co.*, 70 N. York, 569.

The applicant argues that, the law being so that if a factory building must be raised or lowered, shored up or moved, in consequence of the taking of land of a manufacturing company for a highway, such company must be paid enough to make good the expense so necessitated, therefore the same rule must be adopted in respect to the construction of the bridge in this case, required by the law. But the cases stand upon a very different footing. In one the damage is the direct, natural, unavoidable result of the taking. In the other the damage is in no way directly or naturally con-

nected with the taking, but artificially, and by means of a statute which has respect to the safety of the public and not to the damage of the party whose property is taken or to the benefit of the party who takes it.

The question before us is an interesting one and not entirely free from difficulties. The statute requires the applicant to construct a bridge over the highway which is laid out across its track. Now, because it owned the land taken for the highway crossing in fee, and it was therefore taken under the exercise of the right of eminent domain, can the applicant demand, by way of just compensation, that the one half of the expense, which the law requires him to pay, shall be paid back to him by the respondent? We think not.

Compensation for expense arising through such statutory obligation is not a legal element of damage. There is no right to compensation for what the law says shall be done at the expense of the railroad company. It is not a taking of property to compel it to pay one half the expense of building a bridge to protect the public, nor damage incident to the taking of property within the true meaning of the words. We cannot hold that a duty which the state has most justly imposed upon the applicant, as its share towards the protection of life, should be turned into an element of damage, for which compensation must be made when circumstances arise which create the duty. We are well aware that there are decisions that, where highways cross a railroad, the expense of cattle-guards, signs and planking is an element of damage which must be paid for. Different states have decided differently upon this point. Mills on Eminent Domain, § 33. Perhaps it is impossible to discriminate between those cases where compensation has been awarded and the case at bar. But the precise question here involved is substantially novel, and, at the risk of antagonizing the rule, if it exists, of allowing compensation for the expense of erecting statutory safeguards, we must decide this case upon the principles we have stated.

The Superior Court is advised to assess damages in favor

of the applicant to the amount of $250, and to render judgment accordingly.

In this opinion the other judges concurred.

FAIRFIELD COUNTY BAR *vs.* HOWARD W. TAYLOR.

New Haven & Fairfield Cos., Oct. T., 1890. ANDREWS, C. J., CARPENTER, LOOMIS and SEYMOUR, Js.

Courts can as a general rule fine an attorney for a transgression of their rules and can forbid him to appear before them, but the Superior Court alone has power to order the suspension or disbarment of attorneys.

There is no statute or usage authorizing an appeal from an order of the Superior Court suspending or disbarring an attorney.

Certain attorneys, appointed a committee by a county bar to present to the Superior Court the case of an attorney of the county who had been guilty of a gross violation of professional duty, made a presentment of the case to the court. Held that there was no necessity of proof of their appointment as a committee of the bar, as any member of the bar had a right, and it was his duty, to bring such a case to the attention of the court.

A judgment had been obtained against the attorney by a party whom he had defrauded. Held that this judgment, even under strict rules of law, would have been admissible in support of the allegation of the presentment that it existed; but that the hearing of the case was not a trial in the ordinary sense, and was not governed by the ordinary rules with regard to the admission of evidence.

Upon the facts proved, and which showed a very aggravated case of professional misconduct, it was held that the court below properly rendered a judgment of disbarment and not of mere suspension.

[Argued November 5th, 1890—decided January 7th, 1891.]

COMPLAINT by a committee of the Fairfield County Bar, against the defendant, an attorney-at-law of that county, made to the Superior Court for that county, charging the defendant with fraudulent conduct as an attorney, and asking for his disbarment. The case was heard by *Fenn, J.*, a finding of the facts was made, and a decree passed disbarring the defendant and forever prohibiting him from practising law in the state. The defendant appealed to this court.

H. S. Sanford, for the appellant.

S. Fessenden and *G. W. Wheeler*, with whom was *J. C. Chamberlain*, for the appellees.

ANDREWS, C. J. The appellant was an attorney-at-law residing in Danbury and practising in Fairfield County. He was displaced from being an attorney by an order of the Superior Court in that county made on the 13th day of May, 1890. From that order he has appealed to this court.

Section 704 of the General Statutes provides as follows:— "The Superior Court may admit and cause to be sworn as attorneys such persons as are qualified therefor, agreeably to the rules established by the judges of said court; and no other person than an attorney so admitted shall plead at the bar of any court in this state, except in his own cause; and said judges may establish rules relative to the admission, qualifications, practice and removal of attorneys."

Section 785 provides that—"attorneys admitted by the Superior Court shall be attorneys of all courts, and shall be subject to the rules and orders of the courts before which they act, which may fine them for transgressing any such rule or order, not exceeding one hundred dollars for any offence, and may suspend or displace them for just cause."

As is seen from these sections the Superior Court alone has power to admit persons to be attorneys-at-law, and the persons so admitted are attorneys in all the courts of the state. Any other court than the Superior Court may fine an attorney for transgressing its rules and doubtless has the power to forbid him from appearing before it; but only the Superior Court can make an order of total suspension or displacement. In the absence of specific provisions to the contrary, the power of removal is, from its nature, commensurate with the power of appointment.

There is no statute authorizing an appeal from an order by the Superior Court suspending or displacing an attorney. Nor so far as we are able to learn, is there any usage permitting it. Such orders have been made many times in the

Superior Court, and this is the first instance in which any attempt has been made to take an appeal from one of them to the Court of Errors.

Such an order, although it is a judicial act, has in it so much that is of a discretionary nature as to suggest great difficulties in an appeal. It is a discretion, too, that ought to be exercised with great moderation and care. But sometimes it must be exercised, and no other tribunal can decide in a case of removal from the bar with the same measure of information as the court itself. A revising tribunal, if there be such an one, would feel the delicacy of interposing its authority, and do so only in a plain case. In this case all objection to the appeal is expressly waived, and apparently with the approval of the judge of the Superior Court who made the order. We have therefore concluded to examine it.

The case is this :— Certain attorneys practising in Fairfield County, describing themselves to be a committee of the bar of that county, made a presentment to the Superior Court in that county, in the form of a complaint, therein charging the appellant with fraud and with other unprofessional conduct; and that he had been sued by Margaret and David Sprague, who claimed to have been his clients, and that in a matter concerning which they had asked and followed his professional advice he had defrauded them out of a large sum of money; that a trial had been had before the Superior Court in that county at a former session, and a judgment rendered in favor of the said Spragues to recover of the appellant the sum of $2,238.75, for such fraud. A copy of the entire record in that case, the complaint, pleadings, finding of facts, and judgment, was attached to and made a part of the presentment so made by them.

Upon that presentment the Superior Court made an order of notice to the appellant, requiring him to appear on a day named to make answer thereto. On the day so named the appellant did appear with counsel, made an answer denying all the material allegations of the presentment, and was fully heard.

At the hearing the attorneys who had preferred the charges appeared to prosecute them. They offered a duly certified copy of the record, a copy of which had been set out in and made a part of their charges, and also the testimony of witnesses to prove the charges they had made, and also the truth of the things averred in the complaint of the said Daniel and Margaret Sprague. The appellant was also fully heard in his exculpation. All the evidence he offered was received without objection, and the matter was argued at length in his behalf by counsel. The court made a finding of facts and rendered a judgment that the appellant be disbarred and forever prohibited from practising law before the courts of this state.

At the commencement of the hearing the committee who had made the charges proposed to offer evidence of their appointment as a committee of the bar, and for that purpose had the records of the bar in court, and so stated. The court ruled that such evidence was not required, but that the court would recognize the persons named, they being known to the court as members of the bar, as proper persons to prefer the charges and to present the matter therein contained to the court. This ruling was objected to and is the first reason of appeal. There is no force in the objection. While it would have been well enough, perhaps, to have received that record, it would have been wholly without significance. It was the duty of the attorneys, if they knew of unprofessional conduct by the appellant or any other attorney, to bring it to the attention of the court. An appointment by the bar to do that which it was their duty to do without any appointment could give them no added authority. Nor was any such appointment necessary to give the court jurisdiction. The court might summon the appellant to a hearing upon any information it had that it deemed worthy of credit, whether it came from lawyers or laymen. The manner in which the proceeding should be conducted, so that it be without oppression or injustice, was for the court itself. *Ex parte Wall*, 107 U. S. R., 265.

The appellant also objected to the record of the case

brought by Daniel and Margaret Sprague against him being read, and further objected to the finding of the facts therein as not being a part of the record. It is to be observed that the finding of the facts in that case is made a part of the record by the order of the judge who heard the cause. There has been among the statutes of the state ever since 1864 a provision that a finding of facts may be made a part of the record by such an order. Acts of 1864, ch. 49, page 67. This provision may be found in the revision of 1875 at page 444, sec. 9. It is in substance reproduced in the Practice Act, (Acts of 1879, page 439, sec. 30,) and is now section 1111 of the General Statutes of 1888. The objection to the record as a whole is that it was between other parties—*res inter alios acta*. This objection has in it a tinge of sophistry. It turns aside from the purposes for which the hearing was had. It was an investigation by the court into the conduct of one of its own officers, not the trial of an action or suit. Neither the whole bar of Fairfield County nor its committee were parties to an action in any proper sense. They were not prosecuting any matter of their own. They were not plaintiffs. They were performing their sworn duty to the court by bringing to its knowledge the misdoings of one of its agents. But if that committee be regarded as a party, and applying the strictest technical rule, the record was admissible. One of the averments of the complaint was the existence of a certain record. That averment was denied. On such an issue the plaintiffs might surely offer the best possible evidence there could be of the truth of their allegations. The existence of such a record as was averred in the complaint was proved by the production of a copy. For that purpose the whole record was admissible. And it does not appear to have been offered or used for any other purpose. The court seems to have been careful to limit it to its proper effect. All the other parts of the case were proved by other and appropriate evidence.

It is true that the charges contained in the present complaint are substantially the same as those contained in the Sprague complaint. They go over the same ground, and

their truth or falsity was involved in this investigation. To prove them the evidence of witnesses was offered and received, and the finding of the court in this case is based exclusively on their testimony. But these charges did not contain the whole issue. The ultimate question lay beyond them. The real question was whether or not the appellant was a fit person to be longer allowed the privileges of being an attorney. And on that question the fact of the existence of such a record would be legitimate and cogent evidence.

The last reason of appeal is, that the court erred in rendering a judgment of disbarment, instead of suspension only for a reasonable and stated period.

Examined somewhat more in detail, the record shows that prior to January, 1886, the appellant had had such professional relations with Margaret and Daniel Sprague that he believed they would come to him for professional advice and assistance if they should have any law business. In that month he engaged to collect a judgment rendered in the Supreme Court in Dutchess County in the state of New York against the said Daniel Sprague, and owned by one Emeline Kent, for the amount of $1,849.82, with interest thereon from and after 1874. The appellant was authorized to settle for $1,000, net to the owner of the judgment, and was to receive for his own services all he could obtain over $1,000, up to $1,500, and one third of the amount collected in excess of the latter sum. Daniel and Margaret Sprague were husband and wife; Daniel had no property, Margaret had some property. In order to deceive the Spragues, and to cause them to believe, if they should come to him for advice or assistance, that he was not employed to collect the judgment, the appellant drew up and caused to be issued by another attorney a complaint against Daniel and Margaret Sprague in favor of the said Emeline Kent, to recover the amount due on the judgment. Upon this complaint the property of Margaret Sprague was attached. As soon as it was served the Spragues came to the appellant and retained him as their counsel. He accepted that employment. He went to Dutchess County and there learned that Margaret

Sprague was not liable on the judgment. On his return he falsely stated to Mr. and Mrs. Sprague that she was liable on it, and that her property could be taken for it in the suit that had been served on them, and advised them to settle that suit on the most favorable terms they could. Relying on that advice they did settle, the said Margaret paying of her own money the sum of $1,875 in settlement; of which sum the appellant received the stipulated proportion. The appellant knew that, from the time of her employment of him as aforesaid until the settlement of that suit, the said Margaret relied upon him as her counsel and believed him to be acting solely in her interest and behalf. He was however at that time acting for and in behalf of said Emeline Kent, plaintiff in the suit, which the Spragues did not know.

It is hardly possible to characterize such conduct by an attorney-at-law in measured terms. That it was a gross violation of the attorney's oath is only a moderate statement. That it manifested a low condition of moral sensibility is true, and that it showed the appellant to be utterly wanting in the qualities which would entitle him to public confidence is also true.

It is not enough for an attorney that he be honest. He must be that, and more. He must be believed to be honest. It is absolutely essential to the usefulness of an attorney that he be entitled to the confidence of the community wherein he practises. If he so conducts in his profession that he does not deserve that confidence, he is no longer an aid to the court nor a safe guide to his clients. A lawyer needs, indeed, to be learned. It would be well if he could be learned in all the learning of the schools. There is nothing to which the wit of man has been turned that may not become the subject of his inquiries. Then, of course, he must be specially skilled in the books and the rules of his own profession. And he must have prudence, and tact to use his learning, and foresight, and industry, and courage. But all these may exist in a moderate degree and yet he may be a creditable and useful member of the profession, so long as the practice is to him a clean and honest function. But

possessing all these great faculties, if once the practice becomes to him a mere "brawl for hire," or a system of legalized plunder where craft and not conscience is the rule, and where falsehood and not truth is the means by which to gain his ends, then he has forfeited all right to be an officer in any court of justice or to be numbered among the members of an honorable profession.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

STATE EX REL. ANDREW J. BELL *vs.* ALEXANDER WEED.

New Haven & Fairfield Cos., Oct. T., 1890. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

The charter of the borough of Stamford provides that the warden and burgesses, on or before the Monday next preceding the annual election of officers, "shall make out a list of all the electors residing in the borough and qualified to vote therein, which list may be made out entirely from the registry list of the voters of the town last perfected, and no person shall vote at said annual meeting unless his name shall appear upon the list of voters made by said warden and burgesses; provided that, if the name of any elector legally qualified to vote shall be omitted from the list and shall appear upon said registry of the town, he shall be permitted to vote." Held—

1. That the warden and burgesses were not a board of registration. Their duties were merely clerical.
2. That a list copied from the registry list of the town at the request of the clerk of the borough and three burgesses, though not written by the warden and burgesses nor made at their request, but accepted and used at the borough election, was a sufficient compliance with the requirements of the charter.

[Argued November 5th, 1890—decided January 5th, 1891.]

INFORMATION in the nature of a writ of quo warranto, against the defendant as usurper of the office of burgess of the borough of Stamford; brought to the Superior Court in the county of Fairfield, and heard before *Fenn, J.* Facts

found and judgment rendered for the defendant, and appeal by the relator. The case is fully stated in the opinion.

J. H. Olmstead and *G. W. Wheeler*, for the appellant.

1. No list of votes was prepared by the warden and burgesses of the borough, and therefore both elections were illegal and void. They are made by the charter a board of registration, and it provides that "no person shall be permitted to vote or act at said annual meeting of said borough, unless his name shall appear upon the list of voters made by said warden and burgesses." This language is imperative. Since no list was made by them, not a vote cast at the elections was legally cast. The proviso that where a name has been omitted from the list made out by the warden and burgesses, the voter may yet vote if his name is on the town registry, has no application here, because there was no list prepared from which a name could be omitted. In *State ex rel. Doerflinger* v. *Kilmantel*, 21 Wis., 566, the words of the act are: "No vote shall be received at any annual election in this state, unless etc." The court says it is difficult to conceive any language more strongly imperative than this. Cooley (Const. Lim., 758,) says: "And when the law requires such a registry, and forbids the reception of votes from persons not registered, an election in a township where no such registry has ever been made, will be void, and cannot be sustained by making proof that none in fact but duly qualified electors have voted. It is no answer that such a rule may enable the registry officers by neglecting their duty to disfranchise the electors altogether; the remedy of the electors is by proceedings to compel the performance of the duty; and the statute being imperative and mandatory, cannot be disregarded." See also McCrary on Elections, § 9; *Nefzger* v. *Davenport & St. Paul R. R. Co.*, 36 Iowa, 642; *State ex rel. Ensworth* v. *Albin*, 44 Misso., 346; *S. C.*, 46 id., 456; *Zeiler* v. *Chapman*, 54 id., 502; *Harrison* v. *Frazier*, 98 id., 426; *People* v. *Laine*, 33 Cal., 55; *People* v. *Kopplekom*, 16 Mich., 342; *People ex rel. Van Bokkelen* v. *Canaday*, 73 N. Car., 198; *McDowell* v. *Con-*

struction Co., 96 id., 514; *State ex rel. Martin* v. *County Comrs.*, 20 Fla., 859; *Barnes* v. *Supervisors of Pike Co.*, 51 Miss., 305; *State ex rel. Bancroft* v. *Stumpf*, 23 Wis., 630. The principles underlying these decisions are—(1) That the requirement of a registry by the law is mandatory and a failure to comply vitiates an election held in disregard of this requirement. (2) That registry lists must be made up by those authorized by law to make them at the time designated by law, so that all voters may see whether their names are on the list or not. (3) That the law will not permit the registry officers to neglect their duty and thereby cause the voters annoyance in casting their votes, or a total inability to have their votes accepted and counted.

S. Fessenden and *N. C. Downs* cited *Commonwealth* v. *Smith*, 132 Mass., 289; *State ex rel. Love* v. *Freeholders of Hudson Co.*, 3 N. Jer. Law, 269; *Boileau's Case*, 2 Parsons's Sel. Cas., 503; *Stevenson* v. *Lawrence*, Brightly's Lead. Cas. on Elections, 527; *S. C.*, 1 Brewst., 126; *Taylor* v. *Taylor*, 10 Minn., 107; *Wheelock's Case*, 82 Penn. St., 297; *Prince* v. *Skellin*, 71 Maine, 361; *Fowler* v. *The State*, 3 S. W. Rep., 255; Cooley's Const. Lim., 617; McCrary on Elections, §§ 190, 192, 193.

SEYMOUR, J. The sections of the charter of the borough of Stamford under which the claims in this case are presented, provide as follows:—Section 22 that "the warden and burgesses of the borough, on or before the Monday next preceding the annual election of officers for said borough, shall make out a list of all electors residing in said borough and qualified to vote therein, which said list may be made out entirely from the registry list of the voters of the town of Stamford last made and perfected, and no person shall be permitted to vote or act at said annual meeting of said borough unless his name shall appear upon the list of voters made by said warden and burgesses; provided that, if the name of any elector legally qualified to vote at said annual meeting shall be omitted from the list made out by said

warden and burgesses, and shall appear upon said registry list of said town of Stamford last made and perfected, then said elector shall be permitted to vote at said annual meeting and election, notwithstanding his name does not appear on the list so made out by said warden and burgesses. And section 7 provides that "the clerk of the borough of Stamford shall be the clerk of the board of warden and burgesses and shall keep all the records of said borough, and that he shall make true and regular entries upon the records of the votes and proceedings of said borough and of the warden and burgesses."

At the annual election of said borough, held on the first Monday in April, 1890, the relator and the respondent were candidates for the office of burgess. Upon counting the ballots it was found that both had received an equal number of votes, and the moderator declared that there was a tie. Thereupon, on the second Monday of said April, an election was held, pursuant to the provisions of the charter in cases of a tie vote, for the purpose of electing a burgess to fill the position declared to be left vacant by the tie between the relator and the respondent. Upon counting the ballots cast at said election it was found that the relator had five hundred and forty-four votes and the respondent five hundred and forty-six, and that there was one blank ballot. The moderator declared the respondent elected to the office of burgess of the borough. He took the oath of office and proceeded to act as such burgess. Thereupon an information in the nature of a writ of *quo warranto* against said Weed was filed in the Superior Court, and a trial thereon had. At the trial the relator contested the validity of said election on the ground that no list was prepared by the warden and burgesses, as required by the charter of the borough, and that therefore the respondent was not elected, and that both of the elections were illegal and void. The finding shows that a list was used at said elections which was prepared by Edward Riker and Doctor Rowell, both electors, but not officers, of the borough. The said Riker was requested, orally, by the borough clerk, and the said

Rowell by three of the burgesses, orally and separately, to assist in the preparation of the list. Said list first came into the hands of the clerk of the borough on the morning of said first election; nothing appears upon the records of the warden and burgesses of any action looking to the making up of a list nor of the delegation to any one of the power or authority to make such a list. There was no wrongful intent or want of good faith on the part of the former board of warden and burgesses, and all the votes about which there was any question were, by the evidence, before the Superior Court, and the result of said elections was in no way affected by any informality in the preparation of the voting list. Upon these facts the Superior Court found that the respondent is entitled to said office, and rendered judgment in his favor dismissing the information, and the relator has appealed.

Sundry questions of fact were made and decided in the court below. The only question of law presented by the record relates to the list of electors used at said elections. Was it a legal list within the requirements of the charter?

We are fully alive to the importance of all legislation looking towards the prevention of illegal voting. To guard the right of the qualified voter to have his vote counted, and, at the same time, to guard the ballot box against illegal votes and corrupt practices, is a duty of the highest importance. To this end a list of those entitled to vote at the several elections is of great service, and, in the election we are considering, was necessary to its validity. The cases cited in the brief for the relator seem to have been well considered and satisfactory upon the points which they discuss. But a mistake runs through his argument, arising from the assumption upon which the argument is based, that "the warden and burgesses are made, by the charter, a board of registration, passing upon the qualifications of voters and deciding upon those qualified to vote, and that this duty is imposed upon them and them alone." In other words, that the list contemplated by the charter is techni-

cally a registry list. If that were so, there would be no need of argument to convince us that the election was illegal. But such, clearly, is not the fact; so far from it indeed that the charter distinctly discriminates between the registry list and the list to be used at the borough election, and in terms provides that the latter, calling it a list of all electors, may be made out entirely from the registry list of the town last made and perfected. No other method of making out a list is prescribed or provided. If any other method might be adopted, yet the warden and burgesses are authorized to simply follow the last registry list of the town. The provision that, if the name of any elector, legally qualified to vote at the borough meeting, shall be omitted from the list made by the warden and burgesses, his right to vote shall depend, not upon his being a qualified voter, but upon the fact whether his name appears upon the last town registry list, is most significant. The making out of the borough list required no inquiry into the qualifications of those whose names were placed upon it. No application by the voter was necessary to ensure a place upon it. It was enough if it was copied from the last town registry list, and if it was not it could be corrected only from that list.

Nor are the warden and burgesses in any proper sense a board of registration when acting under this provision of the charter. The charter does not call them so nor impose upon them any duties which make them so within the meaniug of the term as used in the argument. Their duties are merely clerical; they are instructed to make out a list, and are told from what other list to make it.

In this view of the matter the difficulties suggested by the relator, that the list was not in fact prepared by the warden and burgesses, nor by their collective procurement, are greatly lessened. A list of all the qualified electors residing in the borough was used. Though copied neither by the warden and burgesses nor at their request, it was a correct list, and was used, as the finding states, without wrongful intent or want of good faith, and the result of the elections was in no way affected by any informality in its pre-

paration. Under these circumstances we cannot decide otherwise than that the charter requirement was substantially complied with. The provision that the warden and burgesses shall make out a list cannot, in view of the mere clerical character of the work required, be construed as mandatory to the extent of requiring that it shall be done by their own hands. If done under their orders or at their request, it will be conceded that the provision would be satisfied. If done without their request and accepted, adopted and used, it may, with equal propriety, be said to have been made out by them within any reasonable construction of the charter, and to have been a substantial compliance with it.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

CHARLES COOK, CONSERVATOR, *vs.* URI P. BARTHOLOMEW AND OTHERS.

Hartford Dist., Oct. T., 1890. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

A deed with a condition for the support of a person for life and to be void on the performance of the condition, is a mortgage.

If it should be necessary to foreclose such a mortgage the money value of the incumbrance can be ascertained approximately, and that is sufficient for all the purposes of substantial justice.

Courts never refuse to redress an injury on account of the difficulty of estimating it in money.

An entry for the failure to perform such a condition in a mortgage is not necessary.

[Argued November 18th, 1890—decided January 7th, 1891.]

SUIT for the foreclosure of a mortgage; brought to the Court of Common Pleas of Litchfield County. Demurrer to the complaint, and reservation for advice. The case is fully stated in the opinion.

D. C. Kilbourn, in support of the demurrer.

R. E. Hall, contra.

CARPENTER, J. This is a suit for the foreclosure of a mortgage, with the alleged mortgage annexed as an exhibit. The mortgage is in two parts—an ordinary deed for the consideration of nine hundred dollars, duly executed to convey real estate, and a condition thereto attached, of the same date, and signed by the grantor, as follows:—"The condition of the within deed is as follows: The said Bostwick, for the consideration named in the within deed, covenants and agrees with said Charles Cook as such conservator, that he will receive said Sarah A. Bostwick into his care and keeping during the term of her natural life, that he will provide for all her wants in a reasonable and proper way, will provide her with all needed food, drink and clothing, have a room and fire when needed, lodging and every necessary comfort, both in sickness and health, and at her decease give her decent and proper burial, and erect tombstones at her grave, with a suitable inscription thereon, within one year after her decease, said tombstones to be of a value of not less than fourteen dollars. Now therefore, if said Bostwick shall well and truly perform all and every of the above covenants and stipulations faithfully, then this deed to be void; otherwise to remain in full force and effect in law."

The complaint also alleges that the defendant Bostwick subsequently conveyed his interest in the premises to the defendant Jones, and that Jones conveyed his interest to the other defendant, Bartholomew. The defendants demurred, and the case is reserved.

Whether the instrument sued on is or is not a mortgage is the principal question in the case. What is a mortgage? "A mortgage is a contract of sale executed, with power to redeem. * * * The condition of a mortgage may be the payment of a debt, the indemnity of a surety, or the doing or not doing any other act. The most common method is to insert the condition in the deed, but it may as well be

done by a separate instrument of defeasance executed at the same time. * * * A bond or note is usually taken for the debt, which is described in the deed, with a condition that if the debt is paid by the time the deed shall be void. In such case the mortgage is called a collateral security for the debt. In like manner an engagement to indemnify, or any other agreement, may be described in the mortgage deed." 2 Swift's Digest, 182, 183. "To constitute a mortgage the conveyance must be made to secure the payment of a debt." *Bacon* v. *Brown*, 19 Conn., 29. "A conveyance of lands by a debtor to a creditor as a security for the payment of the debt." *Jarvis* v. *Woodruff*, 22 Conn., 548.

What is a debt? "That which is due from one person to another, whether money, goods or services; that which one person is bound to pay to another or to perform for his benefit; that of which payment is liable to be exacted; due; obligation; liability." Webster's Dictionary.

What is this case? Ammon Bostwick received $900 from the plaintiff, in consideration of which he agreed to support Sarah A. Bostwick during life, and at her death to bury her and to erect a tombstone to her memory. To secure the performance of this agreement he executed this deed, with a condition that the deed should be void if the agreement should be performed. He assumed a duty which may be aptly described as a debt. He executed a deed of real estate as collateral security for the performance of that duty —the payment of that debt. The obligation falls within an approved definition of debt, and the conveyance is within the legal definition of a mortgage.

There is no force in the objection that this cannot be a mortgage because of the difficulty in ascertaining the amount of the debt, as clearly appears by the definitions. Of course there is less certainty and more inconvenience in reducing an obligation of this nature to a money valuation than there is in computing the amount due on an ordinary bond or note. Nevertheless it may be approximately done; and that is sufficient for all the purposes of substantial justice. Courts never refuse to redress an injury on account of the

difficulty in estimating the extent of the injury in dollars and cents.

In this case the age, health, general condition and expectation of life of Sarah A. Bostwick must be known; add to these the probable cost of supporting her for one year, and we have the date for a reasonable estimate of the cost of supporting her through life. It is a problem of the same nature, containing the same elements and similar factors, with the problem which the parties solved fourteen years ago. They then, as it seems, fixed the outside limit at $900. The same thing can be done now as well as then. Possibly $900 may be considered an equitable limit beyond which the plaintiff may not claim in this case. As other circumstances may exist which will materially affect the general question, we will not consider the question further on this demurrer.

Regarding the conveyance as a mortgage, as we do, there is no foundation for the claim that an entry for a breach of the condition is essential. An entry is essential when the grantor would devest the grantee of his title for a breach of a condition. This is an action by the grantee, in whom the title is, not to enforce a forfeiture, but to foreclose an equity of redemption, unless the grantor, within a reasonable time allowed him therefor, pays the damage sustained by a breach of his agreement.

The Court of Common Pleas is advised to overrule the demurrer.

In this opinion the other judges concurred.

BURTON F. HOYLE *vs.* THE NEW YORK & NEW ENGLAND RAILROAD COMPANY.

Hartford Dist., Oct. T., 1890. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

H, the owner in fee of a tract of land, conveyed to a railroad company a strip of land running through it for the laying of its track, the deed containing the following provision:—"Said company forever to maintain the crossing now made on said land over the railroad and permit the grantor to use the same for his farming purposes; also to permit the grantor to pass over the crossing on *D. B.'s* land whenever he shall require in his farming business." Held that the deed was inadmissible for the purpose of proving a right of way at the crossings acquired by adverse user.

H by his deed having parted with all his title except the right of crossing which he had reserved, had no right of crossing except that so reserved.

Although the deed speaks of the crossings as "now made on said lands," thus recognizing them as material structures existing when the deed was made, yet the grantor retained no right to use them independently of the provision in the deed.

[Argued October 7th, 1890—decided January 7th, 1891.]

ACTION for damages for the obstruction of a right of way; brought to the Superior Court in Windham County, and tried to the jury before *Prentice, J.* Verdict for the plaintiff and appeal by the defendant for error in the ruling and charge of the court. The case is fully stated in the opinion.

S. E. Baldwin and *G. A. Conant*, for the appellant.

C. E. Searls, for the appellee.

TORRANCE, J. This is an action to recover damages for obstructing two certain rights of way claimed to exist between the farm lands of the plaintiff lying on opposite sides of the railroad of the defendant across its tracks at grade.

Prior to 1859 these farm lands and the land lying between, now occupied by the railroad company, were owned and oc-

cupied by Moses Hoyle, the father of the plaintiff, for farming purposes. In February, 1859, Moses Hoyle by deed conveyed to the Midland Railroad Company all his right, title and interest in and to the land now occupied by the defendant's tracks and over which the rights of way in question are claimed. The conveyance was made by a quit-claim deed in the ordinary form, except that it contained the following clause :—" They, the said company, forever to maintain the fence on the line of their railroad on said lands, and forever maintain the crossing now made on said lands over the railroad, and shall keep the same in good order and permit the grantor to use the same for any and all his farming purposes ; and also provided that the grantees shall permit the grantor to pass over the crossing on the railroad made over the same on Daniel Barrett's land, whenever he shall require in his farming business ; and they forever keeping a depot where the one now is in East Thompson."

It was admitted on the trial that the defendant succeeded to all the rights of the Midland Railroad Company in the land conveyed by the deed. The obstruction complained of was caused by raising the railroad bed, and constructing a wire fence, in the line of and across the ways.

The plaintiff did not claim the rights of way under the aforesaid deed of his father, nor by way of grant or reservation, or otherwise, under any deed or writing, but his claim to such rights was grounded wholly upon adverse user.

On the trial to the jury the plaintiff, without objection, offered evidence that he and his predecessors in title, for more than fifteen years before the commencement of the action and the acts complained of, " had continuously, uninterruptedly, adversely and under a claim of right, used and enjoyed the two rights of way across the defendant's land set out in the complaint and as set out, and that for said period of fifteen years and more the defendant had recognized the right of the plaintiff and his said predecessors in title to such use and enjoyment of said rights of way."

As one piece of testimony tending to prove this part of

his case, the plaintiff offered the aforesaid deed in evidence, upon the ground that the acceptance of a deed containing the clause hereinbefore set forth was a recognition of the existence of such adverse rights. The finding states that the deed was offered "for the purpose of showing that said right of way existed as far back as 1859, and that the defendant's predecessors in title thus recognized the existence of such rights in the plaintiff's predecessors."

Against the objection of the defendant the court admitted the deed in evidence, and, in so doing, we think the court erred. The only right of way claimed or attempted to be proved by the plaintiff, was a right of way by adverse user, and the deed was offered and received as tending to prove the existence of such a right in Moses Hoyle, and the recognition of such a right by the grantee.

The construction of this deed in respect to the right to use the crossing therein mentioned, may not be free from difficulty, but from any point of view its true construction can, we think, furnish no ground whatever in support of the plaintiff's claim. Whether the right to use the crossings be regarded as reserved by the grantor, or licensed or otherwise legally conveyed or conferred by the grantee, it is clear that the language used neither describes nor recognizes a right in the grantor which, in any proper sense of the term, was adverse to the grantee, or which existed independently of the deed. The language is—"shall permit the grantor to use" the crossings for certain purposes specified in the deed. The language is that of the grantor himself, describing the rights, and all the rights, which would belong to him after the delivery of the deed. Prior to the delivery of the deed Moses Hoyle had in the land thereby conveyed all the rights which belong to an owner in fee simple. After the delivery of the deed he had only such rights in the land as were expressed in the deed itself. By his own act he parted with his almost absolute right in the land conveyed and limited himself to such rights therein as were set forth in his own deed. When the deed was delivered, whatever rights he had to use the crossings he had under and by virtue of his deed. After

its acceptance it plainly was the duty of the grantee to permit the grantor to use the crossings for the purposes expressed in the deed. The deed was the source and measure of the reciprocal rights and duties of the parties with respect to these crossings. In accepting the deed the grantee accepted it with all its burdens and recognized whatever rights Moses Hoyle had under it, but it did not thereby recognize rights in him which differed from those expressed in the deed, and which existed, if at all, independently of the deed. It is true the deed does speak of the crossings as "now made on said lands," and thus may be said to "recognize" the crossings as material structures existing prior to the deed, but it does not recognize any right to use them as existing in the grantor independently of the deed, for it provides that the grantee shall permit him to use them for certain specified purposes.

The deed then not only does not tend to prove a right to use the crossings by adverse user, but on the contrary proves a right to use them under, and by virtue of, the deed alone, and its acceptance, if it was a recognition of anything, was a recognition of the rights expressed in the deed. It was claimed and admitted to prove a right of way by adverse user, and the recognition of such a right on the part of the grantee by accepting it, and was undoubtedly used for this purpose by the jury in finding a verdict for the plaintiff; and its admission for such a purpose was error.

In view of the fact that a new trial must be granted for admitting the deed in evidence, we have deemed it unnecessary to say much about the claimed errors in the charge. All of the errors assigned upon this part of the case which we deem of any importance arise out of questions respecting this deed and its construction, and will not be likely to arise if the case is tried again.

Both parties in their briefs agree that, upon the facts disclosed by the record, it was the duty of the court to construe the deed, and not to leave such construction to the jury, and that such is the rule is too plain to admit of doubt or dispute.

In one part of its charge the court uses language which seems to, if it does not in fact, sanction a part of the claim of the plaintiff, that the deed does or may contain a recognition of an existing right in Moses Hoyle to use the crossings, and leaves the jury without definite instruction upon the point. Perhaps also in other respects the language of the charge upon this point in the case was not, in view of the plaintiff's claims, so clear and explicit as it should have been, and may have misled the jury.

A new trial should be granted.

In this opinion ANDREWS, C. J., LOOMIS and SEYMOUR, Js., concurred. CARPENTER, J., dissented.

THE NEW HAVEN YOUNG MEN'S INSTITUTE *vs.* THE CITY OF NEW HAVEN.

New Haven & Fairfield Cos., June T., 1890. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

A testator gave a portion of his estate "to the city of New Haven in trust, the income to be applied by the proper authorities for the purchase of books for the Young Men's Institute, or any public library which may, from time to time, exist in said city." When the will was made the Institute had the only library in the city that was in any sense public, though it was so only in a somewhat limited sense. Since his death a free public library had been established by the city under legislative authority, supported by annual appropriations from the city funds. Held not to be the intention of the testator to make the Institute the primary object of his bounty, but to vest in the city a discretion in the matter, and that in the exercise of this discretion the city could exclude it altogether and expend the money in the purchase of books for the free public library.

And held to be no objection to the selection of the free public library that the city taxes would be diminished by such a use of the bequest, since there was no obligation on the city to support the library by taxes.

And held that the bequest was not void as conflicting with the statute against perpetuities, on the ground that the selection might not be made in season to vest the equitable estate before that statute would apply.

A discretionary power in the execution of a trust may be implied.

[Argued June 3d, 1890—decided January 5th, 1891.]

SUIT to determine the rights of the plaintiff under a testamentary trust and to compel the execution of the trust; brought to the Superior Court in New Haven County. Facts found and case reserved for the advice of this court. The case is fully stated in the opinion.

C. R. Ingersoll and *E. P. Arvine*, for the plaintiff.

1. The testator's intention, as disclosed by the words of the bequest in question, was to make the then existing New Haven Young Men's Institute the primary object of his bounty. The provision for any public library that might from time to time in the indefinite future exist in New Haven, was secondary, alternative and substitutional. *Willard* v. *Pike*, 59 Verm., 202; *McDonald* v. *Massachusetts Gen. Hospital*, 120 Mass., 432; *Good* v. *Association &c. for Indigent Females*, 109 Mass., 558; *Am. Asylum* v. *Phœnix Bank*, 4 Conn., 172; *White* v. *Fish*, 22 Conn., 31; *Carey* v. *Carey*, 6 Irish Ch., 255; Theobald on Wills, 457; 1 Redf. on Wills, 487; 2 id., 400; 1 Jarman on Wills, 515; *O'Brien* v. *Heeney*, 2 Edw. Ch., 242.

2. No other construction can give force to all the words of the testator. And any other construction requires the mutilation of the will. 1 Redf. on Wills, 435; 1 Ram on Wills, 98.

3. Nor does the will justify any discretionary power in the trustee to exclude the Young Men's Institute from a participation in the bequest. 1 Perry on Trusts, § 248; 2 id., § 507; *White* v. *Fisk*, 22 Conn., 31; *Treat's Appeal from Probate*, 30 id., 113; *Coit* v. *Comstock*, 51 id., 352, 381; *Bristol* v. *Bristol*, 53 id., 242, 257.

4. The construction contended for by the city would invalidate the bequest for uncertainty, and therefore cannot be accepted if any other permissible construction is reasonable. Schouler on Wills, § 489; *Jocelyn v. Nott*, 44 Conn., 55; *Bristol* v. *Bristol*, 53 id., 242; *Riker* v. *Leo*, 115 N. York, 93.

5. But upon any construction of the will, as between the Institute and the city, the intention of the testator requires

the trust to be enforced in favor of the former. There is no reason why he should have specified the Young Men's Institute except that it was a well-established institution of the city adapted to the purpose of his will. But whether this be so or not, there is not in the provision in question a word or idea suggestive of an intention of the testator to aid the city of New Haven in the discharge of its public duty to maintain a free public library for its citizens. Such an intention is foreign to the whole scheme of the will. Nor can it be presumed of the testator, for the city had not then, nor for many years after, any such municipal power. Therefore, even if the will could be so construed as to let in for its benefit any public library that might exist, to the exclusion of the Institute that did exist, the public library of the city cannot be regarded as within such contemplation of the testator. And the act of the city as trustee in diverting the income of the fund from such a library as that of the Young Men's Institute to such a library as that established by the trustee itself, is a perversion of the trust of the will. The free public library of the city is a department of the city government, as much as its road department or fire department or police department. The amendment to the city charter requires the city to maintain it out of the city treasury. If the design of Mr. Marett was to relieve the taxpayers of the city of this responsibility, or any part of it, he most assuredly would have in some way expressed it. Certainly such an intention, so inconsistent with the charitable plan of Mr. Marett, ought not to be presumed. Nor can it be presumed against that strict rule of equity, which is also a rule of public policy, which forbids a trustee, under any circumstances, to profit or take any advantage by his trust. And that is, practically, what the construction of this will contended for by the city has led to. It has simply enabled the trustee to save for its treasury what the law would otherwise require it to appropriate for the maintenance of its library. At the very least, and beyond any question, it is using the trust income for its own purposes. And this can never be done by a trustee without

express warrant from the powers of the trust. 1 Perry on Trusts, § 129; 2 id., § 511*a*.

W. K. Townsend and *B. Mansfield*, for the defendant.

LOOMIS, J. The complainant seeks to ascertain its rights in a trust fund created by the will of Philip Marett, dated August 30th, 1867. Marett died in New Haven March 20th, 1869. By his will the bulk of his estate was given to trustees of his appointment, to hold for the benefit of his wife and daughter during their lives, and upon the survivor's death, (in the words of the will,) "to be appropriated, distributed and disposed of as follows, namely:

"One fifth part to the Connecticut Hospital Society, in trust, the income to be applied to the support of free beds for the benefit of poor patients in said institution, giving preference to those incurably afflicted, if such are admissible.

"One fifth part to the city of New Haven, to be held in trust by the proper authorities, and the income to be applied through such agencies as they see fit, for the supply of fuel and other necessaries to deserving indigent persons not paupers, preferring such as are aged or infirm.

"One fifth to the President and Fellows of Yale College in trust, the income to be applied to the support of scholarships, or such other purposes in the academical department as they may judge expedient.

"One tenth part to the New Haven Orphan Asylum, to be held in trust, and the income applied to the support of poor inmates therein.

"One tenth part to the St. Francis (Catholic) Orphan Asylum in New Haven, to be held in trust, and the income to be applied to the support of poor inmates therein.

"One tenth part to the city of New Haven, in trust, the income to be applied by the proper authorities for the purchase of books for the Young Men's Institute, or any public library which may from time to time exist in said city.

"One tenth part to the state of Connecticut, in trust, the income to be applied towards the maintenance of any insti-

tution for the cure or relief of idiots, imbeciles and feeble-minded persons."

The contention of the parties relates to the question whether the intention of the testator was to make the New Haven Young Men's Institute the primary object of his bounty or to vest in the city of New Haven a discretion to exclude the plaintiff altogether and to bestow the legacy upon another public library in the same city.

In arriving at a just conclusion upon this subject both parties concede that force and effect must be given to all the language employed by the testator to express his intention in the premises. But in applying the principle the parties reach very different results. The language to be construed is—"One tenth part to the city of New Haven, in trust, the income to be applied by the proper authorities for the purchase of books for the Young Men's Institute, or any public library which may from time to time exist in said city."

The plaintiff contends that the defendant's construction would erase the Young Men's Institute as a beneficiary, while the defendant contends, on the other hand, that the plaintiff's construction practically erases the alternative provision for the benefit of any public library which may from time to time exist. There is some color of truth in both these claims, and yet both cannot be equally correct. Such different conclusions can only be reached by attaching a different meaning to the same words, or by reading something between the lines that the testator did not express.

The plaintiff has the advantage of being a named beneficiary, but to dispose of the alternative clause requires, not only that the fact just named should be specially emphasized, but that there should be also inserted a contingency upon which alone the alternative beneficiary may take, namely, that the Institute shall have ceased to exist prior to the testator's death. The defendant says:—"The words 'The Young Men's Institute' were placed in the will for a purpose. It was not then a public library. It could not therefore be a beneficiary under the clause 'any public

library.' But it might agree to throw open its doors to the public, provided the trustees saw fit in their discretion to purchase books for it. Or the public library might not accommodate the public to the satisfaction of the trustees. In these events the testator was willing that, although the Institute was a private library, the trustees should purchase books for it." We will not stop to discuss whether or not there is adequate foundation for this statement. We prefer to adhere very closely to the language and provisions actually contained in the will, and to such natural and necessary inferences as may fairly be deduced therefrom, when considered in connection with all the surrounding circumstances.

Does the provision then, that requires the city to purchase books for the Institute, or any public library that may from time to time exist, mean that it shall purchase the books exclusively for the Institute provided it continues in existence?

The question cannot even be stated without implying a negative answer, for it requires the use of important additional words and provisions of which no hint is given in the will. Had it been in the mind of the testator to make the Institute the sole beneficiary, except upon the remote and and improbable contingency of its non-existence, it would have been most natural to have made a direct and absolute gift to it, with at most a proviso for some other ulterior disposition of it founded upon such contingency. It seems unnatural that the testator should have anticipated the non-existence of a corporation which in law never dies, and which the testator personally had knowu for twenty years as existing in New Haven; and had this been a controlling consideration, as the plaintiff assumes, it would most naturally have found expression in the will as we have before suggested. But we have been referred to decided cases where an alternative provision following the word "or," has been given a secondary and substitutional meaning. We think the cases are distinguishable from this.

In 1 Redfield on Wills, 487, it is said that the question has arisen most commonly in cases of devises to *A* "or his heirs,"

where it has been held that the word "or," being interposed between the name of the first devisee or legatee and his heirs, indicated the intention of substituting the latter in place of the ancestor.

It seems to us that all these cases may well rest upon the implication derived from the phrase "or heirs," that the first named donee is dead, otherwise in contemplation of the law he could have no heirs.

Since the argument of this case our attention has been called to the case of *O'Rourke* v. *Beard*, 151 Mass., 9, decided in January, 1890. We find this case to be of the class above referred to. An estate was given to trustees for the benefit of the testator's three children, who were named, adding the words "or their heirs." The court holds that in such case "*or* makes a substituted gift, as is provided by public statute chap. 127, sec. 23, in case either of the testator's children should die before him." It ought to be added that the court did not rest the case wholly upon the statute referred to, as they might, but also referred to several English cases giving a similar construction. We have no occasion or inclination to impair the force of these decisions, if we had the power, by any adverse comment.

In the other cases to which our attention has been called, the gift was direct and absolute in form to one person *or* another, where, if the gift had not been held to be substitutional, the whole would have been void for uncertainty, and in none of those cases was there a discretionary power in a trustee to select the beneficiaries from those named, as we think there is in the case at bar.

In this case the entire language of the alternative bequest points to a discretion in the trustee. Although the word "or" may mean "and," or may have the meaning attributed to it in the cases referred to, yet its more natural meaning when used as a connective is to mark an alternative, and present a choice, implying an election to do one of two things. But here, in addition to the force of the word "or," the words which immediately follow are peculiarly significant and make our construction much more reasonable than

the opposing one. The word "any," used as an adjective, means "one out of several or many." When the city as trustee is directed to buy books for the Institute or for any public library, a selection is necessarily implied, and it is the city that is to determine and select the one among the others. The same idea is strongly reinforced and supported by the phrase "from time to time." This greatly enlarges the field for discretion and at the same time implies its existence. If then there is clearly a discretion to select one public library from those that may from time to time exist, it would seem unreasonable to confine it to one side only of the alternative presented by the word "or." We think the testator intended his trustee to exercise a discretion and make a choice as between the Institute and some public library that might after the making of the will come into existence. The fact that the Institute was specially mentioned does not necessarily indicate a preference, although the suggestion has considerable force. The mention of it with an "or" attached, presenting a choice, is very different from an exclusive mention. The Institute had the only library existing in New Haven, when the will was executed, in any sense public, and although it had doubtless been of great benefit to its patrons, yet it was a public library only in a somewhat limited sense. We will not stop to discuss the question whether the restrictions were too great to prevent its being a public library or not. It does not seem to us of great importance. The testator was willing and desired it to be the recipient of his bounty in case no better one should come into existence, but the alternative clause which he inserted justifies the inference that, with the future growth of the city, he anticipated that other libraries might be established which might prove more widely beneficial to the people of the city. Instead therefore of restricting his bounty to the Institute alone, he preferred to leave it open to the city to make the best possible selection. It is doubtless true that the same result might have been reached without special mention of the Institute. It was however not unnatural for him to mention the only existing institution

which could in any manner accomplish his beneficent purpose, and he may have thought that the omission of the name would involve an implication against the Institute which would prevent the trustees from duly considering its claim.

But we are confronted with an objection that lies back of all our reasoning, and will render it futile if it is to prevail, namely, that a discretionary power in the trustee to exclude the Institute from participating in the bequest cannot be implied. We do not think this position is correct. The contrary doctrine seems well established by repeated decisions of this court, and of the courts in other jurisdictions also. In *Storrs Agricultural School* v. *Whitney*, 54 Conn., 342, the gift was of a fund, the interest of which should be held by the selectmen as trustees and applied to aid indigent young men of the town of Mansfield in fitting themselves for the evangelical ministry. No discretion here was expressly conferred and nothing was said about it. But the court said, (page 252:) "The trustees are the persons who for the time being hold office as selectmen of a town, an office of continuous duration. To them the donor has given power, and upon them imposed the duty, of determining the persons who meet the specified requirements and who are to become beneficiaries. There are persons to determine, and a rule for their guidance. These constitute a valid foundation for a charitable use."

So in *Bronson* v. *Strouse*, 57 Conn., 147, the language of the will was that, after the executor had made certain payments, "if any surplus shall remain * * * I will that said surplus shall be given to some poor deserving Jewish family residing in the city of New Haven." Here too nothing was said about discretion, nor was it expressly stated who was to select the poor deserving Jewish family, but both were implied from the mere application of the money in the hands of the executors as trustees. The court said:—"Upon precedent, therefore, we are required to recognize the validity of the bequest to a poor deserving Jewish family residing in the city of New Haven. Upon principle also. The

testatrix has created a testamentary trust; has appointed the persons named as the executors of her will, trustees; has clothed them with power, and put upon them an obligation, to use the income certainly for the care of her burial lot, possibly also for the relief of the poor; and has required of them the exercise of their discretion as to the time and amount of their expenditure upon the lot. She has also vested them with the power to select the family which, according to their judgment, is a member of the class specified by the testatrix, and after selection to determine when and to what amount they will expend the income or surplus for its relief."

In 3 Jarman on Wills, page 704, it is said—"Discretionary power in a trustee must and will be implied from the terms of the will when necessary." In *Clement* v. *Hyde*, 50 Vermont, 715, the court says:—"There is no discretion placed upon the trustee in this case, but the application of the income implies the exercise of it. If the trustee had applied the income arising from the trust fund in good faith and in the exercise of ordinary discretion, there could be no doubt about the testator's intention being accomplished." In *Pickering* v. *Shotwell*, 10 Penn. St., 23, it is said:—"But we certainly will not let a charitable bequest fail where there is a discretion or an option given to the trustee, and if he cannot apply it to all the contemplated objects it will be sufficient if he can apply it to any of them. But power to act at discretion need not be expressly given if it can be implied from the nature of the trust. Now this residue may be applied, by the very words of the bequest, either to a supply of good books, or the support of a school. What school? Any free-school or institution that the monthly meeting (the trustees) may select, provided it answer the description in the bequest. It is thus capable of being reduced to certainty, and as the monthly meeting has the option of applying the fund to the one object or the other, an uncertainty in one of them would not vitiate both. But both are sufficiently certain." The construction adopted will render unnecessary any discussion of the objection that

the bequest is void for uncertainty. The class is sufficiently certain and the exercise of the trustees' discretion will render the beneficiary certain.

But it is further contended that, under the discretionary power to select any public library that may from time to time exist, it is not certain that a selection will be made so as to vest the equitable estate before the statute of perpetuities would apply, and the case is likened to that of *Jocelyn* v. *Nott*, 44 Conn., 55. But the cases as we construe them have no analogy. In the case cited it was provided that whenever a Congregational church and society should, under certain conditions, desire to build upon certain land, the trustee should convey it to them; and this court said:— "No particular church is designated. * * * There is no one whose duty it is to make selection and there is no limit in respect to time. * * * Application may be made and the conditions complied with at any time, and it may not be for a thousand years to come." But in the case at bar the beneficiary is designated as one of a class, and there is one whose duty it is to make the selection; and the time cannot be too remote, for the will provides that upon the decease of the life tenants the estate shall be "appropriated, distributed and disposed of," among others "to the city of New Haven in trust." The city must of course forthwith commence to administer the trust by selecting the beneficiary and by the purchase of books for the library selected.

But it is finally contended that it is a perversion of the trust for the city to select the Free Public Library in New Haven, which was established by the city and has become a department of its new government, and so, it is said, proposes to appropriate the trust income to its own purposes. The establishment of a public library under the provisions of our statute is not, in the sense which the objection assumed, a part of the city government. It is not mandatory on the city, but purely optional and charitable. Section 144 of the General Statutes expressly authorizes any town, borough or city to "receive, hold and manage any devise, bequest or donation for the establishment, increase or main

tenance of a public library within the same," and in view of such paramount authority that the city may take the gift, it would seem quite futile to appeal to any general principles to show that it cannot take.

But such gifts are neither made nor accepted in order to reduce taxation, and they do not necessarily or even usually have that effect. Taxation for such purpose is limited by sections 144 and 145 of the General Statutes. The effect of a gift for this charitable object most likely will be to enlarge the scope and benefit of the charity. The city is of course under the same restrictions as any other trustee would be, and can be equally restrained from any perversion of the trust.

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

In this opinion the other judges concurred.

WILLIAM A. M. WAINWRIGHT *vs.* ANNA E. TALCOTT, EXECUTRIX.

Hartford Dist., Oct. T., 1890. ANDREWS, C. J., CARPENTER, LOOMIS SEYMOUR and TORRANCE, Js.

In a suit of *W* against the executrix of *T* the complaint alleged that in *T*'s lifetime certain real estate occupied by the plaintiff was owned in common by *T* and the plaintiff's wife, who was his niece, and that *T* promised that she should have the property upon his death and the benefit of any improvements which the plaintiff might make upon it, and that in reliance upon this assurance the plaintiff expended large sums of money in the permanent improvement of the property, that *T* knew that the improvements were being made and that they were made in reliance upon this assurance, and that afterwards *T* by will left all his interest in the property to others, and had never in any way reimbursed the plaintiff for his expenditures; praying for both legal and equitable relief in damages. On a demurrer to the complaint it was held—

1. That if the complaint was to be regarded as seeking a recovery upon a parol promise to devise real estate, such promise would be within the statute of frauds and the complaint demurrable.

2. That it would also be demurrable if to be regarded as counting upon a promise of *T* to pay his part of the cost of the improvements, because presenting no consideration for such a promise.
3. But that the action was not founded upon any agreement of *T* to pay for a share of the improvements as such, but that the cause of action presented was the injury to the plaintiff from the conduct of *T* in inducing him to make the expenditures in the belief, founded upon *T*'s promise, that he would devise his interest in the property to the plaintiff's wife.
4. That these facts constituted a constructive fraud for which the plaintiff could recover damages from *T*'s estate.

Where a vendee of land has entered into possession under a contract of purchase not enforceable by reason of the statute of frauds, and in good faith has made valuable improvements thereon, and afterwards the vendor refused or was unable to convey, courts of equity have decreed specific performance on the ground that to allow the statute to be set up would enable the vendor to practice a fraud.

And the same principle is applied in cases of a parol promise to give lands, upon the faith of which possession is taken and improvements made, although there is no contract at all for the breach of which damages could be given; the decree being in such a case for compensation for the improvements.

The cause of action in such cases is not the refusal to perform a contract or keep a promise upon which another relied, but the unjust infliction of loss upon one party, with a consequent benefit to the other, from a violation of a confidence which under the circumstances a court of equity deems to have been rightly reposed.

The statute of frauds is just as binding on courts of equity as on courts of law, but if a refusal of one party to carry out a parol contract will work a fraud upon the other, equity will protect the latter against the injustice.

In such cases a party seeking the aid of a court of equity may always prove the parol agreement for the purpose of showing the fraud, whether it be actual or constructive.

[Argued October 10th, 1890—decided January 5th, 1891.]

ACTION to recover for money expended by the plaintiff in improvements on real estate owned in common by the plaintiff's wife and the defendant's testator, made under a promise of the latter that his interest in the property should be devised to the plaintiff's wife, and that she should have the benefit of the improvements; brought to the Superior Court in Hartford County. After a demurrer to certain counts of the complaint had been overruled, the case was tried upon the facts, on an issue closed to the court, before *Thayer, J.* Facts found, and judgment rendered for the defendant,

and appeal by the plaintiff. The case is fully stated in the opinion.

W. Hamersley, for the appellant.

1. Evidence of Talcott's declarations to the plaintiff that he should devise his interest in the property to the plaintiff's wife and that she and her children would have the benefit of whatever improvements he made, should have been admitted by the court. It went to prove the allegation of a promise to repay the money expended on his property. His promise to confer a benefit on a third party inducing the expenditure by the plaintiff, is not merely a consideration for the money so expended for Talcott's benefit, but is equivalent to a promise to repay the plaintiff if the benefit promised is not conferred. If, in such case, the benefit is not conferred, the law implies a promise to repay the plaintiff; just as truly as the law implies a promise to repay money received for a certain purpose and not applied to that purpose. *Robinson* v. *Raynor*, 28 N. York, 494; *Martin* v. *Wright's Admrs.*, 13 Wend., 460; *Quackenbush* v. *Ehle*, 5 Barb., 469; *Jackson* v. *Exrs. of Le Grange*, 3 Johns., 199; *Bayliss* v. *Pricture*, 24 Wis., 651; *Moses* v. *Macferlan*, 2 Burr., 1005; *Bize* v. *Dickason*, 1 T. R., 285. The statute of frauds has nothing to do with such a case. Browne on Stat. of Frauds, § 124; *Smith* v. *Bradley*, 1 Root, 150.

2. The excluded evidence was admissible to show that Talcott so acted that the law treats his conduct as a fraud which makes his estate liable to pay damages. The plaintiff expended money on Talcott's land. He induced the plaintiff to spend this money by promising benefits to the plaintiff's wife and children, and retains the benefit of the plaintiff's expenditures after failure to execute his promise. Equity treats such conduct as a fraud upon the plaintiff, entitling him to pecuniary damages. *Johnson* v. *Hubbell*, 2 Stockt. Ch., 332; *Ayres* v. *French*, 41 Conn., 142; *Dowd* v. *Tucker*, id. 197.

3. It also went to show that Talcott knew of the improvements made by the plaintiff; as co-tenant consented that

they should be made; and promised to pay his share of the expense, and induced the plaintiff to make the improvements by promises to secure the whole property to the plaintiff's wife and children. The law of contribution by co-tenants of real estate was first recognized in courts of equity. Courts of law under the influence of the old technical rules governing the ownership and occupancy of land refused all adequate remedy. Even so late as 1868, it was held in Massachusetts that an action at law would not lie to recover from a co-tenant his share of reasonable expense for necessary repairs. It is now, however, settled by the weight of authority that the law of contribution by co-tenants of real estate rests upon the same principle of natural justice that supports the law of contribution in other cases. Brandt on Suretyship, § 220; 2 Story Eq. Jur., §§ 1234, 1236, 7, 8; *Fowler* v. *Fowler*, 50 Conn., 256; *Swan* v. *Swan*, 8 Price, 518.

4. The testimony being relevant to the principal facts, it is not made inadmissible by the operation of the statute of frauds. It was relevant, not because it proved a parol agreement, but because it proved admissions of Talcott and facts relevant to the principal facts in a cause of action not founded upon the parol agreement. A parol agreement which is inadmissible as an agreement on which the action is founded, is clearly admissible to prove any relevant fact in actions not maintained upon the parol agreement. *Pearl St. Eccl. So.* v. *Imlay*, 23 Conn., 10; *King* v. *Woodruff*, id., 56; *Ryan* v. *Dayton*, 25 id., 188; *Clark* v. *Terry*, id., 395. But the statute of frauds does not properly apply to a promise to devise lands. The statute invalidates a parol agreement to *sell* lands. While an agreement to devise land or bequeath personal property may possibly be made under such circumstances and in such manner as to be in reality a contract for sale, yet a devise is not a conveyance any more than a bequest is a bill of sale; and an agreement to devise is not necessarily a contract for the sale of land any more than an agreement to bequeath is a contract for the sale of personal property.

5. The defendant's demurrer was properly overruled for the reasons given under the foregoing heads.

C. E. Perkins, with whom was *H. Cornwall*, for the appellee.

1. The statute of frauds provides that "no civil action shall be maintained upon any agreement for the sale of real estate, or any interest in or concerning it, * * * unless such agreement or some memorandum thereof be made in writing and signed by the party to be charged therewith or his agent." The plaintiff claims that a parol agreement to devise land does not come within this statute, because it is not "an agreement for the *sale* of real estate." Browne on the Statute of Frauds, § 263, says:—"An agreement to devise an interest in land, though founded on a precedent valuable consideration, is also within this section of the statute; and, as we shall see in the course of this chapter, the effect of the provision, as expounded and applied by the courts, is to render unavailing to the parties as the ground of a claim any contract, in whatever shape it may be put, by which either of them is to part with any interest in real estate." See also *Brewster* v. *McCall's Devisees*, 15 Conn., 290; *Marcy* v. *Marcy*, 32 id., 308; *Gould* v. *Mansfield*, 103 Mass., 408; *Parsell* v. *Stryker*, 41 N. York, 480; *Gooding* v. *Brown*, 35 Hun, 148; *Wallace* v. *Long*, 105 Ind., 522; *Demoss* v. *Robinson*, 46 Mich., 62; *Mundorff* v. *Kilbourn*, 4 Md., 459; *Ellis* v. *Cary*, 74 Wis., 176; *Madison* v. *Alderson*, L. R., 8 App. Cas., 467.

2. The plaintiff claims that the statute of frauds does not apply to this case, because he asks for equitable relief; but it is well settled that, as a general rule, the statute is applicable to proceedings in equity, as well as at law. Browne on Statute of Frauds, § 129. There are cases where equity will decree a specific performance of verbal contracts for the sale of lands; but this is not that case, nor does it come under any of the heads of equity jurisdiction. It is an action to recover a specific sum of money, which is shown in the bill of particulars, and no other specific relief is asked

for. Merely asking for equitable relief, if no facts are alleged showing an equitable cause of action, is immaterial.

3. The plaintiff also claims that the gist of the count is an implied promise, and that an implied promise to sue is not within the statute. But the statute says that no action shall be sustained on any agreement not in writing relating to lands. If there is here an agreement relating to the transfer of lands, which is not in writing, it cannot be the foundation of an action, and if there is no such valid agreement there is no foundation for any action at all. This case is like that of *Cook* v. *Doggett*, 2 Allen, 439, where the court says:—"The work was done or caused to be done by the plaintiff for his own benefit, on the faith that the defendant would convey the land agreeably to his oral agreement which the plaintiff must be supposed to have known he could not by law enforce."

4. The plaintiff also claims that the statute does not apply because it is alleged that Mrs. Talcott was the heir of John L. Talcott, and therefore this was not an agreement to sell land. It is not alleged that the plaintiff's children were his heirs, and as the promise is that the property should go to his wife and children, it could only be by will or deed. If an agreement to devise land is within the statute, it would seem that an agreement with his heir that the owner would not devise it to any one else, but that he should have it, would also be within it. The object of the statute is to require that all agreements as to the transfer of an interest in land shall be in writing.

5. The plaintiff seems to base his claim not so much on any contract, express or implied, or any well defined principle of law or equity, as on the idea that the building in question was a benefit to Mr. Talcott's land, and therefore the money expended on it should be repaid by him. The general principle is that where a person erects buildings on the land of another without any promise, express or implied, to pay for it, the owner is not obliged to repay the money so spent.

6. Even if the court erred in excluding this parol evidence,

no new trial should be granted, for the second count, which is the only one which was attempted to be proved, and the only one under which the evidence was offered, does not set up any cause of action. It alleges only a promise to the plaintiff that the land should go to the wife and children of the plaintiff after Mr. Talcott's death. There is no consideration alleged for the promise accruing at the time it was made, either from the plaintiff or his wife and children. It was therefore a mere voluntary promise of a gift, and it is unnecessary to cite authorities to show that such an agreement is void, nor that a void promise cannot be the foundation of an action.

TORRANCE, J. From the finding of facts in this case it appears that prior to 1870 a certain lot of land in Hartford was owned in common and undivided by John L. Talcott and Thomas, his brother, the former owning four fifths and the latter one fifth. Thomas died in 1870, and his interest in the land then descended to his daughter, now the wife of the plaintiff, subject to her mother's right of dower. John L. Talcott had no sister and Thomas was his only brother. He had no nephews, and no nieces save the wife of the plaintiff. John L. Talcott and the defendant, who is his executrix, intermarried in 1876, and he died in 1887. From 1870 down to the time of John's death, said real estate continued to be held in common by said parties in the manner stated.

The complaint contains four counts, but the third and fourth are practically the same. We deem it unnecessary to consider any of the counts save the second. That count sets out in substance that on July 1st, 1882, and on divers other days since, John L. Talcott assured and promised the plaintiff that upon his, John L. Talcott's, death, his interest in said real estate should go to the plaintiff's wife and children, and that any improvements made by the plaintiff thereon and expenses incurred therefor, should at the death of said Talcott accrue to the benefit of the plaintiff's wife and children; that in reliance upon said promise and assur-

ance the plaintiff expended large sums of money on the permanent improvement of said real estate; that Talcott knew of this expenditure and knew that it was done in reliance upon his said assurance; that afterwards Talcott, by will, left all of his interest in said real estate to others, and has never in any way reimbursed the plaintiff for said expenditures; and that said conduct of Talcott was wrongful and fraudulent and injured the plaintiff to the amount of four thousand dollars. The complaint prayed for both legal and equitable relief in damages.

To this count the defendant demurred, the court overruled the demurrer, and by a bill of exceptions the question whether that decision was right is brought before this court.

On the trial below, for the purpose, among other things, of proving the allegations of the complaint as to said promise and assurances of Talcott, the plaintiff offered, in connection with other evidence, the declarations of Talcott made at divers times during the time the plaintiff was so expending money on said real estate improvements, and before and after Talcott's marriage, showing or tending to show "an understanding, as between Talcott and the plaintiff, that any expenditures the plaintiff might incur in the improvement of the property would be compensated by the property coming to the wife and children of the plaintiff, and that said Talcott knew that the expenditures made by the plaintiff were made because the plaintiff relied upon his promise as to such disposition of his property, and knowing this, permitted and encouraged the plaintiff to make such expenditures." To this evidence the defendant objected, on the ground that such declarations constituted a parol promise to devise real estate, and claimed that such promise was within the statute of frauds, and that evidence of it was inadmissible. The court excluded the evidence.

We will first consider whether the court erred in overruling the demurrer to the second count. The defendant says, in the first place, that this count sets forth no cause of action, inasmuch as the promise alleged, namely, to leave the real estate to the plaintiff's wife and children, is without con

sideration and void, and there is no allegation of any promise made by Talcott to pay any part of the expenses incurred by the plaintiff in making the improvements.

If the cause of action relied upon in this count is founded upon any promise or assurance of Talcott as a contract or agreement to so leave the real estate or to pay for part of the improvements, then this objection is well taken. No consideration for any such promise is stated, and upon the facts set forth it is difficult to see how one can be inferred. Indeed the cause of action seems based, in part at least, on the fact that the promise or assurance made by Talcott to the plaintiff was without consideration and could not therefore be enforced as a contract, either at law or in equity.

The question then, of consideration for the promise or assurance alleged, may be laid out of the case, because the right to recover, if any exists, does not depend upon that question. And this is also true of the objection that Talcott never promised to pay for any part of the improvements to the real estate. The action, so far as the count in question is concerned, is not founded upon any agreement of Talcott to pay for the improvements, as such. The plaintiff claims no damages for the breach of any such agreement, and is not seeking to enforce any such agreement, and therefore it was unnecessary to allege one. So far then as these objections are concerned the demurrer was properly overruled.

In the second place, the defendant says that if this count be regarded as founded upon the wrongful and fraudulent conduct of Talcott, still it is demurrable "because the allegations therein do not show any fraud." Of course it is never sufficient merely to allege fraud without setting forth the facts constituting the fraud. But here the facts as to the conduct of Talcott in the premises, and how that conduct has injured the plaintiff, are fully set forth. No actual fraud or evil design in making the promise and assurance is alleged, but if the facts stated bring the conduct of Talcott within the definition of what, for want of a better name, courts of equity call "constructive fraud," that is suffi-

cient, whether the word "fraud" be used or not. We think the second count states such a case. In many cases where a vendee of land has entered into possession, under a contract not enforceable by reason of the provisions of the statute of frauds, and in good faith has made valuable improvements thereon, and afterwards the vendor refused or was unable to convey, courts of equity have decreed specific performance, on the ground that to allow the statute to be set up in such cases "would amount to practising a fraud." Browne on Stat. of Frauds, §§ 437, 447, 448, and cases cited.

And a principle analogous to this is applied in cases of a parol promise to give lands, upon the faith of which possession is taken and improvements made, although in such cases there is no contract at all for the breach of which damages could be given. Browne on Stat. of Frauds, § 491*a*; *Freeman* v. *Freeman*, 43 N. York, 34; *Kurtz* v. *Hibner*, 55 Ill., 514; *Hardesty* v. *Richardson*, 44 Md., 617; *Lee* v. *Carter*, 52 Ind., 342; *Story* v. *Black*, 5 Mont., 26.

And in such cases where, for any reason, courts of equity cannot decree specific performance, they will decree compensation to be made by the vendor to the vendee for the fair value of the improvements. Browne on Stat. of Frauds, §§ 119, 490; Bigelow on Fraud, 446; *Worth* v. *Worth*, 84 Ill., 442.

The principle applied in such cases is, that where one party by his contract, or his conduct outside of contract, which was well calculated to mislead another relying thereon, does mislead him to his harm, and thereby obtains an unjust and unconscientious advantage over the latter, he will not be allowed to reap the benefit of his wrong doing. The cause of action in such cases is not the refusal to perform a contract, or keep a promise or engagement upon which another relied, but it is the consequent unjust infliction of loss or injury upon one party, and the consequent benefit and advantage resulting to the other, from the violation or breach of a faith and confidence which, under the circumstances, a court of equity deems to have been rightly

reposed in him. This principle is applicable to the case stated under the second count.

Upon the facts stated the decedent by his conduct gained an unjust advantage at the expense of the plaintiff. His retention or alienation to others of the land, with all its improvements, to the amount alleged of four thousand dollars, under the circumstances set forth, inflicts just as much loss and injury upon the plaintiff, and enriches the estate of the decedent just as much, as if such loss had been inflicted or advantage had been gained by the perpetration of a positive fraud. We think therefore that the demurrer to the second count was properly overruled.

This brings us to the second question, whether the court erred in rejecting the offered evidence. The objection made was, that the evidence would prove or tend to prove a parol promise to devise lands, which promise is, it was claimed, within the statute of frauds.

Whether such a promise is or is not within the statute we have here no occasion to discuss. For the purposes of the argument we will concede that the declarations of Talcott, which the plaintiff offered to prove, would constitute a parol promise to devise land, and that such a promise is within the statute.

Obviously, however, if we are right in what we have said as to the nature of this action, especially as stated in the second count, the object of it is not to enforce a contract at all, either at law or in equity. Had the plaintiff sought to recover damages for the breach of the promise to leave the real estate to his wife and children, or to have it enforced specifically, and had offered the evidence to prove such a contract for such a purpose, the objection, on the concession we have made, would have been well taken, if the action be regarded as one at law, and perhaps also if it be regarded as one in equity. The statute is just as binding in courts of equity as in courts of law, but if a refusal on the part of one party to carry out a parol contract will work a fraud upon the other, equity will protect the latter against the injustice. Bigelow on Fraud, 446; Browne on Stat. of Frauds, § 119.

And in such cases the party seeking the aid of a court of equity may always prove the parol agreement for the purpose of showing the fraud, whether it be actual or constructive. *Busick* v. *Van Ness*, 44 N. Jer. Eq., 82; *Walker* v. *Shackleford*, 49 Ark., 503.

But however this may be, in the case at bar the evidence ruled out was not offered to prove a contract for the purpose of having it enforced either at law or in equity, nor really to prove a contract at all. In offering it the plaintiff was merely attempting to show, as part of his cause of action, under the second count at least, what induced him to spend his money for permanent improvements on the land of another, and upon what conduct of the decedent he relied in so doing. In asking the aid of a court of law or of equity it was not enough for the plaintiff to show that he had expended his money for such permanent improvements with the knowledge or acquiescence of Talcott, or in the unfounded and unwarranted hope or expectation that Talcott would convey or devise the lands or suffer them to go by law to the plaintiff's wife and children. He must show that he made the expenditures solely or largely upon the faith of Talcott's conduct and assurances; that under the circumstances he had a right to rely thereon, and that Talcott knew they were being so made. If he could show that his expenditures were so made, then it might follow, upon the other facts to be shown in the case, that the subsequent conduct of Talcott, by which he retained both the land and the value of the improvements as well, worked a fraud upon the plaintiff, and caused him loss and injury, for which a court of equity at least, taking account of all the circumstances as between the plaintiff and Talcott, would furnish him redress.

This would bring the case at bar clearly within the principle heretofore stated, which courts of equity apply in cases where there is no contract to convey, but only a promise to give land, in which case no action would lie upon the promise. As we have seen in such cases, if a party relying upon such a promise enters upon the land and makes permanent improvements thereon, even if solely for his own benefit,

and is afterwards turned out by the other party, a court of equity will decree fair compensation for the improvements, although in such case there might perhaps be no redress at law. See the authorities heretofore cited upon this point.

In the case at bar, so far as we can see from the pleadings and finding, Talcott never contemplated paying for any part of the improvements. Under these circumstances the plaintiff has perhaps no remedy at law, and, for aught we know, has no adequate and complete remedy without the aid of a court of equity.

We think he has such a remedy in equity, and that the second count of his complaint sets up an equitable cause of action. If upon the hearing it shall appear, as the defendant claims, that under all the circumstances the plaintiff has been more than repaid for all his expenditures upon Talcott's property, a court of equity can do full and complete justice between the parties and protect the interests of all concerned.

The plaintiff was entitled to the evidence offered and the court below erred in rejecting it.

The judgment is reversed, and a new trial is granted.

In this opinion the other judges concurred.

MIECYSLOS J. BRZEZINSKI *vs.* DENNIS H. TIERNEY.

Hartford Dist., Oct. T., 1890. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

In a complaint for assault and battery, demanding general damages only, all the acts and circumstances attending upon and giving character to the assault, may be shown by the plaintiff to enhance damages.

Where the defendant, in an assault upon the plaintiff had pushed him with great force against a car, and he was injured by the violent contact, it was held that this might be shown to enhance damages without any averment of the fact.

And held that it might also be shown as a ground of recovery, under a general allegation of an assault, without any averment of this particular injury. It would be a part of the assault.

And where a complaint alleged that the defendant "assaulted the plaintiff and beat him with a cane," it was held that the plaintiff might show that the defendant in the struggle pushed him with violence against the car, and thereby injured him.

[Argued October 14th, 1890—decided January 5th, 1891.]

ACTION for an assault and battery; brought to the District Court of Waterbury, and tried to the jury before *Bradstreet, J.* Verdict for the plaintiff and appeal by the defendant for error in the rulings and charge of the court. The case is fully stated in the opinion.

J. O'Neill, with whom were *C. W. Gillette* and *G. E. Terry*, for the appellant.

E. F. Cole, for the appellee.

LOOMIS J. This action was brought to recover damages for an assault and battery. The complaint alleges that, at a time and place mentioned, the defendant assaulted the plaintiff and beat him with a cane; that the plaintiff was then in business earning ten dollars a day; that said battery injured him severely, and disabled him, and will disable him for three months, from attending to his business; and that he was compelled, and will be compelled, to pay one hundred dollars for medicines and medical care and attendance," etc. The defendant pleaded the general issue only, and the case was tried to the jury in the District Court of Waterbury, and resulted in a verdict for the plaintiff to recover two hundred and twenty-five dollars damages.

The finding of the court, so far as is necessary to present the questions raised by the appeal, is as follows:

"On July 17th, 1889, while the plaintiff was engaged in conversation with one David David, the defendant, armed with a loaded revolver, and with a heavy walking stick in his hand purchased by him the evening before, stole up to the plaintiff, unobserved by him, and without warning or outcry struck the plaintiff several powerful blows on the head with the stick in question. The plaintiff, bewildered

and dazed, grappled with the defendant, who pushed him backwards with considerable force against the platform of a horse-car standing near the scene of conflict, in the meantime showering blows on his head and shoulders. The plaintiff's buttocks came in contact with one of the iron projections of the car-platform with such violence as to cause a red bruise, resulting in considerable pain; bystanders interfered and separated the assailant and his victim; a minute later the defendant tried to force himself from the party leading him away in order to go back, and, as he expressed it, "do him up," referring to the plaintiff. The plaintiff was cut and bruised about the head and shoulders, and for several days he suffered considerable pain at the point where he came in contact with the car platform. By bathing and treatment the external effects of the blows disappeared, while the pain remained, increasing in intensity, until he sought a physician for relief. On the first examination the physician pronounced it hemorrhoids, but afterwards confessed to having been mistaken in his diagnosis, and pronounced it a fistula or abscess, from which he suffered much pain, with loss of sleep and inability to work for six months after the assault. Considerable evidence was offered by both sides, *pro* and *con*, as to whether the blow against the car platform did or did not cause a fistula. All the foregoing evidence was offered and received by the court and jury without objection by either party. The defendant asked the court to charge the jury as follows:

"'This plaintiff alleges that the defendant beat him with a cane; there is no allegation that he was pushed against the car and that he was injured thereby. He cannot recover for an injury received by being pushed against the car. If the fistula was not the ordinary, natural result of the blow, the plaintiff cannot recover for this injury, for it is not alleged in the complaint.'"

The questions for review must be confined to the two points contained in the defendant's requests to charge the jury, namely, first, that the plaintiff cannot recover for an injury received by being pushed against the car; second,

that if the fistula was not the ordinary natural result of the blow the plaintiff cannot recover for the injury. The court charged the jury as follows upon the second point:—"That unless they found as a fact that the fistula was the ordinary and natural result of the blow received during the assault when the plaintiff came in contact with the car platform, they must not consider that part of the plaintiff's evidence as having any bearing whatsoever on the question of damages; moreover, that the burden of proving this connection was upon the plaintiff; that the defendant was only liable to the plaintiff, if liable at all, for the direct and natural consequences of the assault, and that if they should find from the evidence offered in relation to the fistula that it was not the natural and direct consequence resulting from the blow against the car, this evidence should be dismissed from their minds in considering the case or in assessing damages against the defendant."

It will be seen that there is a striking similarity between the request and the charge. Both are identical as to the principle of law to be applied, namely, that in an action for assault and battery the plaintiff is entitled to recover the damages ordinarily and naturally resulting from the act complained of, although the complaint contains only the allegation of general damages. Both deal with the direct and proximate cause of the fistula as an element of damage. Both assert that if the fistula was not the direct and natural result of the assault and battery there can be no recovery on that account, and both agree that if it was the direct and natural result it was a proper element of damage for the jury to consider. The fact that the defendant adds as a reason for the proposition contained in the request that the complaint contains no allegation as to the fistula, is entirely immaterial as furnishing any basis for a distinction between the request and the charge. The only possible distinction relates to the cause of the fistula under the limitations of the complaint. The defendant says it must have come from the *blow*, which of course means the assault and battery, and is correct. The court said the injury must

have come from the "assault," by which the court, as appears from the context, meant assault and battery, and which is identical in meaning with the defendant's proposition as matter of law. But the court, in applying the agreed principle of law to the facts of the case, speaks of the result of "the blow received during the assault when the plaintiff came in contact with the car platform." On the other hand the defendant, as we infer from his first request (for the second request is silent on that point), would restrict the source of the injury to the blow from the cane, because that is the only battery specially mentioned in the complaint. Is there good ground for any such distinction?

It is to be observed, in the first place, that the defendant did not object to the evidence as to the thrusting of the plaintiff against the car, and as to the fistula claimed to have resulted from it. Then the act of thrusting the plaintiff against the car was in fact as truly a part of the assault and battery as the beating with the cane. The court finds that "the defendant pushed the plaintiff with considerable force against the platform of a horse-car standing near the scene of conflict and in the meantime continued to shower blows on the plaintiff's head and shoulders." So it was all one transaction—one assault and battery; and unless the plaintiff can recover for the whole in this action he is remediless.

If then the defendant would take any benefit whatever from any difference between his request and the charge as given, he must show that the court should have held that there was a technical variance between the allegations and the proof as to the mere extent of the battery. In reference to this it is suggested, first, whether the defendant not having objected to the evidence can now have the full benefit of it by his request to charge the jury. But, before coming to that question, we will consider another that lies back of it, and may render a discussion of the first unnecessary; namely,—in an action for assault and battery is it necessary to allege in the complaint all the separate acts of violence

done by the defendant during one continuous assault, in order to have the benefit of them in the proof?

"It is well settled that an indictment for assault and battery need not describe the instrument used, and error in the description is not a material variance. Upon an indictment alleging shooting and striking with a gun, a conviction upon evidence of beating with a stone was sustained. *Ryan* v. *The State*, 52 Ind., 167. Even in indictments for murder, where the injury is specifically set forth, it is sufficient if the proof agree with the allegation in its substance and generic character. Thus, if the allegation be that death was caused by stabbing with a dagger, and the proof be of killing by any other sharp instrument, or if it be alleged that the death was caused by a blow with a club, or by a particular kind of poison, or by a particular manner of suffocation, and the proof be of killing by a blow given with a stone or any other substance, or by a different kind of poison, or another manner of suffocation, it is sufficient, for, as Lord COKE observes, the evidence agrees with the effect of the indictment, and so the variance from the circumstances is not material." 3 Greenl. Ev., § 140.

In *People* v. *Colt*, 3 Hill, 432, it was held that if the charge be of murder by "cutting with a hatchet," or by "striking and cutting with an instrument unknown," evidence may be given of shooting with a pistol. If such technicalities are discarded where liberty and life are at stake, surely they cannot prevail in a civil action for damages merely.

In 1 Swift's Digest, side p. 640, in reference to the civil action for assault and battery it is said:—"It is not necessary to describe with particularity the assault, the battery, or the wounds received; it is sufficient to allege an assault, battery and striking, and the circumstances may come out in the proof." In 1 Waterman on Trespass, 222, under the head of "assault and battery," it is said:—"When the assault consists of a series of acts of violence following one another so as to constitute one continued wrongful act, the

various acts of violence may be proved as constituting one continuing trespass."

The defendant surely can expect no greater favor than that we should apply to this complaint, and the question arising under it, the principle applicable under the strict requirements for criminal indictments; and if we apply the same test, it must be apparent that the battery proved is of the same generic character as the battery alleged, for there can be no difference in principle or in effect between an act that hurls an object against the person of another, and an act that hurls the person against the object. In either case the responsible actor delivers a *blow*, and must answer for its ordinary and natural results.

The burden of the defendant's brief is that special damages must be averred in the complaint in order to justify a recovery for them. This as a legal position is correct. But in assuming this position the defendant departs widely from the question which he made in the court below. In order to make the rule now invoked applicable he should have claimed before the trial court that if the injury resulted in a fistula the damage so far must necessarily be special. But he made no such claim. On the contrary his request to the court to charge the jury that "if the fistula was not the ordinary, natural result of the blow, the plaintiff cannot recover for this injury," necessarily admitted that if the fistula was the ordinary and natural result of the blow the plaintiff could recover, even as the declaration then stood. The request also involved an admission that the jury was the proper tribunal to determine the question as one of fact. The court was not asked to rule that damage from the fistula must be treated as special damage. We will not therefore further discuss the question now first raised in this court. The defendant by his request induced the court to submit the question to the jury and to make their verdict turn upon the point whether the fistula was the ordinary and natural result of the blow, and having done so he must abide the consequences.

In thus disposing of the question we do not intend to in-

timate, or authorize the inference, that if the claim as to special damage had been made in the court below the result in this court would have been different. We design simply to leave the point undecided.

The other question presented by the defendant's request to charge was whether the plaintiff could recover for any injury received by being pushed against the car, upon which the court charged the jury as follows:—"If the defendant assaulted the plaintiff while the plaintiff was in close proximity to the car, and, in the struggle that ensued, if the plaintiff came in contact with the car, either in attempting to escape from the defendant or by being pushed against the car by the defendant, the jury could take into consideration in aggravation of damages any injury which the plaintiff sustained by reason of so coming in contact with the car."

Our previous discussion contains a full answer to this question, so far as it shows that the act of thrusting the plaintiff against the car could be shown as a part of the assault charged; but to justify the charge as given it is not necessary to go so far as that, for it will be seen that the court allowed this act to be shown only in aggravation of the damages, and not as a distinct ground for the recovery of damages. There is no rule of law more firmly established than that under a complaint for assault and battery demanding general damages only, all the attending acts and circumstances which accompany and give character to the assault may be given in evidence to enhance the damages.

There was no error in the rulings complained of.

In this opinion the other judges concurred.

CORNELIA A. BUEL'S APPEAL FROM PROBATE.

New Haven and Fairfield Cos., Oct. T., 1890. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

It is provided by Gen. Statutes, § 600, that a court of probate, upon application of an executor or administrator, upon hearing after notice, "may in its discretion order the sale of the whole or a part of the real estate in such manner and on such notice as it shall judge reasonable," and that, if a surplus remains after paying debts and charges, "the same shall be divided or distributed in the same manner as such real estate would have been divided or distributed if the same had not been sold." Held that under this statute the question whether and under what circumstances the interest of the decedent in any real estate, assets of the estate, should be turned into money, is left to the sound discretion of the court, subject to the right of appeal as in other cases.

The statute was enacted in 1885. Held to apply to any later proceedings before the probate court in the settlement of the estate of a testator who died in 1880, and whose estate was then in the course of settlement.

A testator devised to his daughter an interest in his real estate. There was ample personal property to pay the debts, but the executor had squandered it, and the court of probate, after a notice and hearing, ordered a sale of all the real estate. Held, on an appeal by the daughter, that the court had power to order the sale without reference to any question as to the disposition of the proceeds, that question not being affected by the order.

And held not to be a decisive reason against the order that there could be a recovery of a large amount from the executor's bondsmen; nor that a large creditor had so conducted as to be debarred from making a claim upon the property. All such questions would remain open for future determination by the court.

[Argued October 30th, 1890—decided January 5th, 1891.]

APPEAL from two decrees of a probate court; taken to the Superior Court in New Haven County. Facts found and case reserved for advice. The case is fully stated in the opinion.

J. W. Alling and *G. E. Terry*, with whom was *L. F. Burpee*, for the appellant.

S. W. Kellogg and *J. P. Kellogg*, for the appellees.

TORRANCE, J. This case comes before us upon a reservation. The appeal was taken from two orders or decrees of the court of probate for the district of Waterbury, made in the settlement of the estate of Philo Brown, deceased. The administrator with the will annexed made a return to the probate court, showing the existence of certain unpaid claims against the estate, and also made application for an order to sell all the remaining personal and real estate thereof. The probate court ordered the acceptance of the return, and granted an order in accordance with the prayer of the application.

The appellant, who is a daughter of the deceased, claiming an interest in the real estate ordered to be sold, appealed to the Superior Court from both of the orders. The only questions, however, made upon the appeal or reserved for the advice of this court, relate to the order of sale of the real estate.

One of the questions arising upon the finding of facts made by the Superior Court in the case, is, whether the appellant has any such interest in the real estate ordered to be sold as entitled her to take an appeal. The administrator with the will annexed claims that under the will of Philo Brown the appellant has no interest whatever in said real estate. On the other hand, the appellant claims that either as heir-at-law of her father, or under his will, she has such an interest as entitles her to take the appeal.

In the view we take of the case it will be unnecessary to decide this question, and in the discussion of the other questions involved we will, for the purposes of the argument merely, assume that she has such an interest.

The statute under which this order of sale was made, gives the court of probate, upon the application of the executor or administrator of any deceased person whose estate is in settlement in such court, power in its discretion to "order the sale of the whole or a part of any real estate or an undivided interest therein, in such manner and upon such notice as it shall judge reasonable;" and to divide or distribute the surplus, if any, after paying the debts, "in the

same manner as such real estate would have been divided or distributed if the same had not been sold." Gen. Statutes, § 600. Did this section authorize the court of probate in its discretion to make the order in question here upon the facts disclosed by the record? We think it did.

As early as 1782 such courts were, by an act of the legislature, empowered to sell so much of the real estate of a deceased person as should be sufficient to pay the debts and charges, in cases where the debts and charges allowed exceeded the value of the personal estate. Prior to that time, as appears by the orders for such purpose scattered through the colonial records, such a power had been exercised by the legislature from a very early period. The power thus confided by statute to the courts of probate was, down to a comparatively recent period, very strictly limited and guarded. Prior to 1788 such power was limited to the cases mentioned in the statute, and only so much of the real estate could be sold as would, with the available personal estate, be sufficient to pay the debts and charges. In 1788 an act was passed giving to the judge of the probate court, when the debts and charges could not be fully paid out of the personal estate "without prejudice to the widow or heirs, by depriving them of their necessary stock and implements of farming, or other business of upholding life," power to order "payment of such part of the debts and charges as he shall judge reasonable, by disposing of the land or real estate for that purpose in such way and manner as he shall judge to be most equitable and beneficial for the widow and heirs or devisees of such estate, any law or usage to the contrary notwithstanding." Revision of 1808, page 270, chap. 3, sec. I. This provision was continued upon the statute book in substantially the same form down to the revision of 1866, in which it appears as section 48, page 412.

In 1862 an act was passed providing that if the appraised value of the real estate in the inventory of any estate should exceed the amount of the debts and charges specified in any order of sale, the administrator or executor might apply in writing to the court of probate, describing the real estate

proposed to be sold under the order, alleging that the real estate could not be beneficially divided, and if the court, after a hearing, found the allegation true, it might order the sale of the whole or a part, or an undivided interest, of such real estate, and divide or distribute the surplus proceeds of the sale, if any, as the real estate would have been divided or distributed if it had not been sold. Public Acts of 1862, chap. 45.

In 1864 the court of probate was empowered, in order to pay debts and charges or legacies, to order the sale of real estate instead of personal, if, on application therefor and hearing, "it shall appear to said court to be most for the benefit of said estate that said real estate should be sold instead of personal estate." Public Acts of 1864, chap. 83.

In the revision of 1875 the act of 1788 does not appear, doubtless for the reason that the cases therein provided for were covered by the act of 1864. The other provisions referred to appear in the revision of 1875, p. 394, as sections 36, 37 and 38 respectively. Section 36 furnished the general rule; sections 37 and 38 provided for exceptional cases.

The first exception was where the sale of real estate rather than personal might be ordered, and this was confined to cases where the court, upon application and hearing, found that such a course would "be most for the benefit of those interested in the estate." In such cases the court could order to be sold only so much of the real estate as might be necessary to pay the debts, legacies and charges.

The second exception provided for cases where so much of the real estate had been ordered sold as was necessary to pay debts, and the court on written application of the executor or administrator found that such real estate could not be beneficially divided. In such cases the whole or a part of, or an undivided interest in, the real estate might be ordered sold, and the surplus proceeds of the sale, if any, divided or distributed as the land would have been if it had not been sold. The act of 1884 (chap. 17), extended the provisions of section 38 (Revision of 1875, p. 394), to "any real es-

tate proposed to be sold," without reference to any previous order of sale made by the probate court.

Thus the law stood when the act of 1885 (Public Acts of 1885, chap. 110, sec. 166), was passed, which appears in the revision of 1888 as section 600, and is hereinbefore referred to. In that section the various provisions with reference to the sale of real estate of deceased persons, heretofore considered, were consolidated, and in making such consolidation the power of the court of probate to order such sales has, we think, been enlarged rather than restricted. If before it could order the sale of a sufficient quantity of such real estate instead of personal to pay debts and legacies, in cases where it found such a course would "be most for the benefit of those interested in the estate," it may now "in its discretion" order the sale of the whole real estate or a part of it, or an undivided interest therein, without reference to the amount of debts or legacies. And if before it could order the sale of any real estate proposed to be sold or any part of it, or undivided interest therein, to pay debts, where it found that such real estate could not be beneficially divided, it may now do so in any case without specifically so finding, and in its discretion, without regard to any previous order of sale to pay debts, and whether or not there is sufficient personal property to pay debts.

In the law as it now is, certain of the former provisions and restrictions under which this power could be exercised are removed, and the question whether, and under what circumstances, in such cases, the interest which any decedent had in any real estate, assets of the estate, shall be turned into money, is left to the sound discretion of the court, to be decided after a hearing, with full knowledge of all the facts, and subject of course to the right of appeal as in other cases.

The appellant claims that if the act of 1885 wrought any changes in the law in respect to the power to order the sale of real estate of deceased persons, "it was not intended that the law should retroact and affect the rights of the parties as they were in 1880, upon the death of Philo Brown."

If this means that, in cases pending in the probate court when the law of 1885 took effect, the court thereafter could not act under the new law in passing orders of sale of real estate, then the claim is without foundation. As soon as the present law went into effect it was the only law upon this subject. All prior laws were repealed, and estates then in process of settlement were not exempted from its operation. After it went into effect such orders, if they could be made at all, must be made under the provisions of the new law. It can hardly be seriously contended that the court of probate was powerless, after the law went into effect, to make orders for the sale of real estate in the cases of estates in process of settlement at that time; yet this is what is implied in the contention of the appellant on this point. The act is not retro-active in the sense claimed, but it did apply to every estate in settlement in which an order to sell real estate was asked for or ordered, after it went into effect.

In the case at bar the debts found to be due and unpaid are debts of the estate, and there is now substantially no property of the estate out of which they can be paid except the property ordered to be sold. The court has found that the real estate cannot be beneficially divided for the purpose of sale, and it is also evident from the facts found that the avails of all the remaining property will be far from sufficient to pay the debts in full.

It would seem, therefore, as if, under such circumstances, the probate court had full power to make the order in question. It is claimed however that, upon the facts as they appear of record, the court had not the power to order a sale of the appellant's interest in the real estate. The facts upon which this claim is based are substantially the following. The principal executor upon the estate of Philo Brown, who was a son of the deceased, was also from the time of his father's death in 1880 until May, 1884, the president, treasurer, principal owner and manager of Brown & Brothers, a corporation, to whom is now due the largest of the unpaid debts of the estate. At the death of Philo Brown the value of his personal estate exceeded the amount of all his debts

by about two hundred thousand dollars. Between the time of his father's death and May, 1884, said principal executor wrongfully converted to his own use, and otherwise wasted and squandered, substantially all of the personal estate, and a part of the real estate, without paying the debts now found to be due. The executors upon the estate had given bond with surety in favor of the estate, to the amount of fifty thousand dollars. After Brown & Brothers had full knowledge that its president and principal manager had, as executor, so converted and squandered the personal estate, without paying the two principal debts now due, it in 1884 released and discharged the executors, their bondsmen and the estate, from all claims and demands, except the right to collect its claim of over one hundred thousand dollars out of the assets of the estate which then remained, which included the real estate now ordered to be sold.

Upon the facts found the appellant claims that her interest in the real estate cannot be sold to pay either the Brown & Brothers debt or the savings bank debt now owned by the trustee in insolvency of Brown & Brothers. This claim may mean, either that her interest in the real estate cannot be sold for such purpose, or that the avails of such sale representing her interest cannot be applied in payment of these debts.

So far as the claim of the savings bank is concerned, we think this claim of the appellant, in either aspect of it, is untenable. As to this claim, the trustee of Brown & Brothers, on the facts found, stands in the shoes of the bank, unaffected by any transactions between Brown & Brothers and the former executors. This claim amounts to about twenty thousand dollars or more, and for aught that appears the property ordered to be sold may not be worth more than enough to pay it. The claim that, so far as this claim is concerned, it can be collected from the bondsmen, furnishes no good reason why it may not also be collected out of the estate by the sale of this real estate. The existence of this claim alone would justify the court in making the order of

sale, upon the facts here found, under the present law, and indeed under the former law.

As to the debt due to Brown & Brothers, this claim of the appellant, if it means that her interest in the real estate cannot be sold, is also untenable, if we are right in our view of the present law. Under that law the question whether, and under what circumstances, and in what manner, the real estate of a decedent shall be turned into money, is left to the discretion of the probate court. Presumably, in ordinary cases, the proceeds of such a sale will be just as valuable to all concerned as the real estate would be if it remained unsold.

The fact that a creditor of the estate has so conducted himself as to debar him from the right of appropriating to the payment of his debt the interest in real estate which an heir or devisee has in common with others, furnishes no good reason why the real estate should not be sold together as a whole, if it cannot be beneficially divided for the purpose of sale. In such cases we think the court of probate has the power to order a sale if it sees fit. If the real claim of the appellant is that the proceeds of the sale of her interest in the real estate cannot be taken to pay the debt of Brown & Brothers, the answer is that the order appealed from does not affect that question. Whether and in what manner the real estate of a decedent shall be turned into money, is one question to be decided, in view of the situation, nature and ownership of the property, and kindred considerations. What disposition shall be made of the proceeds of the sale is a different question, to be decided at another time and upon other considerations.

Whatever rights then the appellant may have to the avails of the sale of her interest in the real estate, are preserved to her under the law in the provision for the distribution and division of the avails of the sale, and can be fully settled and protected in subsequent orders of the court of probate.

We therefore hold that the court of probate had the power to make the order of sale in question in its discretion,

and that, so far as the record discloses, that discretion was exercised without prejudice to the claimed rights of the appellant.

The Superior Court is therefore advised to dismiss both appeals.

In this opinion the other judges concurred.

CHARLES H. DILLABY *vs.* BETSEY A. WILCOX.

New London Co., Oct. T., 1890. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

The clause of the statute of frauds which relates to a special promise of an executor or administrator to answer out of his own estate, has reference to claims against the estate for which the executor or administrator was liable only as the representative of the decedent, and which, but for the promise, he would have been liable to discharge only in due course of administration and to the extent of the property that had come into his hands.

The provision of the statute which relates to a special promise to answer for the debt, default or miscarriage of another, invalidates such a promise where not in writing, of a person not before liable, to pay the debt of a third person, for which the original debtor remains liable. The continued liability of the original debtor is essential to the application of the statute to the case.

Whenever the promise is merely collateral to the original debt, it must be in writing, whatever the consideration; and it remains collateral so long as the original debt still subsists as the principal debt.

The defendant was administratrix of the estate of *W*, and as such held a mortgage on certain personal property of *G*. *G* failing to pay his taxes, the plaintiff, tax collector, threatened to levy his tax warrant on the mortgaged property. To prevent this the defendant promised to pay the taxes and the plaintiff forbore to levy, but *G* remained liable for the taxes. Held that the promise was within the statute of frauds.

[Argued October 21st, 1890—decided January 19th, 1891.]

ACTION upon a parol promise of the defendant to pay certain taxes due from a third person, on the promise of the plaintiff, a tax collector, to forbear to levy on certain prop-

erty upon which the defendant as administratrix held a mortgage; brought to the Court of Common Pleas in New London County, and tried to the court before *Crump, J.* Facts found and judgment rendered for the plaintiff, and appeal by the defendant. The case is fully stated in the opinion.

S. Lucas, for the appellant.

1. The promise, not being in writing, was of no validity under the statute of frauds. Gordon Wilcox remained liable to an action brought under the statute at the time this suit was commenced. *City of Hartford* v. *Franey*, 47 Conn., 82. An undertaking to be within the statute of frauds must be an undertaking by a person not before liable, for the purpose of securing or performing the same duty for which the party for whom the undertaking is made continues liable. *Packer* v. *Benton*, 35 Conn., 349. The promise sought to be enforced in this suit comes clearly within that rule and within the statute of frauds. Gen. Statutes, § 1366. The plaintiff had no lien on this property, and he parted with nothing. He could not have held it as against the defendant. *Fuller* v. *Day*, 103 Mass., 481. There is no reason therefore why she should not be protected by the statute and the court erred in not so holding.

2. The court erred in not holding that there was no consideration for the promise. The title to this personal property was in the defendant and her co-administratrix, that is, in the estate of Wm. Wilcox. Jones on Chattel Mortgages, 2d ed., § 699; *Ashmead* v. *Kellogg*, 23 Conn., 70, 76; Gen. Statutes, § 3016. And they had the right to the possession as against the plaintiff. Jones on Chattel Mortgages, § 453; *Fuller* v. *Day*, *supra*; *Gaar, Scott & Co.* v. *Hurd*, 92 Ill., 315; *Cooper* v. *Corbin*, 105 id., 224; Desty on Taxation, 738. It nowhere appears in the case that if the plaintiff had not delayed to levy he could have collected the taxes. He obtained this promise by a threat to do that which he had no right to do to the prejudice of the holders of the mortgage. The forbearance was therefore not only a worthless con-

sideration as matter of fact, since the property sold for less than the mortgage debt, and the plaintiff had no right to the possession as against the defendant, but the promise was obtained by a wrongful threat, and the forbearance was also a worthless consideration in legal contemplation, since the rule is too well known to need emphasis that forbearance of a worthless or ill founded claim is no consideration. Langdell's Summary of Contracts, § 56; Chitty on Contracts, 38.

J. Halsey and *W. A. Briscoe*, for the appellee.

1. The promise of the defendant was an original undertaking and therefore not within the statute of frauds. While it is true that the taxes in question were not a specific lien upon the personal property, nevertheless the plaintiff had a right to levy upon the equity of redemption in the property and to sell it for the taxes. In consideration of his promise to relinquish such right, the defendant undertook to pay the taxes when the property should have been sold under foreclosure. It was not a promise as administrator to answer for the debt of her decedent, because there was no such debt; but an original undertaking, in consideration of the relinquishment of a right by the plaintiff, at the defendant's request and for her benefit. Browne on Statute of Frauds, § 204; *Burr* v. *Wilcox*, 13 Allen, 273.

2. Forbearance at the request of the defendant, or any act done at the defendant's request and for her convenience or to the inconvenience of the plaintiff, is a sufficient consideration for the promise. *Burr* v. *Wilcox*, *supra*. As appears from the finding, the plaintiff at the request of the defendant forbore to levy, and the defendant upon the sale secured the benefits accruing therefrom.

SEYMOUR, J. The plaintiff in this case was collector of taxes for the town, city and central school district of Norwich, and had in his hands warrants for the collection of taxes assessed in favor of each of them upon property of one Gordon Wilcox. The defendant and her mother were the administrators of the estate of William Wilcox, deceased,

and, as such, held a mortgage on certain personal property of Gordon Wilcox, consisting of printing presses and material in the possession of and used by him in Norwich.

The plaintiff was unable to procure payment of the taxes from Gordon Wilcox, and applied to the defendant for the payment thereof, and threatened to levy upon said mortgaged property unless they were paid. The defendant promised the plaintiff that if he would forbear to levy upon the property she would pay the taxes as soon as the property should be sold under the judgment of foreclosure which she and her mother, as administrators aforesaid, had obtained upon the mortgage. The plaintiff, in consideration of this promise of the defendant, promised to forbear, and did forbear to levy upon the property, and the same was sold under the judgment of foreclosure and was bid in for the defendant.

The defendant, after the sale, refused to pay the amount of the taxes to the plaintiff and they have not been paid.

The suit, it will be observed, is against Mrs. Wilcox personally. No pleadings subsequent to the complaint appear to have been filed, but the finding shows that the defendant denied that she made the promise upon which the action was brought. She also claimed that the promise declared on was within the statute of frauds, and, not being in writing, no recovery could be had upon it; and further that there was no consideration for the promise; and asked the court so to rule; but the court refused so to do and rendered judgment for the plaintiff, from which the defendant appeals.

Was the promise, which the court finds was made, within the statute of frauds?

The statute provides that "no civil action shall be maintained upon any agreement whereby to charge any executor or administrator upon a special promise to answer damages out of his own estate, or against any person upon any special promise to answer for the debt, default or miscarriage of another, * * * unless such agreement or some memorandum thereof be made in writing and signed by the party to be charged therewith or his agent." General Statutes, § 1366.

The first clause has reference to promises by an executor or administrator to answer out of his own estate for a claim against his decedent—some liability resting upon the executor or administrator strictly in his representative character and which, but for the promise, he would have been liable to discharge only in due course of the administration of the estate. To change the expression—this clause of the statute covers a special promise made by the executor or administrator to pay, out of his own estate, what, (being the legal representative of the party originally liable) he is already, in that representative capacity, under a liability to pay to the extent of the property which has come into his hands. "The particular object of this provision," says a recent writer upon the statute, "was evidently to guard executors and administrators against being held to a personal liability to pay debts, legacies or distributive shares in consequence of a wilful or mistaken perversion of expressions of encouragement which they may have used in conversation with claimants and which were not justified by the ultimate result of administration of the assets in their hands." Throop's Treatise on the Validity of Verbal Agreements, p. 87. However that may be, the suggestion illustrates the nature of the promise referred to in this section. The promise proved, in the case before us, was to answer for the debt or default of Gordon Wilcox, a third party, and is a promise to which that clause has no reference. The suggestion that the defendant, if compelled to pay the judgment, can repay herself out of the assets of the estate, does not tend to bring the promise within the clause. Most of the personal obligations of an executor contracted in the course of his administration, says the court in *Chambers* v. *Robbins*, 28 Conn., 550, are proper charges against the estate in the final settlement of his account, but they are none the less his private debts for which he is alone liable in his private capacity. In *Pratt* v. *Humphrey*, 22 Conn., 317, a leading case upon this clause, the promise was to pay a debt due from the estate of which the defendants were administrators—an entirely different case from the one at bar.

The second clause of the statute relates to the special promise of any person to answer for the debt, default or miscarriage of another. An immense amount of litigation has arisen over its construction. It is impossible to reconcile the decisions which have been made under it. Almost any theory of its scope and meaning can find some case to support it. The most careful text-writers have acknowledged their inability to find anything like uniform rules of construction in the conflicting decisions which have been rendered. It has even been stated that the law upon it is in a state of hopeless confusion. It is all the more satisfactory, therefore, that our own court seems, so far at least as the points involved in this case are concerned, to have found and adopted a rule which has proved satisfactory—a rule which, we think, substantially settles the question before us.

The promisor, to briefly re-state the facts, was one of the administrators of William Wilcox's estate; a fact, as we have seen, of no significance unless to show a motive for her promise, founded on a fancied advantage to the estate of her decedent. The promisee was the collector of taxes, threatening to levy on personal property upon which he had no lien and on which William Wilcox's estate held a mortgage. The levy, if made, would of course have been subject to such mortgage. The party for whose debt or default the promise to answer was made was a delinquent tax-payer who, after the promise, continued liable for the taxes until paid. The suit, then, is by a tax-collector against a defendant who, in consideration of the plaintiff's forbearance to levy for a third person's tax on personal property on which an estate of which she was one of the administrators had a mortgage, promised to pay taxes due to Norwich town and city and a school district of the town from said tax-payer, the mortgagor of the property.

In *Packer* v. *Benton*, 35 Conn., 343, it is held that "where a person, not before liable, agrees to pay the debt of a third person, and, as a part of the arrangement, the original debtor is discharged from his indebtedness, the agreement is not

within the statute of frauds. Otherwise, if the original debtor continues liable."

We shall quote somewhat extensively from that case, as the rule therein established has subsequently been applied in *Pratt's Appeal from Probate*, 41 Conn., 191, and in *Gridley* v. *Sumner*, 43 id., 16, and is, as already suggested, decisive of the case now before us. Judge BUTLER writes the opinion, and, after contrasting the facts then before the court with those in *Clapp* v. *Lawton*, 31 Conn., 95, he says (p. 349:)— "Here the contract was tripartite, between the debtor, a creditor, and a third person; and it contemplated the discharge of the original debtor and a new obligation by the third party to the particular creditor. Such new obligation and indebtedness is not within the statute of frauds. In *Turner* v. *Hubbell*, 2 Day, 457, the distinguished counsel for the defendant in error deduced from the cases which had then occurred under this branch of the statute, the following definition of the promise intended by it, to wit, 'An undertaking by a person *not before liable*, for the purpose of securing or performing the *same duty* for which the party for whom the undertaking is made is, *at the same time*, liable;' and it was adopted by the court. With a single modification that definition furnishes as perfect a text as has ever been, or, we think, can be devised. * * * The foregoing definition may be modified therefore so as to read—'An undertaking by a person *not before liable*, for the purpose of securing or performing the *same duty* for which the party for whom the undertaking is made *continues liable*.' Applying this test to the case in hand, it is obvious that the objection of the defendant ought not to prevail. It was the *purpose* and *effect* of the tripartite contract in question to discharge the original debtors in consideration of their giving up their property to the defendant, as well as to onerate the defendant in consideration of that discharge. * * * As the original debtors did not *continue liable* an essential element of the test was wanting, and the contract was not within the statute."

In the case now before us all the essential elements of the test are present and bring the promise within the statute.

The case of *Packer* v. *Benton* does not discuss the questions which might arise in that class of cases where the defendant, for his own use and advantage, procures from the plaintiff the surrender, release or waiver of a lien or security which the latter holds for a debt due him, upon the promise to pay the debt. In such cases it has been held, in a large number of cases, that the promise is not within the statute, though the original debt is not discharged, on the ground that the transaction amounts to a purchase from the creditor of such lien or security for a price which is the amount of the original debt, and that the relinquishment of the lien or security has inured to the defendant's benefit. In the leading case of *Fullam* v. *Adams*, 37 Verm., 391, it is held that "a verbal promise to pay the debt of another, where the original debt still subsists, is never legally binding, except where the promisor has received the funds or property of the debtor for the purpose of being so applied, so that an obligation or duty rests upon him, as between himself and the debtor, to make such payment, whereby his promise, though in form to pay the debt of another, is in fact a promise to perform an obligation or duty of his own." POLAND, C. J., who writes the opinion, says (p. 397,) that the cases which decide that where a creditor holds a security and surrenders it to a third person, for his benefit, upon his promise to be answerable for the debt, stand really upon the the same substantial principle.

It is stated in the text of the American and English Encyclopedia of Law, *in loco*, that, in a large and increasing number of the states of the Union, the promise, although made upon a new consideration of benefit to the promisor, is held to be collateral, whatever the intent of the parties, if the original liability remains; and a very large number of authorities are cited in support of the proposition.

It is to be noticed, as illustrating the difference in construction already alluded to, that in a recent case in New York, *White* v. *Rintoul*, 108 N. York, 222, it is stated, though under a *semble*, that a promise to pay a debt of another, antecedently contracted, where the primary debt still subsists,

is original and so valid within the statute of frauds, although not in writing, when it is founded on a new consideration moving to the promisor and beneficial to him, and when by the promise he comes under an independent duty of paying irrespective of the liability of the principal debtor. Curiously enough this intimation of an opinion, for it amounts to nothing more as reported, is made in a case where the defendant was a creditor of a firm and was secured by a chattel mortgage. The plaintiff was the holder of two notes of the firm which were nearly matured. The defendant disclosed the fact that he held the mortgage and promised to pay the notes if the plaintiff would forbear for a time. It was held that the promise was within the statute. The court says:—"The plaintiff contends that the defendant had a direct personal interest in procuring a forbearance to sue the firm, which he explains in his brief, by saying, that 'if the plaintiff pressed the collection of his notes and did not wait till the then next summer, the defendant would lose his money, which had been loaned to the firm.' But I do not discover a single fact in the case which tends to any such conclusion. * * * It was a fear without a foundation, a state of mind and not a result of existing facts seen in their legal bearing. Delay on the part of the plaintiff is not shown to have been of the slightest consequence to the interest of the defendant." No more do we see in the case before us a single fact which shows that a levy by the collector, subject, as it must have been, to the mortgage, could have injured the defendant or the estate she represented. If she thought so "it was a state of mind and not a result of existing facts seen in their legal bearing," and the decision of the case from which we are quoting seems to unmistakably favor her defense, though the dictum seems adverse.

It is said in Browne on the Statute of Frauds, § 214*e*, that "the mere passing of a new and independent valuable consideration between the plaintiff and defendant does not take the case out of the operation of the statute; and, so far as some of the decisions depend upon the contrary, they cannot be regarded as law. Every contract of guaranty re-

quires a valuable consideration moving from the party to whom the guaranty is given. There can be no sensible distinction made between 'new and independent' considerations and any other valuable considerations; and the general proposition that 'a new and independent consideration moving between the parties to the contract of guaranty,' takes it out of the statute, simply nullifies the statute. The distinction is between a mere valuable consideration for the defendant's promise of guaranty, and that transfer of value which creates an original obligation on the part of the defendant, the measure of which is, by the agreement of the parties, the defendant's payment of the third party's debt."

It was suggested that the promise relied on was an original undertaking. We cannot look upon it as such within the proper meaning of that word. It is a new promise to pay the already existing debt of a third party. The court say in *Molloy* v. *Gillett*, 21 N. York, 412:—"The words 'original' and 'collateral' are not in the statute of frauds; but they were used at an early day; the one to mark the obligation of a principal debtor, the other that of the person who undertook to answer for such debt. This was no doubt an accurate use of language; but it has sometimes happened that, by losing sight of the exact ideas represented by these terms, the word 'original' has been used to characterize any new promise to pay an antecedent debt of another person. Such promises have been called original because they are new; and then, as original undertakings are agreed not to be within the statute of frauds, so these new promises, it is often argued, are not within it. If the terms of the statute were adhered to or a more discriminating use were made of words not contained in it, there would be no danger of falling into errors of this description."

Where the person undertaking to pay the debt of another, receives property or funds of the debtor for the purpose, his promise is in no proper sense an undertaking to answer for the debt of another, but an undertaking to apply the property or funds to such payment. The undertaking becomes then an independent one, and the continuing obligation of

the debtor becomes in a sense collateral to it. Whenever the new promise is merely collateral to the original debt, it must be in writing, whatever the consideration, and it remains collateral so long as the original debt still subsists as the principal debt.

The decision at which we have arrived makes any discussion of the other questions presented on the record superfluous.

There is error in the judgment appealed from, and it is reversed.

In this opinion the other judges concurred.

PASQUALE LOGIODICE *vs.* EDWARD GANNON.

New Haven and Fairfield Cos., Oct. T., 1890. ANDREWS, C. J., LOOMIS, SEYMOUR and TORRANCE, Js.

It was a leading feature of the old system of pleading that when a party had once taken his ground he should not be permitted to depart from it. It was a departure when the replication or rejoinder contained matter not pursuant to the declaration or plea and which did not support or fortify it.

This rule in substance forms a part of our present system. Its violation leads to uncertainty and confusion in the pleadings, and these results the present law seeks to avoid by giving the court power to strike out the objectionable pleading on motion of the opposing party, and by giving the right to the parties under proper circumstances to amend the case or defense first presented.

The plaintiff brought to the Court of Common Pleas, the jurisdiction of which was limited to one thousand dollars, an action for the recovery of a described lot of land with buildings upon it, claiming five hundred dollars damages. The defendant filed a plea to the jurisdiction, alleging that the value of the demanded premises was four thousand dollars and so beyond the jurisdiction of the court. The plaintiff replied, denying this, and stating that he did not claim the possession of all the described premises, but only of one tenement on the third floor of the house, and nominal damages. The defendant thereupon filed a motion that this part of the reply be stricken out as inconsistent with the complaint. Held, upon this state of the pleadings—

1. That the motion to strike out that part of the reply should have been granted, it being no answer to any part of the plea to the jurisdiction.
2. That the plaintiff's only proper course was, either to withdraw his suit and begin anew, or to amend his complaint, if he could bring his case within the law relating to amendments.

[Argued October 29th, 1890—decided January 19th, 1891.]

ACTION to recover possession of a described lot of land with buildings upon it; brought to the Court of Common Pleas of New Haven County, and reserved upon certain pleadings for the advice of this court. The case is fully stated in the opinion.

T. J. Fox and *J. J. Buchanan*, for the plaintiff.

C. S. Hamilton, for the defendant.

TORRANCE, J. This is an action brought in the Court of Common Pleas to recover the possession of real estate. The complaint alleges, in the ordinary form, that the plaintiff owned and possessed a certain described lot of land, with buildings thereon, and that the defendant wrongfully entered and dispossessed him, and still keeps him out of the possession thereof, and claims judgment for possession and five hundred dollars damages.

The complaint does not state the value of the premises. The defendant filed a plea to the jurisdiction, in which he alleged, in substance, that the true and just value of the premises sought to be recovered was four thousand dollars, and that therefore the court had no jurisdiction. The plaintiff filed a reply to this plea, alleging therein "that the plaintiff does not claim the possession of all said described premises from the defendant, but only three rooms, a tenement on the third floor of the dwelling house standing and situate on the land described in the complaint, and nominal damages." He denied that the value of the premises described in the complaint was four thousand dollars, and denied that he claimed a judgment for the possession of the entire premises described in his complaint.

Thereupon the defendant filed a motion to strike out from this reply the portion quoted above, on the ground that the same was "irrelevant, immaterial, unnecessary, prolix and entirely inconsistent with the allegations of the complaint, and no part of a proper reply to the defendant's plea to the jurisdiction."

The record does not show that any action was taken on this motion, nor any reason why it was not allowed. The court heard the parties on the pleadings as they then stood.

Upon this hearing it found that the premises described in the complaint consist of a lot of land with a three-story house thereon, and that the third floor of the premises consists of a tenement of four rooms. The defendant offered testimony to prove that the premises described in the complaint were of the value of three thousand dollars. The plaintiff objected to this testimony. If it be admissible the court finds the value of the premises to be three thousand dollars.

The plaintiff, for the purpose of proving the allegations in his reply, "offered testimony and claimed to be entitled to prove that he did not claim the possession of the entire premises" mentioned in his complaint, but only of a portion thereof, "to wit, the tenement on the third floor," and that "the value of the tenement was not greater than one thousand dollars," and was a sum within the jurisdiction of the court. The defendant objected to such testimony.

The record does not show that the court received or rejected it, or made any ruling whatever in regard to this offer and claim of the plaintiff. The case comes before this court by way of reservation.

In the first place, we think it is obvious that the defendant's motion to strike out should have been allowed. The plaintiff in his complaint claimed judgment for the entire premises and five hundred dollars damages. In his reply to a plea to the jurisdiction, he says he only claims a part of the premises and nominal damages.

It was a leading feature in the old system of pleadings that "when a party has once taken his ground, he shall never be permitted to depart from it, for if this was allowed

the parties could not be brought to an issue." The replication must be "consistent with the declaration, must maintain and fortify it, and must not be a departure from it in any material allegation." "A departure in pleading is said to be where a party quits or departs from the case or defense which he has first made and has recourse to another; it is when his replication or rejoinder contains matter not pursuant to the declaration or plea, and which does not support or fortify it." 1 Swift's Dig., 623.

This rule was founded in good sense, and in substance it forms a part of our present system, although the violation of it is not attended, perhaps, with the same consequences as under the old system. Its violation leads to uncertainty, obscurity and confusion in the pleadings, and these results our present law seeks to avoid by giving the court power to strike out the objectionable pleading on motion of the opposite party, and by giving ample power, under the proper circumstances, to the parties and to the court to amend the "case or defense first made."

The part of this reply which the defendant moved to strike out was no answer to any part of the plea to the jurisdiction. It neither denied nor admitted any part of the plea, but was in fact a denial of the complaint. It should have had no place in such a reply, and was in the fullest sense irrelevant, immaterial and unnecessary. The object which the plaintiff seems to have sought to accomplish in this irregular way, could have been accomplished either by withdrawing his suit and beginning anew, or by amending his declaration, provided he could bring himself within any of the provisions of law relating to amendments. Taking the record as it stands, the evidence offered by the defendant was admissible, and as the allegations of his plea as to the value of "the matter in demand" are found true, it would seem to follow, from the reasoning of this court heretofore in similar cases, that the case at bar should have been dismissed. *Sullivan* v. *Vail*, 42 Conn., 90; *Fowler* v. *Fowler*, 50 id., 256.

As however the case is reserved for our advice, we are at

liberty to give such advice as will best subserve the ends of justice. The plaintiff may be in a position to bring himself within the provisions of the law relating to amendments, and be able to so amend his complaint as to bring his case within the jurisdiction of the Court of Common Pleas. If done at all, this would be done on such terms as would do justice to all concerned. If he can do so perhaps he ought to have the opportunity.

We advise the Court of Common Pleas, unless the complaint can be and is amended as herein indicated, to dismiss the case.

In this opinion the other judges concurred.

THE BOROUGH OF STAMFORD *vs.* EDGAR STUDWELL.

New Haven and Fairfield Cos., Oct. T., 1890. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

The borough of *S* passed an ordinance, under authority of its charter, that it should be unlawful for any person, without the consent of the warden and burgesses, to erect any building or addition to a building, within certain specified limits, unless the outer walls and roof were made of some metallic or mineral non-combustible material, under a penalty of one thousand dollars. The defendant owned a wooden building within the specified limits, seventy-six feet long in front and twenty-one wide and two stories high, with an attic, and a piazza extending along the entire front. The building was divided about midway of its length by a wooden partition, the north half being used by itself for tenements and the south half for a boarding house. The building took fire, and the entire roof was burned off and the second story and attic of the north part considerably burned, and the south part burned down to the sills, except a small portion of the front wall. The defendant at once proceeded to repair the north portion, enclosing its south end with sheathing, and made this part complete of itself, and it was immediately occupied by the defendant's tenants. About three months later, without the consent of the warden and burgesses, he rebuilt the south part of wood, using a few of the charred timbers that remained, and the old stone walls of the cellar. Held that the rebuilding of the south part was not the building of an addition to the north part, but that the whole was to be taken as the repairing of one entire building.

The completion of the north part as an entire and separate building and the use of it as such, and the delay in the rebuilding of the south part, did not affect the case. The owner had a right to rebuild in parts and at his own convenience.

The court below found that the rebuilding of the south part was the erection of an addition to a building within the meaning of those words in the ordinance. Held that as all the acts of the defendant were detailed in the finding, it presented the question whether those acts constituted such a building of an addition as the ordinance intended, which involved the construction of the ordinance, and presented a question of law which could be reviewed.

[Argued October 30th, 1890—decided January 19th, 1891.]

ACTION to recover a forfeiture for the erection of a building in violation of an ordinance of the plaintiff borough; brought to the Superior Court in Fairfield County, and tried to the court before *J. M. Hall, J.* Facts found and judgment rendered for the plaintiff, and appeal by the defendant. The case is fully stated in the opinion.

J. B. Curtis, for the appellant.

1. The 35th section of the amended charter of the borough, authorizing the ordinance passed by the warden and burgesses under which this action is brought, was never intended to apply to a case like this, where a building had been partially consumed, and where the defendant without molestation had repaired the larger portion and finished it with rough sheathing at one end and intended to repair the remaining portion in the near future, and did so three months later. The case is the repairing and reconstructing of one entire building. The defendant had a perfect right to wait three months before he finished a portion of it. The delay did not at all change the character of the work when done. The entire reconstructed building was upon the same foundation and cellar walls and much of the former structure was used in the work. It cannot affect the case that the south part was more completely destroyed by the fire than the other.

2. Such an ordinance, being highly penal in its character, should receive a strict construction in favor of a party who

is charged with its violation. *State* v. *Daggett*, 4 Conn., 60; *Booth* v. *The State*, id., 65; *State* v. *Brown*, 16 id., 54; *Brown* v. *Hunn*, 27 id., 332; *Stewart* v. *Commonwealth*, 10 Watts, 306; *Douglass* v. *Commonwealth*, 2 Rawle, 262; *Brady* v. *Northwestern Ins. Co.*, 11 Mich., 425; *U. States* v. *Sheldon*, 2 Wheat., 119.

S. Fessenden and *N. C. Downs*, for the appellee.

1. The defendant claims that the building erected by him did not constitute an addition, but should be regarded only as the repairing of an old building. It seems to us that the facts found by the court are conclusive upon this point. A large portion of the original building was destroyed by fire. The south part, which had always been used separately from the north part and which was separated from it by a partition, was practically burned to the ground. The defendant, with the permission of the warden and burgesses, reconstructed the north part and enclosed it on all sides, "so as to make a building separate and complete in itself." Here, then, was a completed building. Any work thereafter done on such building would necessarily be either the repairing of or an addition to the same. The addition which the defendant subsequently erected was in every sense a new building, except that it was joined to an existing building, and by force of that fact became an addition in the full sense of the word.

2. We submit that the ordinance in question is a salutary police regulation, the due observance of which is demanded in the interest of public safety. Wooden buildings constructed in the heart of a populous city or borough, especially buildings of the character of that erected by the defendant, constitute a menace to life and property. *Klingler* v. *Bickel*, 117 Penn. St., 326.

SEYMOUR, J. By a resolution of the General Assembly, passed in the year 1882, amending the charter of the borough of Stamford, it is provided (section 35,) that "the warden and burgesses of said borough shall have power and author-

ity to prescribe limits in said borough, within which it shall be unlawful, without the consent of the warden and burgesses of said borough, for any person to erect or remove any building or addition thereto, unless the outer walls and roof thereof shall be composed of iron, brick, slate, stone, or of such material as in the judgment of said warden and burgesses shall be non-combustible; and to make and cause to be executed all proper orders in relation thereto; and any person who shall erect or remove or add to any building within such limits contrary to the provisions of this section, shall forfeit and pay to the use of said borough the sum of one thousand dollars, to be recovered in any proper action."

Subsequently an ordinance of the borough of Stamford was passed which provides that, within certain specified limits in said borough, "it shall be unlawful for any person, without the consent of the warden and burgesses first obtained, to erect any building or addition thereto, unless the outer walls and roof thereof shall be composed of iron, brick, slate, cement, stone and mortar, or some metallic or mineral non-combustible material, nor until the plans and specifications have first been submitted to the fire wardens and by them approved, and their assent signed on said plans and specifications."

The defendant was in the possession and occupation of a lot situated within the limits prescribed by the ordinance. Upon it was a wooden building about seventy-six feet long, twenty-one feet wide, and two stories high, with an attic. A piazza extended along the entire front of the building. The building was divided, about midway of its length, by a wooden partition. The north part was used for tenements and other purposes, separate and independent of the south part. The south part was used and occupied by one Morris as a boarding house and bar-room.

On January 21st, 1885, the entire roof of the building was burned off, the second story and attic of the north part considerably burned, and the south part burned and destroyed down to the sills, except a small portion of the front, which was burned to the tin roof of the piazza. Eight or ten feet

of the piazza at the south end was consumed, so that all that remained of the south part of the building was some twenty or twenty-two feet of piazza attached to the same number of feet of the front, which front was about ten feet high and was broken and burned through in several places. In short, the south part of the building and the upper story and attic of the north part, were pretty much consumed, though the partition between the two was only burned down above the first story.

Soon after the fire the defendant proceeded to rebuild the north portion of the building, and within a short time put a new roof thereon, and enclosed the south end, where the old partition was, with sheathing, so as to effectually protect it from the weather, and finished the same so as to make a building separate and complete in itself. It was thereupon immediately occupied by the defendant's tenants and has ever since been used and occupied separate and distinct from the rest of the building.

Some three months later, and shortly after June 8th, 1885, the defendant, without the consent of the warden and burgesses of Stamford, and in disregard of their vote refusing to grant him permission to do so, rebuilt the south part of the building entirely of wood. In so doing he used a few of the charred floor and other timbers that remained in the south part of the original building, and the stone walls of the cellar and the foundation were the same as those of the old building.

The complaint, after reciting the borough ordinance above set forth, alleges that on the 1st of June, 1885, the defendant was in the possession, occupation etc., of a certain tract of land, with a wooden building thereon. The land is duly described, bounded and located. The wooden building referred to is the rebuilt north part of the original building. Then follows the allegation that on or about said June first the defendant, without the consent of the warden and burgesses of Stamford, did erect a certain addition to and upon the south side of said building, and a statement of the particulars in which the addition failed to meet the requirements of

the borough ordinance, and the claim that the defendant by building such wooden addition has, by virtue of section 35 of the borough charter, forfeited to and for the use of the plaintiff the sum of $1,000.

Upon the trial of the case the defendant claimed that the work done by him was only the repairing of an old building and not the building of a new addition, and not within the letter or the spirit of the 35th section of the borough charter relating to the erection of additions. But the court found that the work done by the defendant was the erection of an addition to an existing building, in violation of the charter and by-laws of the borough, and rendered judgment for the plaintiff to recover of the defendant $1,000 and costs.

Our main difficulty is with the question whether the Superior Court has conclusively found, as a question of fact, that the defendant has erected an addition to an existing building. If so there is nothing left of this part of the controversy for us to decide. Taking isolated expressions it would seem as if such was the case. But, because the case is peculiar, all the acts of the defendant are detailed, and the real question finally decided is, that the ordinance must be held to embrace such acts within its definition and prohibition of erecting an addition to a building. This, of course, involves the meaning and construction of the ordinance as a whole, and the legal scope of the words "any addition to a building," and necessarily presents a question of law. That an enclosed structure existed and that the structure in question was afterwards built and connected with it was not denied. The contention was that the structure erected immediately after the fire was not in itself a building within the meaning of the ordinance nor the subsequent structure an addition.

It is evident, then, that the question before the Superior Court required a construction of the charter and ordinance of Stamford. Did their provisions apply to the case? Was the erection of the south part of the building contrary to them? In other words, were the acts of the defendant, as stated in the complaint and proved at the trial, the erection

of an addition to a building, within the meaning of the law applicable thereto? The defendant thought not. The court decided that they were.

We do not think the defendant has erected an addition to a building, within the fair meaning and intention of the ordinance.

That it was in some sense an addition to the work theretofore begun is true and, because it was so the court seems to have concluded that the ordinance applied. But it was in a truer sense a completion of the work of repairing the original building. The building as it stood before the fire was a legal structure. It was one building and is stated to have been so in the finding. It is not claimed that the fact that it was divided by a partition made it two buildings. Suppose, after the fire, instead of rebuilding in sections or by degrees, the defendant had rebuilt the whole at once, upon the old foundations, using so much of the old material as was available, would it have been claimed that the prohibition against erecting additions had been violated? What difference ought it to make, in the construction of the law, that for his own convenience or that of the occupants of the tenements into which the north end of the building was divided, or from lack of present means to rebuild the entire building at once, the defendant rebuilt, and enclosed in the manner set forth, the north part at once, and three months later continued the work which, when completed, replaced the old building substantially as it stood before the fire, upon the same cellar walls and foundations.

The north erection was treated as, and consented to as, a repair of the north part of the burnt building. It is difficult to see why, upon the facts found, the work on the south part should not equally be treated as a repair, more extensive, to be sure, because the south part was more damaged, and a little delayed, but still a repair.

On the whole we think the provisions of the charter and ordinance relied on are not applicable, and that the court mistook the law in holding that the acts of the defendant

amounted to the erection of an addition to a building in violation of their fair intention and meaning.

There is error, and the judgment is reversed.

In this opinion the other judges concurred.

JOSEPH ROMERO *vs.* THE STATE.

New Haven and Fairfield Cos., Oct. T., 1890. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

Art. 1, sec. 9, of the state constitution provides that "no person shall be holden to answer for any crime the punishment of which may be death or imprisonment for life, unless on a presentment or indictment of a grand jury." Section 1610 of Gen. Statutes provides that "for all crimes not punishable with death or imprisonment for life the prosecution may be by complaint or information;" and § 1404 that "every person who shall assault another with intent to commit murder shall be imprisoned in the state prison not less than ten years." Held that the crime of assault with intent to commit murder may be prosecuted by an information by the state's attorney.

While the court may in its discretion sentence a person convicted of that offense for more than ten years, yet it can do so only by sentencing for a greater, but definite, number of years, and not for life.

A sentence for a term of years is not in law the equivalent of a sentence for life, even though it may be practically such.

[Argued November 7th, 1890—decided January 27th, 1891.]

WRIT OF ERROR from a judgment of the Superior Court in Fairfield County convicting the plaintiff in error, upon an information by the state's attorney, of an assault with intent to murder; brought to this court. The principal error assigned was that the plaintiff in error could have been held to answer for the offense charged only on an indictment by a grand jury.

J. B. Curtis and *R. A. Fosdick*, for the plaintiff in error.

The state constitution provides (art. 1, sec. 9,) that "no

person shall be holden to answer for any crime the punishment of which may be death or imprisonment for life, unless on a presentment or indictment of a grand jury." Prior to the revision of 1875 a person accused of assault with intent to commit murder was put to plead and tried upon indictment of a grand jury only. The revision of 1866 provided that every person convicted of that crime should "suffer imprisonment in the state prison during life or for any time not less than ten years." In the revision of 1875 the statute appears in the same form, only with the words "during life or for any time" omitted, making it read "shall be imprisoned in the state prison not less than ten years." The act now appears in this form in the Gen. Statutes of 1888 as § 1404. "It has been held in many cases that the mere change in the phraseology of a statute will not be deemed to alter the law, unless it *evidently* appears that such was the intention of the legislature. 'This rule has been frequently laid down in the modified re-enactment of British statutes and the revision of our own in the different states." Sedgw. on Stat. & Const. Law, 2d ed., 194. It clearly is not evident here that the legislature intended, by the omission of the words noted, to change the law. *State* v. *Grady*, 34 Conn., 128; *State* v. *Stanton's Liquors*, 38 id., 236; *Wright* v. *Oakley*, 5 Met., 406. The omission of the words leaves the maximum penalty undeterminate, thus giving the court unlimited discretionary power to punish for any number of years—a hundred, a thousand, and really during life. The legislature of New York has placed this precise construction on a statute of that state similar in substance. If the court should find that the defendant *might have been* sentenced to imprisonment for life, then this judgment must be reversed. If the Superior Court could have inflicted punishment in the state prison for *any* number of years exceeding ten, we should then ask how any court can be given absolutely unlimited discretion as to the punishment for crime, and such limitation not be for life. It cannot be claimed that there is any difference, so far as the individual is concerned, between imprisonment for life, in so many words, and imprisonment

for a thousand or more years. The courts will take judicial notice of the fact, that no man's life extends over a period of a thousand years. The phrase "not less than," in § 1404, designates the minimum limit. The expression of a minimum implies that there is a maximum. What is it? There is none expressed; consequently *any* number of years. Is it just or reasonable to claim that imprisonment for any conceivable number of years is less in degree than imprisonment for life?

G. A. Carter, for the State.

LOOMIS J. The only question presented by this appeal is, whether a person can be lawfully tried and convicted of an assault with intent to commit murder upon an information by the state's attorney, instead of an indictment by a grand jury. The answer will depend upon a proper construction of our constitution and statutes relating to the matter.

Art. 1, sec. 9, of the constitution of this state provides that "no person shall be holden to answer for any crime, the punishment of which may be death or imprisonment for life, unless on a presentment or indictment of a grand jury." And section 1610 of the General Statutes provides that "for all crimes not punishable with death or imprisonment for life, the prosecution may be by complaint or information." The constitution and statute are in perfect harmony, and the meaning is clear if the offense charged is not punishable either by death or by a sentence to prison for life. In that case the information by the state's attorney was a lawful mode of prosecution. The doubt in this case arises upon the statute which prescribes the punishment, which is as follows:—"Every person who shall assault another with intent to commit murder, * * * shall be imprisoned in the state prison not less than ten years." Gen. Statutes, § 1404.

The obscurity arises from the fact that the statute prescribes a minimum punishment but no maximum. But the kind of punishment is prescribed, which is imprisonment

for a definite term of years, for a prescribed punishment of not less than ten years imprisonment is the same as one for a term of years not less than ten. The only discretion the court has in going above ten years is merely to add to the number. But a definite number of years must be specified, otherwise the sentence would be void for uncertainty. It may however be suggested in this connection that imprisonment for life in its result is only for a certain number of years, and that if the sentence is long enough to cover the entire life of the person, there is no practical difference. But such reasoning overlooks the fact that in contemplation of the law a sentence to imprisonment for life is perfectly distinct from that for a term of years, and one is never the equivalent of the other without express statutory authority. Our law has always regarded imprisonment for life as a punishment much greater in degree than imprisonment for a term of years, and in our statutes the latter is classed under the head of "less than life."

This is shown by section 1621 of Gen. Statutes, allowing peremptory challenges of jurors on the part of the accused. The number increases according to the punishment. For instance, if the punishment is death, twenty jurors may be challenged; if imprisonment for life, ten jurors; if for less than life, four jurors; for any other offense (except under the liquor laws) two jurors. *State* v. *Neuner*, 49 Conn., 232.

The contention on the part of the accused in this case is, that, as there is no limit above ten years to govern the discretion of the court, it could impose a sentence for such a term of years as would practically result in a life sentence. This may be so, but it is not a test the law can recognize. The minimum sentence for ten years in some cases would in all probability be practically a life sentence, while fifty years in another case would not be. The true and decisive test under our constitution is whether the offense is one where the court has power to sentence the accused to the state's prison during the term of his natural life. In no case can this be done without the statute so provides *in terms*. We think it would have been clearly illegal in this

case for the trial judge to have given a life sentence. This is a conclusive test; but take another from a different standpoint. Suppose the law in a given case in terms punished the act by imprisonment for life, could the court sentence for so long a term of years as would certainly cover the natural life? No one would claim such an absurdity; but this shows that no term for years, however long, can be the legal equivalent of a term for the natural life.

The defendant cites the statute of New York in favor of his construction of our own law, that the court might sentence during life. That statute is as follows:—"Whenever in this chapter any offender is declared punishable upon conviction by imprisonment in a state prison for a term of years *not less than any specified number of years*, and no limit to the duration of such imprisonment is declared, the court authorized to pronounce judgment upon such conviction, *may in its discretion sentence such offender to imprisonment during his natural life*, or for any number of years not less than such as are prescribed." N. York Rev. Statutes, 1859, part 4, tit. 7, ch. 1, sec. 12. This statute of course settles such a question for the state of New York, but as bearing upon the question here it impresses us very differently from the views entertained by the counsel for the defendant, for the implication is that statutory authority was necessary in order to justify a sentence for life.

But the defendant calls attention to the fact that in the revisions of our statutes in the years 1866 (p. 247,) 1854 (p. 306,) 1849 (p. 223,) and 1838 (p. 144,) it was expressly provided that every person convicted of the offense in question should "suffer imprisonment during life or for any time not less than ten years;" and that in the revision of 1875 the statute first appeared as at present, with the words "during life" omitted; and the argument in behalf of the defendant is, that since 1875 the construction of the statutes on this subject ought to be the same as before, inasmuch as it is not evident that the legislature intended to change the law on this subject.

We cannot accept this argument as sound. The words

"during life," as connected with punishment for crime, are too significant to be treated in this manner. They have always had in our statute a meaning so clear and definite as to exclude the possibility of doubt or difference of opinion. When, therefore, they were stricken from the statute in question we must presume a change of meaning was intended and that the purpose was to take away the power to sentence for life. Why such a change was made we do not know; we can only conjecture as a possible explanation that, as murder in the second degree was punishable by imprisonment during life, it was considered a more perfect gradation of penalties to make the mere attempt at murder punishable by imprisonment for a term less than life, though not less than ten years.

But the reasons for the change are of no consequence; we can well afford to leave them in the realm of doubt. We are concerned only with the fact of a change, and of this we have no doubt, for we find it impossible to say that the striking out of the words "during life" from the former statutes had no effect whatever upon the power of the court to sentence the convicted person during life.

There was no error in the judgment complained of and it is affirmed.

In this opinion the other judges concurred.

THE STATE *vs.* JOHN D. CARPENTER.

New Haven & Fairfield Cos., Oct. T., 1890. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

A city ordinance, authorized by the city charter and by Gen. Statutes, § 2573, provided that every person who should keep a place for the playing of the game known as "policy," or of allowing others to play it, should be fined not more than one hundred dollars; and that every person owning or controlling any building or place, who should knowingly permit the same to be occupied for the purpose of playing that game, should be fined not more than one hundred dollars. Held not

necessary that the ordinance should set out the particular facts that constituted the game of policy.

The court would take notice of the fact that the term "policy playing" was in current use when the ordinance was passed.

And the ordinance held not to be invalid on the ground that the statute authorizing the city to pass it violated the rule that legislative power cannot be delegated. It is now generally conceded by the courts of this country and of England that powers of local legislation may be granted to cities, towns, and other municipal corporations.

Neither the statute nor the city charter contained any limitation of the penalty that might be fixed by the ordinance. Held that a limitation was necessary, but that it was sufficient that the ordinance fixed it, so long as it was not unreasonable in amount.

If an offense is created by statute it is sufficient to describe it in the words of the statute.

The averment in a complaint that the accused "did keep a place where policy-playing was carried on, contrary to the ordinance, etc.," held bad because not averring his knowledge that it was so carried on, and that the place was kept for that purpose.

[Argued October 30th, 1890—decided January 27th, 1891.]

TWO COMPLAINTS in the City Court of the city of Bridgeport, the first charging that the defendant, "within the corporate limits of the city, did keep a place where policy-playing was carried on contrary to the ordinance of the city;" and the second that the defendant "did, within said city, keep a place for the playing in and conducting and carrying on the game and scheme commonly known as policy, contrary to the ordinance, etc." Both cases were appealed to the Criminal Court of Common Pleas, where the defendant demurred to both complaints. The court (*Walsh, J.*,) overruled the demurrer, and, the defendant not answering further, rendered judgment against him. The defendant appealed from both judgments.

D. B. Lockwood, for the appellant.

1. The complaint does not specify the criminal nature of the offense, nor does it contain any description of the offense. Many *dicta* are to be found in the reports to the effect that it is a well settled rule of the common law "that in setting out a statutory offense it is generally sufficient to follow the words of the statute." *State* v. *Lockbaum*, 38 Conn., 400;

State v. *Jackson*, 39 id., 229. There is no such rule of law. No distinction is made by the common law as respects the degree of particularity and precision essential to the description of an offense between statutory and common law offenses. All indictments must specify the criminal nature and degree of the offense, and the particular facts and circumstances which render the defendant guilty of that offense. If the statute sets out fully and precisely the necessary ingredients of the offense, then an indictment is generally sufficient which follows the words of the statute. But such indictment is good not because it follows the words of the statute, but because it satisfies the common law rules of pleading. 1 Starkie on Crim. Plead., ch. 12; 1 Archbold's Crim. Prac. & Plead., (8th ed.,) 265–272; 1 Bishop on Crim. Proced., (3d ed.,) §§ 415–420, 509, 593, 630; Bishop on Statutory Crimes, §§ 373, 378; *State* v. *Bierce*, 27 Conn., 319; *State* v. *Lockbaum*, 38 Conn., 400; *Roberson* v. *City of Lambertville*, 38 N. Jer. Law, 69, 72; *Com.* v. *Welsh*, 7 Gray, 324. It is undoubtedly true, as a matter of fact, that where a statute creates an offense it is generally sufficient to follow the words of the statute. But this is true only because when the legislature makes a new offense it generally specifies the facts necessary to constitute the offense. 1 Green's Cr. Law Rep., p. 295, note to *State* v. *Jackson*. Indictments must contain a statement of all the facts essential to constitute the crime with such particularity and certainty that the defendant may know its nature and what he has to answer; that the jury may be warranted in their conclusion of guilty or not guilty upon the premises delivered to them; that the court may see a definite offense on the record, to which it may apply the judgment prescribed by law; and that the conviction or acquittal of the defendant may be pleaded in bar to a subsequent prosecution for the same offense. 2 Swift's Digest, 396; 1 Chitty Crim. Law, 169; 1 Archb. Crim. Prac. & Pl., 265; 2 Bishop's Crim. Proced., §§ 105, 275; Rapalje's Crim. Proced., § 113; *Rex* v. *Horne*, Cowp., 682; *Rex* v. *Aylett*, 1 T. R., 69; *Hall* v. *People*, 43 Mich., 417

People v. *Taylor*, 3 Denio, 91; *Wood* v. *People*, 53 N. York, 511.

2. The ordinance is of no effect because it does not set out the facts and circumstances which constitute the crime of "policy-playing." From all that appears in the information, "policy-playing" may have been carried on without the knowledge of the defendant. The information does not charge that he kept a place "for the purpose" of policy-playing. Under sec. 9, art. 1, of the state constitution, the accused in all criminal prosecutions has the right to demand the *nature* and cause of the accusation against him.

3. The ordinance is unconstitutional. The legislative power of the state is vested in the General Assembly. Const. of Conn., art. 3, sec. 1. One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Cooley's Const. Lim., 141, and cases there cited. Section 2573 of the General Statutes, upon which this ordinance is based, is unconstitutional, not only for the reason that it is a delegation of legislative power, but also for the reason that it contains no limitation of the punishment. In *State* v. *Tryon*, 39 Conn., 183, which was a complaint for a violation of a city ordinance of New Britain, the court held that the charter of the city which authorized the common counsel to pass ordinances and inflict a penalty for the violation thereof was not unconstitutional, because the charter provided that no penalty should exceed fifty dollars. If policy-playing is gambling, or lottery dealing, then those offenses are fully covered by the General Statutes of the state. In the case of *Mayor etc. of Savannah* v. *Hussey*, 21 Geo., 80, LUMPKIN, J., says, (p. 86:) "I deny that a municipal corporation can legislate *criminaliter* upon a case fully covered by the state law." Gambling being punishable under the general law, a city council "invested with authority to make ordinances to secure the inhabitants against fire, against violations of the law and the public peace, to suppress riots, *gambling*, drunkenness, etc., and generally to provide for the safety, prosperity and good order of the city.'

possesses, by virtue thereof, no power to make the keeping of any gambling device a misdemeanor, and to punish the same. *Mount Pleasant* v. *Breeze*, 11 Iowa, 399. See also *Slaughter* v. *The People*, 2 Doug. (Mich.,) 334; *In re Lee Tong*, 18 Fed. Rep., 253.

J. C. Chamberlain and *W. B. Glover*, for the State.

LOOMIS, J. The appellant is defendant in two complaints for a violation of a city ordinance prohibiting, under penalty of a fine, the keeping of a place for policy-playing within the limits of the city of Bridgeport.

The complaints were originally presented by the prosecuting attorney of the city to the City Court, and were appealed by the defendant to the Criminal Court of Common Pleas for the county of Fairfield, where the defendant filed general demurrers to the complaints, which were overruled by the court. The questions for review, as presented by the reasons for the appeal to this court, are precisely the same in both cases, and have reference to the validity of the complaints and to the validity of the ordinance upon which they are founded.

The ordinance is styled "An ordinance relative to Policy-Playing," and is as follows:—

"SECTION 1. Every person, whether as principal, agent or servant, who shall keep or manage, or have any interest in the keeping or managing of, any room, place or shop for the purpose, in whole or in part, of playing, conducting or carrying on, or of allowing any other person or persons to play, conduct or carry on, the game, business or scheme commonly known as policy; or who shall write, transfer, sell, deliver or buy, in whole or in part, any of the slips, tickets, tokens, numbers or chances used in or connected with such game, business or scheme of policy; or who shall in any other way knowingly take any part whatever in such game, business or scheme of policy, or in any part thereof, shall be fined not more than one hundred dollars.

"SEC. 2. Every person owning or controlling any build

ing, room or place, who shall knowingly let, lease or permit the same to be occupied, used or resorted to for the purpose of playing, conducting or carrying on, in whole or in part, the game, business or scheme commonly known as policy, shall be fined not more than one hundred dollars.

"SEC. 3. No person summoned as a witness on the part of the city, in any prosecution under either of the two preceding sections, shall be excused from testifying by reason that the evidence he may give will tend to disgrace or criminate him; nor shall he thereafter be prosecuted for anything connected with the transaction about which he shall so testify."

The defendant alleges in his reasons of appeal, and argues in his brief, that the ordinance is of no effect because it does not set out fully and precisely the necessary ingredients which constitute the offense charged. There are many offenses created by statute that could not stand such a test, for it would seem to require that all general words used to indicate the offense to be punished should be particularly defined. Take for illustration section 283 of the General Statutes, which makes it a crime to keep a place resorted to for the purpose of selling or buying pools upon the result of any election. There is no definition given of "pools" and the ingredients of the offense are not mentioned, but it would require some hardihood to claim that the act on that account would be of no effect. The objection overlooks the fact that the prohibited acts may have a general name to characterize them, as well understood without as with a definition. We think this is true of the act in question. It may be that the term "policy-playing" is of recent origin, but we may properly take notice of the fact that it was in current use when the ordinance in question was enacted, and in Webster's Imperial Dictionary the third definition of the word "policy," used as a noun, is—"A method of gambling by betting as to what numbers will be drawn in a lottery; as to play policy."

But if the ordinance is sufficiently certain as to the acts prohibited, it is claimed to be unconstitutional in that the

statute authorizing the city to pass such an ordinance violates the fundamental maxim of constitutional law, that legislative power cannot be delegated. But this maxim cannot be applied in the unlimited manner asserted, for, if it could, it would invalidate every city charter and every ordinance, for the municipality has no life or power at all except as delegated to it by the legislature either through its charter or by means of statutes. The maxim therefore which is cited in behalf of the defendant must be understood in the light of the immemorial practice of this country and of England, which has always recognized the propriety of vesting in municipal organizations certain powers of local regulation in respect to which the parties immediately concerned may fairly be supposed more competent to judge of their needs than the sovereign power of the state.

It is now generally conceded by the courts of this country and of England that powers of local legislation may be granted to cities, towns and other municipal corporations. Cooley on Constitutional Limitations, 4th ed., top page, 230; and see authorities cited in note 1. The case of *State* v. *Tryon*, 39 Conn., 183, decided by this court, contains a sufficient answer to this objection.

But the counsel for the defendant urges another reason for the claim that the ordinance is unconstitutional, namely, that section 2573 of the General Statutes, which authorized the common council of the city to enact by-laws "to suppress and punish all kinds of gambling and gaming, pool selling, policy playing, lottery dealing," etc., contained no limitation of penalty, and is therefore void. The case of *State* v. *Tryon*, just referred to, is cited to sustain this position, and it is said that the court held the by-law in that case constitutional because the charter provided that no penalty should exceed a sum mentioned.

The fact that the legislature had fixed a maximum penalty, which the common council had not exceeded, was referred to in the discussion, but was given a very different application from that made in the argument for the defendant. The contention in that case did not turn on the amount of

the penalty, but solely on the point that the legislature had no authority to delegate power to the city council to define and determine what should be crime. The discussion by the court was confined strictly to that claim; and the reply was, in substance, that the common council merely exercised the power conferred by passing the ordinance, and that when passed it was the statute that declared the act a crime. Then, in answer to the suggestion that the common council did actually fix the penalty, the reply was that the legislature had fixed the maximum penalty, which was none too great, and the fact that the common council might reduce it did not show that the council made the act a crime, and the point was illustrated by reference to statutes that confer on a judge of the Superior Court a discretion, within certain bounds, in passing sentence for a violation of some criminal law. The use made of the fact that the penalty was there limited in the charter was pertinent to the discussion in hand, but we have never understood the case as holding that a limitation as to the penalty must be found either in the public statutes or in the charter in order to make the ordinance valid. There must be a limitation somewhere, either in the statute authorizing the ordinance, or in the charter, or in the ordinance itself, and if in the last the courts will determine whether the amount is reasonable or not. But if fixed in either of these ways and found reasonable in amount it will be valid. *Bowman* v. *St. John*, 43 Ill., 337; *Town of Ashton* v. *Ellsworth*, 48 Ill., 299.

In 1 Dillon on Municipal Corporations, 4th ed., § 341, it is said:—"A municipal corporation, with power to pass by-laws and to affix penalties, may, if not prohibited by the charter, or if the penalty is not fixed by the charter, make it *discretionary within fixed reasonable limits*, for example 'not exceeding fifty dollars.' The maximum limit must of course be reasonable. This enables the tribunal to adjust the penalty to the circumstances of the particular case, and is just and reasonable. The older English authorities, so far as they hold such a by-law void for uncertainty, are regarded as not sound in principle, and ought not to be fol-

lowed." See the authorities referred to in note 2, to the same section. In the same treatise, § 338, it is said:— "Since an ordinance or by law without a penalty would be nugatory, municipal corporations have an implied power to provide for their enforcement by reasonable and proper fines against those who break them."

No claim has been made in this case that the maximum penalty of one hundred dollars fixed by the ordinance is an unreasonable amount, and no reasons occur to us that would tend to show it. And as there is ample authority in the act referred to for the enactment of such an ordinance, and as the subject matter is an appropriate one for municipal regulation, we conclude that the ordinance is valid in every respect, and that the defendant is liable for its violation, provided he has been prosecuted and tried for the offense according to law.

And this brings us to the only remaining question in the case—are the complaints sufficient? The first complaint alleges "that on the 7th day of February, A. D. 1890, within the corporate limits of said city, John D. Carpenter, then of said city, with force and arms, did keep a place where policy-playing was carried on, contrary to the ordinance of said city, against the peace, and contrary to the form of the statute in such case provided." The other complaint alleges "that on the 24th day of February, A. D. 1890, within the corporate limits of said city, John D. Carpenter, then of said city, with force and arms, did keep a place for the playing in, and conducting and carrying on the game, business and scheme commonly known as 'policy,' contrary," etc., concluding as before.

The principles to which we have already referred in discussing the validity of the ordinance sufficiently show that there can be no foundation for the objection that the complaints do not contain a sufficient description of the offense. By section 997 of the General Statutes it is provided that in all complaints for an offense against an ordinance or by-law of any town, city or borough, it shall be sufficient to set forth the offense in the same manner as in case of offenses

created by a public act. And in this state it has been settled by many decisions of this court that if an offense is created by statute it is sufficient to describe the offense in the words of the statute. *Whiting* v. *The State*, 14 Conn., 487; *State* v. *Bierce*, 27 id., 319; *State* v. *Lockbaum*, 38 id., 400; *State* v. *Cady*, 47 id., 44; *State* v. *Schweitzer*, 57 id., 537.

The second complaint comes fully within the strictest rule and is beyond all question good. The first complaint is defective in that it entirely omits any allegation that the defendant kept the place for the purpose of policy-playing or with knowledge that it was carried on there. There is no doubt that a consenting mind is an essential ingredient of the offense. The ordinance itself gives unusual prominence to this feature of the crime. It starts off with a direct statement that the place must be kept for this "*purpose;*" then follows the alternative "or of *allowing* any other person or persons to play," etc.; then, after specifying several particular acts, it adds—"or who shall in any other way *knowingly* take any part whatever in such game," etc. Section 2, also, which punishes the leasing of a room or building for the purpose, qualifies the act by the use of the word "knowingly."

Our conclusion therefore is that the court erred in overruling the demurrer to the first complaint, and that there is no error in the judgment upon the second complaint.

In this opinion the other judges concurred.

JAMES OSBORNE, TRUSTEE IN INSOLVENCY, *vs.* JANE L. TAYLOR.

New Haven and Fairfield Cos., Oct. T., 1890. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

A owned three tracts of land and mortgaged two of them to *B*, and subject to this mortgage the same two tracts and the third to *C*. Still later he mortgaged the three tracts to *B*, the first mortgagee. Afterwards *B* foreclosed the first and third mortgages as against *A*, not making *C* a party, and obtained an absolute title as against *A*. *B* conveyed all title to and interest in the three tracts to *D*, by quit-claim deed. The trustee in insolvency of *C* then brought a suit against *D* for a foreclosure of the mortgage to *C*, being the second mortgage in the above statement. Held that he could not foreclose the second mortgage as against *D*, without redeeming the first mortgage.

B's foreclosure of *A* in that mortgage extinguished the mortgage lien as against him and vested an absolute title in *B*; but as against *C*, who was not made a party to *B's* foreclosure, the mortgage debt remained a lien on the land.

As *B* conveyed to *D* the entire interest acquired by the mortgages and foreclosure, *D* took the same right in the land that *B* had, which was an absolute title as against *A* and a mortgage title as against *C*.

[Argued November 7th, 1890—decided January 19th, 1891.]

SUIT for foreclosure; brought to the Court of Common Pleas of Fairfield County, and heard before *Perry*, *J.* Facts found and decree of foreclosure passed, and appeal by the defendant. The case is fully stated in the opinion.

L. Warner, for the appellant.

There is error in the decree of the court in allowing the plaintiff a foreclosure without requiring him to pay the amount due on the foreclosure of the first mortgage from Munson Taylor to Jane Taylor. The record shows that when Jane Taylor foreclosed her mortgage on this property there was due her $454.55. This mortgage was given to secure the payment to her of the sum of $181.80 each year during her life, and she died August 25th, 1886. Between the date of the foreclosure and her decease there became due from the mortgagor, on this first mortgage, the further sum of $1,272.60, and neither of said sums has been paid unless the

foreclosure paid them. We claim that the foreclosure was not payment as to these second mortgagees. *Baldwin* v. *Norton*, 2 Conn., 161; *Lockwood* v. *Sturdevant*, 6 id., 388. The mortgage not being foreclosed as against these mortgagees, remained a mortgage as to them, entirely unaffected by the fact that it had been foreclosed as against Munson Taylor. And Jane L. Taylor, the defendant, acquired by the conveyance of Jane Taylor all her rights, both as absolute owner as against Munson, and as first mortgagee as against these second mortgagees.

J. B. Hurlbutt and *A. T. Bates*, for the appellee.

The quit-claim deed of Jane Taylor to the appellant did not, as matter of law, and did not in fact, convey the mortgage debt which the releasor once owned. *Bulkley* v. *Chapman*, 9 Conn., 8; *Chestnut Hill Reservoir Co.* v. *Chase*, 14 id., 131; *Dudley* v. *Cadwell*, 19 id., 227; *Farrell* v. *Lewis*, 56 id., 280. By the decree of foreclosure and the taking of possession of the real estate under it, the mortgage debt was thereby satisfied and cancelled, especially as it is not found that the real estate was of less value than the amount then found due. *Derby Bank* v. *Landon*, 3 Conn., 63; *Swift* v. *Edson*, 5 id., 535; *Bassett* v. *Mason*, 18 id., 136; *Gregory* v. *Savage*, 32 id., 263. The decree of foreclosure united the legal and equitable estates in Jane Taylor and effected a merger, and thereby the debt secured by the mortgage was extinguished. *Bassett* v. *Mason*, *supra*; *Gregory* v. *Savage*, *supra*.

TORRANCE, J. On the 10th of June, 1872, Munson Taylor was the owner of three separate tracts of land in Redding. On that day he entered into an obligation in writing, with his mother, Jane Taylor, now deceased, to pay her yearly a certain sum of money during her life, and, to secure the performance thereof, mortgaged to her two of these tracts of land. Subsequently on the same day he mortgaged the same two tracts of land, subject to his mother's mortgage, and the third tract, which was not subject to her mortgage,

to his five brothers and sisters, to secure notes which he owed them, payable at the death of his mother.

In 1876 he mortgaged to his mother, subject to the aforesaid mortgages, the three tracts of land to secure another debt due from him to her. These mortgages will hereafter be referred to as the first, second and third mortgages respectively. In 1878 Jane Taylor foreclosed both of her mortgages as against Munson Taylor, without making the owners of the second mortgage parties to the suit. The decree became absolute on the first Tuesday of February, 1879, at which time Jane Taylor, under the decrees, entered into possession of the three tracts of land.

In January, 1880, she made an arrangement with Jane L. Taylor, her daughter-in-law, by which the latter became obligated to pay Jane Taylor, yearly, during the life of the latter, one hundred and fifty dollars, and as a consideration therefor Jane Taylor conveyed by deed to Jane L. Taylor all the right, title and interest which she had in the three tracts of land.

Jane Taylor died in August, 1886. The present suit was brought by James Osborne, trustee in insolvency of Henry Taylor, one of the mortgagees in and under the second mortgage. On the trial the defendant, Jane L. Taylor, among other things claimed that the plaintiff was not entitled to a decree of foreclosure against her of the second mortgage, without at the same time paying to her the amount due upon the first mortgage.

The original plaintiff stated to the court that if it should find that the first mortgage had not been assigned to Jane L. Taylor, then the plaintiff withdrew his claim and offer to redeem and pay the first mortgage, which he had made in his complaint, and in that event claimed the right to foreclose the second mortgage without paying the first.

The court in effect overruled the claim of Jane L. Taylor, and decreed the foreclosure of the second mortgage as against her in favor of the owners of the second mortgage, without requiring them to pay the first mortgage. In so doing we think the court erred.

So far as we can see from the record, the action of the court below appears to have been based upon the supposition, either that the first mortgage had, to all intents and purposes, ceased to exist, or that, if it existed, it was not transferred to Jane L. Taylor. As applicable to the facts in this case neither supposition is well founded.

For the purposes of the argument we concede that when Jane Taylor foreclosed the first mortgage and took possession of the land, the debt as between herself and Munson Taylor was paid and the mortgage no longer existed. But as between the mother and the owners of the second mortgage, this was not so. As between them the first mortgage and the debt secured thereby, in effect, continued to exist.

If Munson Taylor had in fact paid the first mortgage debt, then the debt and the mortgage would no longer have existed for any purpose, and the second mortgage would by such payment have become a first mortgage. But the actual transaction between Munson Taylor and his mother had no such effect as between the mother and the owners of the second mortgage. Notwithstanding that transaction, the rights of the mother and the owners of the second mortgage, as between themselves, in relation to the land mortgaged to both, remained essentially unchanged. After the foreclosure the second mortgagees still had the right to redeem the first mortgage, and as against them all the rights of the mother under the first mortgage remained as if no foreclosure had taken place. *Baldwin* v. *Norton*, 2 Conn., 161; *Lockwood* v. *Sturdevant*, 6 Conn., 388.

If then the complaint in the case at bar had been brought against Jane Taylor, we think the plaintiffs would not be entitled to a decree of foreclosure against her on the second mortgage without paying the first mortgage debt. We also think that the defendant, Jane L. Taylor, in the case at bar, stands as to these plaintiffs in the position of Jane Taylor. She, by the quit-claim deed from her mother-in-law, acquired, for a valuable consideration, all the right, title and interest which the latter had in this land at the time of the conveyance.

That this was the intent of the parties to that transaction is, we think, clear from the facts found, and the court expressly finds that the mother did not intend to retain any interest in the land. But independently of any intent, the deed itself in express terms conveys to the daughter-in-law, absolutely and without qualification, all the right, title and interest which the mother then had in the land; and this alone and of itself placed Jane L. Taylor, with refereuce to this land and these second mortgagees, in the precise position occupied by Jane Taylor before the conveyance.

In this view of the case it is of no consequence that the court has found that both the mother and daughter-in-law supposed that the first mortgage no longer existed, and that neither of them expected that the obligation secured thereby was to be transferred to Jane L. Taylor. Under the circumstances such a supposition would be quite natural; but it could in no way alter or affect the rights which the mother in fact had in this land under the foreclosure, nor those which were conveyed by and acquired under the deed from her to her daughter-in-law. The fact that the mortgage or the mortgage debt were not in terms transferred, is of no consequence, for the transfer of all the rights of the mother to the land under the circumstances of this case, in equity placed Jane L. Taylor in the position previously occupied by Jane Taylor, and this is sufficient.

The cases wherein this court has held that a mere quit-claim deed from a mortgagee does not necessarily carry with it the mortgage debt, have no application to a case like the one at bar.

As against the plaintiffs, owners of the second mortgage, and seeking to foreclose it against Jane L. Taylor, she is the holder of the first mortgage, and entitled to be paid whatever the court shall, under all the circumstances, find to be justly due thereon.

There is error in the judgment of the court below, and a new trial is granted.

In this opinion the other judges concurred.

The City of New London *vs.* William F. Miller and Wife.

New London Co., Oct. T., 1890. Andrews, C. J., Carpenter, Loomis, Seymour and Torrance, Js.

An assessment for benefits from a city improvement should be made against the owner or owners of each piece of land benefited. A joint assessment may be made where there is a joint ownership, but where there are separate and distinct interests in the same land there should be a separate assessment against each of the owners of such interest for the benefit accruing to his interest.

An assessment otherwise made is irregular, but is not so wholly void that the irregularity cannot be waived by the persons against whom it is made.

The authority to make special assessments for benefits is found in the taxing power of the legislature.

[Argued October 21st, 1890—decided March 3d, 1891.]

Suit for the foreclosure of a lien for an assessment against the defendants for benefits from the construction of a sewer in the plaintiff city; brought to the Court of Common Pleas in New London County. The plaintiff amended the complaint by making William F. Miller the sole defendant. The defendant demurred to the amended complaint. Demurrer overruled by the court (*Crump, J.*,) and, the defendant not answering over, judgment rendered for the plaintiff. The defendant appealed. The case is fully stated in the opinion.

R. Wheeler and *H. A. Hull*, for the appellant.

J. Halsey and *A. Brandegee*, for the appellee.

Andrews, C. J. This action was brought against William F. Miller and Margaret Miller, his wife. The complaint, as it stood before it was amended, alleged in substance that the defendants were on and before the 13th day of August, 1887, the owners of certain real estate in the city of New London abutting on Main street; that prior to said day the

board of sewer commissioners of said city laid out and constructed a public sewer in and through said Main street; that on the 27th day of August, 1887, the said board, after notice and hearing to the defendants, assessed against the defendants, whose property was in the judgment of the board benefited by the sewer, the sum of $149.25 as the sum which they ought justly and equitably to pay as their proportionate share of the expense thereof; that notice of said assessment was given to the defendants and no appeal was taken, and that it has never been paid; and that a certificate of lien was duly filed and recorded in the town clerk's office; and the complaint claimed a judgment for the amount of the assessment and a foreclosure of the lien. A copy of the certificate of lien was annexed to a deed made part of the complaint and is as follows:

"This may certify that a lien in favor of the city of New London is claimed and continued upon the land and premises hereinafter described to secure the payment of one hundred and forty-nine and $\frac{25}{100}$ dollars due said city from Wm. F. and Margaret Miller, the owners of said property, as an assessment of benefits resulting thereto from the construction of a public sewer in and along Main street in said city by the board of sewer commissioners thereof. Said assessment was duly made by said board on the 13th day of August, 1887, under and in compliance with the provisions of an act relating to sewers and sewerage in the city of New London, passed at the January session of the General Assembly of the state, A. D. 1886; amounts to the sum of one hundred and forty-nine $\frac{25}{100}$ dollars, and was due on the 27th day of August, 1887. The parties liable to pay the same have been duly notified, and the same is unpaid, and is claimed as the amount secured by this lien, with interest from the 6th day of October, 1887. The premises upon which this lien is claimed are situated on Main street in said city of New London and are bounded and described as follows, namely: northerly by land of Wm. R. and Mary F. Brown, easterly by Winthrop Avenue, southerly by land of James

Maux, and westerly by Main street. Dated and recorded October 26th, 1887."

At the trial the plaintiff amended the complaint as follows:—"Strike out from the complaint the name of Margaret Miller, and insert the word 'defendant' instead of the word 'defendants' whenever the latter occurs in said complaint." Add to the complaint a new paragraph as follows: "The land described in said complaint consists of four lots lying contiguous to each other, and not separated by any visible boundaries. Of three of said lots the record title stands in the name of Margaret Miller. The record title of the remaining lot stands in the name of William and Margaret Miller, Said William and Margaret Miller are husband and wife, and were married prior to 1870. Plaintiff claims only a foreclosure of the interest of William Miller in said lands."

To the amended complaint the defendant William Miller demurred. The court overruled the demurrer, and on his failure to answer over rendered judgment against him for the full amount of the assessment and decreed a foreclosure of his interest in the land. He appeals to this court.

If the action had been prosecuted in its original form against both these defendants it is more than possible that it might have been successfully carried through. The trial court would have had some ground to assume that the land of the defendants had been increased in value by the construction of the sewer to the full amount of the assessment, which in all fairness they ought to pay. They had timely notice of the proposed assessment and an opportunity to appear and object to any excess or irregularity in that assessment. They did not do so. From their default in such appearance, in connection with the other facts in the case, and in the absence of any evidence to the contrary, the court might very likely find that they were willing to have their interests in all the lots treated as wholly joint instead of partly joint and partly several. Strictly an assessment for benefits should be made against the owner of each piece of land benefited. A joint ownership in the same land would jus-

tify a joint assessment for benefits against all the owners. And where there are separate and distinct interests in the same land, owned by different persons, which are benefited, there should be separate assessments against each of the owners for the benefit accruing to his property. Any assessment that did not observe this rule would be irregular. But it would not be so wholly void that the irregularity could not be waived by the persons against whom it was made.

In the judgment rendered against William F. Miller alone, on the amended complaint, we think there is manifest error. An assessment for benefits is a kind of taxation. And like all taxes it must be wholly joint or wholly several. It cannot be joint *and* several. There is no joint and several liability for taxes. One person is never liable for the taxes of another. A certificate of such an assessment, in order to be valid, must, unless it be a case where it is otherwise provided, describe an assessment made against a party liable severally, or against the parties liable jointly to pay it. Any action brought to recover the amount of an assessment for benefits, or to foreclose a lien laid to secure it, must be predicated on the assessment as it was actually made, of which the certificate recorded in the town clerk's office is usually the only evidence, and is always the only record evidence. After the expiration of the time within which such certificate must be recorded, the record becomes the sole evidence that an assessment was ever made. If a complaint in such an action should allege a several assessment, it would not be proved by a record that described a joint one. In an action where the complaint alleged a several assessment and the proof was of a joint one, no valid judgment could be rendered, because it could not follow both. A judgment must follow the things proved as fully as it must the things alleged. If it varies from either it is erroneous.

In this case the certificate does not support, but rather contradicts, the averments of the amended complaint. The complaint declares on an assessment made for benefits to

the land described as though William F. Miller was its sole owner. The certificate speaks of a joint assessment for benefits to land of which William F. Miller and Margaret Miller were the joint owners. The certificate speaks of but one assessment for benefits to a single piece of land. The amended complaint shows that instead of a single piece of land there were four lots, one of which is owned by William F. and Margaret Miller jointly, and that of the three others William F. is the tenant for life and Margaret the tenant in fee. The certificate shows that there has been no separate assessment for the benefits to the one lot owned jointly, and that there has been no assessment for the benefit to the separate interest owned by each in the other three lots; but that there has been one lump sum assessed for the benefit to four pieces of land in which William and Margaret have distinct properties, against them jointly. In this way the certificate shows that there has never been any such assessment as is alleged in the amended complaint. The remainder in fee owned by Margaret Miller is her separate estate. Her husband has no interest in it, nor is he subject to any liability on account of it. It is altogether likely that her remainder was benefited by the sewer more than was the life estate of William. To require him to pay for that benefit is not equitable or just.

We have spoken of the assessment for benefits as a kind of taxation. The statement is correct to this extent, that the authority to lay special assessments for benefits is found in the taxing power of the legislature. It would, however, be improper to say that an assessment for benefits is ordinarily included in the term "taxes" or "taxation." It is not. "It is never so spoken of in the charters of cities or boroughs, or in the general law, or in popular speech." Taxes are the regular, uniform and equal contributions which all citizens are required to make for the support of the government. An assessment for benefits may lack each of these qualities and yet be valid. "It is a local assessment, imposed occasionally, and upon a limited class of persons interested in a local improvement" and is uniform only in that

it is supposed to give an added value to the property of each person assessed to the full amount of the assessment. But it has one requirement in common with every kind of taxation—that the assessment must be made against the very person whose property is benefited.

There is error and the judgment is reversed.

In this opinion the other judges concurred.

LOUIS MEYER AND OTHERS *vs.* ANGELO C. BURRITT AND OTHERS.

New Haven & Fairfield Cos., June T., 1890. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

By 9 Private Acts, 215, the tax collector of the town of Waterbury is made *ex officio* collector of taxes for the city of Waterbury and the Center School District, and after paying the taxes on his rate bills to the communities to which they are due, can, by a suit in his own name, foreclose the tax liens held by them against the tax-payer; but he cannot maintain such a suit before he has paid such taxes to the communities.

But where, after suit brought, the collector paid to the communities the taxes due from the tax-payer, it was held that the court could properly, under the practice act, admit the communities as parties plaintiff.

So far as the tax-payer was concerned the taxes remained unpaid. The lien still existed and could be foreclosed by the communities in their own name for the benefit of the tax collector.

The special provision with regard to the collector of taxes in Waterbury does not exclude from application the general provisions of our statutes with regard to the proceedings for the collection of taxes.

The assessed value of a portion of a tax-payer's real estate which was mortgaged to a savings bank, was $12,000, and of his whole taxable property $27,350. Held that under the Gen. Statutes, § 3890, the lien for the taxes could be enforced against the savings bank only to the extent of the taxes on the $12,000.

The lien for the taxes being created by this statute, and limited as against a prior mortgagee to the taxes on the property mortgaged, and a later section providing for the foreclosure of the lien, the rights of all parties in a proceeding for the foreclosure of the lien must be determined by this statute, and cannot be affected by other statutes which provide for the collection of taxes by levy and sale.

[Argued January 22d,—decided March 4th, 1891.]

SUIT to foreclose a tax lien; brought to the District Court of Waterbury, and heard before *Cowell, J.* The Chelsea Savings Bank, one of the defendants, alone made defense. The court granted the foreclosure and the Savings Bank appealed. The case is fully stated in the opinion.

C. F. Thayer and *W. A. Briscoe*, for the appellant.

E. F. Cole, for the appellee.

TORRANCE, J. This is an action brought to foreclose certain tax-liens claimed to exist in favor of the Town of Waterbury, the City of Waterbury, and the Center School District of Waterbury.

It was first brought in the name of Meyer alone, who is the tax collector for the three communities, who are now joined as plaintiffs. Subsequently, after a demurrer had been filed by the Chelsea Savings Bank, one of the defendants, the court below, on motion of the collector, and against the objection of the bank, admitted the three above named communities as parties plaintiff. In one of the reasons of appeal by the bank, this action of the court is assigned for error.

In the case of *Hart* v. *Tiernan*, recently decided by this court, (59 Conn., 521,) it was held that the tax collector of these three communities, *after* he had settled his rate bill with the communities, and had paid over to them the tax, under the provisions of the private act concerning the collection of taxes within the town of Waterbury, passed in 1881, and found in the private acts of that year, might bring a suit in his own name to foreclose tax-liens existing in favor of the communities for taxes which the collector had so paid. The reasons for so holding are given in the report of that case. We think there is nothing in that decision to warrant the inference that such collector can bring such a suit *before* he has so settled and paid over the tax to the communities, nor do we think that in such a case any such right exists. The record in the case at bar shows that the

present action was brought before the collector had settled his rate bill or paid the tax to the communities. Under these circumstances the collector could not bring such suit in his own name.

Under the practice act, however, it was, we think, within the discretion of the trial court to admit the communities as parties plaintiff, and its action in so doing in the case at bar was permissible.

It appears from the record that, long before the time when the three communities were admitted as plaintiffs, the taxes here in question, with the exception of a small balance due to the city which was in dispute, had been paid to them by the collector. After the communities were admitted as plaintiffs the bank contended that they had no cause of action against the bank, on the ground that the taxes had theretofore been paid to them in full. The court overruled this claim, and this we think was right. So far as all of the defendants in a proceeding of this nature were concerned, the taxes were and still are unpaid. As against them the lien still exists, and may be foreclosed by the communities in their own name for the benefit of the collector, who has, after suit brought, been compelled by law to pay the tax. The reasoning of this court in the case of *Hart* v. *Tiernan*, above referred to, plainly justifies this conclusion.

On the trial below, the bank further contended that, under the provisions of section 3897 of the General Statutes, the premises sought to be foreclosed were not subject to any lien for any of the taxes laid by either of the plaintiff communities and described in the complaint, upon the ground that special provision had been made by statute for the assessment and collection of taxes within the town of Waterbury. This contention is based upon the existence of the private act of 1881, hereinbefore referred to. By a reference to that act, however, it will be seen that it makes no provision for any of the matters provided for in the sections of the General Statutes referred to in section 3897. It does not prescribe how a demand or levy shall be made by the collector, nor how he shall proceed to collect a tax.

It does not provide, in any manner for the existence or continuance of a lien for taxes. It does not provide for the foreclosure of such liens, nor for the sale of an equity of redemption, nor for the mode of selling land for taxes, nor for the form of the collector's deed in such case.

All these matters, and others not embraced within the provisions of the private act aforesaid, are provided for only in the General Statutes. The private act provides only for matters with regard to the collector and the collection of taxes in Waterbury that are in a certain sense special and peculiar to that town. The private act itself refers to the general law on this subject for a description of the powers of such collector in these words:—"Said collector shall have and possess all the rights and powers to enforce the collection thereof as are or may be provided by law for collectors of taxes." In that act no special provision is made for any of the important matters relating to the collection of taxes which are provided for in the sections of the General Statutes which are referred to in section 3897.

To hold that because of the existence of this private act these three communities and their officials possess none of the important powers conferred upon other communities by those sections, would be doing that which we think the legislature never intended, namely, excluding these communities from the benefit of certain provisions important and almost necessary for the due collection of taxes. The language employed by the legislature in section 3897 aforesaid, does not, we think, warrant us under the circumstances in coming to any such conclusion. In passing upon the claim of the bank, on the point in question, the court below did not err.

But the bank on the trial below further asked the court to hold, that if the premises sought to be foreclosed were subject to any lien for taxes, they were subject, so far as the bank was concerned, to such a lien only for the taxes laid upon the assessed value of those premises. This claim the court overruled, and this action of the court is one of the errors assigned in the reasons of appeal.

The premises sought to be foreclosed consisted of a lot of

land, with buildings thereon, situated in the city of Waterbury. The taxes sought to be recovered in this proceeding were taxes due from one Angelo C. Burritt, which became due on the first day of May, 1888, upon the assessment list of the year previous. The assessed value of the premises, as it appeared in the completed assessment list, was twelve thousand dollars. The assessed value of the other property of Burritt, as it appeared in said completed list, was fifteen thousand three hundred and fifty dollars, making in all twenty-seven thousand, three hundred and fifty dollars. On the fourteenth day of October, 1887, Burritt and his wife gave a mortgage to the defendant, the Chelsea Savings Bank, of the premises sought to be foreclosed, to secure an indebtedness of theirs to the bank of twenty thousand dollars. The mortgage was recorded the same day.

Section 3890 of the General Statutes, in force when the taxes here in question were laid, provides as follows:— "The estate of any person in any portion of real estate which is by law set in his list for taxation, shall be subject to a lien for that part of his taxes which is laid upon the valuation of said real estate, as found in said list when finally completed." This section was passed in 1887, as part of chapter 110 of the public acts of that year. Prior to that time the law upon this matter was found in section 15, page 163, of the Revision of 1875, which provided as follows:— "Real estate owned by any person in fee or for life or for a term of years, by gift or devise, and not by contract, shall stand charged with his lawful taxes in preference to any other lien." This section was repealed by the act of 1887 referred to above. Under the law as it stood prior to 1887, this court, in the case of *Albany Brewing Company* v. *Town of Meriden*, 48 Conn., 243, held that any part of the real estate of a tax-payer was subject to a lien for the whole amount of his tax. But the act of 1887 changed this.

Under the law as it was when the liens here in question commenced, and as it now is, the premises sought to be foreclosed are, by the express words of the statute, subject to a lien only for that part of the taxes "which is laid upon

the valuation of said real estate as found in said list as finally completed." This was twelve thousand dollars. The court below held that the premises in question were subject to a lien for the entire tax upon twenty-seven thousand three hundred and fifty dollars.

The plaintiffs seem to concede that if section 3890 of the General Statutes stood alone, the construction contended for by the bank would perhaps be the correct one; but they say that if that section is read, as it should be, in connection with sections 3889 and 3899, it will be seen that there is a conflict between the sections, if we adopt the defendant's construction.

So far as the question in hand is concerned, section 3889 provides that the tax collector "may enforce by levy and sale any lien upon real estate for said taxes which exists, except such as are continued by certificate, or he may levy upon and sell such interest of the person in any real estate as exists at the date of the levy." Section 3899 provides that "no real estate incumbered by mortgage or other lien shall be sold for the payment of any taxes, except the tax laid upon the assessed valuation of such real estate, unless the sale is made subject to such mortgages or other liens thereon as were recorded before the laying of such taxes."

Under these two sections the plaintiffs claim that the tax collector, if he were here proceeding by way of levy and sale, would be empowered to collect, out of the real estate in question, the whole amount of the tax due from Burritt, without regard to the mortgage. And they argue that if this be so, it follows that in this proceeding to foreclose a lien, the whole amount of the tax is secured by the lien and can be collected as against the bank.

If we concede that the tax collector is so empowered in case of levy and sale, it does not follow that he can collect the entire tax as against this bank in a proceeding of this kind. This proceeding is based upon the existence of a lien, and it is not a proceeding by way of levy and sale. The question here is—what is the amount of the debt or tax which is secured by the lien? Under the former statute it

was the whole amount of the tax; under the present statute it is expressly provided that it shall be for "that part of his taxes which is laid upon the valuation of said real estate, as found in said list when finally completed." It is true that the sections in question must be construed together and harmonized, if possible, where they seem to conflict, but in so construing them we must give its full force to the language of all the sections, taking into account the former law and the change therein which the present law seems to make.

The liens sought to be enforced here exist solely by virtue of the statute. It is the statute that determines what property shall be subject to them, when they commence, how long they endure, how they shall be enforced, over what other claims they shall have precedence, and what amount of the tax shall be secured by them. They are the creatures of the positive statute, and by that must their nature and qualities be tested. The provisions for their creation and enforcement are special and peculiar methods for the collection of taxes, adopted in addition to the ordinary and general method by way of levy and sale of the property. "This lien, with its extension, is a statutory creation. It stands quite apart from the matter of selling land upon a tax warrant, and is not encumbered by any provision as to possession of other property." *Albany Brewing Company* v. *Town of Meriden, supra.*

The liens in question here, if they exist at all, are created by section 3890 of the General Statutes. It is true that they were continued by certificate under the provisions of section 3896, but this did not alter their nature nor affect the amount of tax secured by them. The liens that commenced on the first of October, 1887, were the identical liens continued by certificate, save and except the change in the rate of interest, and the identical liens provided for in section 3890. Under this section the lien created thereby takes precedence, not only of mortgages recorded *after* October first, but "of all mortgages, attachments and liens purporting to cover or affect said estate in the whole of said portion recorded *before* October first."

This is the order of precedence in case of a lien. If the order of precedence under a proceeding by way of levy and sale is different, a point which we do not here decide, this cannot affect the consideration of the question in hand. If the legislature has made any such distinction, the two methods of procedure may well stand together. There is no apparent conflict between the provisions of the statutes here in question, and certainly no such necessary conflict as requires us to hold, against the express and positive language of one of these sections, that a lien exists upon the premises sought to be foreclosed, as against the bank, for the whole amount of the tax due from the tax debtor.

We think the mortgage in question, so far as the Chelsea Savings Bank is concerned, takes precedence of all of said taxes, save and except the taxes laid upon the assessed value of the real estate covered by the mortgage, as found in the tax list when finally completed, and that the court below, in deciding otherwise, erred and mistook the law.

For these reasons the judgment of the court below is reversed, as to the Chelsea Savings Bank, the sole appellant in this court.

In this opinion the other judges concurred.

James J. Regan *vs.* The New York and New England Railroad Company.

Hartford Dist., Oct. T., 1890. Andrews, C. J., Carpenter, Loomis, Seymour and Torrance, Js.

Gen. Statutes, § 3581, provides that when an injury is done to the property of any person by fire from the locomotive engine of any railroad company, without contributory negligence on his part, the company shall be held responsible in damages to the extent of such injury. Where a railroad company was liable under this statute for the destruction of the plaintiff's property, it was held that it could not in any form secure the benefit of the insurance held by him upon the property.

Where the law subrogates one who has discharged the obligation of a third

person, in the place of the person to whom the obligation was due, the obligation must have rested primarily on such third person. Here the duty to pay for the destruction of the plaintiff's property rested primarily on the railroad company.

On a hearing in damages upon a default both parties must be confined to such questions of damage as would naturally arise from the facts stated in the complaint. The railroad company could not, on such a hearing, properly make the question of their right to a reduction or extinguishment of the damages by reason of the insurance received by the plaintiff.

Where a suit is brought for the destruction of property that has a definite money value, susceptible of easy proof, a just indemnity to the plaintiff requires the addition to the value of the property at the time of its destruction, of interest from that time to the date of the judgment.

[Argued November 18th, 1890—decided March 4th, 1891.]

ACTION for the destruction, by fire from the locomotive engine of the defendant company, of goods of the plaintiff in a store-house adjacent to the track of the defendant's railroad; brought to the Superior Court in Tolland County. The defendant suffered a default and the case was heard in damages before *F. B. Hall, J.*

Upon the hearing the counsel for the defendant inquired of the plaintiff, who testified as a witness in his own behalf, if he had not received from insurance companies some compensation for the damage to the goods by the fire. To this inquiry the plaintiff objected, upon the ground that it was immaterial. The court sustained the objection and excluded the question.

The defendant claimed that the rule of damages was the value of the goods at the time of their destruction, without interest. The court overruled this claim, and in assessing damages added to the value of the goods a sum equal to interest thereon at six per cent. from the date of their destruction to the date of the judgment.

The defendant appealed.

E. D. Robbins, for the appellant.

The plaintiff had a lot of stock destroyed or damaged by fire. This stock was in a store-house standing alongside the railroad of the defendant. The Superior Court finds that

the fire was communicated to the store-house by a spark from a locomotive engine belonging to the defendant. There was no claim that the defendant was guilty of any negligence or was in any wise at fault. Upon the hearing the counsel for the defendant inquired of the plaintiff, as a witness, if he had not received from insurance companies compensation for the damage to his goods. The plaintiff objected to the question on the ground that it was immaterial. The court sustained the objection and excluded the testimony. It is submitted that in so doing the court erred. The liability of the railroad company is deduced solely from section 3581 of the General Statutes. Under that statute it is liable in damages only "to the extent of the injury to the person injured." If the plaintiff in this case has been paid all his loss by insurance companies he has not been injured at all. It is therefore most material to know whether he has in fact been so paid or not.

As this question arises on our statute, decisions in other states could be of no pertinency or weight. The question has never arisen before in this state. It must, therefore, be decided on principle and the language of the statute. Certainly there are no equities which call for the stretching of the statute in the plaintiff's favor. The fire was a pure accident, and the ensuing loss was due to an extraordinary conjunction of circumstances. It is a harsh rule of law which makes a railroad company liable in such a case. To hold the defendant liable to the plaintiff on such a statute for $13,091, when he has in fact incurred no loss at all, would be a refinement of injustice.

The reason given by the plaintiff's counsel, arguing in the court below, for holding this evidence immaterial, was that one purpose of the statute was to enable owners of property adjoining a railroad to obtain insurance without having to pay larger rates because of the consequent additional risk. Whether this was part of the intent of the statute I do not care to inquire. The statute will, in fact, evidently enable any property-owner to avoid such a raising of rates if ever attempted. If any insurance company were disposed to regard

the vicinity of a building to a railroad as a reason for raising rates of premium, it would be perfectly easy to stipulate that this risk should be excepted, and that if, in a suit between the property-owner and the insurance company, it should appear that the railroad company set the fire, then the insurance company would be released from its liability and would be entitled to receive back the amount paid the person insured.

Rules of law which might apply for the benefit of an insurance company against a wrong-doer whose wrong has caused the fire, have no bearing on the case at bar. This statute was intended as between property-owner and railroad company, to lay the damage of a fire starting from a locomotive engine on the railroad company rather than the property-owner. It is an entirely gratuitous assumption to suppose that its intent was to protect insurance companies. Here is a loss that must fall on some one. Both the railroad company and the property-owner are innocent of any fault. As between these innocent parties, it has seemed best to the legislature to throw the loss on the railroad company. The insurance company, however, has no such standing ground against the parties to the suit. Its business is to assume fire risks. It has very likely in the course of years been paid a large sum of money for insuring the plaintiff's stock. There is no reason why the statute should be strained to protect its interests and save it harmless from loss by a fire against which it had for a valuable consideration insured the plaintiff.

The liability of the defendant is not a natural primary liability like that of a tort-feasor. Suppose the plaintiff had omitted to give the defendant the notice required by the other sections of this statute, the insurance company would then clearly have to pay the loss and would have no legal ground of complaint against the plaintiff. The able reasoning of the court in *Harding* v. *Town of Townsend*, 43 Verm., 538, brings out the distinction between such cases as that and the case at bar. The court says: "As between the insurer and wrong-doer, in reason and justice the burden of

making compensation to the injured party ought to be ultimately borne by the party thus in fault. The party whose wrongful act or culpable negligence caused the injury ought to make compensation and bear the loss." In the present case, in reason and justice the defendant, being innocent of negligence or any wrong-doing, ought not to bear the loss when the issue lies between it and an insurance company which had been paid to assume the risk.

A. P. Hyde and *C. Phelps*, for the appellee.

LOOMIS, J. This is a complaint to recover damages for the loss of goods belonging to the plaintiff, which on the 13th day of July, 1889, were destroyed by a fire communicated by a locomotive engine belonging to and in the use of the defendant corporation.

The action is predicated upon section 3581 of the General Statutes, which provides as follows:—"When any injury is done to a building or other property of any person, by fire communicated by a locomotive engine of any railroad company, without contributory negligence on the part of the person entitled to the care and possession of the property injured, the said railroad company shall be held responsible in damages to the extent of such injury to the person so injured; and every railroad company shall have an insurable interest in the property for which it may be so held responsible in damages along its route, and may procure insurance thereon in its own behalf." The defendant suffered a default and a hearing in damages was had before the court.

The court found all the facts essential to a recovery of compensatory damages, and assessed as such damages the sum of thirteen thousand and ninety-one dollars and ninety-five cents, and rendered judgment for the plaintiff to recover that sum of the defendant, and his cost.

Upon the hearing the counsel for the defendant inquired of the plaintiff as a witness, if he had not received from insurance companies some compensation for the damages to

said goods by said fire. This was objected to by the plaintiff and excluded by the court. Was this ruling erroneous?

In the first place, if we assume that under proper pleadings the defendant might be allowed a reduction equal to the amount of insurance collected by the plaintiff on the goods destroyed, we do not think it admissible as the pleadings were at the time of the hearing.

It is true that in this case there was no answer, but a default, which admitted the allegations of the declaration to be true; but an admission of the truth of the allegations could surely give no greater latitude of proof upon the subject of the damages than a denial. Both parties must be confined to such questions of damage and such matters of aggravation or mitigation as would naturally arise from the facts stated in the complaint. The plaintiff could not show special or consequential damages not averred and not naturally flowing from the cause of action described, nor could the defendant on the other hand have the benefit of a set-off, recoupment, or any other ground for the reduction of damages, depending on some independent transaction between the plaintiff and a third person.

The matter to be proved by the rejected evidence upon the defendant's assumption would be a complete defense except for the default. If it equaled in amount the value of the goods it would be an absolute bar to the action, otherwise it would be a bar *pro tanto*.

But irrespective of the pleadings, the ruling complained of was clearly right upon the merits of the question. Any other conclusion would seem to us utterly at variance with established principles and sound reason, and contrary to an unbroken line of decisions by the courts of England and the United States.

If the defendant is entitled to have the insurance money deducted from the amount otherwise due, it must be because it owns or has some legal claim to the money. How happens it that the defendant corporation is entitled to this money? Not because it ever paid the premium or any part of it, nor because the policy was obtained for its benefit or

upon its request, nor because there is any privity between it and the insurance company. Our own court in *Conn. Mutual Life Insurance Co.* v. *N. York, N. Haven & Hartford R. R. Co.*, 25 Conn., 265, held that there was no privity between the defendant whose negligence caused the death of the insured, and the insurance company who issued the policy on the life of such person, and this position accords perfectly with the law in other jurisdictions.

The defendant, instead of paying anything toward procuring the policy, by its extraordinary use of the dangerous element of fire in close proximity to the plaintiff's property, rendered it necessary for him to pay a much larger sum to obtain his insurance than would otherwise have been required.

How then can the defendant claim, as it does, the exclusive benefit of the insurance? It came to the plaintiff from a collateral source, wholly independent of the defendant, and which as to him was "*res inter alios acta.*" The defendant, in our judgment, has no more claim to the insurance money than it would have to money obtained upon a subscription paper which the friends of Regan may have procured to make good his loss. How can the defendant make any distinction between money raised voluntarily after the loss, and that obtained from a contract of indemnity to which it was no party, and had paid no part of the consideration?

The statute upon which the action is founded justly imposes an absolute primary liability on the defendant for having caused the loss. But the ruling which the defandant asked for would completely nullify the statute as applicable to such a case as this, by practically imposing the primary obligation on the insurer, who is innocent, and allowing the defendant, who caused the loss and who alone could have prevented it, to go entirely free, at least to the extent of the insurance; for the insurer, having paid the money due the insured, could not get it back from him, and of course the insured, after such deduction from his damages, would have no remaining right to which the insurer could be subrogated to recover the money back again from the defendant.

If the principles that underlie the defendant's position are correct, had the loss been paid in full in ignorance of the fact that the plaintiff had obtained insurance, the defendant might bring a suit against the plaintiff to recover the money so paid; or had the money due on the policy not been paid, the defendant, after paying the loss in full, could intervene to prevent the amount due on the policy from being paid to the insured or any other than itself. What a strange subrogation that would be, to put the party who caused the loss in the place of the insured to enforce the contract between the latter and his insurer! And what a strange revolution would be made in the relation of the parties were we to adopt the defendant's contention! It has hitherto been established by a line of decisions reaching backward more than a century and substantially unbroken by dissent, that there is no privity in such cases between one made primarily liable for such a loss and an insurance company; that the liability of the insurer is merely secondary; that the insurer's position is practically that of a surety; that insurance is personal and does not inure to the benefit of one not a party thereto; and that where the insurer has indemnified the owner of the goods lost, he is entitled to be subrogated to all the means of indemnity which the owner held against the party causing the loss and primarily liable therefor.

The true relations of the parties and the law on the subject under discussion are very clearly shown by the opinion of the court delivered by Chief Justice SHAW in the case of *Hart* v. *Western Railroad Corporation*, 13 Met., 99, which was an action on a statute identical with our own in that it provided that when any injury was done to a building of any person by fire communicated by a locomotive engine of a railroad corporation, the corporation should be responsible in damages to the person so injured, and such liability, as in the case of our statute, was irrespective of any actual proof of negligence. The plaintiff's house was destroyed by a fire communicated by a locomotive engine of the defendants, and the underwriters paid to the owner of the house

the amount of his loss, and it was held that such payment did not bar the owner's right to recover of the railroad corporation, and that the owner, by receiving payment of the underwriters, became trustee for them, and they could prosecute the suit against the railroad corporation in the name of the owner, who could not even release the railroad corporation so as to affect the rights of the underwriters to recover. In delivering the opinion Chief Justice SHAW said:—"Railroad companies acquire large profits by their business. But their business is of such a nature as necessarily to expose the property of others to danger. * * * The manifest intent and design of this statute, we think, and its legal effect, are, upon the considerations stated, to afford some indemnity against this risk to those who are exposed to it, and to throw the responsibility upon those who are thus authorized to use a somewhat dangerous apparatus, and who realize a profit from it. * * * Now, when the owner, who *primâ facie* stands to the whole risk and suffers the whole loss, has engaged another person to be at that particular risk for him, in whole or in part, the owner and the insurer are, in respect to that ownership and the risk incident to it, in effect one person, having together the beneficial right to an indemnity provided by law for those who sustain a loss by that particular cause. If, therefore, the owner demands and receives payment of that very loss from the insurer, as he may by virtue of his contract, there is a manifest equity in transferring the right to indemnity, which he holds for the common benefit, to the assurer. It is one and the same loss for which he has a claim of indemnity, and he can equitably receive but one satisfaction. So that, if the assured first applies to the railroad company, and receives the damages provided, it diminishes his loss *pro tanto*, by a deduction from, and growing out of, a legal provision attached to and intrinsic in the subject insured. The liability of the railroad company is, in legal effect, first and principal, and that of the insurer secondary; not in order of time, but in order of ultimate liability. The assured may first apply to whichever of these parties he pleases; to the railroad company

by his right at law, or to the insurance company in virtue of his contract. But if he first applies to the railroad company, who pay him, he thereby diminishes his loss, by the application of a sum arising out of the subject of the insurance, to wit, the building insured, and his claim is for the balance. And it follows, as a necessary consequence, that if he first applies to the insurer, and receives the whole loss, he holds the claim against the railroad company in trust for the insurers. Where such an equity exists the party holding the legal right is conscientiously bound to make an assignment in equity to the person entitled to the benefit; and if he fails to do so, the *cestui que trust* may sue in the name of the trustee, and his equitable interest will be protected. We think this position is exceedingly well sustained by authorities."

And if the principles were so well sustained then, in 1847, when that opinion was written, they are now, after the lapse of more than forty years, still more strongly supported. *Mason* v. *Sainsbury*, 3 Doug., 61; *Clark* v. *Hundred of Blything*, 3 Dowl. & Ryl., 489; *S. C.*, 2 Barn. & Cress., 254; *Yates* v. *White*, 4 Bing. N. C., 272; *Randal* v. *Cochran*, 1 Ves. Sen., 98; *Commercial Union Assurance Co.* v. *Lister*, L. R. 9 Ch. App., 483; *Propeller Monticello* v. *Mollison*, 17 How., 152; *Hall & Long* v. *Railroad Cos.*, 13 Wall., 367; *Clark* v. *Wilson*, 103 Mass., 219; *Hayward* v. *Cain*, 105 id., 213; *Harding* v. *Town of Townshend*, 43 Verm., 536; *Monmouth Co. Fire Ins. Co.* v. *Hutchinson*, 21 N. Jer. Eq., 107; *Weber* v. *Morris & Essex R. R. Co.*, 35 N. Jer. Law, 409; *Same* v. *Same*, 36 id., 213; *Collins* v. *N. York Central R. R. Co.*, 5 Hun, 503; *Conn. Fire Ins. Co.* v. *Erie Railway Co.*, 10 id., 59; *Merrick* v. *Brainard*, 38 Barb., 574; *Althorf* v. *Wolf*, 22 N. York, 355; *Merrick* v. *Van Santvoord*, 34 id., 208; *Carpenter* v. *Eastern Transportation Co.*, 71 id., 574: *Briggs* v. *N. York Central R. R. Co.*, 72 id., 26; *Gales* v. *Hailman*, 11 Penn. St., 515; *Rockingham Ins. Co.* v. *Bosher*, 39 Maine, 253; *Disbrow* v. *Jones*, Harr. (Mich.), 48; *Sherlock* v. *Alling*, 44 Ind., 184; *Swarthout* v. *Chicago & N. W.*

R. R. Co., 49 Wis., 625; *Pratt* v. *Radford*, 52 id., 114; *Honore* v. *Lamar Ins. Co.*, 51 Ill., 414.

In 1 Sutherland on Damages, p. 242, it is said:—"There can be no abatement of damages on the principle of partial compensation received for the injury, where it comes from a collateral source, wholly independent of the defendant, and is as to him *res inter alios acta*. A man who was working for a salary was injured on a railroad by the negligence of the carrier; the fact that the employer did not stop the salary of the injured party during the time he was disabled was held not available to the defendant sued for such injury in mitigation. Nor will proof of money paid to the injured party by an insurer or other third person, by reason of the loss or injury, be admissible to reduce damages in favor of the party by whose fault such injury was done. The payment of such moneys not being procured by the defendant, and they not having been either paid or received to satisfy in whole or in part his liability, he can derive no advantage therefrom in mitigation of damages for which he is liable. As has been said by another, to permit a reduction of damages on such agreement would be to allow the wrongdoer to pay nothing, and take all the benefit of a policy of insurance without paying the premium." The same thing in substance is said in Wood's Mayne on Damages, p. 155, § 114.

In the above quotation the doctrine of the cases cited is well summarized and we forbear further citations from the opinions in those cases, except such as bear directly upon the particular point which the defendant makes in this case; for the counsel for the defendant admits the general doctrine as applied to cases where the defendant caused the loss by negligence or some positive wrongful act; but his contention is that, under our statute, the railroad company and the insurance company are equally innocent in regard to the loss, and therefore the insurance company did not acquire by payment of the amount insured any right of subrogation as against the defendant corporation. But we think this is an entire misconception of the defendant's true position and of the law relative to this subject.

In the first place, the defendant cannot in the present posture of this case say that the loss in question was not occasioned by its own negligence. It is explicitly found that there was no negligence on the part of the plaintiff, but it is not found that there was no negligence on the part of the defendant. In some cases the omission to find negligence would justify the claim that there was no negligence, but this cannot apply to such a case as this, where by law the presumption of negligence arises from the mere fact that the defendant caused the loss. In such cases the burden rests on the defendant to overcome the presumption by showing to the satisfaction of the court that there was no negligence. Section 1096 of the General Statutes provides that "in all actions to recover for any injury occasioned by fire communicated by any railway locomotive engine in this state, the fact that such fire was so communicated shall be *primâ facie* evidence of negligence on the part of the person or corporation who shall, at the time of such injury by fire, be in the use and occupation of such railroad."

It may be said that in the other section of the statutes, upon which the present action is particularly predicated, the railroad company causing the loss is made liable irrespective of any finding of negligence, and as such fact was immaterial the defendant ought not to be prejudiced by failing to show that there was no negligence. If however the defendant's present contention is correct, that the amount of the damages depends upon the fact of negligence or no negligence, then it is material to the question under consideration, and the defendant must rest under the statutory presumption that the loss was caused by negligence.

But there are other still more satisfactory answers to the objection under consideration. The sole foundation for the defendant's contention rests on the fact that the railroad company and the insurance company, in their relation to the loss, are equally innocent in contemplation of the law. Now any proper theory of the statute under consideration will utterly exclude such an idea. The theory of the statute is, that as the railroad corporation is privileged, for its

own profit, to use for purposes of rapid locomotion the dangerous element of fire in close proximity to adjoining combustible property, and as it alone, through its own agents, who construct and manage its locomotive engines, has power to prevent the communication of fire to the adjoining property, if fire is communicated from its engines and the property of another is thereby destroyed there is legal fault, predicated upon the mere fact of a loss so caused, and the railroad corporation is made absolutely liable to make good the loss to the owner irrespective of any finding as to negligence. In view of this statute it seems to us almost preposterous to hold that the defendant who causes the loss is equally innocent with the one who merely issues to the owner of the property an ordinary policy of insurance.

But there is still another independent answer to the point referred to, namely, that the principles established by the authorities render it immaterial whether or not the loss was occasioned by any positively negligent or wrongful act. This is shown, first, by the leading English cases, where the doctrine which we apply to this case originated, and which cases are referred to and cited with approval in all the leading American cases on the subject.

The earliest case on this subject is that of *Mason* v. *Sainsbury*, 3 Doug., 61, decided in 1782. It was an action against the community known in England as the hundred—a division of a county—to recover damages sustained by the demolition of a house by the act of certain rioters in 1780. The plaintiff had an insurance on the house destroyed which the insurance company (or office as it is there called), paid without suit, and this action was brought in the name of the plaintiff, with his consent, for the benefit of the insurance company. The judges all agreed that the plaintiff was entitled to recover. Lord MANSFIELD said:—"The office paid without suit, not in ease of the hundred and not as co-obligors, but without prejudice. It is to all intents and purposes as if it had not been paid. The question then comes to this—can the owner, having insured, sue the hundred? Who is *first* liable? If the hundred, it makes no

difference; if the insurer, then it is a satisfaction, and the hundred is not liable. But the contrary is evident from the nature of the contract of insurance. It is an indemnity. Every day the insurer is put in the place of the insured. In every abandonment it is so. The insurer uses the name of the insured. The case is clear, the act puts the hundred, for civil purposes, in the place of the trespassers; and upon principles of policy, as in the case of other remedies against the hundred; and I am satisfied that it is to be considered as if the insurers had not paid a farthing." BULLER, J., said it was to be treated as an indemnity, in which the principle is that the insurer and the insured are as one person, and the paying by the insurer, before or after, can make no difference.

In *Clark* v. *The Inhabitants of the Hundred of Blything*, 3 Dowling & Ryland, 489, decided in 1823, it was held that the owner of stacks of corn maliciously destroyed by fire set by some persons unknown, may maintain an action against the hundred on the act of 9 Geo. 1, ch. 22, although he has previously received the full amount of his loss from an insurance office. ABBOTT, C. J., in delivering the opinion, said he could not entertain a doubt as to the propriety of the decision in *Mason* v. *Sainsbury*, and added:—"The intention of the legislature in passing this and other statutes of the same nature was two-fold:—to render the inhabitants of hundreds vigilant for their own sake, as well as that of the public, by making them interested in the prevention of offenses, and where that is impossible, in the apprehension and conviction of offenders. * * * With respect to the question whether it is competent for the defendants to set up in their own defense a contract made between third persons, it seems to me that the principle of the act fully justifies the decision of the former case, and that we should be acting in violation of the principle if we were to disturb the present verdict."

The analogy between the cases just cited and the one at bar, particularly as they stand related to the question under consideration, would seem to be nearly perfect. By sundry

statutes passed by Parliament at different times, the particular community known in England as the hundred was made liable, in the cases specified, to make good the loss sustained by individuals within the hundred by robbery, riot and other violent crimes committed within their jurisdiction. The community might be ever so vigilant to prevent, discover and punish crime, and might leave nothing whatever undone which it was their legal or moral duty to do, and yet they would be liable just the same as if actual culpability were proved. The only distinction that can be made between these cases and the one at bar will render them still stronger as authorities against the position of the defendant, for it is manifest that the hundred had far less power in fact to prevent the commission of the crimes referred to and the losses therefrom, than a railroad corporation with us has to prevent the communication of fire to adjoining property, and yet the statutes referred to imputed to the hundred, upon the mere happening of loss from the commission of the crimes referred to, a legal fault or wrong which made them absolutely liable to make good the loss. So our statute conclusively fixes a legal fault or wrong upon a railroad corporation that fails to so construct and manage its locomotive engines as absolutely to prevent loss of property of another, from fire communicated by it in the way and manner specified, and makes it primarily liable to make good the loss.

The statutes in the case of the hundred were designed to make the inhabitants vigilant to prevent and punish crime. So one purpose of our statute was to make railroad corporations more careful and vigilant to prevent loss from fire; but another, and perhaps more controlling purpose, was to place the loss, should it happen, where justice required it to be placed, namely, on the one who caused the loss, while exercising the privilege and making a profit out of the hazard which it thereby imposed as a burden on the adjoining property, and this furnishes most ample vindication of our statute, whatever we may think of the statutes concerning the hundred.

In further contravention of the defendant's position we might cite all those cases where the doctrine under consideration was applied to carriers, who are by law made absolutely responsible for the safe delivery of goods entrusted to them, with the single exception of losses arising from the act of God, irrespective of any negligence or positively wrongful act. The principle of these cases is stated and approved in Sheldon on Subrogation, § 229.

We will cite two of this class of cases, where the precise point now made was raised and decided adversely to the defendant by courts of as great ability as any in the United States. The first case is that of *Hall & Long* v. *The Railroad Companies*, 13 Wallace, 367.

The head note is as follows:—"An insurer of goods consumed and totally destroyed by *accidental fire* in course of transportation by a common carrier, is entitled, after he has paid the loss, to recover what he has paid by suit in the name of the assured against the carrier. It is not necessary, in order to sustain such a suit, to show *any positive wrongful act* by the carrier." Mr. Justice STRONG, in delivering the opinion of the court, said:—"It is too well settled by the authorities to admit of a question, that, as between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss or destruction is primarily upon the carrier, while the liability of the insurer is only secondary. The contract of the carrier may not be first in order of time, but it is first and principal in ultimate liability. In respect to the ownership of the goods, and the risk incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract or for non-performance of his legal duty. Standing thus as the insurer does, practically, in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon

familiar principles of equity." Then, after citing several pertinent cases, the opinion proceeds:—"It has been argued, however, that these decisions rest upon the doctrine that a wrong-doer is to be punished; that the defendants against whom such actions have been maintained were wrong-doers; but that in the present case the fire, by which the insured goods were destroyed, was accidental, without fault of the defendants, and therefore they stood, in relation to the owner, at most in the position of double insurers. The argument will not bear examination. A carrier is not an insurer, though often loosely so called. The extent of his responsibility may be equal to that of an insurer, and even greater, but its nature is not the same. His contract is not one for indemnity, independent of the care and custody of the goods. * * * In all cases, when liable at all, it is because he is proved, or presumed to be, the *author* of the *loss*."

The case of *Gales* v. *Hailman*, 11 Penn. St., 515, is equally in point. In a very able opinion by GIBSON, C. J., it was held that "a shipper, who has received from his insurers the part of the loss insured against, may sue the carrier on the contract of bailment, not only in his own right for the unpaid balance due to himself, but as trustee for what has been paid by the insurer, and upon the trial the court will restrain the carrier from setting up the insurer's payment of his part of the loss, as satisfaction for so much of the demand at law. The carrier cannot, in case of his own liability, call upon the insurer for contribution upon the principle of double insurance; for the carrier is not an insurer, though he is sometimes inadvertently called so."

The only case cited by the counsel for the defendant in support of his contention is *Harding* v. *Town of Townsend*, 43 Verm., 536; but we regard the case as strongly against him. It was an action against a town for damages occasioned by a defective highway, and it was held that the defendant was not entitled to have deducted the amount received by the plaintiff from an insurance company on account of the injuries for which he claimed to recover against the town; which would seem to be precisely the

point now under consideration. The principles upon which the decision was made to rest are equally in point. They are given in the first part of the opinion of the court delivered by PECK, J., who says: "There is no technical ground which necessarily leads to the conclusion that the money received by the plaintiff of the accident insurance company should operate as a defense or enure to the benefit of the defendant. The insurer and the defendant are not joint tort-feasors or joint debtors, so as to make a payment or satisfaction by the former operate to the benefit of the latter. Nor is there any legal privity between the defendant and the insurer so as to give the former a right to avail itself of a payment by the latter. The policy of insurance is collateral to the remedy against the defendant, and was procured solely by the plaintiff and at his expense, and to the procurement of it the defendant was in no way contributory. It is in the nature of a wager between the plaintiff and a third person, the insurer, to which the defendant was in no measure privy, either by relation of the parties or by contract or otherwise. It cannot be said that the plaintiff took out the policy in the interest or behalf of the defendant, nor is there any legal principle which seems to require that it be ultimately appropriated to the defendant's use and benefit." These are the principles that controlled the case and must equally control the one at bar. But the opinion proceeds to answer objections on the part of the defense, and in the course of the discussion it is shown that the defendant as a wrong-doer is in no position to make such objections. These expressions were seized upon as the turning point of the case, when in our judgment they were not so intended at all. The opinion continues as follows: "But it is urged on the part of the defense that the plaintiff is entitled to but one satisfaction. If we assume this to be a correct proposition, the question arises whether the defendant stands in a condition to make this objection. This depends on the question who, as between the insurer and the defendant, ought to pay the damage—which of the two ought primarily to make compensation to the plaintiff and ultimately to bear

the loss?" Then, after referring to the obligation of the town to keep its highways in good repair, it is added: "The defendant is found liable in consequence of the breach of this duty. The defendant town, therefore, *in respect to the injury* the plaintiff has sustained, is the wrong-doer; and whether by *some positive, affirmative act*, or by culpable negligence, does not vary the principle applicable to the case."

Although it was very natural, in answering the particular objection of the defendant, to call the town a wrong-doer and to argue the matter upon that basis, yet the above extract makes it obvious that the court did not intend by wrong-doer one necessarily guilty of positive negligence. This view is materially strengthened by what follows, where it is said—"In principle the question involved in this case has been settled in *analogous cases;*" citing *Mason* v. *Sainsbury*, *supra*, and *Clark* v. *Blything*, *supra*, where, as we have seen, there was no actual wrong, but only a statutory one, as in the case at bar.

In commenting on the case of *Harding* v. *Town of Townsend*, counsel for the defendant seemed to assume that to entitle the insurance company to be substituted in the place of the plaintiff, it must appear that the defendant was guilty of negligence or some positive wrongful act. Such however is not the true doctrine, but it is this: "Where one person discharges an obligation which *primarily* rests upon another, he shall be subrogated to the place of the injured party or the creditor, in respect to the party who is *primarily* liable. *Conn. Ins. Co.* v. *Erie R. R. Co.*, 10 Hun, 59; *Ætna Fire Ins. Co.* v. *Tyler*, 16 Wend., 397; Wood on Fire Insurance, 793, note 1.

One other point made on the trial has been assigned for error, although it was not noticed in the argument for the defendant. The defendant claimed that the rule of damages was the value of the goods at the time of their destruction, without interest, but the court allowed interest from the date of the injury to the date of judgment. It has been sometimes said that interest is not to be allowed on unliquidated demands. There are actions, such for instance as

assault and battery or slander, to which the rule is applicable. But where the demand is for property that has a market value susceptible of easy proof, there is no propriety in such a rule. A loss of property having a definite money value is practically the same as the loss of so much money; the loss of the use of the property is practically the same as the loss of the use (or interest) of so much money. We think therefore a just indemnity to the plaintiff required the addition to the value of the goods at the time of their destruction, of the interest from that time to the date of judgment. This court has already applied such a rule to actions of trover for the conversion of goods, as in *Clark* v. *Whitaker*, 19 Conn., 319, and *Cook* v. *Loomis*, 26 Conn., 483, and to the action of trespass for taking personal property, as in the case of *Oviatt* v. *Pond*, 29 Conn., 479.

There was no error in the judgment complained of.

In this opinion the other judges concurred.

IRENE M. BUCKINGHAM'S APPEAL FROM PROBATE.

New Haven and Fairfield Co's., Jan. T., 1891. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

C, who had several thousand dollars standing to her credit in a savings bank, requested the teller of the bank to transfer $1,500 to each of three nieces whom she named, one of whom was with her, which he did, charging her account with $4,500, and opening an account with each of the nieces for $1,500, and preparing a bank book for each. *C* requested that the bank books should be so made that the money could not be drawn out during her life, and the teller endorsed on each of them—"Only *Mrs. C* has power to draw." *C* and the niece who was present wrote their names in a signature book kept by the bank, the teller adding to *C's* name the word "Trustee." The names of the others were afterwards written by them on slips and sent to the bank, the teller writing *C's* name with the word trustee added. *C* had before the transfer declared her intention to make the gifts. After the transfer she took the new books and kept them during her life. It was found that she so held them only as trustee for the nieces, and that the

nieces accepted the gifts in her lifetime. Held to be a valid gift *inter vivos*.

B, one of the residuary legatees under the will of *C*, appealed from a probate decree allowing the final account of the executor, in which he had not charged himself with money which he claimed had been given to these nieces by *C* in her lifetime. *B* had previously procured her daughter, also one of the residuary legatees, to bring a bill in equity against the executor and the three nieces, to compel the latter to pay to the executor the money so received and the executor to receive and account for it, and had employed counsel to manage the suit, and upon the facts proved the bill had been dismissed. Held that though *B* was not a party on the record, yet that she was an actual party to that suit, and that the decree was admissible against her upon the trial of the probate appeal.

The decree did not show the facts on which it was based, but the opinion of the court stated them. Held that the opinion was inadmissible as not being in itself evidence.

It might be shown by parol evidence what was in issue in the former case.

Where inadmissible evidence has been received by the court below, unless it clearly appears that no harm could have been done, the safer rule is to grant a new trial.

The legal title to all personal property of a decedent vests in his legal representative, who holds it as trustee for all parties interested in it.

[Argued January 21st—decided March 4th, 1891.]

APPEAL from a probate decree accepting and approving the administration account of the executor of the will of Irene Clark, deceased; taken to the Superior Court in New Haven County. The case was heard before *Robinson*, *J.*, by whom the following finding of facts was made.

Irene M. Clark died in April, 1887, leaving a will, dated November 11th, 1881, which was duly probated, by which she gave all the residue of her personal property to the appellant and five others, to be equally divided among them.

On the 15th of October, 1884, she had on deposit in the Connecticut Savings Bank of New Haven $5,871. A few days prior to that date she told one Georgiana Hubbell that she was going to give to each of her nieces, Mary Bell Clark, Emma Clark, and Ellen C. Platt, a sum of money, and requested her to go with her to New Haven for the purpose. This she was unable to do, and Mrs. Clark then requested the said Ellen C. Platt to go with her. On the 15th of October, 1884, Mrs. Clark and the said Ellen went together to

the savings bank at New Haven, and Mrs. Clark told the teller to write up her deposit book, and desired that $1,500 should be transferred from her account to each one of the three nieces named. This was done, and three new accounts were opened in their names. Each was credited with $1,500, and Mrs. Clark's account was reduced $4,500.

Three new pass-books were made out in the names of the three new depositors, and were given to Mrs. Clark. She told the teller, in the presence and hearing of said Ellen, that she wanted to have the bank books so fixed, or the entries so made, that the money should belong to the three nieces named by her, but so that they could not draw it out and spend it during her life. The teller therefore entered upon each of the pass-books—"Only Mrs. Irene Clark has power to draw." The ledger accounts of these deposits were in the names of the three nieces. Mrs. Clark declared to Mrs. Platt while at the bank that she had given her $1,500, and that she had given the same amount, each, to Emma Clark and Mary Bell Clark.

The bank had a book called a signature book, in which was entered the signature of each depositor, with other facts relating to the depositor, for purposes of identification. When the bank books were given to Mrs. Clark, Mrs. Platt wrote her name on this signature book opposite the number of the book in her name, and Mrs. Clark also signed under the name of Mrs. Platt, and the two names were included in a bracket. The teller added to the name of Mrs. Clark the word "Trustee." The words "Mrs. Clark only to draw," were also written in the margin by the teller. Bank slips were also handed to Mrs. Clark by the teller, and she was desired to obtain the signatures of Emma Clark and Mary B. Clark upon those slips, and to have them write upon the slips certain other required facts, and return the same to the bank, to be pasted in the signature book.

On the same day, upon her return to Milford, Mrs. Clark showed these three bank books to the husband of Mrs. Ellen C. Platt, and said to him that she had given the girls $1,500

each, and that the girls should share equally in the will, as if she had not given them the money; she also showed him the two slips, and instructed him to have Emma Clark and Mary B. Clark informed that these slips must be signed and returned to the bank. Emma Clark called at Mrs. Clark's house, and was told by her that she had given each of her said nieces $1,500; she was shown the pass-book issued to herself, and those issued to the other two nieces, and was given the slip to fill out, sign and return to the bank. At the same time Mrs. Clark gave to Emma Clark's husband the slip for Mary B. Clark, with instructions to deliver it to her to sign and return to the bank. The slip delivered to Emma Clark and the one sent to Mary B. Clark were filled out and signed by them, and returned to the bank, where the signatures were pasted in the signature book in their appropriate places. After these signatures were pasted in the book the teller wrote under each signature the words "Mrs. Irene Clark, Trustee," and on the margin, the words "Mrs. Clark only to draw."

Afterwards, and within a few days, Mrs. Clark and Mary B. Clark met, and Mrs. Clark informed her that she had made her a gift of $1,500, and informed her of the fact of her having taken out a bank book in her name for that sum, and also named the other two nieces as having received from her a like gift. Mrs. Clark also inquired of her whether she had received her paper, referring to the slip, and whether she had signed it and returned it to the bank.

Mrs. Clark after her return from New Haven declared to a number of her personal friends and neighbors that she had given to these nieces $1,500 apiece, and to two of these persons stated in addition that notwithstanding these gifts her nieces were to share equally with the others under her will. The bank books were retained by Mrs. Clark in her possession.

Mrs. Clark, at the time she made the transfers at the bank from her own name to the names of the nieces, intended to give to each of them the sum deposited in her name, and intended to retain custody and control over the bank book and

deposit only as trustee for them. The teller at the bank was honestly attempting in making the various entries on the deposit books, and in the signature book, to carry out this intention of Mrs. Clark thus expressed to him. The court finds that the donees accepted the gifts of the sums of money so deposited.

The bank books remained in the possession of Mrs. Clark until her death, with the exception of a short period before her death, when they were delivered to Mrs. Ellen C. Platt, with four other bank books belonging to Mrs. Clark absolutely, she remarking at the time—"Nellie, I want you to take these bank books and keep them until I call for them: possession is half." They were retained by her for a few days, when they were asked for by Mrs. Clark and returned to her.

Shortly after October 15th, 1884, Mrs. Platt informed the appellant that Mrs. Clark had given the three nieces $1,500 each, and on December 14th, 1884, the appellant wrote a letter to Mrs. Clark, saying she had been informed of the gifts, and asked her to give her some money that was deposited in the Bridgeport Savings Bank. This letter Mrs. Clark gave to Mrs. Platt and told her to keep it, as it might be of value to her. To the admission of this letter the appellant objected as irrelevant and incompetent. The court overruled the objection, and the appellant duly excepted.

Each of the three nieces has drawn $500 on her book.

Upon the hearing at the trial the appellee claimed that, upon the question of the title to the deposits in the three bank books, the decree in the case of *Miller* v. *Clark and others*, hereinafter referred to, was, if admissible in evidence, conclusive, and would estop the appellant from offering evidence upon the point in question, and requested the court to allow him to open the case and offer the judgment; but the court declined to permit it, and the appellant offered evidence in regard to the title of the bank deposits, and both parties were fully heard in reference thereto; and upon the evidence so received the above finding in relation to the ownership of the deposits is made.

The appellant claimed that the facts showed a gift of a testamentary nature to take effect at the death of Mrs. Clark, and that her control over the deposits and retention of the books during her life rendered it such a testamentary gift, and therefore void because not in testamentary form; but the court overruled this claim, and affirmed the judgment of the court below.

On the 3d of January, 1887, Martha A. Miller, of Iowa, a daughter of the appellant, and one of the residuary legatees with her of the personal property under the will, brought a bill in equity in the United States Circuit Court for the District of Connecticut against the said Emma Clark, Mary Bell Clark, Ellen C. Platt, and the executor, the present appellee, asking that they be compelled to turn over to the executor said bank books, and that the executor be ordered to receive said books and the money deposited in the Connecticut Savings Bank, and to include said sum and accrued interest as assets of the estate of Mrs. Clark, and amend his inventory so as to include the same. The executor offered in evidence a certified copy of the record in the case, including the opinion of Judge SHIPMAN, and the printed proofs taken before an examiner, on which the decree was based, supported by oral testimony that these printed proofs were those so taken and the only proofs used at the hearing. The printed proofs were not certified, but certification was waived by the appellant, and it was admitted that the proofs were correctly printed as taken.*

* NOTE. The opinion of Judge SHIPMAN in the case of *Miller* v. *Clark*, here referred to, is as follows:—

SHIPMAN, J. This is a bill in equity by one of the residuary legatees under the will of Irene Clark, deceased, to compel three of the defendants to deliver to the executor of said will three savings bank books alleged to be in their possession, and to compel the executor to receive the books, to inventory the deposits named therein as a part of the assets of the estate, and to collect the amount due thereon for the benefit of the estate.

Mrs. Irene Clark, of Milford, Connecticut, died in April, 1887, leaving a last will, which was executed in November, 1884, by which, after a specific legacy to her husband, she gave all the rest of her personal estate to six nieces, Irene M. and Martha A. Buckingham, Emma J. and Mary Bell Clark, Ellen C. Platt and Rosalie Merwin, to be equally divided between

The appellant excepted to the whole evidence as irrelevant, and *res inter alios acta*, and also to the copies as not

said persons, and appointed Albertus N. Clark, the husband of said Emma J., her executor. At the time of her death she was from seventy-six to seventy-eight years old, without children, the second wife of Bela Clark, to whom she was married late in life. Her living relatives were a sister and a brother, and divers nephews and grand-nephews, nieces and grand-nieces. Her personal property, besides a small amount of household goods and wearing apparel, amounted to $7,509.83, mostly consisting of deposits in savings banks.

On October 15th, 1884, she had $5,871 on deposit in the Connecticut Savings Bank of New Haven. In pursuance of a previously expressed intention she went to the bank on that day, accompanied by Mrs. Nellie C. Platt, gave the teller her bank book to be written up, and directed that $1,500 should be transferred from her account to each one of the three defendants, Nellie C. Platt, Emma M. Clark and Mary Bell Clark. This was done and three new accounts were opened in the names of said three persons, whereby each was credited with $1,500, and Mrs. Irene Clark's account was correspondingly reduced $4,500. Three new pass books were made out in the names of the three new depositors, and were given to Mrs. Irene Clark. She told the teller that she wanted to have the bank books so fixed, or the entries so made, that the money should belong to the persons named, but so fixed that they could not draw it and spend it during her life. The teller thereupon entered upon the pass books the words—"Only Mrs. Irene Clark has power to draw." The ledger accounts were in the names of said three persons.

The bank has a "signature-book," so called, in which are entered the signatures of each depositor, and, when trust accounts are opened, the signatures of the trustee and of the *cestui que trust*. Other facts in regard to the depositor or the *cestui que trust* are also entered in this book for the purpose of identification. Mrs. Irene Clark on this day wrote her name in the signature book, to which the teller added, in writing, the word "Trustee," but it did not clearly appear when the word was written. Mrs. Platt wrote her name in the book opposite the number of her pass book, and the two signatures were included in a bracket. The words "Mrs. Clark only to draw" were also written in the margin by the teller. Blank slips for the two other donees to sign, and upon which to state the required facts, were given to Mrs. Clark. Upon her return to Milford, on that day, she showed the husband of Mrs. Platt the three bank books, said that she had given the girls $1,500 each, showed the two slips, and instructed him to have the two other nieces informed that they must be signed and returned to the bank. These slips she kept. In a few days the said two nieces were informed that their aunt had given to each a bank book of $1,500, and that she wanted them to come to her house and get some slips to sign and return to the bank. The slips were obtained, signed and returned to the bank, and the portions containing the signature of the *cestui que trust* were pasted in the signature book opposite the respective numbers of the books. The

showing on what proof the decree was based, and as showing that the executor disclaimed any title and interest in the

other facts were entered by the teller and some other clerk. After the signatures were pasted in the book, but how long after did not appear, the teller also wrote the words "Mrs. Irene Clark, Trustee" below each signature, and the words "Mrs. Clark only to draw" in the margin. The bank books were retained by Mrs. Irene Clark until a short time before her death, when all the seven bank books in which she was interested were intrusted by her to Mrs. Platt, for some purpose not known, and were, at the request of Mrs. Clark, returned to her three or four days before her death. This request to return was manifestly to satisfy and quiet her husband. Nothing has ever been drawn upon the three books in controversy either as principal or interest.

Other testimony in regard to the executed purpose of Mrs. Irene Clark to give the three deposits of $1,500 each to said three persons, as declared by her after her return from New Haven and before the acceptance of the gifts by the absent nieces, and also about the time of and either before or soon after said acceptance, was given. Her executed and completed intention to give said deposits to the three donees, the actual gift, its consummation by an acceptance on their part, and her express declaration of trusteeship during her life of the said moneys for the benefit of the named persons, were clearly proved. Her purpose to give the several sums so that the funds should belong to said parties, and to create a trusteeship thereof in herself during her life, was plainly declared at the bank, and was honestly, and, so far as appears, at the request of Mrs. Irene Clark only, attempted to be carried out by the teller in accordance with her wishes, by the entries which he made upon the books of the bank and the pass books.

The facts bring the case within any rule which has been laid down in regard to the validity of gifts *inter vivos*. The courts of last resort in Massachusetts and in New York differ from each other in regard to the absolute necessity of an acceptance of the gift of the donee, (*Gerrish* v. *New Bedford Inst. for Savings*, 128 Mass., 159; *Martin* v. *Funk*, 75 N. York, 134); but there can be no doubt that the donees in this case knew of and accepted the gifts. The authorities unitedly declare that the gift may be made by delivery to the donee, or by the creation of a trust in a third person or in the donor, and that where there is an express declaration of trust in the donor the rule which requires cessation of control and dominion by the donor over the personal property which is given is not applicable. *Milroy* v. *Lord*, 4 De G., F. & J., 264; *Young* v. *Young*, 80 N. York, 422; *Scott* v. *Berkshire Co. Sav. Bank*, 140 Mass., 157; *Minor* v. *Rogers*, 40 Conn., 512; *Boone* v. *Citizens' Savings Bank*, 84 N. York, 83.

Testimony in regard to the declarations and acts of the donor which were made or which took place before or about the time of the acceptance of the gifts, and which declared her purpose in transferring the deposits to the donees, was objected to. This species of testimony is wont to be admitted in this class of cases for the purpose of showing the intention of Mrs. Clark in making the transfer and holding the books, and of showing the charac-

bank books, and did not claim to represent the appellant in the matter; and objected also to so much of them as contained Judge SHIPMAN'S opinion, as being no part of the record and mere hearsay, and irrelevant and incompetent to explain the grounds of the decree. The court overruled all these objections and admitted the evidence, and held that the opinion of Judge SHIPMAN might be read to show the grounds of the decree.

Said action was brought at the request of the appellant and for her benefit, and the appellant's attorneys, Mr. McMahon and Mr. Buckingham, appeared and had the exclusive charge of the case during the preparation and trial thereof, except that the bill in the case was originally drafted by Mrs. Miller's counsel in Iowa. This bill was sent to the appellant's attorney, Mr. McMahon, who made such changes in it as he deemed best, and had the action commenced. Mr. Baldwin, the appellant's attorney in this appeal from probate, was not concerned in the Miller case. Mr. McMahon advised with the appellant touching the case.

The executor's charges consisted of time and money spent, principally in attending to lawsuits which were brought against the estate. A small part only accrued upon the Miller case. The appellant was a very active promoter of this litigation, and either directly or indirectly

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ter of said acts. *Scott* v. *Berkshire Savings Bank*, *supra*. These statements being also against the interest of Mrs. Clark, and tending to prove the fact of the gift, are admissible. By the statute of Connecticut, in actions by or against the representative of a deceased person, the entries, memoranda and declarations of the deceased, relevant to the matter in issue, may be received as evidence. No testimony was given by any of the parties to the suit in regard to the acts or declarations of the donor.

The complainant makes the point that in case these transfers were gifts they were in partial ademption or satisfaction of the residuary bequests under the will. Without stopping to consider the question whether the principle of the ademption of a general or specific legacy is applicable to the case of these residuary legatees, it is sufficient to say that the testimony proves the existence of an intent on the part of the testatrix that the gifts were to have no reference to the testamentary disposition of her property.

Let the bill be dismissed.

was responsible for the existence of most of it. The charges of the executor were reasonable and fair charges.

At the hearing before the probate court the executor appeared with vouchers for each item of his account, and offered to show them to the appellant and her attorney; but the appellant waived the production, and made no objection to the account, except by filing certain written objections. All the items of the account were true and just charges against the estate, and all, except the executor's charges for services, were admitted to be correct and just. The appellant claimed, and asked the court to hold, that the form of the account was not proper, in that it was in gross, without proper explanation of its nature; but the court overruled the objection.

The court affirmed the decree of the probate court, and the appellant appealed to this court.

J. M. Buckingham, of New York, for the appellant.

1. The gift of the $1,500 to each of the three nieces was not valid. It was not a gift *inter vivos*, because the donor was to retain the gift during her life and the donees were not to receive it until after her death. And for the same reason it cannot be claimed to be a *donatio causâ mortis*. *Basket* v. *Hassell*, 107 U. S. R., 602. Mrs. Clark had already made her will and given to legatees this very money, the three nieces sharing equally with the others. The attempt to secure the money by them as a gift is an attempt *pro tanto* to revoke the will by verbal declarations of the testatrix sustained by the testimony of the parties interested. *Hough* v. *Bailey*, 32 Conn., 288; *Bartlett* v. *Remington*, 59 N. Hamp., 364; *Sherman* v. *New Bedford Sav. Bank*, 138 Mass., 581. It is established law that a gift to take effect upon or after the death of the donee is in the nature of a testamentary disposition of property, and can only be made effectual by a will duly executed. "Where the intent of the donor in declaring a gift or trust is shown to be to retain control of the fund during his life, the property to pass from his control to that of the donee only at his death, it is in the nature of a

testamentary disposition of property, and will not be sustained unless the formalities of the wills acts are conformed to. For example, *A* made a deposit in trust, notifying the donees, and telling them that he would control the money while he lived but at his death it would be theirs. This was not a completed gift." 2 Morse on Banking, § 613, citing *Nutt* v. *Morse*, 142 Mass., 1. See also *Hoar* v. *Hoar*, 5 Redf., 637; *Sheegog* v. *Perkins*, 4 Baxt., 273; *Zimmerman* v. *Streeper*, 75 Penn. St., 147; *Baltimore Retort Co.* v. *Mali*, 65 Maryl., 93; *Harris* v. *Clark*, 1 N. York, 93; *Curry* v. *Powers*, 70 id., 212; *Young* v. *Young*, 80 id., 422; *Jackson* v. *Twenty-Third St. R. R. Co.*, 88 id., 520; *Sherman* v. *New Bedford Sav. Bank*, 138 Mass., 581; *Raymond* v. *Selleck*, 10 Conn., 480; *Burton* v. *Bridgeport Sav. Bank*, 52 id., 398; 2 Schouler on Pers. Prop., 139.

2. The gift cannot be sustained by supposing a trust for the nieces on the part of Mrs. Clark, for no trust was ever intended or declared. There is no finding or pretense that the word "trustee" was written on the signature book by Mrs. Clark or by any one else with her knowledge. It is only found that the teller of his own accord afterward added it to her name. And in all the alleged declarations of Mrs. Clark in connection with this transaction to the teller or to other persons the word "trustee" was not used or any idea of a trust heard of until afterwards. It is an absurdity after hearing Mrs. Clark declare that she wanted her bank book written up, and $1,500 to be transferred from her account to each of the three nieces named, and that she wanted the bank books so fixed and the entries so made that the money should belong to the three nieces, but so fixed that they could not draw it and spend it during her life, and the teller made out the books, and entered on each, at the head of the account, "only Mrs. Irene Clark has power to draw," that afterwards he could, by adding to her signature on the signature book the word "trustee," change or alter this declared gift to take effect in the future, into a trust. The case of *Young* v. *Young*, 80 N. York, 422, is precisely in point. See also Lewin on Trusts, ch. 6, § 3; *Curry* v. *Powers*, 70

N. York, 212; *Bradbrook* v. *Boston Five Cent Sav. Bank*, 104 Mass., 228; *Sherman* v. *New Bedford Sav. Bank*, 138 id., 581; *Nutt* v. *Morse*, 142 id., 1; *Hill* v. *Stevenson*, 63 Maine, 364; *Robinson* v. *Ring*, 72 id., 140; *Tillinghast* v. *Wheaton*, 8 R. Isl., 536; *Case* v. *Dennison*, 9 id., 88; *Antrobus* v. *Smith*, 12 Ves., 39; *Bridge* v. *Bridge*, 16 Beav., 315.

3. The record in the case of *Miller* v. *Clark* was improperly admitted. It is enough that it was not pleaded. But the present appellant was no party to it. The fact that she promoted the suit would not be sufficient to make her concluded by the judgment. A judgment can conclude only the parties and their privies. While persons may in some cases be held concluded who were not strictly parties on the record, yet they must have a direct interest in the subject matter, with a right to intervene, and to make defense or control the proceeding. *Bates* v. *Stanton*, 1 Duer., 79. Also a right to call and cross-examine witnesses and to appeal. 1 Greenl. on Ev., § 535. The appellant does not come within any of these conditions. Besides this, the judgment here was merely one of dismissal and concludes no one. *Fisk* v. *Parker*, 14 Louis. Ann., 491; Freeman on Judgments, § 261. But if the record was admissible, yet the opinion of Judge SHIPMAN was not so. That was no part of the record, and was not legal evidence of the facts which it stated.

W. L. Bennett and *W. B. Stoddard*, with whom was *S. C. Loomis*, for the appellee.

1. It must be perfectly clear that Mrs. Irene Clark intended to make, and did make, a valid, completed gift of this money to her nieces, and that the nieces accepted the gift. She intended to act as trustee for them for the purpose of preventing it from being spent so long as she lived. The material fact as to this part of the case is absolutely found by the court as follows: "Mrs. Clark, at the time she made the transfers at the bank from her own name to the names of the nieces, intended to give to each of them the sum deposited in her name, and intended to retain custody and control over the bank book and deposit only as trustee

for them. The court finds that the donees accepted the gift of the sums of money so deposited." This is an end of that matter. *Ward* v. *Ward*, 59 Conn., 188, and cases cited. The fact that the pass books remained in Mrs. Clark's possession most of the time during her life, does not affect the gift. She was the trustee, and, as such, was entitled to the possession of the books. There is no intimation that she held the books because she owned the money. Her entire action in the matter shows that she held them as trustee, which was proper. It is so expressly found by the court. This case has been decided upon the same state of facts by the United States Circuit Court. *Miller* v. *Clark*, 40 Fed. Rep., 15. See also *Camp's Appeal from Probate*, 36 Conn., 88; *Minor* v. *Rogers*, 40 id., 512; *Kerrigan* v. *Rantigan*, 43 id., 17; *Burton* v. *Bridgeport Sav. Bank*, 52 id., 398; *Gerrish* v. *New Bedford Inst. for Savings*, 128 Mass., 159; *Martin* v. *Funk*, 75 N. York, 134; *Boone* v. *Citizens' Sav. Bank*, 84 id., 83; *Howard* v. *Windham Co. Sav. Bank*, 40 Verm., 597; *Ray* v. *Simmons*, 11 R. Isl., 266.

2. The objection that the executor's account is in gross, without specifications of items, is not well taken. There were schedules annexed which stated the items in detail. The account meets the requirements of the decision in *Fairman's Appeal from Probate*, 30 Conn., 208. See also *Atwater* v. *Barnes*, 21 Conn., 237; *Hutchinson's Appeal from Probate*, 34 id., 300.

3. The record in the case of *Miller* v. *Clark* was properly admitted. When any person procures a suit to be brought in the name of another for his own benefit, and employs counsel in the prosecution of that suit, the judgment in it is admissible and conclusive against him. *Stoddard* v. *Thompson*, 31 Iowa, 80; *Conger* v. *Chilcote*, 42 id., 18; *Marsh* v. *Smith*, 73 id., 295; *Palmer* v. *Hayes*, 112 Ind., 289; *Castle* v. *Noyes*, 14 N. York, 331; *Spencer* v. *Dearth*, 43 Verm., 98; *Hunt* v. *Haven*, 52 N. Hamp., 162; *Peterson* v. *Lothrop*, 34 Penn. St., 223; *Cecil* v. *Cecil*, 19 Maryl., 72; *Lovejoy* v. *Murray*, 3 Wall., 1, 18; *Cromwell* v. *County of Sac*, 94 U. S. R., 351, 360. The case was brought at the request of this

appellant and for her benefit, and her attorneys appeared and had exclusive charge of the case, except to draft the original bill. The record and finding of facts by Judge SHIPMAN was admissible under the practice of this state. *Munson* v. *Munson*, 30 Conn., 425; *Huntley* v. *Holt*, 59 id., 102.

TORRANCE, J. In the case at bar the present appellant, Irene M. Buckingham, took an appeal to the Superior Court from a decree of the court of probate for the district of Milford accepting and approving the final administration account of the executor upon the estate of one Irene Clark, deceased. The appellant was one of the residuary legatees of the personal property under the will. The reasons assigned for taking the appeal were three in number, namely:—

First. Because the executor had not charged himself with all the assets and property belonging to the estate that came into his hands.

Second. Because the court allowed the executor's account "in gross and without proper itemizing and explanation."

Third. Because the court allowed amounts for personal services and expenses to the executor, which were alleged to be "excessive, unnecessary, unjust and illegal."

Upon the trial in the Superior Court the principal point in dispute between the parties related to the matter referred to in the first assigned reason of appeal. The decision of this point turned upon the question whether Mrs. Irene Clark, in her lifetime, had or had not made to three of her nieces a valid gift of certain moneys in bank, amounting in the whole to forty-five hundred dollars. If such gifts were valid, then the money in question did not belong to the estate, and ought not to have been inventoried as part thereof. If they were not valid gifts, then, of course, the money formed a part of the estate and should have been so returned.

The Superior Court found all the facts and circumstances under which the claimed gifts of fifteen hundred dollars to each of three nieces were made; that in what Mrs. Clark so did with reference to the making of the gifts, she intended

to make a valid gift of that sum to each of the nieces, to take effect at that time; and that the nieces then accepted the gifts.

The facts and circumstances aforesaid are particularly found and stated upon the record, but for the purposes of this decision it is unnecessary to state them at greater length here.

We are satisfied that the conclusion of the court below, upon the facts as found, that these gifts of money to the nieces were valid gifts, was right, whether regarded as a conclusion of fact or as one of law. But in the trial of the case we think the court erred in admitting certain evidence against the objection of the appellant. We do not here refer to the admission of the letter written by the appellant to the deceased, for we think that was, under the circumstances, properly admitted, and indeed this point was not pressed before us on the argument. We refer to the admission of the opinion of the judge in the case from the Circuit Court of the United States for the district of Connecticut, to which reference is hereinafter made.

It appears from the record in the case at bar, that in 1887, one Martha A. Miller of Iowa, a daughter of the appellant, and one of the residuary legatees of the personal property under the will of Mrs. Clark, brought a bill in equity, in the above named court, against the executor of Mrs. Clark's will and the three nieces to whom the gifts were made by Mrs. Clark in her lifetime, asking that the nieces be compelled to turn over to the executor the money so given, and the bank books which had been taken therefor in the names of the nieces, and that the executor be ordered to receive and account for the money as such executor. The court upon the facts dismissed the bill. Upon the trial of this present case in the court below, the executor of Mrs. Clark, who is the sole appellee in the case at bar, offered in evidence a certified copy of the record of the case aforesaid, in the United States Circuit Court, together with a like copy of the opinion filed in the cause by the judge who tried it, and the printed proofs taken before an examiner in the

cause. The appellant objected to the whole of this evidence, as among other things "irrelevant and *res inter alios acta*," and also to the copies, "as not showing on what proof the decree was based." She also objected to the opinion of the judge "as being no part of the record and mere hearsay, and irrelevant and incompetent to explain the grounds of the decree." The court overruled each and all of these objections, admitted the evidence, and held that the opinion of the judge might be read and used to show the grounds of the decree.

If the present appellant was a party or privy to the suit in the United States Court, then of course the legal record in that suit would have been admissible against her upon any matter which had been there litigated and determined between herself and the present appellee.

She was clearly not a party of record in that suit, but the appellee claims that she was, within the meaning of the law, an actual party thereto, and in privity with himself, as executor of the estate which he, in that suit, represented. In regard to the actual connection of the present appellant with the suit in the United States Court, the record is as follows:—"The said Martha Miller is one of the devisees under said will, (that is, of Mrs. Clark), and the daughter of the appellant, and said action was brought at the request of the appellant and for her benefit, and the appellant's attorneys, Mr. McMahon and Mr. Buckingham, appeared and had the exclusive charge of said case during the preparation and trial thereof, except that the bill in the case was originally drafted by Mrs. Miller's counsel in Iowa. This bill was sent to the appellant's attorney, Mr. McMahon, who made such changes in it as he deemed best, and had the action commenced. Mr. Baldwin, the appellant's attorney in this appeal from probate, was not concerned in the Miller case. Mr. McMahon advised with the appellant touching this Miller case."

It thus appears from the record that the present appellant, for her own benefit as a legatee under the will of Mrs. Clark, caused a suit to be brought in the United States

Court in the name of her daughter, another legatee under the will, against the executor of Mrs. Clark's estate and those to whom the gifts aforesaid had been made, to determine whether the money claimed under the gifts was or was not the money of the estate, for which the executor should account. This suit was commenced by her attorneys, it was prosecuted by them to a final conclusion, and they had the exclusive charge of it during the preparation and trial thereof, with the exception of the original draft of the bill. To that suit the estate of Mrs. Clark, through the executor thereof, was a party. So far as legatees and distributees of the personal property were concerned, the executor represented them and their interest in the estate in this proceeding.

"The rule of law is well established that the legal title to all personal property of the deceased vests in his legal representatives. They can dispose of it at pleasure, being responsible for the faithful execution of the trust." *Beecher* v. *Buckingham*, 18 Conn., 110; *Johnson* v. *Connecticut Bank*, 21 id., 156. The personal representative holds such property as a trustee of all parties interested therein. Schouler on Exrs. & Admrs., § 239.

Assuming that the United States Court had jurisdiction of the parties and the subject matter, we think, if the decree in that suit had determined that the gifts in question were invalid, and that the money so given belonged to the estate, such a decree would have been admissible in evidence in the present case in favor of the appellant and against the appellee. If this be so, we see no good reason why it is not admissible in evidence against the appellant and in favor of the estate upon this same point, more especially in view of the fact that the appellant was the party who actually brought and conducted the suit.

The following authorities support this conclusion. *Crandall* v. *Gallup*, 12 Conn., 365; *Gould* v. *Stanton*, 16 id., 21; *Teague* v. *Corbitt*, 57 Ala., 529; *Scott* v. *Ware*, 64 id., 174; *Stone* v. *Wood*, 16 Ill., 177; *Castellaw* v. *Guilmartin*, 54 Geo., 299; *Steele* v. *Lineberger*, 59 Penn. St., 308.

Whether, when so admitted, such decree would be conclusive or not, we have no occasion at present to determine.

In admitting the record itself therefore, under the circumstances disclosed by the finding, we do not think the court below erred. But the court also admitted in evidence the written opinion of the judge who tried the case in the United States Court. This was no part of the record. It was admitted for the purpose of showing the grounds of the decree. The decree itself did not show on what facts it was based.

After the record was admitted, the question then was whether the validity of the gifts to the nieces, which was in issue in the case at bar, had been in issue and had been determined in the prior suit. In such a case, if the record does not clearly disclose the facts upon which the judgment or decree is based, they may be shown by any proper evidence outside of the record. *Supples* v. *Cannon*, 44 Conn., 424; *Mosman* v. *Sanford*, 52 Conn., 23. But the witnesses who give such evidence must give it in the ordinary way, and under the conditions imposed upon all witnesses. It must be given under oath and subject to the right of cross-examination, and it must not be what is termed "hearsay" evidence.

By the admission of the opinion aforesaid, as evidence to show the grounds of the decree, these fundamental rules of evidence were violated, and the court committed an error. But the appellee claims that, if the court did so err, the decision at which the court arrived upon the merits of the case, was not affected by the admission of the aforesaid testimony. This may be true, but we cannot be certain of it. The conclusions of the court below were drawn after the reception of the entire testimony, and we cannot profitably speculate as to the degree of influence which the objectionable testimony had in the final result. In such a case, unless it clearly appears that no harm could have been done, perhaps the safer rule is to grant a new trial. *Jacques* v. *Bridgeport Horse R. R. Co.*, 41 Conn., 66; *Richmond* v. *Stahle*, 48 id., 22.

We regret the necessity that compels us to grant a new trial in a case like the one at bar, where the real questions at issue have been so fully tried before two able and impartial judges, but we see no way of avoiding such a result in the present case.

For the reasons herein given the judgment of the court below is reversed and a new trial is granted.

In this opinion the other judges concurred.

MARY F. COCKCROFT AND ANOTHER'S APPEAL FROM RAILROAD COMMISSIONERS.

New Haven and Fairfield Cos., Jan. T., 1891. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

It is provided by Gen. Statutes, § 3461, that every railroad company, after its line has been established, may alter the location of its road with the approval of the railroad commissioners and take lands for additional tracks and stations; and by § 3466 that where land had been conveyed to a railroad company for its track with any reservation or condition which interfered with the furnishing by the company of proper depot accommodations, such reservation or condition may, with the approval of the commissioners, be condemned in the same manner that land might be taken. And it is provided by § 3518 that any person aggrieved by any order of the commissioners upon any proceeding "relative to the location, abandonment or changing of depots or stations" may appeal to the Superior Court. Held that cases arising under §§ 3461 and 3466 were entirely distinct from those arising under § 3518, and that an order made by the railroad commissioners upon a petition brought under those two sections was not subject to the appeal provided for in the last section.

[Argued January 27th—decided March 20th, 1891.]

APPEAL from an order of the railroad commissioners; taken to the Superior Court in Fairfield County, and heard before *Robinson, J.* Motion to erase from the docket for want of jurisdiction granted by the court, and appeal by the original appellants. The case is fully stated in the opinion.

S. E. Baldwin, for the appellants.

L. Harrison, for the appellees.

SEYMOUR, J. On the 10th of February, 1890, the New York, New Haven & Hartford Railroad Company presented its petition to the railroad commissioners, stating that the proper operation of its railroad, and public convenience and necessity, require the taking by the petitioner, for additional tracks, turnouts and freight and passenger stations and depots at Westport, of certain lands therein bounded and described. The petition also states that theretofore one Nash conveyed to the petitioner certain lands by a deed containing the provision "that said company are to construct for the grantor a convenient crossing place over said railroad to his land on the north," which the petitioner alleges is a reservation or covenant which interferes with the furnishing by the petitioner of reasonable and proper depot accommodations to the public. The petition further states that its railroad cannot be judiciously constructed upon a highway therein described without interfering therewith, and that the location of the highway should be changed as shown by a diagram filed with the petition. Thereupon the petitioner prayed the commissioners to approve of its taking the described land, the condemning of said reservation and the changing of the location of said highway.

An answer was filed to the petition, and a demurrer to the answer, which latter was sustained. Afterwards the parties appeared and were fully heard. Upon such hearing the railroad commissioners found the allegations of the petition to be proved and true and granted the prayer thereof. The respondent appealed to the Superior Court. The appellants make all the proceedings before the railroad commissioners a part of their appeal, and allege, as their authority for taking an appeal, that "said petition to said railroad commissioners related to the location of a new passenger station for said railroad company at Westport and the abandonment

of its present station there, and the changing of its depots and stations at said town."

In the Superior Court the appellee moved to erase the appeal from the docket, because it appeared that the Superior Court had no jurisdiction; that said court cannot acquire jurisdiction of the matters therein contained by appeal from the action of the railroad commissioners; and that neither said petition, nor the order and finding of the railroad commissioners thereon, relates to the location of a new passenger station for said company at Westport nor the abandonment of its present station there and the changing of its depots and stations in said town. The motion to erase was granted and an appeal from such decision taken to this court.

The reasons of appeal are that the Superior Court had jurisdiction by General Statutes, section 3518, and Public Acts of 1889, p. 129; that the proceeding leading to said order was relative to the location, abandonment and changing of depots and stations, and that it so appeared upon the face of the appeal; and that the grounds for granting the motion to erase were insufficient.

It appears almost too clear for argument that there is nothing in the petition to the railroad commissioners looking to or asking authority for the location, abandonment or changing of depots or stations within the meaning of the statutes. The only part of the finding and order that refers directly or indirectly to the subject of depots is as follows:—"And we do hereby give our written approval of the alterations in the location of said New York, New Haven & Hartford Railroad in said town of Westport, for the purposes set forth in said petition, and we do prescribe the limits within which said railroad company may take real estate for the purposes set forth in said petition, to be those asked for and defined therein, which real estate we hereby find to be necessary to be taken for the purposes described as aforesaid. And we further find that said grant of June 4th, 1847, as described in the petition, reserves such rights, titles, interest, easement or privilege in such land, or subjects said company to special conditions or covenants, as above set

forth, which interfere with the furnishing by said company of suitable and proper depot accommodations to the public, and that said company cannot agree with the party or parties in interest as to the compensation or damages to be paid for the release of such condition or covenant. We do therefore give our written approval of the condemnation by said company of such reservation, condition or covenant."

Neither the taking of land for additional tracks, turnouts and freight and passenger stations and depots, nor the condemnation of reservations, conditions and covenants which interfere with the furnishing of reasonable and proper depot accommodations to the public, imply or suggest the location, abandonment or changing of depots or stations.

It is perfectly evident that so much of the petition as is involved in this discussion was based upon sections 3461 and 3466 of the General Statutes and is not affected by the provisions of section 3518 as amended by chapter 213 of the Public Acts of 1889.

It appears from the face of the appeal itself that the Superior Court has no jurisdiction, and there is no error.

In this opinion the other judges concurred.

EDGAR W. PINNEY *vs.* FREDERICK J. BROWN AND ANOTHER.

Hartford Dist., Jan. T., 1891. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

The selectmen of a town have no authority to appoint a superintendent of highways, nor an agent to act for the town.

Their powers are for the most part conferred by statute, and where they are they cannot go beyond the special limits of the statute. In other matters long usage has given them certain powers.

In either case their authority is in the nature of a personal trust to be performed by themselves. They have no power to appoint another to per-

form the duties that devolve upon them; and still less to appoint an agent to exercise powers of the town which they cannot exercise themselves.

There is no statute which provides for any such office in a town as that of "town agent," nor that defines any duty to be performed by such an officer.

A town may appoint an agent for any proper purpose, but it is necessary that it be done by a vote in a town meeting duly warned for that purpose.

Any action of a town in a legal town meeting of which notice was not given in the warning, has no legal effect.

[Argued January 7th—decided March 20th, 1891.]

AMICABLE SUBMISSION, upon an agreed statement of facts, of a question as to the title to certain offices; in the District Court of Waterbury. Reserved for advice. The case is fully stated in the opinion.

S. W. Kellogg, for the plaintiff.

L. F. Burpee, for the defendants.

ANDREWS, C. J. The annual meeting of the town of Waterbury for the year 1890 was holden on the first Monday, being the sixth day, of October of that year, pursuant to a notice which was as follows:—"Notice is hereby given to all the legal voters of the town of Waterbury that the annual meeting of said town will be held in the District Court Room, City Hall, on Monday, October 6th, 1890, at 8 o'clock in the forenoon, for the purpose of voting by ballot for assessors, members of the board of relief, selectmen, town clerk, town treasurer, agent of town deposit fund, auditors, grandjurors, constables, registrars of voters, school visitors, tax collector, and all other officers who must be chosen in such manner. Also to lay a tax for the payment of interest, the support of the common schools, and the current expenses of the town. Also to determine by ballot whether any person shall be licensed to sell spirituous and intoxicating liquors within said town. Also to accept or reject a proposed lay-out and change of highway along Chapel street

(so called,) made necessary by the location of the tracks of the Naugatuck and Waterbury Tramway Company, or to take such action in reference thereto as may seem proper. Also to transact any other business proper to come before said meeting."

There has been for many years in said town a standing vote that all officers to be elected at any annual town meeting shall be voted for by ballot, and all on one piece of paper, with which the voters undertook to comply at this town meeting. At the meeting Edgar W. Pinney was, and was declared to have been, elected first selectman. The other persons elected to be selectmen were Frederick J. Brown and Maurice Carmody. On all the ballots cast at said meeting there was the designation of an officer (or officers) as "For Town Agent and Agent of Town Deposit Fund." Under this designation Edgar W. Pinney received 1998 votes and Frederick J. Brown 2070 votes.

The annual town meeting was adjourned from the sixth to the thirteenth day of October, and on the latter day the following vote was passed. "*Voted*—That Robert Fruin be, and is hereby, appointed by the town, surveyor and superintendent of highways and bridges, and shall hold the office until the first Monday of October, 1895, at a salary of $1,000 per year. And in case said office shall during said term become vacant by death, resignation or otherwise, it shall be the duty of the selectmen to appoint some person to fill the vacancy until the next annual meeting." Said meeting was then adjourned without day.

At a meeting of the selectmen so chosen, held on the fifteenth day of October, it was moved by Mr. Brown and seconded by Mr. Carmody, that Robert Fruin be and is hereby appointed superintendent of highways and bridges for one year from October 6th, 1890, at a salary of $1,000 per year. Mr. Pinney refusing to entertain the motion, it was so voted, Mr. Brown and Mr. Carmody voting in the affirmative and Mr. Pinney refusing to vote. At another meeting of the selectmen held on the 11th day of November, 1890, on motion of Mr. Brown, seconded by Mr.

Carmody, Frederick J. Brown was appointed town agent, Mr. Pinney refusing to vote.

The town of Waterbury at a town meeting in October, 1845, adopted a certain plan to repair and maintain its highways and bridges for the term of five years. By the terms of this plan a "superintendent of highways and bridges" was designated and appointed for said term of years, and was empowered to let out the repairs of the highways and bridges to the lowest bidder.

This plan was successively adopted at the end of each period of five years, in meetings specially warned for that purpose, and was so adopted for the same term of years on the third day of January, 1884, in a vote which provided that the first selectman for the time being should be superintendent of highways and bridges. Under this vote the first selectman for the time being exercised all the powers and performed all the duties of superintendent of highways and bridges. The vote of 1884 has never been rescinded. Since the third day of January, 1884, the town has not provided at any annual or special meeting for the repairs of its highways and bridges. Since January, 1889, the selectmen have provided for such repairs, and the work has been done under the superintendence of the first selectman, who has received a special compensation therefor. During the year from October, 1889, to October, 1890, the first selectman has also performed the duties of town agent. But he has assumed such powers and duties concerning the highways and the town agency by sufferance of the board of selectmen, and not because of any positive action by them or by the town, unless the statutes or previous votes of the town conferred such authority. The selectmen took no action concerning the matter. Mr. Pinney, upon his election as first selectman, claimed to be superintendent of highways and bridges, and discharged the duties of that position until the fifteenth day of October, the other selectmen neither objecting nor assenting thereto.

On these facts an amicable suit was brought to the District Court of Waterbury and was reserved for the advice

of this court. Two questions are presented:—whether Edgar W. Pinney or Robert Fruin is the lawful superintendent of highways and bridges for said town of Waterbury; and whether said Pinney or Frederick J. Brown is the lawful town agent of said town.

The first of these questions may be answered without hesitation, that Mr. Pinney is the lawful superintendent of highways and bridges in that town. The vote at the annual town meeting appointing Mr. Fruin was void for the reason that there was nothing in the warning of that meeting to notify the inhabitants that a superintendent of highways was to be chosen. Nor was there anything in it to indicate that any action was to be taken respecting the care of highways and bridges in the town. In a town as large as Waterbury the care of its highways and bridges is of great importance to every tax-payer, as well by reason of the expense of such care as by reason of the liability to which the town might be subjected if the highways and bridges were not kept in proper repair. Section 33 of the General Statutes requires that "the warning of every town meeting, annual or special, shall specify the objects for which such meeting is to be held." This statute intends that the warning shall specify the matters to be acted on in order that all the inhabitants may know in advance what business is to be transacted at the meeting. If the object of the meeting is specified in the warning it will present a motive to the citizens to attend, while on the other hand every one has the right to presume that matters not mentioned in the warning will not be acted on at the meeting. It has been repeatedly decided that a town meeting not warned agreeably to the mode designated in the statute is no legal congregation of the town and its acts at such a meeting are void; and that at a meeting duly warned for some purposes, if a vote is had upon some subject not specified in the warning, as to that vote the meeting is void, and such vote has no legal effect and binds neither the town nor its inhabitants. *Hayden* v. *Noyes*, 5 Conn., 391, 396; *Willard* v. *Borough of Killingworth*, 8 id., 247, 253; *South School District* v. *Blakeslee*, 13 id., 227; *Isbell* v. *N.*

York & N. Haven R. R. Co., 25 id., 556, 563; *Wilson* v. *Waltersville School District*, 44 id., 157; *Brooklyn Trust Co.* v. *Town of Hebron*, 51 id., 22; *Wright* v. *North School District*, 53 id., 576; *Turney* v. *Town of Bridgeport*, 55 id., 415; *Town of Bloomfield* v. *Charter Oak Bank*, 121 U. S. R., 121; Dillon on Municipal Corporations, (4th ed.) §§ 266 to 269, and the cases cited in the notes.

Nor did the action of the selectmen give Mr. Fruin any right to the office of superintendent. The selectmen had no authority to make such an appointment. The selectmen of a town are, to be sure, its general prudential officers, and are charged with the duty of superintending the concerns of the town, but in so doing they act as the agents of the town and exercise a delegated authority. Their powers are for the most part conferred by some statute. In respect to the matters mentioned in these statutes they cannot go beyond the special limits of the statute. In other matters long usage has given to the selectmen of towns certain powers. In either case their authority is in the nature of a personal trust to be performed by themselves. They have no power to appoint another to perform the duties that devolve on them. And still less do they have authority to appoint an agent to exercise other powers of the town which they cannot themselves exercise. *Leavenworth* v. *Kingsbury*, 2 Day, 323; *Tomlinson* v. *Leavenworth*, 2 Conn., 292; *Griswold* v. *North Stonington*, 5 id., 367, 371; *Town of Union* v. *Crawford*, 19 id., 331; *Town of Burlington* v. *New Haven & Northampton Co.*, 26 id., 51; *Town of Sharon* v. *Town of Salisbury*, 29 id., 113; *Hine* v. *Stephens*, 33 id., 497; *Ladd* v. *Town of Franklin*, 37 id., 53; *Hoyle* v. *Town of Putnam*, 46 id., 56; *Town of Haddam* v. *Town of East Lyme*, 54 id., 34. See also "The Connecticut Civil Officer," under the title "Selectmen."

What we have already said substantially disposes of the other question, and shows that Mr. Brown cannot be town agent, either by the ballot at the town meeting or by the action of the selectmen. There is no statute that provides for any such office in a town as town agent; nor is there any

statute that defines any duty to be performed by such an officer.

Undoubtedly a town, like any other corporation, may appoint an agent for any proper purpose. Possibly a town might appoint an agent to perform any or all duties usually performed by the selectmen, except such as are specifically imposed on the selectmen by the constitution or by some statute. But the selectmen, being themselves agents, cannot appoint another, or one of themselves, to be an agent for their own town. That rule of law governs which is found in the maxim *delegata protestas non potest delegari.* Certainly they could not unless specially empowered so to do. They would have no such authority by virtue of their general powers. And if the town itself desired to appoint an agent, it would be necessary that it should be done by a vote in a town meeting duly warned for that purpose.

The District Court is advised that Mr. Pinney is superintendent of highways and bridges in the town of Waterbury; and that Mr. Brown is not town agent of that town.

In this opinion the other judges concurred.

HENRY C. BUTLER *vs.* WALLACE BARNES.

Hartford Dist., Oct. T., 1890. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

A in 1872 agreed by parol to sell and *B* to buy a piece of land, which *A* had marked out by stakes. Both parties understood that the north line was the south line of a lot belonging to *O*, but supposed the stakes were upon that line, and *A*, although he pointed out the stakes as marking the line, had no intention of agreeing to sell anything beyond the true line. A warranty deed was executed by *A* and delivered to and accepted by *B*, bounding the lot on the north by land of *O*, and making no mention of the stakes. *B* in 1873 conveyed the lot, with the same description, to *C*. The stakes were in fact a few inches over the north line of *A*'s lot, and upon the lot of *O*, but the error was not discovered

until *C* had erected a barn on the lot which stood in part on this strip of land, when in 1886 he was evicted from it by the owner of the *O* lot. *C* then brought a suit against *A* for the reformation of the deed, so as to make it embrace the strip in question, and for damages for the eviction. Before the suit was brought *B* assigned to him all his rights against *A*, growing out of the original transaction. Held—

1. That the pointing out by *A* in the sale to *B* of the stakes as marking the true lines of the lot, was determinative of the actual subject-matter of the sale, and that its effect was not qualified by the fact that *A* intended to sell and *B* to buy only to the boundary line of *A's* ownership.
2. That the mistake of the parties in supposing that the lot described in the deed was identical with the lot as staked out, was such a mistake as entitled the grantee to a reformation of the deed.
3. That the right which *B* would have had to equitable relief passed to *C* as his grantee.
4. That the fact that the deed, if reformed so as to include the strip in question, could not convey a title to the strip, *A* having no title to it, was not a sufficient reason for denying equitable relief.
5. But that the court, without decreeing the reformation of the deed, would render judgment for the damages which would have been recoverable, under the covenants of the deed, if it had been reformed.
6. That *C* was not chargeable with laches in not bringing his suit earlier.

The court below found that *A* did not intend to sell to *B*, nor *B* to *C*, any other land than a piece bounded northerly on the land of *O*, and that all three supposed the land described in the deed of *A* to *B* to be identical with the lot as marked by the stakes, and thence found that the land actually sold and conveyed in both cases was the piece described in the deeds. Held to be a conclusion of law, based upon the idea that the description in the deed must prevail over the boundaries actually pointed out, notwithstanding the mistake of the parties in supposing that they agreed.

Under the practice act (Gen. Statutes, § 877), the plaintiff could in the same action ask for the reformation of the deed and for damages for the breach of the covenants which the deed would contain if reformed.

[Argued October 8th, 1890—decided March 3d, 1891.]

SUIT for the reformation of a deed and for damages; brought to the Court of Common Pleas of Hartford County, and heard before *Bennett, J.* The court made the following finding of facts.

On August 15th, 1872, Wallace Barnes, the defendant, sold to Charles H. Riggs a piece of land fronting on North Main street, in Bristol, which he described and bounded in the deed as follows:—"Northerly on land of the heirs of

Mrs. Ann O'Connor, one hundred feet; easterly on highway called North Main street, thirty-three feet; southerly on grantor, one hundred and sixteen feet and ten inches; westerly on grantor, thirty feet two and a quarter inches;" and conveyed the same by deed containing the usual covenants of warranty and seisin.

At the time of the purchase both Barnes and Riggs went upon the land, and Barnes then pointed out four stakes which he had previously placed at the corners, one at each corner, as designating the boundaries of the lot. Both supposed that the lot described in the deed and the lot staked out were identical, and that the lines indicated by the stakes correctly designated the boundaries of the piece of land purchased. There were no buildings on the land, and no fence marked any of the boundaries.

This lot was a portion of a tract of land owned by Barnes, and which he had divided into three lots, and had indicated the boundary lines of each lot by a stake driven into the ground at the corner of each lot.

Riggs held the land conveyed to him by Barnes till December 29th, 1873, when he sold it to Henry C. Butler, the plaintiff, and bounded and described the lot as follows:— "Northerly on land of heirs of Mrs. Ann O'Connor, one hundred feet; easterly on highway called North Main street, thirty-three feet; southerly on land of George W. Goodsell, one hundred and sixteen feet and ten inches; westerly on land of Wallace Barnes, thirty feet and two inches;" and conveyed it by deed containing the usual covenants of warranty and seisin.

When Riggs sold and conveyed the lot to Butler, the stakes placed at its corners by Barnes were all standing, and both Butler and Riggs supposed the land described in the deed was the lot designated by the stakes.

At about the time of the purchase of the lot, Butler employed a surveyor to locate the boundaries of the described land, who reported that the boundaries were correctly designated by the stakes placed by Barnes.

Barnes, Riggs and Butler all supposed that the lot staked

out correctly designated the land described in the deeds from Barnes to Riggs, and from Riggs to Butler, and that the northerly line of the lot indicated by the stakes correctly marked the boundary line of the land of the heirs of Mrs. Ann O'Connor.

In January, 1874, Butler erected a barn on this lot, about twenty-seven feet wide, and within the boundary line as indicated by the stakes.

In June, 1886, Catharine R. Root, who had become the owner of the land on the north, described as belonging to the heirs of Mrs. Ann O'Connor, brought an action against Butler, returnable to the Court of Common Pleas of Hartford County, claiming that his barn encroached on a portion of her land; and in this action the court found the barn to be an encroachment, and also established the boundary line between the lands of Mrs. Root and Butler. The boundary line having been established by the court, it is found that the northerly line, as indicated by the stakes placed by Barnes, had included in Butler's lot a triangular piece of land belonging to Mrs. Root, six and one half inches wide at the front on North Main street, and running out to a point at the rear of Butler's lot. By the decision of the court the plaintiff was ejected from this triangular piece.

The title of Butler to the triangular piece, or his right of occupancy of the same, had never been disputed or questioned by any one till about the time of the commencement of the action of *Root* v. *Butler*, and the plaintiff did not learn until the rendering of final judgment in that action that the line of the land of the heirs of Mrs. O'Connor, and the northerly line of the lot staked out by Barnes, were not identical.

Riggs on the 6th day of March, 1888, and before the present suit was brought, executed and delivered to the plaintiff the following assignment, which is set forth in the complaint:—

"BRISTOL, CONN., March 6, 1888.

"In consideration of the receipt of one dollar, which is hereby acknowledged, I hereby sell, assign and transfer to

Henry C. Butler all claim, right, and cause of action, which I may have against Wallace Barnes, arising from the conveyance by said Barnes to me of a certain piece of land, by deed dated August 15th, 1872, or from the covenants in said deed contained, or from the parol contract made by said Barnes with me for the sale of a lot of land, to complete which said deed was made; and I hereby authorize said Butler in my name or in his own, but for his own benefit, to prosecute his suit against said Barnes for the recovery of judgment upon said covenants, or for a reformation of said deed, or for other legal or equitable relief arising out of such contract, deed or covenants, as he may deem fit.

C. H. RIGGS. [L. S.]"

Before the commencement of this action the plaintiff demanded of Barnes a reformation of his deed, and also demanded payment of damages.

The court finds that the land actually sold and conveyed by Barnes to Riggs, and by Riggs sold and conveyed to the plaintiff, was the piece described in their deeds; and that all three supposed the land described in the deeds was identical with the lot staked out by Barnes. But Barnes did not intend to sell and convey to Riggs any other land than a piece bounded northerly on the land of the heirs of Mrs. Ann O'Connor, and extending southerly on North Main street from the line of said land of Mrs. O'Connor thirty-three feet; and Riggs sold to the plaintiff the same land, having the same northerly line and the same frontage on North Main street. Barnes had attempted to locate such a piece by placing stakes at its corners, but he had mistaken the correct northerly line.

Butler had occupied the lot staked out, supposing it to be the land described in his deed. The decision of the court had ejected him from a portion of the land he was occupying, but not from any part of the land described in his deed. He has lost no land which he actually bought of Riggs. The substance of the whole matter is that Barnes, Riggs and Butler were all mistaken as to the correct location of the northerly line of the piece of land bought and sold by them.

Upon the foregoing facts on the trial the plaintiff claimed as matter of law that the pointing out by Barnes to his grantee, while the negotiations were in progress, of a lot exactly located and staked, which lot all the parties supposed to be the lot which was to be sold and conveyed, and the mutual mistake between them by which they gave and received the deeds as correctly describing the staked lot, entitled the plaintiff to a reformation of the deed, to make it so describe the staked lot, and to damages upon the covenants as reformed. But the court overruled these claims, and held that the plaintiff was not entitled to the reformation of his deed as asked for, nor entitled to recover damages from the defendant.

Upon these facts the court rendered judgment for the defendant, and the plaintiff appealed to this court.

N. A. Pierce and *E. Peck*, for the appellant.

1. This action was instituted in accordance with the ruling of this court in *Broadway* v. *Buxton*, 43 Conn., 282. The facts offered to be proved by the plaintiff in that case were identical with those at bar. The grantee had brought an action of covenant at law, and the court said:—"An action on the covenants can afford no remedy; resort must be had to a court of equity to correct the deed, and make it conform to the intent and agreement of the parties." This ruling was in accordance with the entire current of modern equity decisions. The power and duty of equity to grant reformation of deeds and other writings upon parol evidence of the real intention of the parties, and of the mutual mistake by which they have failed to carry out that intention, is constantly stated in more and more unqualified language. 2 Pomeroy's Equity, § 866; Story's Eq. Jur., § 152; *Johnson* v. *Taber*, 10 N. York, 319; *Bush* v. *Hicks*, 60 id., 298; *Tabor* v. *Cilley*, 53 Verm., 487; *May* v. *Adams*, 58 id., 74. No Connecticut case except that of *Broadway* v. *Buxton* involved exactly the same facts as the case at bar, but the general doctrine of the reformation of deeds in case of mutual mistake has been applied many times, and with no

intimation that the rule was narrower here than in other jurisdictions. *Chamberlain* v. *Thompson*, 10 Conn., 243; *Stedwell* v. *Anderson*, 21 id., 139; *Bunnell* v. *Read*, id., 586; *Knapp* v. *White*, 23 id., 543; *Blakeman* v. *Blakeman*, 39 id., 320; *Cake* v. *Peet*, 49 id., 501; *Palmer* v. *Hartford Fire Ins. Co.*, 54 id., 488. It is true that this court, by a majority of the judges, in *Osborn* v. *Phelps*, 19 Conn., 63, held that a deed cannot be reformed and enforced in the same action. This doctrine was based upon the statute of frauds, and the court rely upon the fact that no part of the purchase money had been paid by the plaintiff, no possession taken, and no act done by him in reliance upon the parol contract. In the case at bar the payment of the purchase price, the sixteen years' occupancy of the land, the erection of a barn partly upon the strip of land in dispute, effectually dispose of any argument under the statute of frauds. But *Osborn* v. *Phelps* was questioned and virtually overruled in *Thompsonville Scale Mfg. Co.* v. *Osgood*, 26 Conn., 16. It is contrary to the whole current of modern American decisions, and certainly is obsolete under our present practice, in which equity and law are joined, and in which complete and final justice, equitable or legal, or both, is commonly to be obtained in a single action. Story's Eq. Jur., § 161; Pomeroy's Eq., §§ 861, 862, 866.

2. There can be no question as to the right of the plaintiff (grantee of the original grantee) to bring this action. Even if the action were purely a legal one on the covenant, the right of action against the remote warrantor is unquestioned. But the plaintiff here was not only in privity of title with the original parties, but was a party to the mistake, and fully within the equities which existed between them. An action for the reformation of a deed may be brought not only by the original parties, but by their privies in title. 1 Story's Eq. Jur., § 165. *Bunnell* v. *Reed*, 21 Conn., 586, was an action for the reformation of a deed brought by an execution creditor of the original grantee. But all question as to the right of the plaintiff to bring this action is removed by the assignment from Riggs. The validity of this assignment is

fully established by *Dickinson* v. *Burrell*, L. R., 1 Eq., 337, and *Traer* v. *Clews*, 115 U. S. R., 528. See also 2 Story Eq. Jur., § 1040; *Elting* v. *Clinton Mills Co.*, 36 Conn., 296. But the whole question as to the right of the assignee to sue upon "any chose in action" is put at rest by our statute, § 981. See *Hoyt* v. *Ketcham*, 54 Conn., 60.

3. But it may be claimed that the finding "that the land actually sold and conveyed by Barnes to Riggs, and by Riggs * * * to the plaintiff, was the piece described in their deeds; that Barnes did not undertake to sell any other land than a piece bounded northerly on the land of the heirs of Ann O'Connor; and that he (Butler) has lost no land which he actually bought of Riggs,"—is fatal to the plaintiff's right of action. But we believe that it will appear clearly, upon careful examination, that these findings are really the legal conclusions of the court below. The court goes over in detail all the facts alleged in the complaint, and denied in the answer, and substantially finds them all. It then draws its conclusions as to what is to be deemed the sale and undertaking arising from those facts, leading up to the judgment for the defendant. This court has recently said of a similar finding:—"It was not therefore intended as a finding of a fact based on independent evidence, but only as an application of the special facts previously stated to the determination of the legal issue. The question is therefore controlled by the special facts referred to and the legal conclusions to be drawn therefrom." *Tyler* v. *Waddingham*, 58 Conn., 386. These conclusions of the court are erroneous. Can it be that one who has staked out a certain lot, takes a prospective purchaser to see it, points out the stakes "as designating the boundaries of the lot," leads him to suppose that the lines indicated thereby correctly designate the boundaries, and thereupon makes a sale, does not "undertake" to sell that precise lot. Can it be that the purchaser, going into possession, occupying sixteen years, maintaining the staked line, and then ejected from it, "has lost no land which he actually bought?" The making, delivery and acceptance of every deed are necessa-

rily the carrying out of some prior parol contract of sale. The deed cannot be drawn, nor the money paid, unless the minds of the parties as to the lot to be bought, and the money to be paid, have already met. The negotiations out of which the contract arose were carried on upon the visibly staked-out lot, which stakes the vendor pointed out "as designating the boundaries," "which lot all the parties supposed to be the lot which was to be sold and conveyed." In view of those stakes, and in that supposition, the vendee agreed to pay whatever price was paid. Can it be true that the resulting contract concerned, not that visible lot, but an unknown, indefinite lot, bounded by a legal line first established by a judgment many years after? This court has, in recent cases, fully established the doctrine that a so-called finding, which really involves legal conclusions from other facts specially found, may be reviewed here. *Mead* v. *Noyes*, 44 Conn., 487; *Hayden* v. *Allyn*, 55 id., 280; *Tyler* v. *Waddingham*, 58 id., 375.

J. J. Jennings, for the appellee.

1. The action was brought too late. Barnes's deed was dated August 15th, 1872, and the service of the complaint was made August 16th, 1889. We claim that the case is within the statute of limitations. Wood on Limitation of Actions, 116; *Oakes* v. *Howell*, 27 How. Pr., 145. If a statute of limitations ought ever to be taken advantage of, this would seem a proper case. A man makes a deed; that deed is accepted. Seventeen years after it is sought to cause an entirely different contract to be substituted for the one expressed in writing at the time, by means of oral testimony. Such an attempt ought to be met by a refusal.

2. The plaintiff has no standing in this court against the defendant. When the plaintiff vouched in the defendant in the case of *Root* v. *Butler*, the latter could see that his deed was correct, and it appears clearly from the complaint that the plaintiff can have no action at law against the defendant on any covenant of warranty in the deed. The defendant is therefore in no wise affected by the judgment in *Root* v. *But-*

ler. No contract relation exists between the plaintiff and defendant. Barnes has given Butler no deed, has entered into no contract with him. Barnes is privy to no contract with Butler. Butler is a naked assignee of Riggs, and Riggs had nothing to assign. The assignment is void, or at least an assignee thereunder gains no right to bring or maintain a suit. The leading case is *Prosser* v. *Edmonds*, 1 Younge & Coll., 481. But the whole question is gone into at length in 2 Story's Eq. Jur., § 1040 *h*, and note, and there are quotations there from the cases, especially the English cases. See also *Hill* v. *Boyle*, L. R., 4 Eq., 260. An action for the reformation of a deed is not sustainable by one who does not as a matter of fact connect himself with the arrangement, bargain or contract under which the deed was made; and the mere fact that one is a grantee of the party to whom the deed was made, does not so connect him. *Willis* v. *Sanders*, 51 N. York Super. Ct., 384. The assignment of a mere right of action to procure a transaction to be set aside on the ground of fraud is not permitted. 3 Pomeroy Eq., § 1276; *Milwaukee & Minn. R. R. Co.* v. *Milwaukee & Western R. R. Co.*, 20 Wis., 195. The claim here is, I suppose, mistake. But the principle is the same whether fraud or mistake. A right to prosecute a suit in equity to set aside a deed on the ground of fraud is not assignable. *Jones* v. *Babcock*, 15 Mo. App., 149; *Brush* v. *Sweet*, 38 Mich., 574; 2 Spence's Eq., 363, 369, 372. A mere right to file a bill in equity is not assignable. *Marshall* v. *Means*, 12 Geo., 61; *Norton* v. *Tuttle*, 60 Ill., 130; *Mitchell* v. *Winslow*, 2 Story, 630; *Kendall* v. *U. States*, 7 Wall., 113.

3. But waiving all question as to the plaintiff's right to sue, he fails to bring himself within the plain and well established rules governing cases concerning the reformation of written instruments. (1.) The statute of frauds. Contracts concerning the sale of lands must be in writing. There is no written contract, no pretense that there is or ever was one between Butler and Barnes, nor between Riggs and Barnes, about the purchase of land bounded on the north by a line drawn between two stakes. If parties to a written

contract can come into court and have an oral contract substituted for a written contract, the statute of frauds may as well be repealed. (2.) Where the language of a conveyance is unambiguous, no parol evidence to vary or control its import is admissible. *Stone* v. *Clark*, 1 Met., 378; *Osborn* v. *Phelps*, 19 Conn., 63. (3.) The only resource left to the plaintiff is the principle that a court of equity will reform contracts where, through fraud, accident or mistake, the written agreement does not express the intent of the parties. There is no claim of fraud or accident. The plaintiff says there was a mutual mistake. But was this mistake, if there was one, one that affects this deed? Will even the plaintiff claim that Barnes would have written the description of the north boundary differently under any circumstances? The plaintiff must prove this in order to make out his case. The fact that he got the foundations of his barn six inches too far north through a mistake made in locating the boundary, cannot affect this case. The court finds that there was no mistake as to the contract itself; that the plaintiff did not rely upon any representation of Barnes or Riggs as to where the boundary was because he employed a surveyor to locate his north boundary according to the deed. PARDEE, J., in *Palmer* v. *Hartford Fire Ins. Co.*, 54 Conn., 501, says:—"Of course the presumption in favor of the written over the spoken agreement is almost resistless; and the court has wearied itself in declaring that such prayers must be supported by overwhelming evidence or be denied." "A written instrument will not be reformed by a court of equity until a mistake is made to appear beyond reasonable controversy." *Hinton* v. *Citizen's Mut. Ins. Co.*, 63 Ala., 488. See also *Remillard* v. *Prescott*, 8 Or., 37; *McCoy* v. *Bayley*, id., 196; *Rowley* v. *Flannelly*, 30 N. Jer. Eq., 612; *McDonnell* v. *Milholland*, 48 Md., 540; *Yocum* v. *Foreman*, 14 Bush, 494; *Hamlon* v. *Sullivant*, 11 Ill. App., 423; *Griswold* v. *Hazard*, 26 Fed. Rep., 135; *Brohammer* v. *Hoss*, 17 Mo. App., 1; *Cox* v. *Woods*, 67 Cal., 317; *Stiles* v. *Willis*, 66 Md., 552; *Paulison* v. *Iderstine*, 28 N. Jer. Eq., 306; *Ramsey* v. *Smith*, 32 id., 28; Stark. Ev., 676. Equity will

not relieve against mistakes due to the plaintiff's want of reasonable care and diligence, in the absence of fraud. *Pearce* v. *Suggs*, 85 Tenn., 724; *Lewis* v. *Lewis*, 5 Or., 169; *Brown* v. *Fagan*, 71 Mo., 563; *Iverson* v. *Wilburn*, 65 Geo., 103. A mistake to be the ground of reformation of a written agreement should be proved as much to the satisfaction of the court as if admitted. *Ford* v. *Joyce*, 78 N. York, 618; *Turner* v. *Shaw*, 96 Mo., 22. The mistake must appear beyond a reasonable doubt. *Jarrell* v. *Jarrell*, 27 W. Va., 743. Equity will not reform a deed where the parties did not mistake its contents but only its effect; also where the misdescription of the land conveyed is the result of carelessness in procuring a correct description. *Toops* v. *Snyder*, 70 Ind., 554. A written instrument will be reformed for fraud or mistake only so as to give effect to a previous binding contract of the parties. *Petesch* v. *Hambach*, 48 Wis., 443. The mere fact that had the parties been differently informed they would not have made the deed as they did, affords no ground for reformation. *St. Anthony Water Power Co.* v. *Merriman*, 35 Minn., 42. Words inserted intentionally cannot be changed on the ground that one party misunderstood their meaning or effect, or that they conflict with a contemporaneous parol agreement. *Barnes* v. *Bartlett*, 47 Ind., 98. Equity will correct errors, but of course cannot make new contracts. *Casady* v. *Woodbury County*, 13 Iowa, 113. A contract must have been made and by a mutual mistake of the parties incorrectly reduced to writing. *Lanier* v. *Wyman*, 5 Rob., (N. Y.) 147; *Sutherland* v. *Sutherland*, 69 Ill., 481; *Evarts* v. *Steger*, 5 Or., 147. The courts in this jurisdiction have usually confined themselves to correction of mere formal mistakes or omissions in written instruments. The principle which guides this court was well stated by Judge PARDEE, in the case cited above. Special attention is also called to *Thompsonville Scale Mfg. Co.* v. *Osgood*, 26 Conn., 16; *Osborn* v. *Phelps*, 19 id., 63. If the plaintiff wanted the northern boundary to be a line between two stakes, why did he not have that description and a covenant to that effect inserted in the deed? The description by boundaries is

conclusive. It was the duty of the plaintiff to measure his land and ascertain the facts according to the boundaries. If he desired to limit the defendant, he should have asked to have express covenants inserted. "It is not competent to control the boundaries given in a deed by parol evidence that the parties supposed other land, in addition to what is embraced within such bounds, was included in the grant, or that the monument expressly described is different from the one intended." *Powell* v. *Clark*, 5 Mass., 355. See also 3 Washb. Real Prop., 364; *Frost* v. *Spaulding*, 19 Pick., 445; *Child* v. *Wells*, 13 id., 121; *Pride* v. *Lunt*, 19 Maine, 115; *McCoy* v. *Galloway*, 3 Ohio, 282; *Emerick* v. *Kohler*, 29 Barb., 169; *Parker* v. *Kane*, 22 How., 1; *Clark* v. *Baird*, 5 Seld., 183; *Dodge* v. *Nichols*, 5 Allen, 548; *Spiller* v. *Scribner*, 36 Verm., 245; *Gilman* v. *Smith*, 12 id., 150; *Peasles* v. *Gee*, 19 N. Hamp., 273; *Terry* v. *Chandler*, 16 N. York, 354; *Dean* v. *Erskine*, 18 N. Hamp., 83; *Roberti* v. *Atwater*, 42 Conn., 266; *Snow* v. *Chapman*, 1 Root, 528; Rawle's Covenants for Titles, 523.

SEYMOUR, J. In this case the appellee claims at the outset, and as conclusive of the question before us, that the court below has decided, as a question of fact, that no mistake occurred between the parties to the original deed which the plaintiff seeks to have reformed, but that it accurately expresses the contract which was made and correctly describes the land which was sold.

Is this claim well founded? The finding states that in 1872 the defendant sold to one Riggs a piece of land which he described and bounded in the deed as follows:—"Northerly on land of the heirs of Mrs. Ann O'Connor, one hundred feet; easterly on highway called North Main street, thirty-three feet; southerly on grantor, one hundred and sixteen feet and ten inches; westerly on grantor, thirty feet two and a quarter inches;" and the deed contained the usual covenants of warranty and seisin.

At the time of the purchase both Barnes and Riggs went upon the land, and Barnes then pointed out four stakes

which he had previously placed at the corners, one at each corner, as designating the boundaries of the lot. Both supposed that the lot described in the deed and the lot staked out were identical, and that the lines indicated by the stakes correctly designated the boundaries of the piece of land purchased. There were no buildings on the land, and no fence marked any of the boundaries.

Barnes and Riggs, and Butler, the plaintiff, who afterwards purchased the land of Riggs, all supposed that the lot staked out correctly designated the land described in the deeds from Barnes to Riggs and from Riggs to Butler, and that the northerly line of the lot indicated by the stakes correctly marked the boundary line on the land of the heirs of Mrs. Ann O'Connor.

The court finds that "the land actually sold and conveyed by Barnes to Riggs, and by Riggs sold and conveyed to the plaintiff, was the piece as described in their deeds; and that all three supposed the land described in the deeds was identical with the lot staked out by Barnes. But Barnes did not undertake to sell and convey to Riggs any other land than a piece bounded northerly on the land of the heirs of Mrs. Ann O'Connor, and extending southerly on North Main street from the line of the land of Mrs. O'Connor thirty-three feet; and Riggs sold to the plaintiff the same land, having the same northerly line and the same frontage on North Main street. Barnes had attempted to locate such a piece by placing stakes at its corners, but he had mistaken the correct northerly line. Butler had occupied the lot staked out, supposing it to be the land described in his deed. The decision of the court had ejected him from a portion of the land he was occupying, but not from any part of the land described in his deed. He has lost no land which he actually bought of Riggs. The substance of the whole matter is that Barnes, Riggs, and Butler, all were mistaken as to the correct location of the northerly line of the piece of land bought and sold by them."

From this finding it is evident that the court did not decide, as matter either of law or of fact, that *no* mistake oc-

curred between the parties to the original deed. A mistake is clearly stated, namely, "that both parties supposed that the lot described in the deed and the lot staked out were identical, and that the lines indicated by the stakes correctly designated the boundaries of the piece of land purchased." That is to say, both parties supposed that the deed accurately described the lot which was staked out and which the defendant pointed out as the subject of the sale. This supposition was incorrect. The deed did not accurately describe the northern boundary of the lot so designated and pointed out by the grantor.

Here the mistake arose. This was the mistake. The reasoning of the court in coming to its conclusion seems to have been substantially this:—The line pointed out as the correct line for the northern boundary, when the sale was made, was indicated by two stakes; the parties supposed that the line so indicated was identical with the O'Connor line and would be correctly described by bounding the lot sold northerly on land of the heirs of Mrs. O'Connor. The deed did bound the lot northerly on the land of said heirs; therefore I find that the lot actually sold was the piece described in the deed and not the piece pointed out and contained within the four stakes, and that the defendant did not undertake to sell and convey to Riggs any other land than a piece bounded northerly on the land of the heirs of Mrs. O'Connor.

The conclusion is manifestly a conclusion of law based upon the idea that the description of the boundaries in the deed must prevail over the boundaries actually pointed out upon the premises, and that the parties must be taken to have intended to contract according to the boundaries named in the deed, although they were mutually mistaken in supposing these were identical with the boundaries pointed out as above stated.

The claim which the court overruled, as stated in the finding, was the claim of the plaintiff "that, as matter of law, the pointing out by the defendant to his grantee, while the negotiations were in progress, of a lot exactly located and

staked, which lot all the parties supposed to be the lot which was to be sold and conveyed, and the mutual mistake between them by which they gave and received the deeds as correctly describing the staked lot, entitled the plaintiff to a reformation of the deed so as to make it describe the staked lot, and to damages upon the covenants as reformed." In overruling this claim the court manifestly decided that, upon the facts stated, the law was so that the plaintiff was not entitled to the relief sought. Was this decision correct? That is the question now presented. As between the original parties would the grantor have been entitled to a reformation of his deed?

The mistake which the parties made was, as we have seen, that both supposed that the lot described in the deed and the lot staked out were identical. Both supposed that the description in the deed covered the land which was staked off and had been pointed out by the defendant as the lot sold. Notwithstanding this the court held that the land actually sold and conveyed was the piece described in the deed. That it was the piece *conveyed* by the terms of the deed is self-evident. That it was the piece *sold* is the conclusion upon which the court bases its refusal to reform the deed so as to embrace the lot contained between the lines of the stakes.

Notwithstanding, also, the mistake set forth, the court further finds that the defendant "did not undertake to sell and convey to Riggs any other land than a piece bounded northerly on the land of the heirs of Mrs. O'Connor." If by the word "undertake" the court means that, taking all the facts together, it must be held that the defendant only agreed to sell what the deed specifies, which is the natural meaning of the word as here used, then the issue is plainly before us.

It is clear that, while on the premises, the defendant undertook, both in the sense of offered and of agreed, to sell the lot he pointed out. The deed through the mistake of the parties did not express that undertaking. What would have prevented the grantee from having it so corrected that it should express the undertaking?

It may be suggested that it is evident, that the defendant did not intend to sell any land which he did not own and therefore it was no mistake on his part to bound the land in the deed as he did. But the suggestion is specious. It has reference to the general intent which every honest man has within himself not to sell what is not his own. And yet he may fully intend, as between himself and another, to sell what he mistakenly supposes to be his own. It may, no doubt, be truly said, in one sense, that the grantor in this case did not intend to sell nor the grantee to buy, land belonging to the O'Connor heirs. At the same time it is true that the grantor intended to sell, and the grantee to buy, exactly the lot which was pointed out as for sale between the lines indicated by the stakes. The mistake was in supposing that the line between the north stakes was identical with the O'Connor line. If the grantor had known where that line was he would have made his stakes conform to it.

The bargain was made before the deed was executed. There was no misunderstanding as to the shape or dimensions of the land which was the actual subject of the sale. If the parties had united in fencing it after the execution and delivery of the deed, they would have built the fence from stake to stake.

The true statement of the case would be that the defendant had no intention of encroaching on the O'Connor land when he marked out for sale, and sold, a lot which, in fact, so encroached, though described in the deed, in accordance with the parties' belief, as bounded north on the O'Connor's heirs' land. If the court had found that, though the lot was pointed out, yet the parties intended to bound it north on the O'Connor land, whether the stakes correctly indicated that line or not, such finding would present a very different case and would have been conclusive. If, also, the question had arisen in a court of law as to what land the defendant had sold, then the deed, upon well known principles, would have been held to express the contract and to exclude parol testimony to vary or contradict its terms. The very reason for coming into a court of chancery is to avoid the applica-

tion of those principles, and, in a proceeding brought for that purpose, to make the deed conform to the contract of which it purports to be the evidence. It seems to a majority of us that here was a mistake of such a nature as would have entitled the original grantee to have the deed reformed. *Broadway* v. *Buxton*, 43 Conn., 282, was an action upon the covenants of warranty and seisin. Buxton gave a deed of certain land to Broadway which bounded it "west by land of Calvin Hoyt, John L. C. Hoyt, Alva June and land of Ira Scofield." It appeared therefore from the deed that the lands of the four proprietors named extended along the entire length of the western boundary. Such however was not the case. One G. W. Young also owned land abutting for several rods on the west. After the execution of the deed the true divisional line between said Young's land and the land conveyed to Broadway was judicially ascertained and determined. Broadway claimed that by such line he was dispossessed and evicted of a strip of land which was covered by the deed of Buxton to him, and that therefore Buxton was liable on the covenants in his deed. To support this claim he offered parol evidence that prior to completing the contract for purchasing the land, and prior to the giving of the deed, the parties went upon the premises, and Buxton pointed out a line of fence constructed partly of stone and partly of brush, running generally in a northerly and southerly direction, as being in the western boundary line of the land proposed to be conveyed. This line was in fact one or two rods westerly of the line established as the true divisional line between Young's land and the plaintiff's land. It was for the loss of that strip of land, consequent upon establishing the boundary line farther east than Broadway anticipated, that the action was brought. This court said:—"As this is an action at law on a sealed instrument, the intent of the parties must be gathered from the instrument itself, not from any parol evidence. * * * The western boundary of the land conveyed is the eastern line of the adjacent proprietors; those lands, by the express terms of the deed, being made the plaintiff's western boundary.

No line of fence, no visible monuments, are referred to as boundaries, and to interpolate them as such, by parol, would clearly affect and vary the meaning of that instrument. Such a course is clearly inadmissible. If the plaintiff has been led into error, if he has been deceived or imposed upon by the representations of the defendant as to the western boundary of the land contracted for, and that it extended to a line of fence, pointed out, which would give him more land than his deed covers, an action on the covenants can afford no remedy; resort must be had to a court of equity to correct the deed and make it conform to the intent and agreement of the parties."

In *May* v. *Adams*, 58 Verm., 74, two tenants in common divided their land by deed of partition. There was a mutual mistake in the deed in that the words and figures "north 45 degrees 30 minutes west" did not correctly describe the line agreed on. The agreed line was recognized and understood by them to be the one described in the deed so long as they were the owners; and the parties to the suit purchased with a like understanding and also recognized it for several years. When the mistake was discovered a bill in chancery was brought by May for the reformation of the deeds so as to make them describe accurately the line originally agreed on. It was held that the mistake was remediable in equity, both as between the original owners and their grantees. The court says:—"With the deeds reformed, making the division line to follow the old fence, the defendant is secured in his title to all the land that he understood his deed included at the time of his purchase, and the orator is entitled to have the deeds of partition reformed as against the defendant so as to conform to the practical location of the division line as made by the Doanes (the original owners) and understood by the orator and defendant at the times of their respective purchases."

See also *Bush* v. *Hicks*, 60 N. York, 298; *Beardsley* v. *Knight*, 10 Verm., 185; *Tabor* v. *Cilley*, 53 id., 487; *Wilcox* v. *Lucas*, 121 Mass., 25; *Allen* v. *McGaughey*, 31 Ark., 252; *Calverley* v. *Williams*, 1 Vesey Jr., 210; Frye on Specific

Performance, § 501; 2 Pomeroy's Equity Jurisprudence, § 866.

For the purpose, then, of putting the original grantee, Riggs, in a position to recover for a breach of the covenants in the defendant's deed, it is clear, both upon principle and authority, that his deed might have been reformed and made, in terms and description, to cover the land pointed out and lying within the lines which connected the corner stakes. Making the deed describe the line pointed out as the boundary, could only result in exact justice between the parties to it.

In *Johnson* v. *Taber*, 10 N. York, 319, it was held that where the boundaries of lands are pointed out by the vendor to the purchaser, but, in the written contract of sale and in the deed executed in pursuance of it, the description is made, by mistake, to include lands not within such boundaries, the deed will be corrected, on the application of the vendor, so as to correspond with the boundaries thus pointed out; and that it is no answer to such application that the description in the contract and deed was made in accordance with the instructions of the vendor, where it appears that both he and the vendee believed the description to correspond with the boundaries.

There being, then, a mutual mistake in the deed, which would have entitled the original grantee to have it reformed, the purchaser from him brings this complaint. Is he entitled to the relief which he demands?

And first, irrespective of the facts in this case, can the claims therein made be properly joined in a single complaint? The plaintiff asks for the reformation of the deed, to make it state the true contract between the parties, and then, not a specific performance of the contract thus truly stated, but damages for the breach of covenants which the contract as amended will show that he is entitled to upon the facts of the case. Under the practice act, (Gen. Statutes, sec. 877,) all courts which are vested with jurisdiction both at law and in equity, may hereafter, to the full extent of their respective jurisdictions, administer legal and equita-

ble remedies, in favor of either party, in one and the same suit, so that legal and equitable rights of the parties may be enforced and protected in one action.

The rules under said act, chapter two, section two, refer to "a complaint demanding specific equitable relief and also damages, as equitable relief, incident thereto; (as for the reformation of a policy of insurance and the payment of a loss under the same as reformed.)" Pomeroy, in his book on Remedies and Remedial Actions, sec. 78, treats of the provisions, in the several codes and practice acts, combining legal and equitable actions and defenses in the same suit. He says:—"Where a plaintiff is clothed with primary rights, both legal and equitable, growing out of the same cause of action or the same transaction, and is entitled to an equitable remedy and also to a further legal remedy based upon the supposition that the equitable relief is granted, and he sets forth in his complaint the facts which support each class of rights and which show that he is entitled to each kind of remedy, and demands a judgment awarding both species of relief, the action will be sustained to its full extent in the form adopted." This rule, he says, has been firmly established by the court of last resort in New York and is adopted in all the states with one or two exceptions.

He states several cases where it has been applied; among them, an action by the holder of the legal title to correct his title deed, to recover possession of the land according to the correction thus made, and to recover damages for withholding such possession; and an action by the grantor of land to correct his deed by the insertion of the exception of the growing timber, and to recover damages for trees, embraced in the exception, wrongfully cut by the grantee. The author further says:—"The court, instead of formally conferring the special equitable remedy and then proceeding to grant the ultimate legal remedy, may treat the former as though accomplished, and render a simple common law judgment embracing the final legal relief which was the real object of the action." See sec. 80.

It was a maxim of equity jurisprudence, before the statu-

tory joinder of legal and equitable actions, that when the chancellor had once obtained jurisdiction he would do complete justice. But the limit of his power in that direction was not well defined. Certainly the spirit of our practice act, and of acts of a similar character, would enlarge such jurisdiction rather than restrict it. The application now is to a single court having both legal and equitable jurisdiction, and the intention of the law is to give the suitor full and complete relief, within certain well defined rules as to joinder of actions and parties, in a single action.

If it be suggested that, inasmuch as the defendant does not own the strip of land in question, a complaint for the reformation of the deed and a specific performance of the reformed contract would not lie, and therefore the court will refuse to reform the deed, we reply, that for that very reason—because he cannot obtain a specific performance—the plaintiff is entitled to the relief he is seeking. There is no other way to compel the defendant to pay for what, not owning, he sold. An action of covenant broken will not lie because, unreformed, the deed does not cover the land. If it cannot be corrected so as to make it include the land sold, then the grantee is remediless, and the protection expected from the covenant of warranty breaks down just when it is needed. As to the facts on this point, the finding shows that in 1873 Riggs, the original grantee, sold the land in question to the plaintiff and conveyed it by a deed, containing the usual covenants of warranty and seisin, in which it was bounded and described to all intents and purposes precisely as in the original deed. The stakes placed at the corners by the defendant were still standing, and both Riggs and the plaintiff supposed the land described in the deed was the lot designated by the stakes.

About the time of the purchase the plaintiff employed a surveyor to locate the boundaries of the described land, who reported that they were correctly designated by the stakes. In 1874 Butler erected a barn on the lot within the boundary line as indicated by the stakes. In 1886 Catharine R. Root, who had become the owner of the land described in the deeds

as belonging to the heirs of Mrs. Ann O'Connor, brought an action against the plaintiff, claiming that his barn encroached upon her land. The court found upon the trial of the action the barn to be an encroachment, and also established the boundary line between the lands of said Root and the plaintiff, and it is found by the court below, in accordance with that decision, that the northerly line, as indicated by the stakes, had included in the plaintiff's lot a triangular piece of land belonging to said Root, six and one half inches wide at the front and running out to a point at the rear of the lot. By this decision the plaintiff was ejected from such triangular piece. The title of the plaintiff to the triangular piece and his right of occupancy had never been disputed until about the time the action of Root against Butler was commenced, and the plaintiff did not learn, until final judgment was rendered in that action, that the line of the land of Mrs. O'Connor's heirs and the northerly line of the lot staked out by the defendant were not identical. Riggs executed and delivered to the plaintiff an assignment of all his claim, right and cause of action against the defendant arising out of said sale and conveyance, and authorized him to bring suit in his own name.

These facts present the case of a grantee, in a deed containing the usual covenants of warranty and seisin, who has been evicted from a portion of the granted premises, seeking, first, to reform the deed, and second, to recover damages, not against his immediate grantor, but against a remote grantor who conveyed the premises to his grantor with the same covenants. It is familiar law that the covenants of seisin, and of a right to convey, and against encumbrances, are personal covenants, not running with the land or passing to the assignee; for, if false, there is a breach of them as soon as the deed is executed and they become *choses in action*, which are not assignable at common law. But the covenant of warranty and the covenant for quiet enjoyment are prospective, and an eviction is necessary to constitute a breach of them. They are therefore in their nature real covenants. They run with the land conveyed, and descend to heirs, and

vest in assignees. So long as the grantor has not a good title there is a continuing breach. In respect of them this court held, in *Booth* v. *Starr*, 1 Conn., 246, that "every assignee may maintain an action against all or any of the prior warrantors till he has obtained satisfaction. This results from the nature of the covenant, for each covenantor covenants with the covenantee and his assigns, and as the lands are transferable it is reasonable that covenants annexed to them should be transferred." And (p. 249) "that the nature of the engagement of the first covenantor is to indemnify all the subsequent covenantees from all damage arising from a breach of the covenant."

The plaintiff, as assignee of the real covenants of the deed, has also a right of action against the defendant for the reformation of the deed, for the purpose of enabling him to take advantage of the breach of such covenants. An action for reformation may be brought not only by the original parties but by their privies in title. 1 Story's Eq. Jur., § 165. This court held in *Bunnell* v. *Reed*, 21 Conn., 586, that an execution creditor, to whom land had been set off, could sustain an action against his debtor's grantor for the correction of the deed conveying such land to the debtor, so that it might be made to include the land levied upon, as was intended by the parties thereto, but which by mistake it failed to do.

We have thus disposed of all the questions which it is necessary to consider in order to decide the case before us. There is nothing in the record which shows any such laches on the part of the plaintiff, in pursuing his remedies after his eviction, as would defeat his right to invoke the assistance of a court of equity, and the majority of the court think there is error in the judgment appealed from, and that a new trial should be granted, at which the Court of Common Pleas may reform the deed as herein indicated, and thereupon render judgment for damages for the breach of the covenants now in said deed contained.

There is error and a new trial is granted.

In this opinion ANDREWS, C. J., and LOOMIS and TORRANCE, JS., concurred.

CARPENTER, J., (dissenting.) A mistake which justifies the interference of a court of equity, is defined by the civil code of New York as follows:—"Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in, 1st, an unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or, 2d, belief in the present existence of a thing material which does not exist, or in the past existence of such a thing which has not existed." This definition is endorsed by Mr. Pomeroy as "both accurate and comprehensive." 2 Pomeroy's Eq., § 839.

Again: "If a mistake is made by one or both parties in reference to some fact which, though connected with the transaction, is merely incidental, and not a part of the very subject matter or essential to any of its terms; or if the complaining party fails to show that his conduct was in reality determined by it; in either case the mistake will not be ground for any relief, affirmative or defensive." 2 Pomeroy's Eq., § 856.

I presume that it will be conceded that such is the law of this state. A court of equity will not stoop to correct an immaterial mistake. My first inquiry then is, was the mistake in this case a material one? Did the parties sell and purchase because of their belief that the front line extended to the stake? In other words does it distinctly appear that there would have been no sale had the parties known that the front line fell six and one half inches short of the stake? There can be but one answer to all these questions, and that a negative one. The finding is ominously silent on this subject. Not only is an express finding of materiality wholly wanting, but there is nothing in the record from which it can be inferred. It will be remembered that the question is, not whether the triangular piece six and one half inches in front and running to a point one hundred feet back, is now important to the plaintiff after constructing his build-

ing partly thereon, but did Barnes and Riggs regard it as important in 1872 that the real corner should be at the stake? There is no finding that they did and there can be no inference to that effect. Riggs purchased a piece of land with a frontage on the street of thirty-three feet. That quantity of land he received; at least that must be presumed for our present purpose, as there is nothing in the case indicating that he did not. If therefore Riggs received all the land that he purchased, and all that he supposed that he was to receive, there is absolutely no ground on which it can be claimed that he purchased it because he thought the stake indicated the true corner, and that he would not have purchased had he known that the corner was six and one half inches further south. This alone I regard as a conclusive answer to the plaintiff's case.

The alleged mistake was not in drafting the deed. That instrument contained nothing which the parties intended it should not contain, and omitted nothing which they intended should be inserted. Had there been a material mistake of that description a court of equity might have corrected it by reforming the deed. But the deed as it stands describes the land which the grantor owned, and which was intended to be conveyed by it, correctly. True, there was a mistake, but it was *dehors* the deed. It was in locating one corner of the premises. Obviously such a mistake is not to be corrected by any change in the deed, especially a change which will make it include land which the grantor did not own, and the title to which cannot be affected by it. The plain common sense method of correcting such a mistake is to ascertain and correctly locate the premises. Then, if the grantee fails to get what he expects, and what he wants, his remedy is an application to set aside or cancel the deed and restore to him the consideration paid.

The change asked for will not effectuate the intention of the parties. It will inevitably lead to results not intended and not contemplated. The deed was intended to convey the land and only the land which the grantor owned. Changing it so as to include land which he did not own is futile.

It is said that by pointing out the stake as the corner the parties virtually agreed that the deed should so describe the land, and therefore that the parties intended to deed to the stake. True, in one sense, and not true in another. It clearly appears that they intended to bound the premises north by the O'Connor line. That was the primary and principal intention. The intention to deed to the stake was secondary and subordinate; it was contingent upon the supposition that that was identical with the O'Connor line. Thus there were, so to speak, two intentions; one absolute, to convey to the true line wherever that might be, and the other contingent, to convey to the stake, provided that indicated the true line. The absolute and only real intention has been effectuated by the deed as it is; the contingent one, by reason of the failure of the contingency on which it depended, ceases to be of any consequence. An intention depending upon a contingency which does not exist, and which never can exist, is, in legal contemplation, no intention at all. Legally speaking then, there was but one intention, and that was to convey only the land which the grantor owned.

The court, as it seems to me, now attempts to give effect to what was a secondary and contingent intent, and which is now no intent at all—an impossible intent, by changing the deed so as to carry a mistake, made during the negotiations, into that instrument, when the parties themselves had consciously or unconsciously rectified the mistake in their deed. Thus such a mistake is unduly magnified as of more importance than the real agreement of the parties as truly expressed in their deed. Courts of equity do not reform deeds to give effect to mistakes. It is in effect enforcing an agreement founded in a mistake; and the mistake is of such a character that a court of equity, were the circumstances slightly changed, would unhesitatingly annul the agreement. That is hardly reformation. Courts of equity do not reform written instruments to give effect to mistakes, or agreements resulting therefrom, but to rectify them in cases where injustice would otherwise be done.

Let us pursue this thought a little further. I take it that

it is a sound proposition that a court of equity will not lend its aid to give effect to an agreement founded in and resulting wholly from a mistake of fact, unless it clearly appears that the parties after having actual knowledge of the facts would have entered into or have ratified the agreement. Any substantial doubt on this point should lead the court to refuse its aid. How is it in this case? The mistake was not discovered until many years after the deed was given, and was not known with certainty until the determination of the case of *Root* v. *Butler*. Since then no contract has been made and none has been ratified. Indeed no such fact is claimed in the case, and the finding nowhere intimates that any such fact exists.

From what I have already said it will not escape the notice of the profession that this is not an ordinary case of a reformation of a written instrument. It is rather in the nature of an action for a specific performance. It is in fact an action to compel Barnes to perfect a defective or incomplete performance. The deed as it is embraces no land north of the O'Connor line. The object is to extend its operation beyond that line. The case therefore stands upon the same principle that it would if it was a suit to compel Barnes to give an independent deed of that strip of land. The circumstances and results may be different; but the essential principles upon which courts proceed are the same in the two cases. In either case the important questions are, has there been a valid agreement? and does justice now require that that agreement shall be performed? I need not repeat the arguments here. An agreement based upon a radical misconception of facts can rarely be a valid agreement. The non-existence of an assumed fact, the assumption being vital to the agreement, is an insuperable objection to a decree for a specific performance. Justice cannot require the performance of the agreement for two reasons: first, there is no valid existing agreement, and second, the agreement is of such a character that specific performance is impossible. These propositions will not be denied:—1st, that the agreement to convey to the stake was founded in the mistaken belief that

Barnes owned to the stake; and 2nd, that any decree which the court may pass cannot possibly affect the title to the land. I cannot understand upon what principle, or for what purpose, a court of equity can now interfere, unless it is in some way to take into its jurisdiction the matter of damages. I had supposed that courts gave damages generally in such cases only as incidental to some distinctively equitable relief. Mr. Pomeroy, (3 Eq., § 1405,) says:—"The contract must be free from any fraud, misrepresentation even though not fraudulent, mistake or illegality." Again, in the same section:—"The contract must be such that its specific performance would not be nugatory. Although the contract by its terms can be specifically enforced, the defendant must also have the capacity and ability to perform it by obeying the decree of the court. It must be such that the court is able to make an efficient decree for its specific performance, and is able to enforce its decree when made." And in a note the author says:—"If the defendant is totally unable to perform because he has no title at all, or a title completely defective, the remedy will not be granted."

In vol. 1, § 237, the same author says:—"If a court of equity obtains jurisdiction of a suit for the purpose of granting some distinctively equitable relief, such for example as the specific performance of a contract, or the rescission or cancellation of some instrument, and it appears from facts disclosed on the hearing, but not known to the plaintiff when he brought his suit, that the special relief prayed for has become impracticable, and the plaintiff is entitled to the only alternative relief possible of damages, the court then may, and generally will, instead of compelling the plaintiff to incur the double expense and trouble of an action at law, retain the cause, decide all the issues involved, and decree the payment of mere compensatory damages." In a note to this section the author says:—"The following rules have been established by American decisions:—If through a failure of the vendor's title, or any other cause, a specific performance is really impossible, and the vendee was aware of the true condition of affairs before and at the time he

brought his suit, the court, being of necessity obliged to refuse the remedy of specific performance, will not in general retain the suit and award compensatory damages, because, as has been said, the court never acquired jurisdiction over the cause for any purpose; citing cases. A second rule is, —that if the remedy of specific performance is possible at the commencement of the suit by the vendee, and while the action is pending the vendor renders this remedy impracticable by conveying the subject matter to a *bonâ fide* purchaser for value, the court, having acquired jurisdiction, will do full justice by decreeing full damages; citing cases. The third rule is as follows:—If specific performance was originally possible, but before the commencement of the suit the vendor makes it impossible by a conveyance to a third person; or if the disability existed at the very time of entering into the contract on account of a defect in the vendor's title or other similar reason; in either of these cases, if the vendee brings his suit in good faith, without a knowledge of the existing disability, supposing, and having reason to suppose himself entitled to the equitable remedy of specific performance, and the impossibility is first disclosed by the defendant's answer, or in the course of the hearing, then, although the court cannot grant a specific performance, it will retain the cause, assess the plaintiff's damages, and decree a pecuniary judgment in place of the purely equitable relief originally demanded. This rule is settled by an overwhelming preponderance of American authorities." Citing a large number of authorities. Among them were *Kempshall* v. *Stone*, 5 Johns. Ch., 193; *Morss* v. *Elmendorf*, 11 Paige, 278; *Milkman* v. *Ordway*, 106 Mass., 232; *Smith* v. *Kelley*, 56 Maine, 64; *Doan* v. *Mauzey*, 33 Ill., 227; *Gupton* v. *Gupton*, 47 Mo., 37; *McQueen* v. *Choteau's Heirs*, 20 id., 222. An examination of the authorities satisfies me that this is a case in which a court of equity ought not to grant the relief prayed for; also, that the court having acquired no jurisdiction for granting equitable relief, cannot grant relief by giving pecuniary damages.

I do not think that the practice act has any application.

That act was not designed to give a remedy where none existed, but enables the plaintiff to unite legal and equitable remedies in the same action, where each is existing at the time and a complete cause of action in itself. It has long been a settled practice for a court of equity, where it has taken jurisdiction of a suit for equitable relief by way of a decree for specific performance or the reformation of a deed, to render judgment instead for the damages that the plaintiff would be entitled to if the specific relief sought had been granted. In doing this the court is not departing from its jurisdiction as a court of equity or assuming legal jurisdiction, but is simply exercising its own long established powers as a court of equity. The court therefore needed no aid from the practice act, and acquired no additional powers from it, so far as the present case is concerned. The case must therefore be adjudged wholly upon its merits as a suit in equity, and with reference solely to the rules of practice in equity.

THE NEW YORK & NEW ENGLAND RAILROAD COMPANY *vs.* WILLIAM G. COMSTOCK, JR., AND OTHERS.

Hartford Dist., Oct. T., 1890. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

The rights of the owner of land condemned for railroad purposes differ in some important respects from the rights retained by the owner of land taken for a highway. The possession of the railroad company is necessarily exclusive.

The power to exclude every one from the railroad limits must be left, as matter of law, absolutely with the officers of the company who are immediately responsible, subject only to such state supervision as may be deemed expedient.

It does not follow, because there were long-used farm roads across the land condemned, that these crossings were to be considered as not included in the condemnation of the land.

The act of 1889 (Session Laws of 1889, pp. 81, 167,) provides, under a penalty, that no railroad company shall obstruct any farm crossing "until

the legal right to do so has been finally settled by a judgment or decree of the Superior Court," and that any railroad company may "bring its complaint against the person owning the land adjoining such crossing to the Superior Court, which shall hear and determine the rights of the parties." A railroad company which, before the act was passed, had made a fence across such a crossing, brought a suit in equity for an injunction to restrain the adjoining owners from removing it. Held to be a sufficient suit under the statute for determining the legal rights of the parties in the matter.

[Argued October 9th, 1890—decided March 4th, 1891.]

SUIT for an injunction against the defendants' using a claimed crossing over the track of the plaintiff corporation; brought to the Superior Court in Hartford County, and heard before *Thayer, J.* Facts found and judgment rendered for the defendants, and appeal by the plaintiff. The case is fully stated in the opinion.

E. D. Robbins, for the appellant.

The defendants do not claim a right of way of necessity across the railroad; nor that they have gained a right of way by adverse user. Their claim is based simply on the fact that the land in question was taken by condemnation, and that the fee thereof is in them. If sustained, it will prove of sweeping application. It raises squarely the fundamental question, what rights are acquired by the taking of land in regular form of law for railroad uses. The notion seems to be that these rights are merely like those of the public in a highway. But this view is clearly erroneous. A railroad company which has taken land in proper form of law is entitled to the exclusive possession of it. This is well settled by the authorities. *Jackson* v. *Rutland & Burlington R. R. Co.*, 25 Verm., 159; *Troy & Boston R. R. Co.* v. *Potter*, 42 id., 265, 274; *Hazen* v. *Boston & Maine R. R. Co.*, 2 Gray, 574, 580; *Proprietors of Canals & Locks* v. *Nashua & Lowell R. R. Co.*, 104 Mass., 1, 9. Nor can the fact that a well defined private road existed across the condemned land before it was taken make any difference whatever. *Presbrey* v. *Old Colony & Newport R. R. Co.*, 103 Mass., 1. Any other view would be absurd. No man can

have an easement in his own land. Washb. on Easements, 670; *Atwater* v. *Bodfish*, 11 Gray, 150. If the Comstocks have a right simply as fee owners to enter upon this land, this right cannot be confined to any particular point or points. They own the fee of one part just as much as of another. Nor can they be confined to a right of crossing. They may enter to cut timber or grass by precisely the same title. They might even enter and cultivate a crop on the land alongside the track, which is not actually occupied by the railroad. The logical statement of the defendants' claim carries with it its own refutation. It is not true that when a railroad company pays, as it actually must, the full value of land condemned, it acquires merely the right to lay rails on the land and draw cars upon them. It in truth acquires the right of exclusive possession of the land taken, and in its own discretion, in order to secure safety on the railroad, may absolutely shut out all persons therefrom, including the owners of the reversionary interest in the land. *Boston Gas Light Co.* v. *Old Colony & Newport R. R. Co.*, 14 Allen, 444; *Brainard* v. *Clapp*, 10 Cush., 6; *Presbrey* v. *Old Colony R. R. Co.*, 103 Mass., 1; *Proprietors of Locks & Canals* v. *Nashua & Lowell R. R. Co.*, 104 id., 1; *Jackson* v. *Rutland & Burlington R. R. Co.*, 25 Verm., 150; *Conn. & Passumpsic Rivers R. R. Co.* v. *Holton*, 32 id., 43; *Troy & Boston R. R. Co.* v. *Potter*, 42 id., 265; *Hayden* v. *Skillings*, 78 Maine, 413; *Cedar Rapids &c. R. R. Co.* v. *Raymond*, 37 Minn., 204; *Fayetteville R. R. Co.* v. *Combs*, 51 Ark., 324; *Burnett* v. *N. & C. R. R. Co.*, 4 Sneed, 528; Mills on Eminent Domain, § 208; Pierce on Railroads, 159.

L. Sperry, with whom was *J. A. Stoughton*, for the appellees.

1. Our statutes regard private crossings as a species of property not to be lightly swept away. See act of 1889, "to prevent the arbitrary removal of farm-crossings by railroad companies." "In the condemnation of a right of way across a farm the necessities and conveniences of location for farm-crossings should be taken into consideration, and after

condemnation it will be presumed that they were, and that the damages were estimated upon the hypothesis that a farm-crossing would not be constructed and maintained at any point where it would affect the safe and efficient operation of the road." Mills on Eminent Domain, § 213. See also *Chalcraft* v. *Louisville &c. R. R. Co.*, 113 Ill., 86. The record in the present case shows that in the condemnation proceedings reference was had to the crossings in question, and the fact found by the court that the railroad company has always recognized them, takes the case out of hypothesis and places it in the domain of fact. Again, it may be assumed that a legal obligation rests upon the railroad company to give facilities for crossing their tracks under condemnation proceedings. The statute provides that the Superior Court shall appoint appraisers to estimate all damages "for railroad purposes." Nothing more is estimated, and no further right is acquired.

2. This right of the corporation to use the land for railroad purposes becomes paramount but is by no means exclusive. "As a general rule a land owner has a reasonable right to farm-crossings at such places as the necessities of his farm demand," provided such crossings and the use thereof will not interfere with the paramount rights of the railroad company. Mills on Eminent Domain, § 213. "The presumption always is that the fee of highways is in the adjoining owner." *Copp* v. *Neal*, 7 N. Hamp., 275. "And the profits thereof consistent with the existence of the easement remain in the original owner." Lewis on Eminent Domain, § 151; *Tucker* v. *Eldred*, 6 R. Isl., 404. A very strong case on the doctrine of the undisturbed fee is found in *Blake* v. *Rich*, 34 N. Hamp., 282, in which it is held that "the exclusive right of property in the land, in the trees and herbage upon its surface, and the minerals below it, remains unchanged—subject always to the right of the corporation to construct and operate a railroad through it." "The stone and minerals under a railroad belong to the owner of the fee." Lewis on Eminent Domain, § 152. "The timber and grass found in public highways belong to the

owner of the adjoining soil." *Woodruff* v. *Neal*, 28 Conn., 165. "We conclude therefore that eminent domain is not of the nature of any estate or interest in property, reserved or otherwise acquired, but simply a power to appropriate individual property as the public necessities require." Lewis on Eminent Domain, § 3; *N. York, Housatonic & Northern R. R. Co.* v. *Boston, Hartford & Erie R. R. Co.*, 36 Conn., 196. Our court said in *Imlay* v. *Union Branch R. R. Co.*, 26 Conn., 255—"Hence when land is condemned for a special purpose, on the score of public utility, the sequestration is limited to that particular use. Land taken for a highway is not thereby convertible into a common; as the property is not taken, but the use only, the right of the public is limited to the use." The finding of the court is conclusive upon the fact that the Connecticut Central Railroad Company, this plaintiff's predecessor in title, and the plaintiff, constructed and maintained bars at the crossings where the defendants had been accustomed to use them. These acts by both parties in interest must be taken as evidence of the interpretation given by them to the condemnation proceedings. "The nature and extent of a presumed right are measured by the adverse and unobstructed use of the right, and the use is conclusive evidence of the terms of the presumed grant." *Olcott* v. *Thompson*, 59 N. Hamp., 154. "Two easements may be enjoyed together." *Atkins* v. *Bordman*, 2 Met., 457; *Martein* v. *Delaware & Hudson Canal Co.*, 27 Hun, 533. The plaintiff lays great stress on the fact that the title was obtained by foreclosure of the mortgage bonds of the Connecticut Central Railroad, as though by some occult process greater interests were conveyed by such a proceeding than by ordinary purchase. This claim might be safely discarded on the general principle that one cannot convey more than his own interest in property; but the exact question has been adjudicated, and it was held that "a purchaser at a mortgage sale cannot interfere with a farm-crossing." *Hunter* v. *Burlington & Cedar Rapids R. R. Co.*, 76 Iowa, 490.

3. An action of trespass or ejectment might have been

brought, but the plaintiff seeks an injunction. A strict construction of these proceedings and the interpretation gathered from the acts of the parties certainly throw great doubt over the plaintiff's claims of exclusive possession, and if they raise, as we claim they do, a question of disputed title to these crossings, no injunction will lie. "The relief in equity will be denied where the plaintiff's title is in dispute." Lewis on Eminent Domain, § 633. "But if the entry is made with the consent of the owner, upon some understanding as to the further adjustment of compensation, or if the owner acquiesces in a possession taken without his knowledge, he cannot enjoin the use of his property until he has exhausted his legal remedies or they are shown to be inadequate." Id., §§ 633, 634. A land owner may acquire a right of way across a railroad notwithstanding the statute. *Fisher* v. *N. Y. & N. E. R. R. Co.*, 135 Mass., 107. "An injunction will not be granted where the right to it as a matter of law is unsettled." *Del., L. & W. R. R. Co.* v. *Central Stock Yard Co.*, 43 N. Jer. Eq., 71, 77. "The cases in which a party will be denied an injunction, and be put on his action at law for damages, by reason of his delay in applying for the injunction, and the great injury which would result to the party who has thus been permitted to proceed, are those where such party has proceeded in good faith founded in the belief of his right to do so." *Vick* v. *Rochester*, 46 Hun, 607.

4. The statute will not be extended by implication. "No more is to be taken than is necessary for the accomplishment of the public object; and if the language of the act admits of a construction which will leave a fee in the owners subject to a public easement, it will be so construed." *N. York & Harlem R. R. Co.* v. *Kip*, 46 N. York, 546; *Gardner* v. *Brookline*, 127 Mass., 358; Mills on Eminent Domain, § 49. "Land condemned for railroad purposes cannot be used for any other." *Proprietors of Locks & Canal* v. *Nashua & Lowell R. R. Co.*, 104 Mass., 1. "No implication ought to be indulged that a greater interest or estate is taken than is absolutely necessary to satisfy the language and object of

the statute." Mills on Eminent Domain, § 49; *Washington Cemetery* v. *Prospect Park & Coney Isl. R. R. Co.*, 68 N. York, 591. "If there are doubts as to the extent of the power, after all reasonable intendments in its favor, the doubts should be resolved by a decision adverse to the claim of power." *N. York & Harlem R. R. Co.* v. *Kip, supra.*

LOOMIS J. This is a complaint for an injunction to prevent the defendants from crossing the railroad track of the plaintiff. The following is a brief statement of the material facts contained in the finding.

The land in question, now occupied by the plaintiff's railroad tracks, was formerly owned by William G. Comstock, the father of the defendants, who derived title by deed from him, and it formed part of one contiguous tract of land forty-four rods wide, and extending easterly from Main Street in East Hartford about two hundred rods. In 1875 the Connecticut Central Railroad Company took, by condemnation for railroad purposes, a strip of land, including that now in question, extending northerly and southerly through said entire track, dividing it into two nearly equal parts, and leaving no access to that part lying east of the railroad, except by crossing the railroad; and when the tracks were laid on the strip of land so condemned the Connecticut Central Railroad Company constructed suitable crossings at two places where said Wm. G. Comstock, Sen., had been accustomed to pass from one part of the tract to the other, and these crossings were maintained by the Connecticut Central Railroad Company as long as it continued to run and operate the road, and have since been maintained by the plaintiff corporation until August, 1888, and said William G. Comstock, Sen., while he continued owner of the tract was, and the defendants since they acquired title have been, accustomed at all times when they had occasion for farm purposes to cross the railroad upon the two crossings mentioned until the date last referred to.

In October, 1875, the Connecticut Central Railroad Com-

pany mortgaged its railroad, including this land, to secure certain bonds, and in 1887 the treasurer of the state foreclosed the mortgage, and the title became absolute in him. In December, 1887, the state treasurer by good and sufficient deed conveyed all the right, title and interest that formerly belonged to the Connecticut Central Railroad Company in said railroad and in said land to the plaintiff corporation, which has ever since owned and operated the railroad over the land in question.

In the year 1888 a new highway was laid out and opened for public travel, extending from Main street easterly along the south line of the defendants' land, which highway crosses the railroad in the immediate vicinity of the southerly crossing previously maintained by the railroad companies for the use of the defendants, but since that time it has not been used by these defendants.

The other farm crossing near the center of the above tract of land remained, and was used by the defendants as before, until a short time before the commencement of this suit, when the plaintiff took up the crossing and erected a fence on the sides of its railroad tracks to prevent the defendants from crossing. But the defendants insisted upon their right to use the crossing near the center of their land, and tore down the fence so erected by the plaintiff, and have since continued to use it as before.

In the proceedings to condemn the land for railroad purposes no reference of any kind was made to the farm roads which William G. Comstock, Sen., had been accustomed to use on the land, nor to any future use of the same.

The court further finds that "no evidence was offered to prove that the use of said farm crossing" (referring to the central one,) "as it had been heretofore used by the defendants, was unreasonable or inconsistent with the plaintiff's use of said strip of land as it has been accustomed to operate its railroad, or that the use of the farm crossing by the defendants will in the future interfere in any way with the use of the same land by the plaintiff corporation for railroad purposes."

The general question arising upon these facts is, whether the defendants have a right to have the crossing in question kept open and maintained for their use?

Upon what foundation can any such right rest in this case? The defendants do not claim to have gained a right to cross by adverse user, for the time is inadequate to confer such a right; neither do they claim a right of way of necessity, for in 1888 a highway was laid out and opened for public use along the south line of the land in question, and it is obvious that any point on the entire tract may be reached from this highway without crossing the railroad at all, and the most remote point is distant only forty-four rods.

The argument in behalf of the defendants, although stated in different forms, seems to be based principally upon the assumption that when land is taken under the power of eminent domain for railroad purposes, no exclusive right to the possession and control is thereby vested in the railroad company, but that there is left in the original landowner, not only the fee subject to the easement, but also a right to use the same land in any manner not inconsistent with the railroad purposes for which the land was condemned, and that the question whether the landowners' proposed use is inconsistent or not with the use for which the land was condemned, is a question of fact to be determined by the evidence in the particular case. The special finding in the case at bar, that no evidence was offered to show such inconsistent use, renders it probable that the trial judge may have accepted this idea as the basis of his judgment for the defendants.

The defendants cite *Imlay* v. *Union Branch R. R. Co.*, 26 Conn., 255, as supporting their contention. It does not seem to us to furnish such support. The question in that case was whether the location of a railroad upon a public highway amounted to the imposition of a new servitude, in addition to and distinct from the other, so that the owner in fee was entitled to compensation therefor. The able discussion of the question by STORRS, C. J., was directed solely to the point that a taking of land for railroad purposes was

a very different thing from a taking for highway purposes, and the conclusion reached was that on that account the landowner was entitled to compensation. In the argument for the defendants in that case as in this, the rights retained by the landowner after condemnation of his land for railroad purposes were illustrated by reference to the rights of an adjoining owner in the highway. The opinion in that case shows that such an argument must be misleading. But it may be suggested that the object of citing that case was to show the principle there laid down and applied, namely, "that when land is condemned for a special purpose, on the score of public utility, the sequestration is limited to that particular use. Land taken for a highway is not thereby convertible into a common; as the property is not taken, but the use only, the right of the public is limited to the use—the specific use for which this proprietor has been deprived of a complete dominion over his own estate."

We have no fault to find with the principle here laid down, but the question recurs—what are the purposes for which land is condemned by a railroad company, as in this case? To us it seems obvious that there is little analogy between the case of a highway and a railroad, but in most respects there is contrast rather than analogy, for in the case of a highway the use is general and open to all, including the adjoining landowner as part of the public, but the public have no exclusive right to occupy any particular part or put any permanent structure upon the way. It is taken simply for public travel over it, while on the other hand a taking for railroad purposes is necessarily peculiar, permanent and exclusive. This scarcely needs other demonstration than that addressed to the eye from the mere appearance of a railroad, with its level grade, often far above or below the general surface of the adjoining ground, with its iron rails firmly laid above and upon the projecting cross-ties adapted solely to one special mode of conveyance—to vehicles of immense weight, speed and momentum, and to agencies for locomotion of the most hazardous kind.

Our statutes that require all railroad companies (under

certain qualifications) to build continuous fences on both sides of their roads, implies that their possession is exclusive and that adjoining landowners have no greater rights than others. For, if the law is as claimed, then the right of the landowner to make entry on the track would not be confined to regular places, but he might cross anywhere along the line of his land and might travel lengthwise as well as crosswise, unless indeed the court should first determine, as matter of fact, that the proposed use would interfere with the operation of the railroad.

It cannot be that the question is one of fact. If so, there would be no rule at all that could be relied upon. It would vary as often as a case arose with the adjoining owner.

In view of the responsibility of railroad companies for safely carrying persons and property and the great hazard to human life and property from obstructions on the track, the power to exclude every one from the railroad limits must be left, as matter of law, absolutely with the officers of the company, who are immediately responsible, subject only to such state supervision as may be deemed expedient. And such is the established doctrine as declared by a general consensus of legal authority.

REDFIELD, C. J., says, in giving the opinion of the court in *Jackson* v. *Rutland & Burlington R. R. Co.*, 25 Verm., 159:—"The right of a railway company to the exclusive possession of the lands taken for the purposes of their road differs very essentially from that of the public in the land taken for a common highway. The railway company must, from the very nature of their operations, in order to the security of their passengers and workmen and the enjoyment of their road, have the right at all times to the exclusive occupancy of the land taken, and to exclude all concurrent occupancy by the former owners in any mode and for any purpose. It is obvious that the right of the railway to the exclusive occupancy must be for all the purposes of the roads much the same as that of an owner in fee." The Supreme Court of Massachusetts says:—"The right acquired by the corporation, though technically an easement, yet requires for its enjoy-

ment a use of the land permanent in its nature and practically exclusive." *Hazen* v. *Boston & Maine R. R. Co.*, 2 Gray, 580. The Supreme Court of Vermont says:—"Those who control, manage and operate the railroads in the country should have the full and exclusive possession and control of the land taken for the legitmate use of the road within the lines thereof and embraced within the fences that by the laws of this state the railroads are required to keep upon the sides of their road. Although the right of the railroad company is but an easement, and not a fee, this does not preclude their having the sole and exclusive possession of the land while in the exercise of that easement. The fact that upon the abandonment and surrender of their road and charter the land would revert to the former owner, does not curtail their right to its exclusive use if necessary. . . . . Everything that tends to increase the danger of travel upon our railroads, public policy requires should be prevented if practicable. . . . . The railroad companies are always liable to suffer severely in their property in cases of accident. They are also, to a certain extent, liable to others for injuries resulting from such causes, and to this liability they should be strictly held. At the same time we think they should have such sole and exclusive control of the land within the lines of their road as shall enable them so to keep it as to exclude all probability of any accident resulting from any outside interference with such possession." *Troy & Boston R. R. Co.* v. *Potter*, 42 Verm., 274. The Supreme Court of Massachusetts says, speaking of the rights of a railroad company to the land condemned by it for railroad purposes:—"The mode of occupation and the degree of exclusiveness necessary or proper for the convenient exercise of its franchise, are within the absolute discretion of the managers of the corporate functions. They are the sole judges of what is proper or convenient as means for attaining the end and performing the service for which the corporate franchises were granted." *Proprietors of Canals & Locks* v. *Nashua & Lowell R. R. Co.*, 104 Mass., 9.

In further confirmation of our position we also refer to *Hayden* v. *Skillings*, 78 Maine 413; *Conn. & Passumpsic*

Rivers R. R. Co. v. *Holton*, 32 Verm., 43; *Boston Gas Light Co.* v. *Old Colony & Newport R. R. Co.*, 14 Allen, 444; *Presbrey* v. *Old Colony R. R. Co.*, 103 Mass., 1; *Brainard* v. *Clapp*, 10 Cush., 6; *Fayetteville R. R. Co.* v. *Combs*, 51 Ark., 324, 328; *Williams* v. *Michigan Central R. R. Co.*, 2 Mich., 259; *Burnett* v. *N. & C. R. R. Co.*, 4 Sneed, 528; Mills on Eminent Domain, § 208; Pierce on Railroads, 159, 160; 3 Wood's Railway Law, 1544.

The suggestion that the right of crossing was never condemned by the railroad company because the farm roads previously existed at the same place and had long been in use by the owner of the land, hardly requires a separate answer. Mr. Comstock was the sole and absolute owner in fee, and in possession of one and only one entire estate. There was no easement, no dominant and no servient estate, and the taking without exception or qualification necessarily took the whole for railroad purposes. The fact that the land had long been used for a farm road has no more materiality than would the fact that a special crop had always been cultivated upon it. Neither is there any legal significance in the fact that the railroad company had for several years kept open the crossings under the circumstances mentioned in the finding.

Only one other matter remains which it is important to consider, and that is the effect upon this action of a statute passed in 1889, and found on pages 81 and 167 of the session laws of that year. It is entitled "An act to prevent arbitrary removal of farm crossings by railroad companies." The second section, which is all that needs to be considered in the present suit, is as follows:—"No railroad company shall remove, obstruct or otherwise interfere with any such crossing, until the legal right so to do shall have been finally settled by a judgment or decree of the Superior Court in the county where such crossing is located; and any railroad company claiming to be aggrieved by such crossing may bring its complaint against the person or persons owning the land adjoining such crossing, to said Superior Court, which court shall hear and determine the rights of the parties, subject to the right of appeal as in other civil actions. Any railroad

company which shall violate the provisions of this section shall forfeit for every such violation the sum of one hundred dollars, which may be recovered in an action upon this statute by any person aggrieved thereby."

It seems manifest that one principal object of this section of the statute was to compel railroad companies, in all cases to which it is applicable, to bring a suit and appeal to the courts to settle such controversies, instead of arbitrarily taking the remedy into their own hands and asserting their rights by brute force.

The plaintiff then, having brought a proper suit before the tribunal named in the statute, surely cannot be turned out by the same statute that requires it to come into court. Any objection therefore founded upon this statute renders it indispensable to show that the present suit is not such an one as the statute contemplated. And here the only possible question that can be raised is, whether the statute is exclusive as to the form of remedy and requires an action at law instead of a proceeding in equity.

But what foundation is there for such construction? The statute is silent as to the form of remedy. It simply uses the term "complaint," which is just as applicable to equity as to law. Section 28 of the practice act in terms provided that the word "complaint" should be substituted, not only for "declaration," but also for "petition" or "bill in equity." There is nothing then in the prescribed mode of coming into court that would exclude the present proceedings. Is there any clue in the action required on the part of the court upon the complaint? The statute characterizes the action on the part of the court as a judgment or *decree*. The word "decree" applies peculiarly to the final determination of a court of equity as distinguished from that of a court of law. This alone would seem to justify us in construing the statute as referring to complaints in equity as well as at law.

But it may be suggested that the statute also speaks of settling a legal right; but this is not inconsistent with the view we have taken, for a legal right may be settled by a decree in equity. Where, as in the case at bar, the jurisdic-

tion of a court of equity is invoked in aid of a legal right, upon the ground of averting irreparable injury, the court first determines the legal right, and if that is free from doubt and the exigency requires it, the court will at once intervene and protect the right by decree of perpetual injunction.

Although a complaint in trespass was open to the plaintiff, yet the injury was liable to prove a recurring one, and to be attended with great loss of property and of life, so that the use of a preventive remedy by injunction was eminently proper.

As the finding fails to give the particular date when the railroad company obstructed the crossing by the erection of a fence, it may be well to state that no claim was made that it was after the passage of the act last referred to, and it will be seen that the defendants' answer to the amended complaint gives the date as August 14, 1888; so that there is no foundation for any claim that the railroad company violated the statute by first asserting its rights in the manner indicated.

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

In this opinion the other judges concurred.

JOHN O'BRIEN *vs.* FRANK MILLER AND ANOTHER.

New Haven and Fairfield Cos., Jan. T., 1891. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

A team of the defendant's which was running away and could not be controlled by the driver, ran over and injured the plaintiff. In a suit brought for the injury it was held that the mere fact that the team was running away did not, as matter of law, raise a presumption of negligence on the part of the driver.

And the plaintiff held to have been properly nonsuited in the court below, when he offered no evidence but this of the defendants' negligence.

In such a case the fact that the team was running away comes in with all

the other facts for the consideration of the jury in determining whether in fact there was negligence.

[Argued January 21st—decided March 20th, 1891.]

ACTION for damages for an injury from the negligence of the defendants; brought to the Superior Court in New Haven County, and tried to the jury before *Sanford, J.* The plaintiff was nonsuited by the court, and a motion made to set aside the nonsuit being denied, the plaintiff appealed to this court. The case is fully stated in the opinion.

E. F. Cole, for the appellant.

D. Davenport, for the appellee.

ANDREWS, C. J. The plaintiff brought an action in the Superior Court for New Haven County against the defendants, demanding damages for being run over and injured by a horse belonging to the defendants.

The complaint alleged that the defendants' servant, while engaged in their business, negligently, carelessly and unskillfully drove a team belonging to them against and over the plaintiff, knocked him down, cut open his scalp, broke his right knee, and otherwise seriously injured him. The defendants in their answer admitted that a horse of theirs, while being driven by their servant in their business, collided with the person of the plaintiff; but they denied that such fact was caused by the fault, negligence or misconduct of themselves or their servant. The issue was closed to the jury. At the close of the plaintiff's evidence, when he had rested, the defendants moved for a nonsuit, which the court granted. The court having refused to set aside the nonsuit on motion of the plaintiff, he brings the case here by appeal.

The evidence offered by the plaintiff tended to show that he was an employee of the Naugatuck Railroad Company, and that on the day he was injured he was engaged in cleaning the Bank street crossing of that railroad in the city of Waterbury; that while so engaged a horse of the

defendants hitched to an empty coal cart dashed upon the crossing just in front of a locomotive engine which stood there blowing off steam, ran over the plaintiff, pitched him forward several yards to the ground, turned, ran again over the plaintiff and up the track, and could not be stopped till he had reached the defendants' stables; that the horse was frequently uncontrollable and unmanageable, and afraid of a locomotive, and that the plaintiff had been obliged to keep out of his way on other occasions; that at the time the horse struck the plaintiff he was running away, and was entirely beyond the control of the driver, who was at that time exerting his utmost skill to prevent the horse doing any injury to the plaintiff, and that the plaintiff did not see the horse until the instant he was hit, just as the horse was rearing up over him. No evidence of the cause that led up to the injury was offered.

In cases tried to the jury the rule is, that if there is substantial evidence produced by the plaintiff in support of his cause which should be weighed and considered by the jury, a nonsuit should not be granted. The plaintiff's right to recover in this action depended upon his proving negligence on the part of the defendants, either their own or of their servant. Without some proof of this he was properly nonsuited. The plaintiff's counsel does not deny this proposition. He argues, however, and upon this his whole claim rests, that the fact that the defendants' horse was running away was, without explanation, evidence from which the jury might find such negligence. If by this argument it is intended to claim that as a matter of law there is any evidence of negligence in the fact of a runaway horse, it is clearly wrong. *Button* v. *Frink*, 51 Conn., 342, was a case where the plaintiff claimed damages for injuries done to him by the defendant's horse while running away. The court said, (p. 349:—) "If a horse is running away with his driver, there is nothing in that fact itself which tends to show negligence in the driver, or which tends to show how the horse became unmanageable, any more than a house on fire tends to show the origin of the fire, whether accidental or other-

wise; and it would seem that it could be as well inferred in such a case that the party residing in the house was guilty of negligence in causing its destruction, in the absence of explanatory evidence showing the contrary, as it can be inferred from the mere fact that if a horse is running away that the driver is guilty of negligence in causing his running, in the absence of proof to the contrary. If such a doctrine should be established as the law, it is not easy to see to what extent it might be carried."

If however it is claimed only that the fact of the horse running away affords a presumption of fact that there was negligence on the part of the defendants, then of course it must be taken in connection with the other facts. There is the fact that the horse had previously been frightened when near the cars and had become unmanageable. This fact is not of itself evidence of negligence, although it might call for increased care on the part of the driver. And then there is the fact proved that at the time of the collision the driver was exercising the highest care to prevent injury. This, so far from showing negligence, is positive evidence the other way. No other fact is found in the evidence.

We think the nonsuit was properly granted, and that there is no error.

In this opinion the other judges concurred.

Mary E. Fay *vs.* James Reynolds.

New Haven and Fairfield Cos., Oct. T., 1890. Andrews, C. J., Carpenter, Loomis, Seymour and Torrance, Js.

In a civil issue it is proper that the jury should take into account all the presumptions which, according to the ordinary course of events or the ordinary experience of human nature, arise out of the facts proved. Our courts have not gone so far as to say that any artificial presumption beyond these should be allowed to come in.

[Argued November 6th 1890—decided March 20th, 1891.]

COMPLAINT under the bastardy act; brought to the Court of Common Pleas of Fairfield County, and tried to the jury before *Perry, J.* Verdict for the plaintiff, and appeal by the defendant. The case is fully stated in the opinion.

S. Tweedy, for the appellant.

J. E. Walsh, for the appellee.

ANDREWS, C. J. In the court below the defendant was tried upon a complaint under the bastardy act and found guilty. In his reasons of appeal from the judgment of that court he sets forth divers grounds of error, but it will be unnecessary to consider any of them, save those relating to the request to charge the jury, and that part of the charge hereinafter recited.

The defendant requested the court to charge the jury as follows: "In this case, to create a preponderance of evidence, the evidence must be sufficient to overcome the opposing presumption as well as the opposing evidence. There is a probability that a man will not commit any heinous or repulsive act, or one which would subject him to heavy damages, and there is an improbability that a man will do such acts as are charged against the defendant in this suit. Such a probability is one to the benefit of which the defendant is entitled. This is a presumption to which the defendant is entitled, which the jury ought to consider, and which ought to be overcome before they render a verdict against him."

The court in reply to this request charged the jury as follows:—"The defendant claims that in addition to his sworn denial of the charge, there is a presumption in his favor arising from what he claims is the probability that a man will not commit any heinous or repulsive act, or one which would subject him to heavy damages, and that there is an improbability that a man will do such acts as are charged against him here, and that that is a presumption which must be overcome by the plaintiff's evidence, as well as the force of his own denial. Such is his claim. In view

of this request I ought to inform you that the penalty for fornication, which is a misdemeanor, is a fine of not more than seven dollars, or imprisonment for not more than thirty days, or both. I charge you then, gentlemen, in reply to the request just referred to, that in arriving at your conclusion you will, of course, consider the probabilities of the case. You are to consider whether the defendant would probably do the act with which he is charged, under the circumstances detailed in the evidence. You are to consider the nature of the act and its probable consequences. You are to consider human nature and its many infirmities. You are, in short, to consider the probability of the truth of the plaintiff's charge, as it is detailed by her, and make that a factor in your conclusions."

In reading the charge it seems quite evident that the trial judge intended to comply with the request. True, he did not say to the jury that the request was correct and laid down the right rule of law, but he did what was pretty nearly equivalent to so saying. He stated to the jury the defendant's claim, and immediately followed the statement with remarks which have no significance except on the theory that the defendant's claim embodied the rule of law by which they ought to be guided. We think the judge intended to be so understood and that the jury must have so understood him. The argument of the defendant's counsel does not controvert this position. But he says the judge, in the same connection in his charge, modified the rule which would be so inferred, and thereby gave to the jury, not the rule of the request, but a very different one. The judge said to the jury that in view of the defendant's request he ought to inform them that the penalty for fornication, that being a misdemeanor, was a fine not exceeding seven dollars, or imprisonment in the common jail not exceeding thirty days, or both. It is complained that by this remark he withdrew from the jury the rule contained in the request and fixed their minds on the penalty alone. We do not so understand that remark. It was really an aid to them in the application of the rule. The defendant says there is a

presumption that a man will not commit a heinous and repulsive act. Let this be granted. A presumption, or a probability,—for in this connection these words mean the same thing—is an inference as to the existence or non-existence of one fact from the existence or non-existence of some other fact, founded on a previous experience of that connection. As a general rule men do not commit heinous and repulsive acts nor do they commit acts which subject them to heavy damages. The probability that a man will not commit an act that will subject him to heavy damages flows from the fact that the act is followed by the damages, and the weight of the probability bears an exact ratio to the amount of the damages. And those acts which are heinous and repulsive are not all equally so, even when they are criminal. That quality of an act which makes it heinous and repulsive is, or may be, something entirely distinct from its being criminal. An act may be criminal and not be heinous or repulsive; and sometimes an act may be in its nature heinous and repulsive and not be criminal; or it may be made criminal, and be heinous and repulsive because it is followed by a disgraceful punishment. The probability that a man will not commit a heinous and repulsive act arises not so much out of its being criminal or not criminal, as it does out of the known repugnance of mankind to do such acts, and it is proportioned to the degree of their heinousness and repulsiveness.

There is no uniform rule by which this quality of an act can be measured; nor is there any fixed scale by which the probabilities that a man will not do them can be weighed. The same act often is less heinous and repulsive under some circumstances than under others.

On the other hand all men are not equally free from committing heinous acts. Men have their weaknesses. Human nature is much more prone to do some acts than others. It seems to us that the court below properly called the attention of the jury to the character of the act in question and to the infirmities of human nature. In no other way than by considering both these factors could the rule invoked by the defendant be safely applied by the jury.

In *Mead* v. *Husted*, 52 Conn., 53, this court had occasion to consider instructions given to the jury in response to a request precisely like the request made in the present case. In that case the trial court, after pointing out the distinction between criminal cases and civil ones, said:—"In these cases (i. e. civil cases) the law requires juries to take into account, and sometimes to be governed by, probabilities; and among these probabilities are such as attach to human action. There is an antecedent probability that a man will not commit a crime. In a lesser degree perhaps there is a probability that a man will not commit any heinous or repulsive act, or one that will subject him to heavy damages." In commenting on this language of the Superior Court this court said:—"The charge as given was in advance of the doctrine as heretofore enunciated by this court. * * * Hitherto in this state we have held to the rule that in civil issues the result should follow the mere preponderance of the evidence, even though that result imputes the charge of felony. To that effect is the decision in *Munson* v. *Atwood*, 30 Conn., 102. It ought, however, to be regarded as still an open question in this state whether, as one factor in determining the preponderance of the evidence, the triers may consider the presumption in question. The present case does not require a decision upon that point. It is enough to say that the court will not go beyond the position taken by the court below."

We adhere to the rule so laid down. In a civil issue it is proper that the jury should take into account all the presumptions which, according to the ordinary course of events, or according to the ordinary experience of human nature, arise out of the facts proved. To so much each party is entitled. To so much each party must submit. And we are not prepared to say that any artificial presumption beyond these should be allowed to come in.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

THE STATE *vs.* GEORGE H. TURNER.

New Haven and Fairfield Cos., Jan. T., 1891. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

It is provided by Gen. Statutes, § 1454, that every person who shall enter upon the enclosed land of another, without permission, for the purpose of hunting or fishing, shall be fined, etc. Held, in a prosecution by a grandjuror for a violation of the statute—

1. That it was not necessary that the complaint should have been brought at the request of the owner of the land.
2. That it did not affect the case that the person described in the complaint as owner of the land, had leased the right of fishing in the stream to certain parties.
3. Nor that certain facts made it doubtful to the defendant whether certain signs forbidding fishing were placed along the stream in good faith by parties who had a right to fish there.
4. That it was no defense that the defendant did the acts without guilty intent.

[Argued January 23d—decided March 20th, 1891.]

COMPLAINT by a grandjuror for the violation of Gen. Statutes, § 1454, which forbids the entering upon the enclosed land of another, for the purpose of hunting or fishing thereon, without the consent of the owner; brought before a justice of the peace, and appealed by the defendant to the Criminal Court of Common Pleas of Fairfield County, and tried to the jury in that court, on the plea of not guilty, before *Walsh, J.*

The defendant was charged with fishing in Potatuck brook, upon land of one John B. Peck. Upon the trial the defendant offered evidence that Peck, the owner of the land, had not instituted proceedings against the defendant, and was not interested in the prosecution of the case; claiming that there could be no conviction under the statute upon which the complaint was based, unless the proceedings were commenced at his request. This evidence was excluded by the court and an exception taken by the defendant.

The defendant also offered evidence that there were signs

of parties known as the Rod & Reel Club forbidding fishing, placed upon land near by, upon which the club had no permission to fish; claiming therefrom that the defendant had reason to doubt the validity and legality of other signs along the stream, and therefore entered upon the land in question by mistake. This evidence was excluded by the court and an exception taken by the defendant.

The defendant also offered evidence that trout fry, supplied by the fish commission of the state, had been placed in the stream in question; claiming therefrom that a stream so stocked could not be made a private stream, but was open to the public so long as the property of the state was in it. This evidence was excluded and exception taken.

The defendant requested the court to charge the jury that if they found that Peck had leased to the Rod & Reel Club the right to fish in the brook where the same ran through his land, he was not the owner or occupant of the land for the purpose of fishing, and the jury should acquit the defendant. The court did not so charge. The charge is given in the opinion of the court.

The jury returned a verdict of guilty, and the defendant appealed to this court.

D. B. Lockwood, for the appellant.

1. The statute was passed for the protection of the owner of the land, and if the prosecution was got up by an outside party without his knowledge, that fact should be brought to the attention of the jury. If the owner does not desire the defendant prosecuted he should be acquitted.

2. The fact which the defendant claimed the right to show, that the Rod & Reel Club had put up signs to deceive the public, forbidding fishing on land where they had no right to make the prohibition, was one to which the defendant was entitled, as going to show that he did not suppose the notice here to have been rightfully put up.

3. The stream having been stocked by the fish commissioners of the state, was open to the public for the purpose of fishing. Gen. Statutes, § 2502.

4. If, as the defendant offered to show, Peck had leased to the Rod & Reel Club the right to fish in the brook where it ran through his land, he was not the owner or occupant of the land for the purpose of fishing. *Camp* v. *Rogers*, 44 Conn., 298; Wood's Landlord & Tenant, § 541; Taylor's Landlord & Tenant, § 178.

5. The defendant had the right to show that he did not knowingly and unlawfully enter upon the land for the purpose of fishing, and that if any such entry was made it was by accident and mistake. There can be no crime without a criminal intent. "*Actus non facit reum, nisi mens sit rea.*" "This, then, is the doctrine of the law, superior to all other doctrines, because first in nature, from which the law itself proceeds, that no man is to be punished as a criminal unless his intent is wrong." 1 Bishop's Crim. Law (3d ed.), § 372. See also *Fowler* v. *Padjet*, 7 T. R., 514; *Reg.* v. *Allday*, 8 Car. & P., 136; *Reg.* v. *Tolson*, L. R. 23 Q. B. Div., 168; *Meyers* v. *The State*, 1 Conn., 502; *Birney* v. *The State*, 8 Ohio, 230; *Crabtree* v. *The State*, 30 Ohio St., 382; *Farrell* v. *The State*, 32 id., 456; *Goetz* v. *The State*, 41 Ind., 162; *Fardach* v. *The State*, 24 id., 77; *Brown* v. *The State*, id., 113; *Stern* v. *The State*, 53 Geo., 229. A person is punished not because he has done the act but because he has done it with an evil intent. Endlich on Interpretation of Statutes, § 119, 129; *State* v. *McDonald*, 7 Mo. App., 510; *Hampton* v. *The State*, 45 Ala., 82; *Gordon* v. *The State*, 52 id., 308; *Morningstar* v. *The State*, 55 id., 148; *State* v. *King*, 86 N. Car., 603; *State* v. *Voight*, 90 id., 74. The statute is all in one sentence, and there is nothing to indicate in its punctuation that the words "knowingly and unlawfully" do not apply equally to everything prohibited by it. Any other construction would make the statute a delusion and a snare.

W. B. Glover and *J. C. Chamberlin*, for the State.

ANDREWS, C. J. The defendant was prosecuted before a justice of the peace in the town of Newtown upon a grand-juror's complaint, charging that "on the fourth day of April,

1890, at said Newtown, the defendant with force and arms did enter upon the enclosed lands of John B. Peck of said Newtown, at and near the Deep Hollow bridge over the Potatuck brook so called, in said town, without the permission of said Peck, for the purpose of fishing in said Potatuck brook, which flows on the land of said Peck at that point; against the peace and contrary to the statute in such case made and provided;" and he was convicted.

Section 1454 of the General Statutes, upon which the complaint was brought, so far as it relates to fishing, is that "every person * * * who shall enter upon the enclosed land of another, without the permission of the owner, occupant or person in charge thereof, for the purpose of hunting, trapping or fishing, taking or destroying the nests of birds, or gathering nuts, fruits or berries, shall be fined," etc. etc.

The defendant appealed from the justice court to the Criminal Court of Common Pleas in Fairfield County, and was there tried upon the same complaint, and on his plea of not guilty, by a jury, and was again found guilty, and was sentenced to pay a fine. He now appeals to this court.

Upon the trial before the jury the defendant offered evidence tending to show that the complaint was not brought and prosecuted at the request of the owner of the land over which said brook flows, and claimed that there could be no conviction under the statute unless the proceedings were commenced at the request of the owner of the land. This testimony was rightly ruled out. The authority of a grand juror to prosecute for crimes is fixed by law. It is not controlled or limited by the wishes of any person who may have been affected by the crime.

The evidence offered by the defendant in respect to signs on land adjoining the land of Mr. Peck, that in respect to the putting of trout fry into the brook, and that in respect to the Rod & Reel Club, was all properly excluded. It was all immaterial. It did not prove or disprove any material fact. It did not prove or tend to prove that the defendant did not enter the enclosed land of another for the purpose of fishing without having the consent of the owner.

The real question in the case arises under the defendant's fifth and sixth reasons of appeal. The defendant had claimed that he had the right to show that he did not knowingly and unlawfully enter upon the land of Mr. Peck for the purpose of fishing, and that if he had made any such entry it was by accident and mistake, and that therefore he could not be convicted. Upon this part of the case the court charged the jury as follows:—"I believe that the rule is well established that where the prohibition imposed by law, or the punishment prescribed, depends upon an act being done with knowledge or with evil intent, there must be evidence of such knowledge or intent, as well as of the intention to do the act, in order to convict. But I do not interpret this statute as containing such a prohibition, or that the punishment prescribed depends upon the act being done with knowledge or evil intent. In regard to the allegation under consideration, it seems to the court sufficient for the jury to inquire—Did the accused intend to do the thing he did, and was that thing a violation of the law? Did the accused go upon this particular piece of land, it being the land of another, namely, John B. Peck, without permission, for the purpose of fishing? If he did, it is immaterial in the opinion of the court whether he knew the owner's name at the time or not. This principle is now I believe well settled and generally recognized; and the claim made by some law writers that there is no crime without criminal intent should certainly be modified to this extent."

The question here presented is not a new one in this state. It has recently been before this court and was decided in accordance with the instructions above quoted. In *State* v. *Kinkhead*, 57 Conn., 173, the defendant was prosecuted under section 3092 of the General Statutes, which forbids any person licensed to sell liquor to "allow any minor to loiter on the premises where such liquors were kept for sale," for allowing one Dennis Murphy, a minor, to loiter on the premises where he was licensed to sell liquor. It was confessed that Murphy had been allowed to be in the room

where the liquors were sold. The accused asked the court to charge the jury that if they should find that the accused honestly believed Murphy to be a person over twenty-one years of age, and had good ground for so believing, and acted on that belief in allowing him to be in his bar-room, he should not be convicted of the crime charged, though in fact Murphy was a minor. The court declined to give that instruction, but said to the jury that if Murphy was in fact under twenty-one years of age, whatever the belief of the accused was, he was still guilty. This instruction was sustained. In *Barnes* v. *The State*, 19 Conn., 398., a like question was decided in the same way. Barnes was prosecuted for selling spirituous liquors to one Whitney, who was a common drunkard. It was held that evidence tending to show that Barnes did not know Whitney to be a common drunkard was not relevant. Similar decisions have been made in other states. *Commonwealth* v. *Emmons*, 98 Mass., 6, was a prosecution under a statute which provided that "the keeper of a billiard room or table, who admits a minor thereto without the written consent of his parent or guardian, shall forfeit," etc., etc. It appeared on the trial that at the time of the alleged offense, the supposed minor was almost twenty years old, was fully grown, and did business independently of his parents; and the defendant offered evidence to show that when the alleged minor came to his room, he, the defendant, asked him whether or not he was a minor, saying that if he was he must not enter, and that he replied that he was of full age. This evidence was excluded. Exceptions being taken to the ruling the Supreme Court said:—"The evidence excluded was immaterial. It did not tend to prove or disprove any essential fact. It did not show or have any tendency to show, either that the alleged minor was of age or that the defendant did not admit him to the billiard room kept by him. Nor was it material to show that the defendant did not know or have reason to believe that the alleged minor was under age. The prohibition of the statute is absolute. The defendant admitted him to the room at his peril, and is liable to the penalty whether

he knew him to be a minor or not. The offence is of that class where knowledge or guilty intent is not an essential ingredient in its commission and need not be proved." *Commonwealth* v. *Boynton*, 2 Allen, 160, was a prosecution for selling intoxicating liquors in violation of the statute. The defendant offered to show that he did not suppose and did not believe the liquor he sold to be intoxicating. This evidence was rejected. The court said:—"If the defendant purposely sold the liquor which was in fact intoxicating, he was bound at his peril to ascertain the nature of the article sold. When the act is expressly prohibited without reference to the intent or purpose, and the party committing it was under no obligation to act in the premises unless he knew he could do so lawfully, if he violates the law he incurs the penalty. The statutory rule that every man is conclusively presumed to know the law is sometimes productive of hardship in particular cases. And the hardship is no greater when the law imposes the duty to ascertain a fact." In *Commonwealth* v. *Farren*, 9 Allen, 489, and in *Commonwealth* v. *Waite*, 11 Allen, 264, the defendant in each case was prosecuted for selling adulterated milk, and each defended on the ground that he did not know the milk to be adulterated. It was held in each case that the defendant was under the law guilty. See also *Commonwealth* v. *Elwell*, 2 Metcalf, 190; *Commonwealth* v. *Mash*, 7 id., 472; *Commonwealth* v. *Raymond*, 97 Mass., 569; *Commonwealth* v. *Wentworth*, 118 id., 441.

In the case of *Commonwealth* v. *Mash*, above cited, Judge SHAW, in reply to a suggestion that where there is no criminal intent there can be no guilt, said:—"The proposition stated is undoubtedly correct in a general sense, but the conclusion drawn from it in this case by no means follows. Whatever one voluntarily does he of course intends to do. If the statute has made it criminal to do an act under particular circumstances, the party voluntarily doing that act is chargeable with the criminal intent to do that act." *Commonwealth* v. *Gray*, 150 Mass., 327.

The same doctrine has been approved and followed in

Rhode Island, in *State* v. *Smith*, 10 R. Isl., 258; in Wisconsin, in *State* v. *Hartfiel*, 24 Wis., 60; in Kentucky, in *Ulrich* v. *Commonwealth*, 6 Bush, 400. Other cases to the same effect are cited in the briefs.

The argument of the defendant is, that there can be no crime without a criminal intent; that a man cannot be punished as a criminal unless his intent is criminal. The argument is specious but not sound. "There is no occasion to impute to the legislature an intention to make an act a crime irrespective of the intent, for it is competent for the legislature to imply the intent by making these circumstances equivalent thereto. Knowingly and intentionally to break a statute must, I think, from the judicial point of view, always be morally wrong in the absence of special circumstances applicable to the particular instance and excusing the breach of the law; as for instance, if a municipal regulation be broken to save life or to put out a fire. But to make it morally right some such special matter of excuse must exist, inasmuch as the administration of justice, and indeed the foundations of civil society, rest upon the principle that obedience to the law, whether it be a law approved of or disapproved of by the individual, is the first duty of a citizen. Although *primâ facie* and as a general rule there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject matter, and may be so framed, as to make an act criminal whether there has been any intention to break the law, or otherwise to do wrong, or not." *The Queen* v. *Tolson*, 23 Q. B. Div., 172, WILLS, J. There is a large class of criminal statutes, of which the one now under consideration as well as those hereinbefore referred to are examples, which are properly construed as imposing a penalty when the thing forbidden is done, no matter how innocently, and in such a case the substance of the statute is that a man shall take care that the statutory direction be observed, and that if he fails to do so he acts at his peril. The failure to take care that the statutory direction is observed evidences

the criminal intent, or rather supplies it. *The Queen* v. *Tolson*, *supra*; *The Queen* v. *Prince*, L. R., 2 Crown Cas., 154.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

GEORGE HOTCHKISS *vs.* JOSEPH D. PLUNKETT AND OTHERS.

New Haven & Fairfield Cos., Jan. T., 1891. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

To justify the expenditure of money by a municipal corporation in indemnifying one of its officers for a loss incurred in the discharge of his official duty, it must appear that the officer was acting in a matter in which the corporation had an interest, in the discharge of a duty imposed or authorized by law, and in good faith.

There is no authority conferred on a school district to raise money for other purposes than those specified in Gen. Statutes, § 2155.

Where the members of the board of education of a school district were sued for an injury to the business reputation of the plaintiffs by their refusal to entertain a bid offered by the plaintiffs for furnishing stationery for the district, on the ground that they had some time before dealt dishonestly with the district, it was held that the matter was one in which the district as such had no interest and that its money could not be used for the defense of the suit.

[Argued January 27th—decided March 20th, 1891.]

SUIT for an injunction to restrain the defendants, as members and officers of the board of education of a school district, from paying out the money of the district for the defense of a suit brought against certain members and ex-members of the board, for malicious and wrongful acts in connection with their duties as members of the board; brought to the Superior Court in New Haven County. The defendants filed an answer, to which the plaintiff demurred. The court (*Fenn*, *J.*,) overruled the demurrer, and, the plaintiff making no further reply, rendered judgment for

the defendants. The plaintiff appealed. The case is fully stated in the opinion.

W. H. Ely, for the appellant.

The school district has no interest in the event of the suit in question, and the judgment therein cannot affect the corporate rights or corporate property of the district in any way. Such being the case, it has no right to assume its defense. 1 Dillon on Municipal Corp., § 147; *Gregory* v. *City of Bridgeport*, 41 Conn., 76; *Vincent* v. *Inhab. of Nantucket*, 12 Cush., 103; *Halstead* v. *Mayor &c., of New York*, 3 N. York, 430; *People* v. *Lawrence*, 6 Hill, 244; *Wadsworth* v. *Henniker*, 35 N. Hamp., 189; *Merrill* v. *Plainfield*, 45 id., 126. "The principle which runs through the cases is, that corporations have only such powers as are within the scope of their charters; and where they are wasting or misappropriating the corporate property or funds, courts of equity treat them as trustees of the property for the benefit of the individual corporators, * * * and it makes no difference whether the corporation is a joint stock manufacturing or trading corporation, or a municipal or territorial corporation, or is of the character of this school district." *Scofield* v. *Eighth School District*, 27 Conn., 499, 504. The powers of school districts are fixed by the statutes. Gen. Statutes, §§ 2130, 2132, 2135, 2155.

J. W. Alling and *S. C. Morehouse*, for the appellee.

1. The law is well settled that a municipal corporation has power to indemnify its servants in cases like the present. Dillon on Mun. Corp., § 114; *Nelson* v. *Inhab. of Milford*, 7 Pick., 18; *Bancroft* v. *Inhab. of Lynnfield*, 18 id., 566; *Thayer* v. *City of Boston*, 19 id., 511, 516; *Babbitt* v. *Selectmen of Savoy*, 3 Cush., 533; *Hadsell* v. *Inhab. of Hancock*, 3 Gray, 526; *Fuller* v. *Inhab. of Groton*, 11 id., 340; *Minot* v. *West Roxbury*, 112 Mass., 5; *Pike* v. *Town of Middletown*, 12 N. Hamp., 278; *Baker* v. *Inhab. of Windham*, 13 Maine, 74; *Sherman* v. *Carr*, 8 R. Isl., 431; *Cullen* v. *Town of Carthage*, 103 Ind., 196; *Roper* v. *Town of Laurinburg*, 9 N. Car.,

427; *State* v. *Town of Hammonton*, 38 N. Jer. Law, 430; *Barnert* v. *City of Paterson*, 48 id., 395; *Rex* v. *Inhab. of Essex*, 4 T. R., 591; *Attorney Gen.* v. *Mayor of Norwich*, 2 M. & Craig, 406; *Lewis* v. *Mayor of Rochester*, 9 Com. Bench, N. S., 401.

2. The board of education had power to pass this vote. They have the power of general superintendence over all the affairs of the district. Gen. Statutes, §§ 975, 2124, 2130, 2175, 2152, 2155, 2213; *Dibble* v. *Town of New Haven*, 56 Conn., 199; *Farrel* v. *Town of Derby*, 58 id., 234.

3. A court of equity has no jurisdiction of this question. The subject matter of indemnifying public servants belongs to the municipal corporation, and in the sphere of its legitimate jurisdiction a municipal corporation cannot be interfered with by a court of equity. *Sherman* v. *Carr*, 8 R. Isl., 431; *Dibble* v. *Town of New Haven*, 56 Conn., 199; *Attorney Gen.* v. *Mayor of Norwich*, 2 M. & Craig, 406. It is only where the subject matter is not, by express language, or by implication, properly within the control of a municipal corporation, that a court of equity may interfere. *Attorney Gen.* v. *Mayor of Norwich*, *supra*; *Lewis* v. *City of Providence*, 10 R. Isl., 97; *New London* v. *Brainard*, 22 Conn., 552; *Dibble* v. *Town of New Haven*, 56 id., 199; *Farrel* v. *Town of Derby*, 58 id., 234, supra. There can be no doubt but that the obtaining of supplies for the public schools was within the proper functions of the board of education of the district. Gen. Statutes, §§ 2124, 2130, 2155. Herein the case differs entirely from *Gregory* v. *Bridgeport*, 41 Conn., 76, where Brooks, in what he did, was in the discharge of no public duty, and with reference to his office the city of Bridgeport had "no duty to perform, no rights to defend, and no interest to protect."

ANDREWS, C. J. This is a complaint brought by a taxpayer of a school district of the city of New Haven, claiming an injunction to restrain the members and officers of the board of education of that school district from paying out the money of the district for an alleged unlawful pur-

pose. The defendants made an answer to the complaint, to which answer the plaintiff demurred. The court overruled the demurrer, found the answer sufficient, and rendered judgment for the defendants to recover their costs. The plaintiff filed exceptions, and brings the case to this court by appeal. The sole question upon the record is as to the sufficiency of the answer. The answer to this question involves the discussion of a more general one which lies back of it.

On the 19th day of September, 1890, the board of education voted to employ counsel and to defend at the expense of the school district a certain action brought by William J. Atwater and Edward I. Atwater against William H. Carmalt, Thomas O'Brien, Max Adler and George T. Hewlett, returnable to and then pending in the Superior Court for New Haven County. Pursuant to the vote the board employed counsel who had appeared in court and were defending the suit. In the year 1889 the said Carmalt, O'Brien, and Adler were members, and the said Hewlett was clerk, of the board of education of the school district. At the time the vote was taken Carmalt had ceased to be a member. The general question then is, whether or not the board of education can lawfully use the money of the district to defray the expenses of the defense they have undertaken.

It is not denied by the plaintiff that a municipal corporation may expend money to indemnify its officers for a loss incurred in the performance of their duties in a proper case. But he says this is not a proper case; that the action brought by the Atwaters against Carmalt, O'Brien, Adler and Hewlett, was brought against them personally, and for a cause such that it is their duty to pay all damages that may be recovered therein, as well as the expenses of defending the same. And it is not denied by the defendants that an injunction ought to issue at the complaint of a tax-payer to restrain any illegal expenditure of the money of the school district. But they say it is not illegal to pay the expenses of defending the suit.

In order to justify the expenditure of money by a munici-

pal corporation in the indemnity of one or any of its officers for a loss incurred in the discharge of their official duty, three things must appear. First, the officer must have been acting in a matter in which the corporation had an interest. Second, he must have been acting in discharge of a duty imposed or authorized by law. And third, he must have acted in good faith. *Gregory* v. *City of Bridgeport*, 41 Conn., 76; *Merrill* v. *Plainfield*, 45 N. Hamp., 126; *Vincent* v. *Inhab. of Nantucket*, 12 Cushing, 103; Dillon on Municipal Corporations, (4th ed.,) § 219. If the cause of action set forth in the complaint of the Atwaters against Carmalt, O'Brien, Adler and Hewlett comes within these conditions, then it would be lawful for the school district to assume the defense.

School districts are quasi corporations of a public nature, with limited powers, strictly defined by statute, and they have no right to raise money by assessment and appropriate the same to purposes not within the scope of those powers, even though a majority of their inhabitants expressly vote so to raise and appropriate it. *Berlin* v. *New Britain*, 9 Conn., 180; *West School District* v. *Merrills*, 12 Conn., 438; *Bartlett* v. *Kingsley*, 15 Conn., 327, 335. The powers of school districts are enumerated in section 2155 of the General Statutes, which provides that "every school district shall be a body corporate and have power to sue and be sued, to purchase, receive, hold and convey real and personal property for school purposes; to build, purchase, hire and repair school houses, and supply them with fuel, furniture and other appendages and accommodations; to establish schools of different grades; to purchase globes, maps, blackboards and other school apparatus; to establish and maintain a school library; to employ teachers, except for such time as the town may direct the school visitors to employ the teachers, and pay the wages of such teachers as are employed by the district committee in conformity to law; to lay taxes and borrow money for all the foregoing purposes; and to make all lawful agreements and regulations for establishing and conducting schools, not inconsistent with the

regulations of the towns having jurisdiction of the schools in such district."

There is no authority conferred on a school district to raise money other than such as is conferred by this statute. The grant of power to raise money for the specified purposes is doubtless a prohibition of the raising of money for any other purpose.

The entire complaint in the action brought by the Atwaters against Carmalt, O'Brien, Adler and Hewlett appears in the statement, as well as the whole of the answer made by the present defendants. The gravamen of that complaint is, that Carmalt, O'Brien, Adler and Hewlett had conspired and agreed together to injure the business reputation and standing of the Atwaters and to hinder and obstruct them in the prosecution of their business, and to prevent them from dealing with the school district; and that, in pursuance of such conspiracy, they seized and secreted a bid which the Atwaters had made to the school district to furnish stationery for use in its schools; and in further pursuance of the same conspiracy that they had falsely stated to different parties that the Atwaters carried on their business dishonestly and had cheated the school district.

The answer made by the defendants in the present case is quite long. It contains eleven paragraphs, each of which is here condensed as much as is possible. The substance of them is—First, that the said William J. and Edward I. Atwater, about August, 1889, contracted with the board of education for the district of New Haven to furnish writing paper of an agreed quality for the use of the district, and on the 20th day of November, 1889, presented a bill of $2,205.70 therefor. Second, that said board, believing the quality of the paper so furnished to be inferior, refused to pay said sum, but tendered to said Atwaters in full the sum of $2,000. Third, that said Atwaters took said $2,000, but refused to accept it in full, and afterwards brought a suit against the district to recover the balance of $205.70. Fourth, that the district defended in the suit, alleging by way of defense the inferior quality of the paper, and the

acceptance of the sum tendered. Fifth, that before the decision of the case, and about July 15th, 1890, said board wished to make another contract to furnish paper for the district; that they did not publish for bids, nor did they request said Atwaters to furnish any prices. Sixth, that on July 15th, Edward I. Atwater handed to Hewlett a sealed package, saying it was a proposal of prices for which said Atwaters would furnish paper. Seventh, that said board, believing said Atwaters had not complied with their former contract, and deeming it to be for the best interests of the district not to deal with them, did not open said sealed package. Eighth, that on the 29th day of July, 1889, said suit was decided in favor of the district, the court deciding that the said Atwaters had accepted said $2,000 in full, and also finding the issue with regard to the quality of the paper in favor of the Atwaters. Ninth, that on the 12th day of September, 1890, the said Atwaters brought a certain action of tort against Carmalt and the others (which is the suit hereinbefore mentioned). Tenth, that said board on the 19th day of September, 1890, voted to retain counsel and defend at the expense of the district the said suit. Eleventh, that "in taking said action said board and all of the members thereof had either personal knowledge or the belief that the defendants in that suit, in all their dealings or refusals to deal with the Messrs. Atwater, had acted in good faith, according to their best judgment as to what was for the best interest of the district and their duty in the premises, and without any intent to do wrong or injustice to the Messrs. Atwater; and said board and the members thereof believed in good faith that said suit had been brought by said Atwaters against the said Carmalt, O'Brien, Adler and Hewlett in their capacity as members of said board or clerk thereof, and in which they had no private interest or concern."

Looking at the answer to determine its sufficiency, the first thing observed is that it does not deny any of the allegations in the present complaint, nor does it deny any of the matters and things alleged in the complaint of the Atwaters against

Carmalt and the others therein named. Nor does it aver that the matters and things set forth in itself are the same matters and things alleged in the said Atwaters' complaint. For the purpose of the present inquiry we must take the allegations in the present complaint as well as those in the Atwaters' complaint to be true. Every material allegation in any pleading which is not denied by the adverse party must be deemed to be admitted, unless he avers a want of knowledge, etc. Rules under the practice act, art. 4, sec. 4. *Primâ facie* the acts, matters and things charged in the Atwaters' complaint are such as would do them serious injury, and for which the defendants therein named might justly be subjected in damages.

It seems to us to be too plain for anything but statement that the school district of the city of New Haven has no interest in injuring the business reputation and standing of a copartnership of its citizens; nor is there any duty authorized by law, or imposed upon any of its officers or agents, to engage in a combination for such purpose, or to make charges of dishonesty and cheating. Any attempt to use the money of the district to defend its agents from such acts would seem to be so palpable a misuse of it that the court would not hesitate to interfere by way of an injunction.

The answer we are now considering is in the nature of a plea in bar. A plea in bar is one that undertakes to be a conclusive answer to the entire cause of action. It follows from this property that in general it must either deny all or some essential part of the averments of fact in the complaint, or, admitting them to be true, allege new facts which obviate or repel their legal effect. In the first case the pleading is said to traverse the matter in the complaint, and in the latter to confess and avoid it. If the new facts are such as destroy the *primâ facie* legal effect of the facts averred in the complaint, it defeats the action.

We have seen that there are no denials in the answer. We are to inquire then whether the facts in it are such as destroy the *primâ facie* legal effect of the matters alleged in the complaint. That is to say, does the answer show that the acts

which the Atwaters' complaint charges said Carmalt, O'Brien, Adler and Hewlett with doing, and which are admitted by the pleadings to have been done by them, are such that they come within the rule hereinbefore stated as necessary to justify the expenditure of the money of the school district in their defense? If it does, then the answer is sufficient and the demurrer was properly overruled. If it does not, then the demurrer should have been sustained.

We have examined the answer with care and are not able to find such facts in it. The first ten paragraphs recite certain things done by the said Carmalt and the others, and certain things done by the board of education. All these things so stated are confessed by the demurrer to be true. But they are all consistent with the acts and things charged by the Atwaters. Neither the truth nor the legal character of any of the matters alleged by the Atwaters is changed by any or all the things so stated. The eleventh paragraph declares the knowledge or belief of the members of the board that the said Carmalt, O'Brien, Adler and Hewlett had acted in good faith in what they did, and the belief of the members of the board that it was for the best interests of the district not to deal further with the Atwaters. The whole force of the paragraph is expended on the belief of the members of the board. It does not allege, as a fact, that Carmalt and the others acted in good faith. It says the members of the board believed they did so act.

The fact of their good faith is one thing. The belief of the members of the board in their good faith is quite a different thing. But if their good faith be admitted, there is nothing in the answer to show any duty resting on them to do what they did; nor anything to show an interest in the district to have it done.

One reason of demurrer was that the answer did not show any authority in the board of education to expend the money of the district in the way they had voted to expend it. We have had no occasion to consider this question. In this case it made no difference, because we are of opinion that under the circumstances as here presented the district it-

self could not properly assume the defense of the suit. In any case it would be a very grave question whether a municipal corporation could make an indemnity to one of its own officers in any other way than by a vote in a meeting duly called for that purpose.

There is error in the judgment appealed from and it is reversed.

In this opinion the other judges concurred.

JAMES FARRELL *vs.* THE WATERBURY HORSE RAILROAD COMPANY.

Hartford Dist., Jan. T., 1891. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

The conception of negligence involves the idea of a duty to act in a certain way towards others and a violation of that duty by acting otherwise. It involves the existence of a standard with which the given conduct is to be compared and by which it is to be judged.

Where this standard is fixed by law, the question whether the conduct in violation of it is negligence, is a question of law.

And where the standard is fixed by the general agreement of men's judgments, the court will recognize and apply the standard for itself.

But where it is not so prescribed or fixed, but rests on the particular facts of the case and is to be settled for the occasion by the exercise of human judgment upon those facts, as where the standard is the conduct in the same circumstances of a man of ordinary prudence, there the question is one of fact and not of law.

In such a case this court will not review the conclusion of the court below, unless it can see from the record that in drawing its inference the trier imposed some duty upon the parties which the law did not impose, or absolved them from some duty which the law required of them in the circumstances, or in some other respect violated some rule or principle of law.

[Argued January 6th,—decided March 20th, 1891.]

ACTION for an injury from the negligence of the defendants; brought to the District Court of Waterbury, and

heard in damages, on a default, before *Cowell, J.* The court made the following finding of facts.

On November 10th, 1887, and for some time prior thereto, the plaintiff was duly licensed to make connections with the sewers in the city of Waterbury. On that day the defendant operated a horse-railroad on West Main street in that city, and its cars passed a given point every twelve minutes. In front of the premises of one Kilmartin, which was on the south side of the street, there was a double line of tracks to allow the cars to pass each other. The point of separation between these two lines commenced about one hundred and fifty feet west of Kilmartin's premises, and there was a slight rise of grade towards the east, the street running east and west. The sewer at this point is about fifteen feet below the surface, and is located between the two lines of track. On November 9th, the plaintiff commenced excavating for the purpose of connecting Kilmartin's premises with the sewer, and on November 10th, by ten o'clock in the forenoon, had reached to the depth of about twelve feet below the southerly line of the defendant's track.

The manner in which the cars passed the trench was by running them up to a point ten or twelve feet distant therefrom, then detaching the horses before the car came to a stop, the horses passing around the north end of the trench. The car without coming to a stop was pushed over the trench by one of the defendant's workmen stationed there for that purpose. The plaintiff also assisted a number of times that morning in pushing the car over the trench, so that he well understood the situation.

On the 10th, a workman, whose duties were generally in the horse-car stables, was driving the horses attached to the car which caused the accident. He was a relief driver, or one whose duty it was to relieve the regular drivers whenever it became necessary. He had had considerable experience as a driver on horse cars, and was considered a competent driver.

About ten o'clock in the forenoon, one of the plaintiff's workmen was at work in the trench under the north rail of

the south line of the defendant's tracks, and the plaintiff was standing in the west side of the trench, facing east, one foot on each side of the south rail of the south line of the track, bending over, giving directions to the workmen in the trench, and for this reason his mind was not alive to the fact that a car was approaching him from the west. The driver of the defendant's car as he came to the point where the turn-out separates, west of Kilmartin's, saw the plaintiff, and immediately called out to him to get out of the way, in a voice loud enough to have been heard by the plaintiff if his attention was not then occupied with the workmen in the trench, and was heard by the defendant's workman who was stationed at the trench for the purpose of pushing the car across it, and who was standing but a few feet from the plaintiff, which workman also called out to the plaintiff to assist in pushing the car. The plaintiff, however, did not hear the call.

Just at this moment the driver began preparations to detach the horses from the car, and for that purpose leaned over the forward rail to remove the pin which holds the coupling pin in place, but for some reason it could not be removed immediately, and the horses' heads reached within a few feet of the trench before the driver succeeded in withdrawing the pin. The car at this time was moving at the rate of three or four miles an hour from the momentum it had received, and from being pushed along by the workman whose duty it was so to do.

The driver, immediately after removing the pin and reining his horses away from the track, saw the plaintiff in close proximity to the forward end of the car. He immediately applied the brake, but the car struck the plaintiff, knocking him down, dragging him some distance, breaking his collar-bone, and otherwise severely injuring him.

No other notice of the approach of the car was given than is above set forth.

I find that the defendant was not negligent in running the car in the manner above described, unless the foregoing facts constitute negligence.

The plaintiff claimed that it was not in law negligence to have his attention concentrated on the workmen in the trench for a few moments to such an extent as to divert his mind from the approach of a horse car; also that he had the right to rely to some extent on the fact that the driver would see him, and would exercise care to avoid injuring him; also that, being lawfully on the track, the defendant owed him the duty of active vigilance to avoid injuring him; also that the driver was bound to use every reasonable effort to avoid injuring him after discovering that he was on the track exposed to injury.

On the foregoing facts, however, I find that the plaintiff was guilty of contributory negligence, and therefore assess to him $75 only as nominal damages. If the plaintiff was not on the above recited facts guilty of contributory negligence, his injuries were of such a character that he should recover six fold the assessed damages.

The plaintiff appealed.

J. O'Neill, for the appellant.

1. The driver of the horse car was guilty of negligence. The plaintiff was lawfully on the horse car track; he was licensed to make sewer connections and was performing his work in the place where he was injured; he was momentarily engaged in giving directions to his men in the trench. The car driver saw him at the distance of one hundred and fifty feet, and called out to him to get out of the way; but the plaintiff did not hear the call. The driver gave no further attention to the plaintiff until the instant before the accident happened; he was driving at the rate of three or four miles an hour, or about one hundred and fifty feet in thirty seconds; he was bending over the dash-board removing a coupling pin for the purpose of detaching the horses from the car. Under these circumstances the defendant was plainly under an obligation to make use of *active vigilance* as distinguished from ordinary care to prevent an accident to the plaintiff. There was no *active vigilance;* even ordinary care was not exercised. The driver knew that the plaintiff was on

the track; he called out to him to get out of the way; the plaintiff's back was towards him; he gave no evidence that he heard the call; his mind was momentarily engaged giving directions to the men in the trench; the driver continued to drive at the rate of three or four miles an hour; neither the horses nor the brake were under his immediate control. This, as it seems to us, was gross carelessness. *Com.* v. *Metropolitan R. R. Co.*, 107 Mass., 236; *Oldfield* v. *N. York & Harlem R. R. Co.*, 14 N. York, 310; *Mangam* v. *Brooklyn R. R. Co.*, 38 id., 455; *Mentz* v. *Second Av. R. R. Co.*, 3 Abb. Court of App., 274; *Pendrill* v. *Second Av. R. R. Co.*, 2 Jones & Sp., 481; *Baltimore City Passenger R. R. Co.* v. *MacDonnell*, 43 Md., 534; *Dahl* v. *Milwaukee City R. R. Co.*, 27 N. W. Rep., 185; *Kelly* v. *Hendrie*, 26 Mich., 255, 261.

2. The plaintiff was not guilty of contributory negligence. He had the same right to use the highway that the defendant had; he was not a trespasser, but was there by positive right. *Lyman* v. *Union Railroad Co.*, 114 Mass., 83, 88; *Howland* v. *Union Street R. R. Co.*, 150 id., 86; *Babcock* v. *Old Colony R. R. Co.*, id., 467; *Hegan* v. *Eighth Av. R. R. Co.*, 15 N. York, 380; *Adolph* v. *Central Park &c. R. R. Co.*, 65 id., 554; *Wilbrand* v. *Eighth Av. R. R. Co.*, 3 Bosw., 314; *Shea* v. *Potero & Bay View R. R. Co.*, 44 Cal., 414; *Erickson* v. *St. Paul &c. R. R. Co.*, 43 N. W. Rep., 332.

3. Even if the plaintiff were negligent this would not excuse the defendant, if after discovering the negligence of the plaintiff the accident could have been avoided by the exercise of ordinary care on the part of the driver. *Brown* v. *Lyman*, 31 Penn. St., 510; *Thirteenth St. Passenger R. R. Co.* v. *Boudrou*, 92 id., 475; *Barker* v. *Savage*, 45 N. York, 191; *Northern &c. R. R. Co.* v. *The State*, 29 Md., 420; *Locke* v. *St. Paul & Pacific R. R. Co.*, 15 Minn., 350; *Nelson* v. *Atlantic & Pacific R. R. Co.*, 68 Mo., 593; *O'Keefe* v. *Chicago &c. R. R. Co.*, 32 Iowa, 467; *Satterly* v. *Hallock*, 5 Hun, 178; *Byram* v. *Meguire*, 3 Head, 530; *Flynn* v. *San Francisco &c. R. R. Co.*, 40 Cal., 14; *Trow* v. *Vermont Central R. R. Co.*, 24 Verm., 487; *Isbell* v. *N. York & N. Hav. R. R. Co.*, 27 Conn., 393; *Smithwick* v. *Hall & Upson Co.*, 59 id.,

261; *Davies* v. *Mann*, 10 Mees. & Wels., 546; *Radley* v. *London & N. W. R. R. Co.*, L. R., 1 App. Cas., 754.

4. The conclusions of the court below upon the facts, that the defendants were not guilty of negligence and that the plaintiff was so, can be reviewed. They are expressly made as conclusions from the facts found and not as a finding of facts.

G. E. Terry, for the appellee.

TORRANCE, J. This is an action brought to recover damages for an injury caused to the plaintiff by the negligence of the defendant, in the management of one of its horse cars, on a public highway.

The case was defaulted and heard in damages. The court below made a finding of the subordinate and evidential facts, bearing upon the question of the negligence of the defendant, and the contributory negligence of the plaintiff, and then added the following:—"I find that the defendant was not negligent in running the car in the manner above described, unless the foregoing facts constitute negligence. On the foregoing facts, however, I find that the plaintiff was guilty of contributory negligence, and therefore assess to him seventy-five dollars only, as nominal damages. If the plaintiff was not on the above recited facts guilty of contributory negligence, his injuries were of such a character that he should recover six fold the assessed damages."

Upon the trial below the plaintiff made certain claims upon matters of law, which are set forth in the record.

Four of the six reasons of appeal filed in the case are based upon the assumed fact that the court below decided these claims adversely to the plaintiff. But the record neither expressly nor by necessary implication discloses any such fact. For aught that appears, the court below took the view of the law, as expressed in these claims, which the plaintiff asked it to take. This court upon an appeal cannot consider any error assigned in the reasons of appeal, unless "it also appears upon the record that the question

was distinctly raised at the trial and was decided by the court adversely to the appellant's claim." Gen. Statutes, § 1135. We cannot therefore consider the matters set forth in the last four reasons of appeal.

This leaves to be considered only the first two reasons of appeal, which are stated as follows:—"1st. The court erred in deciding that the defendant, on the facts found, was not negligent. 2d. In deciding that the plaintiff was guilty of contributory negligence."

The plaintiff claims that the conclusions of the trial court upon the facts found, as to the negligence of the defendant, and the contributory negligence of the plaintiff, are inferences or conclusions of law, which may be reviewed by this court upon an appeal, and the defendant claims that they are inferences or conclusions of fact, which cannot be so reviewed.

If the plaintiff is right in his claim, this court can and ought to review the conclusions aforesaid. If the defendant is right, there is properly no question presented upon the record for the consideration of this court. Whether, in a given case involving the question of negligence of either the plaintiff or the defendant, the conclusion or inference of negligence drawn by the trier or triers is one which this court has or has not the power to review, is always an important and often a difficult question to determine. Its importance arises from the fact that in the former case such conclusion may upon review be either sustained or set aside by this court, while in the latter case such conclusion, whether drawn correctly or not, is, generally speaking, final and conclusive.

The difficulty of determining whether the conclusion belongs to one or the other of these classes, arises, in part at least, from the complex nature of negligence as a legal conception, and the fact that the word "negligence" is frequently used for only a part of this complex conception. "Negligence, like ownership, is a complex conception. Just as the latter imports the existence of certain facts, and also the consequence (protection against all the world), which

the law attaches to those facts, the former imports the existence of certain facts (conduct,) and also the consequence (liability), which the law attaches to those facts." Holmes's Common Law, p. 115. This conception involves, as its main elements, the subordinate conceptions of a duty resting upon one person respecting his conduct toward others; a violation of such duty, through heedlessness or inattention on the part of him on whom it rests; a resulting legal injury or harm to others as an effect, and the legal liability consequent thereon. Accordingly, as a legal conception, negligence has been defined as follows:—"A breach of duty, unintentional, and proximately producing injury to another possessing equal rights." Smith's Law of Negligence, 1.

But neither in text books, nor in judicial decisions, is the word "negligence" used at all times as standing for all the elements of this entire complex conception. When in courts of law, the principal question is, what was the conduct, it is customary and perhaps allowable to say that the question of negligence is one of fact to be determined by the trier; and when the question principally respects the duty or the liability, to say that it is a question of law. When therefore, in text books, or in adjudged cases, the assertion is made that the "question of negligence" is a "question of fact" or is a "question of law," or is a "mixed question of law and of fact," no confusion of thought will result if the sense in which the word negligence is used in the particular instance be ascertained, and this in most cases may be readily determined from the context.

But another, and perhaps the chief cause of the difficulty of determining in a given case whether the conclusion as to negligence is one of law or of fact, arises from another source, which we will now consider.

The conception of negligence, as we have seen, involves the idea of a duty to act in a certain way towards others, and a violation of that duty by acts or conduct of a contrary nature. The duty is imposed by law, either directly by establishing specific or general rules of conduct binding upon all persons, or indirectly through legal agreements made by

the parties concerned. It is with duties not arising out of contract that we are here concerned.

There is further involved in the legal conception of negligence, the existence of a test or standard of conduct with which the given conduct is to be compared and by which it is to be judged. The question whether the given conduct comes up to the standard is frequently called the "question of negligence." The result of comparing the conduct with the standard is generally spoken of as "negligence" or the "finding of negligence." Negligence, in this last sense, is always a conclusion or inference, and never a fact in the ordinary sense of that word. When the question of negligence, in the above sense, can be answered by the court, it is called a "question of law," and the answer is called an inference or conclusion of law; when it is and must be answered by a jury or other trier, it is generally called a question of fact, and the answer is called an inference or conclusion of fact. Where the law itself prescribes and defines beforehand the precise specific conduct required under given circumstances, the standard by which such conduct is to be judged is found in the law. When, in such a case, the conduct has been ascertained, the law, through the court, determines whether the conduct comes up to the standard. The rules of the road, some of the rules of navigation, and the law requiring the sounding of the whistle or the ringing of the bell of a locomotive approaching a grade crossing at a specified distance therefrom, may serve as instances of this kind.

Of course if, in cases of this kind, one of the parties injures another, he is not necessarily absolved from blame by showing a compliance with the specific rule or law, for it may be that while so doing he neglected other duties which the law imposed upon him. But, when the only question is whether the ascertained conduct comes up to the standard fixed by the specific rule or law, the conclusion, inference or judgment that it does or does not, is, as we have said, one of law.

"A question of law, in the true sense, is one that can be decided by the application to the specific facts found to exist

(here the conduct of some person and the circumstances under which he acted or omitted to act,) of a pre-existing rule. Such a rule must contain a description of the kind of circumstances to which it is to apply, and the kind of conduct required." Terry's Leading Principles of Anglo-Am. Law, § 72. In such cases, as this court said in substance in *Hayden* v. *Allyn*, 55 Conn., 289, the evidence exhausts itself in producing the facts found. Nothing remains but for the court, in the exercise of its legal discretion, to draw the inference of liability or non liability, and this inference or conclusion can in such cases always be reviewed by this court. Clear cases of this kind usually present no difficulty.

As applicable to most cases, however, the law has not provided specific and precise rules of conduct; it contents itself with laying down some few wide general rules. The rule that all persons must act and conduct themselves, under all circumstances, as a man of ordinary prudence would act under like circumstances, is an illustration of this class of rules or laws. This general rule of conduct is not a standard of conduct in the same sense in which a fixed rule of law is such a standard. In most cases where it must be applied, the principal controversy is over the question what would have been the conduct of a man of ordinary prudence under the circumstances. Manifestly the rule itself can furnish no answer to that question in such cases. "The rule usually propounded, to act as a reasonable and prudent man would act in the circumstances, still leaves open the question how such a man would act." Terry's Lead. Prin. Anglo-Am. Law, § 72.

It is also a varying standard. "In dangerous situations ordinary care means great care; the greater the danger the greater the care required; and the want of the degree of care required may amount to culpable negligence." *Knowles* v. *Crampton*, 55 Conn., 344.

This general rule has rightly been called "a featureless generality," but from the necessity of the case it is the only rule of law applicable in the great majority of cases involving the question of negligence. The law cannot say before-

hand how the man of ordinary prudence would act, or ought to act, under all or any probable set of circumstances. But in cases involving the question of negligence, where this general rule of conduct is the only rule of law applicable, it may and sometimes does happen, that the conduct under investigation is so manifestly contrary to that of a reasonably prudent man, or is so plainly and palpably like that of such a man, that the general rule itself may be applied as a matter of law, by the court, without the aid of a jury. That is, the conduct may be such that no court could hesitate or be in doubt concerning the question whether the conduct was or was not the conduct of a person of ordinary prudence under the circumstances.

The difference between the classes of cases where the court can thus apply the general rule of conduct, and those wherein it must be applied by the jury, is well illustrated in the following extract from the opinion of the Supreme Court of the United States, in the case of *Railroad Company* v. *Stout*, 17 Wall., 657. "If a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be ruled, as a matter of law, that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So if a coach-driver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases it is a matter of sound judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established, from which one sensible, impartial man would infer that proper

care had not been used and that negligence existed, while another equally sensible and equally impartial man would infer that proper care had been used and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury."

The line of division between these two classes of cases is by no means a fixed and well-defined one. Close cases will occur where courts may well differ in opinion as to whether they lie on one side or on the other of the boundary line. "Legal, like natural divisions, however clear in their general outline, will be found on exact scrutiny to end in a penumbra or debatable land." Holmes's Common Law, 127.

Now the difficulty of determining whether a conclusion or inference of negligence is one of fact or one of law, as these phrases are commonly used, arises mainly in this intermediate class of cases. In such cases the law itself furnishes no certain, specific, sufficient standard of conduct, and, of necessity, leaves the trier to determine, both what the conduct is, and whether it comes up to the standard, as such standard exists in the mind of the trier. In a case of this kind the inference or conclusion of the trier, upon the question whether the ascertained conduct does or does not come up to such standard, is, as we have said, called a question of fact, and, generally speaking, it cannot be reviewed by this court. If such inference is drawn by a jury, it is final and conclusive, because their opinion of what a man of ordinary prudence would or would not do, under the circumstances, is the rule of decision in that special case. If drawn by a single trier, as it may be under our system of law, it is equally final and conclusive for the same reason.

In every such case the trier, for the time being, adopts his own opinion, limited only by the general rule, of what the man of ordinary prudence would or would not do under the circumstances, and makes such opinion the measure or standard of the conduct in question. This view of the subject is forcibly put by COOLEY, J., in the case of *Detroit & Milwaukee R. R. Co.* v. *Van Steinburg*, 17 Mich., 99, wherein he says:—"When the judge decides that a want of due care

is not shown, he necessarily fixes in his own mind the standard of ordinary prudence, and measures the plaintiff's conduct by that. He thus makes his own opinion of what the prudent man would do a definite rule of law." And in speaking of this same matter, the Supreme Court of Pennsylvania uses the following language:—"When the standard shifts with the circumstances of the case, it is in its very nature incapable of being determined as a matter of law, and must be submitted to the jury. There are, it is true, some cases in which a court can determine that omissions constitute negligence. They are those in which the precise measure of duty is determinate, the same under all circumstances. When the duty is defined, a failure to perform it is of course negligence, and may be so declared by the court. But where the measure of duty is not unvarying, where a higher degree of care is demanded under some circumstances than under others, where both the duty and the extent of performance are to be ascertained as facts, a jury alone can determine what is negligence and whether it has been proved. Such was this case. The question was not alone what the defendants had done or left undone, but, in addition, what a prudent and reasonable man would ordinarily have done under the circumstances. Neither of these questions could the court solve." And later on in the same opinion, in commenting upon a case cited by the plaintiff, the court says:—"Even if the court might, in that case, have declared the effect of the evidence, it must have been because the duty of the defendants was unvarying and well defined by the law. Here the standard of duty was to be found as a fact, as well as the measure of its performance." *McCully* v. *Clarke*, 40 Penn. St., 399.

In his book on the Common Law, page 123, Judge Holmes speaks as follows:—"When a case arises in which the standard of conduct, pure and simple, is submitted to the jury, the explanation is plain. It is that the court, not entertaining any clear views of public policy applicable to the matter, derives the rule to be applied from daily experience, as it has been agreed that the great body of the law of tort has

been derived. But the court further feels that it is not itself possessed of sufficient practical experience to lay down the rule intelligently. It conceives that twelve men taken from the practical part of the community can aid its judgment."

In treating of contributory negligence, Mr. Beach, in his work on that subject, says:—"In the ultimate determination of the question whether the plaintiff was guilty of contributory negligence, two separate inquiries are involved. First. What was ordinary care under the circumstances? Second. Did the conduct of the plaintiff come up to that standard? With respect to the standard of ordinary care, it is not always a fixed standard. In many cases it must be found by the jury. In such a case each of these inquiries is for the jury. They must assume a standard and then measure the plaintiff's conduct by that standard. Whenever the standard is fixed, and when the measure of duty is precisely defined by law, then a failure to attain that standard is negligence in law, and a matter with which the jury can properly have nothing to do." Beach on Contrib. Negligence, p. 459, § 163. The distinction between these two classes of cases is a fundamental one and not one of mere form.

It is sometimes said that, where all the facts are found, the mode of stating the inference or conclusion of negligence will make it one of law or fact as the case may be. But this clearly is not so. No mere mode of statement, whether found in a special verdict or in a special plea, or in a finding of facts, can convert the one into the other. In *Beers* v. *The Housatonic R. R. Co.*, 19 Conn., 566, this court said:—"If it were competent for the defendants to have availed themselves of a want of ordinary and reasonable care on the part of the plaintiff by a special plea, and that plea should allege merely the facts or circumstances on which the defendant claims that the court should have declared to the jury that such want of care was proved; or if they had been found in a special verdict by the jury; it is quite clear that such plea or verdict would be unavailable to the defendants on the question, for the reason that the one would

allege and the other would find only evidence of the fact in issue, and not the fact itself." In *Williams* v. *Town of Clinton*, 28 Conn., 264, this court said:—"Under the pleadings the issue presented nothing but a question of fact—was there or not culpable negligence on her part? We cannot permit such a question to be taken from the jury, the legal and constitutional tribunal, by the defendant's specially reciting the evidence adduced on the trial and claiming that the court shall instruct them as to its legal effect. Such a course would speedily put an end to all jury trials." In *Fiske* v. *Forsyth Dyeing Co.*, 57 Conn., 119, this court said:—"The only error assigned in this case is that the court below held that 'upon the facts found, the defendants were guilty of negligence in leaving their horses unhitched and unattended, in the manner described.' The finding of the court states all the facts with great particularity. * * * But the question of negligence cannot thus be made a question of law."

In the following cases the findings of facts were substantially similar in form to the finding of facts in the case at bar, yet this court held, and rightly, that it had no power to review the conclusion as to negligence. *Daniels* v. *Town of Saybrook*, 34 Conn., 377; *Congdon* v. *City of Norwich*, 37 id., 414; *Young* v. *City of New Haven*, 39 id., 435; *Brennan* v. *Fair Haven & Westville R. R. Co.*, 45 id., 284; *Davis* v. *Town of Guilford*, 55 id., 356.

On the other hand, where special findings of fact were made, and from those facts the trial court formally drew the conclusion as to negligence, this court, notwithstanding the form of the finding, held the conclusions to be conclusions of law and reviewed them. *Beardsley* v. *City of Hartford*, 50 Conn., 529; *Nolan* v. *N. York, N. Hav. & Hartford R. R. Co.*, 53 id., 461; *Bailey* v. *Hartford & Conn. Valley R. R. Co.*, 56 id., 444; *Dyson* v. *N. York & N. Eng. R. R. Co.*, 57 id., 9; *Gallagher* v. *N. Y. & N. Eng. R. R. Co.*, id., 442.

It is frequently supposed or assumed that it makes some difference in this matter whether the case is tried to the jury or to the court, but this is not so. Whether the trier is one man or twelve men makes no difference. If the case is such

that the trier and not the law must determine whether the conduct in question is, or is not, that of the prudent man, the conclusion of the single trier upon this point is just as binding and final as that of twelve men.

In *Shelton* v. *Hoadley*, 15 Conn., 535, this court held that where an issue of fact is closed to the court instead of to the jury, the conclusion of the court cannot be reviewed upon a bill of exceptions, which sets out all the facts, any more than the verdict of a jury could be in like circumstances. And in *Brady* v. *Barnes*, 42 Conn., 512, it is said:—"When an issue of fact is closed and tried by the Superior Court, this court will not, upon evidence reported, assume the responsibility of finding by inference therefrom a fact which that court could not find. The principles and the reasons which protect the sovereignty of juries over facts, when issues are closed to them, underlie this right of auditors and committees in chancery; for they are but statutory juries finding facts by forms of procedure peculiar to themselves." So also in *Stannard* v. *Sperry*, 56 Conn., 546, it is said:—"Under our system, whenever the court, or a committee of its appointment, finds a fact, such finding is beyond revision or correction equally with the verdict of a jury, if there be no illegality in the mode of proceeding and no intentional wrong done. Errors of judgment as to the value of property must stand uncorrected. This is equally true of the finding of a committee appointed to hear and find in place of and for the court. If its finding of facts is to be reviewed in every case by the court, its hearing becomes an useless expenditure of labor and money."

It may be said that this view of the subject leaves the parties at the mercy of the trier. A like objection, taken in the case last above cited, was thus answered in the opinion:—"The defendant suggests that if this be so he is at the mercy of the committee as to the value of his part. But this fact does not vitiate the proceeding. That every person shall be at the mercy of some tribunal, both as to law and fact, is the only reason for the existence of a judicial system."

The distinction in question then, being in general a fundamental and important distinction, the question remains whether any general rule exists, the application of which will determine in every case with certainty whether the inference as to negligence to be drawn from ascertained facts is one of fact or of law in the sense explained. Perhaps no such general rule has been or can be formulated. At any rate we know of none, and we do not intend in the present case to lay down any such general rule. But cases involving the distinction in question have been frequently before the courts; they have been decided upon principles which have been, to some extent, formulated into working rules; and these rules can be applied with reasonable certainty in most cases that arise in actual practice. In his work on torts, Judge Cooley states such a rule as follows:—"The proper conclusion seems to be this: If the case is such that reasonable men, unaffected by bias or prejudice, would be agreed concerning the presence or absence of due care, the judge would be quite justified in saying that the law deduced the conclusion accordingly. If the facts are not ambiguous, and there is no room for two honest and apparently reasonable conclusions, then the judge should not be compelled to submit the question to the jury as one in dispute." Cooley on Torts, p. 670. In the case of *Detroit & Milwaukee R. R. Co.* v. *Van Steinburg*, 17 Mich., *supra*, Judge Cooley stated the rule as follows:—"It is a mistake to say, as it is sometimes said, that when the facts are undisputed, the question of negligence is necessarily one of law. This is generally true only of that class of cases where a party has failed in the performance of a clear legal duty. When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of these conclusions has been drawn by the jury. The inferences must either be certain or uncontrovertible, or they cannot be decided by the court." Wharton says:—"The true position is this: Negligence is always a logical inference to be drawn by the jury from all the circumstances of the

case, under the instructions of the court. In all cases in which the evidence is such as not to justify the inference of negligence, so that the verdict of a jury would be set aside by the court, then it is the duty of the court to negative the inference. In all other cases the question is for the jury, subject to such advice as may be given by the court as to the force of the inference." Wharton on Negligence, § 420.

The rule as laid down by Judge Cooley is substantially like the one adopted by the Supreme Court of the United States in the case of *Railroad Co.* v. *Stout*, 17 Wall., *supra*. The rule is thus stated in Terry's Leading Principles of Anglo-American Law, § 72:—"The question—was the specific conduct of the specific person in the specific circumstances reasonable or not, must usually remain as a question which is really one of fact. When the reasonableness or unreasonable of the conduct is very plain, the court will decide it. When it seems to the court fairly to admit of doubt, it will be handed over to the jury."

Mr. Beach, in his work on Contributory Negligence, p. 454, states the rule as follows:—"When the facts are unchallenged, and are such that reasonable minds could draw no other inference or conclusion from them than that the plaintiff was or was not at fault, then it is the province of the court to determine the question of contributory negligence as one of law." In *Ochsenbein* v. *Sharpley*, 85 N. York, 214, the court stated the rule thus:—"When the facts are undisputed and do not admit of different or contrary inferences, the question is one of law for the court." This also substantially appears to be the rule in Ohio and California. *Cleveland, C. & C. R. R. Co.* v. *Crawford*, 24 Ohio St., 631; *McKeever* v. *Market St. R. R. Co.*, 59 Cal., 294.

It is perhaps unnecessary to say that, in making the foregoing citations from text writers and decisions, we do not necessarily adopt or approve of all their conclusions, or the rule precisely as stated by them; but we think some of the principles stated, upon which the rules are or profess to be based, will furnish a practical guide for the solution of the question we are considering, in cases like the one at bar.

Manifestly this frequently recurring question ought to be decided upon principle, so far as it is possible to do.

We think an examination of the cases from our own reports heretofore cited, and of others therefrom that might be cited, involving the question of negligence, will show that this court in such decisions has applied principles which, in most cases occurring in practice, will solve the question under consideration without much difficulty. From such an examination we think it will appear that, in cases involving the question of negligence, where the general rule of conduct is alone applicable, where the facts found are of such a nature that the trier must, as it were, put himself in the place of the parties, and must exercise a sound discretion based upon his experience, not only upon the question what did the parties do or omit under the circumstances, but upon the further question, what would a prudent, reasonable man have done under those circumstances, and especially where the facts and circumstances are of such a nature that honest, fair-minded, capable men might come to different conclusions upon the latter question, the inference or conclusion of negligence is one to be drawn by the trier and not by the court as matter of law. Such an inference or conclusion will, speaking generally, be treated by this court as one of fact, which will not be reviewed where the facts have been properly found, unless the court can see from the record that in drawing such inference the trier imposed some duty upon the parties which the law did not impose, or absolved them from some duty which the law required of them under the circumstances, or in some other respect violated some rule or principle of law.

Of course we do not here mean to say that this court cannot review such a conclusion upon an appeal from a verdict against evidence, or that it may or may not do so upon a reservation or other proceeding of a like nature. We only mean to say that, in cases where it is the province of the trier to draw the inference of negligence, and no error of law in the sense explained is apparent on the record, error cannot be predicated of the mere act of the trier in drawing

what is supposed to be an incorrect or wrong inference from facts properly found. We think these principles can be applied to the case at bar, and that they are decisive of it.

The principal facts are correctly found. They are somewhat numerous, and the question of the negligence of either party is complicated with questions as to the conduct of others, and with the special facts and circumstances of the case of which the conduct forms a part. Under the facts found the only rule applicable was the general rule of conduct. The facts and circumstances are, we think, clearly of such a nature that a trier must of necessity measure the prudence of the parties' conduct by a standard of behavior which he himself adopts for that case, based upon his opinion of the manner in which a man of ordinary prudence would act under the same circumstances. The problem involved in such an inquiry can only be solved by the trier placing himself in the position of the parties, and, in the light of his experience of human affairs, examining all the facts and circumstances as they appeared to them at the time. Furthermore, we think the facts found are of such a nature that men equally honest and impartial might, and probably would, draw from them different and opposite inferences as to whether due care was or was not exercised by each party under the circumstances.

It is not apparent upon the record that the court, in arriving at the conclusions as to negligence in the case at bar, imposed upon either party the performance of any duty which the law did not impose, nor that it did not require of them the performance of any duty which the law required; nor that in any other respect it violated any rule or principle of law.

For these reasons we think the case at bar comes within the class of cases where the conclusion of the trier, both as to negligence and contributory negligence, are regarded as conclusions of fact which this court cannot review.

There is no error apparent upon the record.

In this opinion ANDREWS, C. J., LOOMIS and SEYMOUR, Js., concurred.

CARPENTER, J. I concur in the result on the ground that the plaintiff was guilty of contributory negligence. But I think the facts show, as matter of law, that the defendant was guilty of negligence. The driver of the horse car saw the plaintiff on the track and called to him to get out of the way; but the plaintiff did not heed the call. The horses were driven along, detached from the car, and the car, without coming to a stop, was pushed against the plaintiff by the defendant's workmen. One of the workmen called upon the plaintiff to assist in pushing the car, but he did not hear the call. Upon these facts I think the law will not excuse the defendant for running over the plaintiff.

HENRY L. BATES, ADMINISTRATOR, *v.* THE NEW YORK & NEW ENGLAND RAILROAD COMPANY.

New Haven & Fairfield Cos., Oct. T., 1890. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

The statute (Gen. Statutes, § 3554,) requires engineers of railroad trains to commence sounding the steam whistle or bell when within eighty rods of any grade crossing, and to keep sounding it occasionally until the crossing is passed. Held that where the highest degree of diligence may justly be required, a literal compliance with the statute may not be enough.

This is especially so where the duty which the statute was intended to enforce did not originate in and is not measured by the statute, but existed at common law.

An engineer, approaching a grade crossing, where there was a whistling post eighty rods from the crossing, blew the whistle at a point four hundred feet short of the post and did not blow it again. The bell however was constantly rung until the crossing was passed. The plaintiff's intestate was approaching the crossing when the whistle was blown and was soon after killed there. The wind was unfavorable for carrying the sound of the whistle to him and it did not appear that he heard it, although it could have been heard. The court below found, wholly by reason of the neglect of the engineer to blow the whistle when within the eighty rods, that he was guilty of negligence. Held that this court could not, as matter of law, see that the court below erred in so holding. [Two judges dissenting.]

The plaintiff's intestate was driving toward the crossing with a wagon used for carrying wood, on which was an empty woodrack, and he sat on a string piece of the rack. This gave him a low position, where he could not so easily see the approaching train and could not so easily manage his horse, if frightened, as upon a seat of ordinary height. The horse was frightened at the sudden sight of the locomotive near him, and became uncontrollable and dashed upon the track in front of the engine. The court below found that the plaintiff's intestate was not guilty of contributory negligence. Held that this court could not, as a matter of law, see that the court below erred in so holding.

[Argued October 31st, 1890—decided March 20th, 1891.]

ACTION for causing the death of the plaintiff's intestate by negligence in the running of a railroad train of the defendant; brought to the Superior Court in Fairfield County, and heard in damages after a default by *F. B. Hall, J.* The court made the following finding of facts.

The defendant is a railroad company, operating a railroad which passes through the town of Danbury. On the 16th of February, 1889, about noon, Edward H. Bates, the plaintiff's intestate, while passing with his horse and wagon over a grade-crossing of the railroad, a short distance west of the city of Danbury, was struck by the locomotive of the defendant's train and killed.

The train in question was known as the "pay train," and passed through Danbury weekly, being run as a section of and closely following a regular passenger train. It consisted of a locomotive and one passenger car, and was managed and controlled by an engineer, fireman, conductor and brakeman. The train was approaching Danbury from the west, and, at the time of the accident, was running at the rate of about forty miles an hour, and faster than passenger trains are usually run at this place.

A whistling-post, placed by the defendant, stood between seventy and eighty rods west of the crossing in question, at which it was the custom of trains approaching this crossing from the west to give the crossing signal of two long and two short blasts of the whistle. On the day in question the engineer failed to blow the whistle within eighty rods of the crossing in question, but blew it between seventeen and

eighteen hundred feet west of the crossing, and more than four hundred feet west of the whistling-post, and did not again blow the whistle before the accident. The bell of the engine was however continuously rung from the time the whistle was blown until the crossing was reached. The railroad commissioners had made no order dispensing with the blowing of the whistle upon approaching this crossing.

The engineer, who sat on the right hand side of the locomotive, did not see Mr. Bates. The fireman first saw him, when he was within about fifty feet of the crossing and was endeavoring to stop his horse. The fireman immediately called out to the engineer, but it was then too late to avert the accident.

The crossing in question is at right angles to the track. Immediately adjacent to the track on the north is a bridge over a stream about ten feet wide. For a distance of about seventy feet north of the bridge the highway is substantially level, and commands a view of the railroad track to the west for nearly a mile, for which distance the track is substantially straight. A few feet east of the crossing the track enters a deep cut, and at the same time makes a sharp curve toward the north. Going north from a point about eighty feet north of the track, the highway ascends, and the view of the track from the road is obstructed by a stone wall and bank, and by the trees, up to a point three or four hundred feet north of the track, where again a clear view of the track at the west is obtained.

Upon the day in question the plaintiff's intestate was driving down the hill from the north. He was a careful driver, was driving a gentle horse, and was sitting upon one of the string-pieces of a wood-rack upon his wagon; upon which side did not appear. The wood-rack consisted of two poles or string-pieces, running lengthwise of the wagon and resting upon the bolsters, and connected with cross-pieces, and having upright stakes for holding wood, and was similar to that ordinarily used by farmers in drawing wood.

Sitting in so low a position one could not, in passing along that part of the road where the view of the track is ob-

structed by the wall and bank, so easily obtain a view of the track as when seated upon the raised seat of an ordinary wagon, nor could one seated as Mr. Bates was so easily control his horse when frightened, as when sitting upon an ordinary wagon seat.

When he was at the point before described on the hill, three or four hundred feet north of the track, the train was not in sight. Whether or not, after passing that point, and while the track was not in sight, he heard the whistle for the crossing, did not appear. The whistle as blown for this crossing could have been heard on that day by a person on the highway, and as far from the engine as he was at the time the signal was blown. The wind at this time was blowing from the east. If he heard it, it would have been reasonable for him to believe that it was not for the crossing over which he was to pass, but for the next crossing, nearly a mile west.

When he reached the level space at the foot of the hill, and saw the near approaching train, his horse became frightened and unmanageable and ran toward the track. He used every endeavor to stop his horse, and nearly succeeded in doing so at a point very near the track, when the horse, frightened by the engine, sprang in front of the engine, and Mr. Bates was struck and killed.

I find that due regard for the safety of persons passing along this highway, toward and over the crossing, requires that the engine whistle upon approaching trains be blown within eighty rods of the crossing.

I find that Mr. Bates was not guilty of contributory negligence, and that the accident was caused by the defendant's negligence in having failed to blow the whistle within eighty rods of the crossing.

Upon these facts the defendant claimed that Mr. Bates was guilty of contributory negligence, and that the defendant was not negligent, and was not upon the facts required to blow the whistle within eighty rods of the crossing; which claims the court overruled, and assessed damages for the plaintiff in the sum of $2,000. The defendant appealed.

E. D. Robbins, for the appellant.

1. The function of a crossing-whistle is to give timely warning of the approach of a train. The important consideration for the traveler on the highway is not the distance of the engine from the crossing. What concerns him is solely the question of time. If the engine is to pass the crossing in one minute, it is entirely immaterial to him how far and how fast it is to go. It makes no difference with him in consulting for his safety whether it has three hundred and twenty rods to go at the rate of sixty miles an hour, or whether it has eighty rods to go at fifteen miles an hour. In either case he has just the same time in which to stop and look out for his horse, or in which to keep on and perhaps get hurt. In the present case, in which the train was going at the rate of forty miles an hour, it passed over seventeen hundred and sixty feet in half a minute. The court finds that the engineer whistled when his engine was that distance from the crossing. Surely thirty seconds is none too long a warning to a traveler on a highway approaching a dangerous railroad crossing! There could be no question that the whistle as blown would be audible on the highway. Mr. Bates is dead, and we cannot know whether he actually heard it or not; but the court finds that he could have heard it. There is no reason for doubting that he did hear it. We know that after he saw the train coming he drove along some thirty feet further, to wait there for it to pass.

2. Does the rule of law which prescribes the duty of the engineer as to whistling, imperatively require that he should whistle exactly eighty rods from a highway crossing? Such a rule would be utter unreason. There is no mysterious efficacy about this exact distance. Many trains move very rapidly, and would go a number of rods while the engineer turned from taking care of his machinery to pull his whistle. In the case at bar the engineer reached the eighty-rods-point within seven seconds of the time when he commenced to blow his whistle. Or is there no rule of law on the subject, and is it left to the caprice of juries and the varying notions of individual judges to say, that at this or that particular

crossing the whistle ought to have been sounded at this or that distance? Then no engineer can ever know his duty in this matter. His own judgment is of no avail, and his superiors cannot help him. It certainly never would have seemed to any experienced engineer, or to any railroad superintendent, that it could be considered negligence, at a place like the one where this accident occurred, to whistle in time to give thirty seconds warning to travelers on the highway. It was in order to avoid the confusion and injustice of such a state of law that the legislature regulated the subject by statute. The duty of the railroad company is fixed by that statute, and it is thereby made as burdensome as the legislature thought it best that it should be made. A rule of law so established is not to be added to by the courts nor varied by the caprice of juries. *Dyson* v. *N. York & N. Eng. R. R. Co.*, 57 Conn., 9; *Beisiegel* v. *N. York Central R. R. Co.*, 40 N. York, 9; *Grippen* v. *Same*, id., 34; *Van Note* v. *Hannibal & St. Joseph R. R. Co.*, 70 Mo., 641: *Turner* v. *Kansas City, etc. R. R. Co.*, 78 id., 578; *Chicago, B. & Q. R. R. Co.* v. *Damerell*, 81 Ill., 450; *Chicago & Alton R. R. Co.* v. *Robinson*, 106 id., 142; *Chicago, B. & Q. R. R. Co.* v. *Dougherty*, 110 id., 521; Wood on Railway Law, 1309. Plainly, if the words of the statute are taken in their natural meaning, as they have been by other courts in cases above cited, then in the case at bar the ringing of the bell was alone sufficient to comply with the law. If, on the other hand, the statute is to be broadly construed, and for the sake of securing a timely warning an obligation to blow the whistle is to be added to the obligation of ringing the bell, then in the same spirit it will be held that, when an engineer is driving an express train at the rate of forty or sixty miles an hour, to blow the whistle a few seconds before reaching the whistling post is evidence of additional caution and not of negligence.

3. The question, what signals it was the duty of the engineer to give on approaching the highway crossing, is a question of law; the question whether that duty was actually performed would be a question of fact. *Nolan* v. *N. York*,

N. Hav. & Hartford R. R. Co., 53 Conn., 462, 471; *Dyson* v. *N. York & N. Eng. R. R. Co.*, 57 id., 9.

4. Mr. Bates was guilty of contributory negligence. An accident like this one is of most unusual occurrence. The reason of its happening lay in the fact that the driver was so seated as to have no control of his horse. He was sitting sideways on the outside string-piece of his wagon, with his legs loosely dangling toward the ground. His horse was a gentle one, but even gentle horses are afraid of locomotives. It is plainly imprudent to bring even a gentle horse within fifty feet of an onrushing engine unless it is under firm control. When a traveler on a highway hears a whistle, he knows that a train is coming somewhere. It is his duty to take no risks. If he is seated so that he cannot control his horse, he should approach no nearer until he knows that he is safe in so doing. If Mr. Bates was already within fifty feet of the track when the whistle sounded, he then saw the train, and stopped without taking the trouble to change his position, although he had half a minute to do it in. If he was farther back from the track, he kept on going nearer regardless of the risk of the frightening of his horse. Either course of conduct was the careless act of an ordinarily careful man, such as so often causes one of these deplorable accidents. If, on the other hand, Mr. Bates did not listen for a train as he drew near the railroad crossing, he was guilty of such negligence as would plainly bar recovery in this action. If he did not look up the track when he got past the stone wall, eighty rods from the crossing, he was in this also guilty of contributory negligence which would defeat this action. *Peck* v. *N. York, N. Hav. & Hartford R. R. Co.*, 50 Conn., 379, 392; *Railroad Co.* v. *Houston*, 95 U. S. R., 697; *Schofield* v. *Chicago, Milw. & St. Paul R. R. Co.*, 114 id., 615; *Tully* v. *Fitchburg R. R. Co.*, 134 Mass., 499.

L. D. Brewster and *H. B. Scott*, for the appellee.

CARPENTER, J. This is an action for negligently causing the death of the plaintiff's intestate. The defendant suffered

a default and was heard in damages. The Superior Court found the facts, finding that the defendant was guilty of negligence, and that the deceased was not guilty of contributory negligence, and rendered judgment for the plaintiff for substantial damages. The defendant appealed. The claim is that the court erred in matters of law in respect to both findings.

1. As to the negligence of the defendant. The accident occurred on the defendant's railroad, west of the city of Danbury, where a highway running north and south crosses the railroad at nearly right angles, the train going east. It appears that there is a whistling-post between seventy and eighty rods west of the crossing; that the whistle was not blown, as was usually done, at the post, or at any point between that and the crossing; and that it was blown at a point some four hundred feet further from the crossing. On that ground alone the court found negligence.

The statute, (Gen. Statutes, § 3554,) provides that "every person controlling the motions of any engine upon any railroad, shall commence sounding the bell or steam whistle attached to such engine when such engine shall be approaching, and within eighty rods of, the place where said railroad crosses any highway at grade, and keep such bell or whistle occasionally sounding until such engine has crossed such highway." The practical interpretation of this statute is to sound the whistle when within eighty rods of the crossing, and to ring the bell until after passing the crossing. The language of the statute is in the alternative, and it will be literally complied with if either is done to the exclusion of the other; but in a matter of this importance, where the highest degree of diligence may justly be required of railroad companies to protect life at crossings, a strictly literal compliance with the statute is not always enough; especially when it is apparent that such compliance may be ineffectual. There are times when statutes should be complied with according to their spirit and intent. Particularly is that so when the duty which the statute is designed to enforce does not originate in and is not measured by the statute. Here is a duty

which exists at common law. It has its origin in the humane instincts of the race. Obviously the statute was not designed to define and limit the duty of railroad companies. They cannot do less than the statute requires; there are times and occasions when they may properly be required to do more. If both the whistle and bell would be more effective, the statute ought not to be so construed as to prevent their use from being required. Inasmuch as both are at hand ready for instant use, there can be no hardship in requiring both. And so this court was fully justified in saying on this subject "that an omission to sound the whistle, except at a place where the railroad commissioners had authorized the whistle to be omitted, even if the bell was rung, would undoubtedly be regarded as negligence." *Bailey* v. *Hartford & Conn. Valley R. R. Co.*, 56 Conn., 444. It cannot be said that this is technically negligence, but without damage; for it cannot be known that the omission to sound the whistle at the post was not the cause of the accident; obviously it might have been. And the court was justified in finding negligence. The wind was blowing from the east, so that its tendency was to carry the sound from the deceased. It does not appear whether he heard it or not. Perhaps there is some presumption that he did not; otherwise effectual measures would have been taken to prevent the accident. Perhaps also, if he did hear it, the sound was so indistinct as to justify the suggestion of the court that he might reasonably have believed that it was for another crossing nearly a mile west. Who then can say that if the whistle had been sounded at a point some four or five hundred feet nearer the crossing the accident would not have been prevented?

From what has been said it will be readily inferred that we are not prepared to assent to the reasoning of the defendant's counsel, that the sounding of the whistle some seventeen hundred feet from the crossing, thirty seconds away, was better for the deceased than it would have been at the post, thirteen hundred feet and twenty-three seconds away. A danger signal, giving twenty-three seconds of time, if heard

and heeded, is better than one giving thirty seconds, if not heard, or, if heard, mistaken for something else.

2. Contributory negligence. The facts bearing upon this part of the case are found as follows:—"The engineer, who sat on the right hand side of the locomotive, did not see the deceased. The fireman first saw the deceased when the latter was within about fifty feet of the crossing and was endeavoring to stop his horse. The fireman immediately called out to the engineer, but it was then too late to avert the accident. The crossing in question is at right angles to the track. Immediately adjacent to the track on the north is a bridge over a stream about ten feet wide. For a distance of about seventy feet north of the bridge the highway is substantially level, and commands a view of the railroad track to the west for nearly a mile, for which distance the track is substantially straight. * * * Going north from a point about eighty feet north of the track, the highway ascends, and the view of the track from the road is obstructed by a stone wall and bank and by the trees up to a point three or four hundred feet north of the track, where again a clear view of the track at the west is obtained. Upon the day in question the plaintiff's intestate was driving down the hill from the north. He was a careful driver, was driving a gentle horse, and was sitting upon one of the string-pieces of a wood-rack upon his wagon. * * * The wood-rack consisted of two poles or string-pieces running lengthwise of the wagon and resting upon the bolsters, and connected with cross pieces, and having upright stakes for holding wood, and is similar to that ordinarily used by farmers in drawing wood. Sitting in so low a position, one could not, in passing along that part of the road where the view of the track is obstructed by the wall and bank, so easily obtain a view of the track as when seated upon the raised seat of an ordinary wagon, nor could one seated as the deceased was so easily control his horse when frightened as when sitting upon an ordinary wagon seat. When the deceased was at the point before described on the hill, three or four hundred feet north of the track, the train was not

in sight. Whether or not, after passing that point, and while the track was not in sight, he heard the whistle for the crossing, did not appear. The whistle as blown for this crossing could have been heard on that day by a person on the highway and as far from the engine as the deceased was at the time the signal was blown. The wind at this time was blowing from the east. If the deceased heard the signal blown for this crossing, it would have been reasonable for him to have believed that it was not for the crossing over which he was to pass, but for the next crossing, nearly a mile west of this crossing. When the deceased reached the level space at the foot of the hill and saw the near approaching train, his horse became frightened and unmanageable, and ran toward the track. The deceased made every endeavor to stop his horse, and nearly succeeded in doing so at a point very near the track, when the horse, frightened by the engine, sprang in front of the engine, and the deceased was struck and killed."

Evidently the question of contributory negligence is mainly a question of fact. It is difficult to see in the record any legal question in this branch of the case.

We may say generally, that the law requires every one to use ordinary care to avoid danger at a railroad crossing. What will be ordinary care depends upon the degree of danger. For a man in the perilous condition in which the deceased was placed, nothing less than every possible effort to avert an accident will amount to ordinary care; making due allowance, of course, for excitement, misjudging, etc. So far as we can judge from the facts stated, there is no reason to suppose that the deceased did not come up even to this standard; at least, we see no fact in the case which, when carefully considered, is inconsistent with this degree of care.

Negligence, if any existed, was in permitting himself to be placed in that position. It may have existed, but its existence is not so clear as to justify us in saying, as matter of law, that it existed. Let us briefly notice the claims of the defendant's counsel. The first suggestion is that it is an

unusual occurrence, and "that the reason of its happening lay in the fact that the driver was so seated as to have no control of his horse." This assumes that using such a wagon, seated in the manner described, was negligence *per se*. Manifestly this cannot be so. The significance of this fact must depend largely upon the attending circumstances related to and bearing upon this question. He was in the business of hauling wood; he used such a vehicle as was ordinarily used for that purpose; he was as conveniently seated as others in the same business were; he had a gentle horse; the train was an extra one, closely following a regular passenger train; we may suppose that he had the latter in mind but not the former; and we cannot assume that he had any knowledge of the approaching train until about the time he was seen by the fireman trying to control his horse. Upon these facts it is quite clear that the question,—was it reasonable for him to use such a vehicle in the manner he did, was a question of fact. Perhaps most men would have come to the same conclusion that the trial judge did. But however this may be, we cannot say that the judge committed a legal error in the conclusion to which he came.

Again, counsel say:—"As soon as Mr. Bates knew the train was coming, it was his plain duty to stay where he was, or at least to take his horse by the head if he approached nearer. He did neither of these things. After he passed the stone wall, which hid the view from his low seat, and saw the engine coming, he drove on some thirty feet towards the track, and got within fifty feet of it, yet continued to sit in the same awkward position, in which he could have no pull on the reins, and could exercise no proper control of his horse." How do we know when Mr. Bates first saw the train coming? How do we know that it was in his power to change his position, so as to get better control of his horse? Unfortunately the record does not answer these questions.

In the next place, it is said that "the engineer's whistle gave the deceased half a minute's warning." That is in-

consistent with the record, for that leaves it uncertain whether he heard it.

Lastly, it is said that he was guilty of negligence if he did not, as he drew near to the crossing, stop and listen for a train. Of the facts relating to this suggestion we know but little. The trial judge had a much better opportunity to judge of that matter than we have. As he has not found negligence, we cannot.

There is no error in the judgment appealed from.

In this opinion ANDREWS, C. J., and SEYMOUR, J., concurred.

TORRANCE, J., (dissenting.) The trial court, after having found certain facts bearing upon the question of the negligence of the defendant and the contributory negligence of the deceased, expressly finds that the deceased was not guilty of contributory negligence, and that the accident "was caused by the defendant's negligence in having failed to blow the whistle within eighty rods of the crossing."

In the opinion of the majority of this court the finding as to the absence of contributory negligence on the part of the deceased, is regarded as a conclusion of fact, which this court cannot review, and in that opinion I concur. In that opinion this view is also taken of the finding as to the negligence of the defendant, and from this I dissent.

The conclusion of the trial court as to contributory negligence is based upon a number of facts of such a nature that, with regard to the question of what a prudent man would or would not do thereunder, the law can lay down no specific rule in advance. It can only say to all persons—you must act as a prudent man would act under the like circumstances. It cannot inform us what a prudent man ought to do or refrain from doing under all or any given circumstances. In most cases involving the question of negligence it cannot in advance tell what its ideal prudent man ought or ought not to do. It contents itself with warning the trier that the standard he adopts ought to be

that of the prudent man, but it leaves the trier to say what that standard is. Now this precept to act as a prudent man acts can hardly be called a rule, guide or measure of conduct, in any just sense of those terms. It is as vague as an exhortation to do the best you can under the circumstances. But it is from the nature of the case the best the law can do.

In most cases of negligence therefore, where, as is usual, the facts bearing upon that question are numerous, complicated and peculiar to the specific case, the law necessarily leaves to the trier, not only the question what did the defendant do or omit to do, but the further question also, what is the standard or measure by which his liability for his acts or omissions in a given case shall be determined.

"When the judge decides that a want of due care is not shown, he necessarily fixes in his own mind the standard of ordinary prudence, and, measuring the plaintiff's conduct by that, turns him out of court, upon his opinion of what a reasonably prudent man ought to have done under the circumstances. He thus makes his own opinion of what would be generally regarded as prudence, a definite rule of law." *Detroit & Milwaukee R. R. Co.* v. *Van Steinburg*, 17 Mich., 99.

This is precisely what the law in most cases must leave to the trier, whether such trier be one man, as under our practice he may be, or a jury of twelve men.

The question of contributory negligence in the case at bar is clearly one of this character, to be determined by the trier, and his determination as such is as conclusive upon this court as the verdict of a jury would be in like circumstances.

But with regard to the question of the negligence of the defendant, the case on the finding is widely different. It must be borne in mind that the conclusion of the trial court in this case as to the negligence of the defendant is based solely upon one fact, namely, failure to sound the whistle within the eighty rod limit. It is true that other facts are found, but the conclusion aforesaid does not profess to be, and is not, based upon them.

The train was properly manned; it was running at a lawful rate of speed, on a road and at a time where and when the defendant had a right to run it. It is not found or suggested that the engineer and other servants of the defendant on this train were inattentive or careless in any respect whatever, save in this, of sounding the whistle. No other fact is found or suggested which shows, or tends to show, any want of care or attention to duty on the part of the defendant, save in the one particular before mentioned. Had the whistle been sounded within the eighty rod limit, all the other facts in the case remaining as the court finds them, the trial court would undoubtedly have found no negligence.

It is not found that no signal was given by the whistle, or that it could not be heard, and heard distinctly, at the crossing, and along the highway near the crossing, nor is the finding based on any such state of facts. It is expressly found that the whistle could be so heard and that the bell was continuously rung.

The belief of the deceased that the whistle was sounded at a greater distance than it in fact was sounded, if he had any such belief, and the other facts found, had a bearing on the question of contributory negligence perhaps, but the conclusion in question is not based upon any of those facts. If the whistle had been blown within the eighty rod limit, the trial court would have found no negligence, notwithstanding the existence of all these other facts.

It may be thought however that the further finding of the court, that a "due regard for the safety of persons passing said highway toward and over said crossing, requires that the engine whistle upon approaching trains be blown within eighty rods of said crossing," is a finding of fact bearing upon the conclusion of negligence.

To say that public safety requires the whistle to be sounded within the eighty rod limit, is but another way of saying that the law requires this to be done. Even if public safety did require it, the defendant was not liable for not doing what public safety required, unless it failed to perform some duty

which the law imposed upon it. So that after all the decisive question in the case was—does the law require that the whistle be blown precisely within the eighty rod limit, and not elsewhere, on penalty of being found negligent; and this, of course, is a question of law and not of fact.

Similar findings in other cases have been so construed by this court, and have been reviewed and set aside. In *Bailey* v. *Hartford & Conn. Valley R. R. Co.*, 56 Conn., 444, the trial court found "that reasonable care by the defendant under the circumstances required it to have given a signal by whistle or otherwise eighty rods from the crossing, and to have occasionally rung its bell, and not blown its whistle, along the line of the parallel highway, until the crossing was reached;" but this court found no difficulty in holding this to be a conclusion of law, which it could and did review. So in *Beardsley* v. *City of Hartford*, 50 Conn., 529, the trial court found that travel along the sidewalk in question was endangered by the basement opening, and that public safety required the city to enclose it, yet this court reviewed and set aside that conclusion. The findings in the two last named cases seem to be quite as strong in this respect as the one in the present case. Other cases to the same point might be cited. The conclusion of the trial court therefore, in the case at bar, on the question of negligence, seems to be based entirely upon the failure to blow the whistle within the limits prescribed by the statute.

Now whenever the liability of a defendant depends upon the doing or failure to do some one specific act, as in this case, and the trier finds the existence of such act or omission, his conclusion as to the existence thereof is final, but his finding of liability therefrom depends upon whether in so doing or omitting to do the defendant violated any duty, and that is always a question of law.

In *Gallagher* v. *N. York & N. Eng. R. R. Co.*, 57 Conn., 442, the trial court made a finding of facts, and expressly found that the defendant was negligent; but this court reviewed that conclusion and came to an opposite one. In regard to the finding of negligence in that case, this court said—"It is

predicated entirely upon the want of a fence between the two railroads. Upon this part of the case the decisive question is, whether it was the duty of the defendant to erect such a fence, and this is a question of law." In *Williams* v. *Town of Clinton*, 28 Conn., 264, it is said:—"The opinion of the court may properly enough be taken when the case turns upon the legal effect of a single fact." In *Beardsley* v. *City of Hartford*, before cited, the trial court found the facts, and expressly found negligence on the part of the city in not fencing the basement opening, and no contributory negligence on the part of the plaintiff, yet this court reviewed that conclusion of negligence, and held that it depended upon the further question whether any duty rested upon the city to fence the opening, and that was a question of law. In *Bailey* v. *Hartford & Conn. Valley R. R. Co.*, supra, the trial court made a finding of facts, and further found that in not sounding its whistle eighty rods from the grade crossing, and in first sounding it where it was sounded, the defendant was guilty of negligence. This court however reviewed that conclusion, and held that in doing what it did, under the circumstances stated, the defendant was not guilty of negligence.

The case at bar, upon the point now in question, comes I think within the principle of the cases cited. Suppose the trial court, finding all the other facts in the case just as it has done, had found that the whistle was sounded at the whistling post within the eighty rods, and then had found that the accident was caused by the negligence of the defendant in failing to blow the whistle within forty rods of the crossing, can there be any doubt that this court could review such a conclusion? And if another trier, on a similar state of facts, holds the defendant liable for not blowing the whistle at ninety rods, is this court prepared to say it cannot review that conclusion? Upon principle as well as upon authority, therefore, I think the conclusion of the trial court upon the question of the negligence of the defendant, is one which this court can review.

The question then is, did the court below adopt the cor-

rect rule as to the duty resting upon the defendant? Unless this court is prepared to hold that the statutory duty to blow the whistle within the eighty rod limit is imperative under any and all circumstances, then it seems to me the trial court did not adopt the true rule. In *Bailey* v. *Hartford & Conn. Valley R. R. Co.*, before cited, this court said:—"The statute (Gen. Statutes, § 3554,) directs that the engineer of every train shall, within eighty rods of any grade crossing, sound the whistle or ring the bell. This is required that all persons who are about to cross the track at the grade crossing may have notice that the train is coming. Obviously such notice should be given at such place and by such means as will be most likely to accomplish the object which the statute had in view. * * * If by reason of curves in the railroad, or by reason of high bluffs on either side, the signal when given at the distance of eighty rods from the crossing is not likely to be heard by persons near the crossing, but when given at a distance of forty-five rods is certain to be heard by such persons, then by every rule of good sense the signal, if to be given but once, should be given at the latter distance and not at the former. To argue the other way is a plain 'sticking in the bark.'" The majority opinion in the present case seems to take the same view of the law.

This then is the rule of law as held by this court, namely, that it was the duty of the defendant in the case at bar to sound the whistle at such place as would under all the then existing circumstances be most likely to give ample notice of the approach of the train to all who were about to use the crossing.

Now apply this rule to the facts in this case. The train was running at the rate of forty miles an hour. The whistle signal was blown when the train was distant from the eighty rod limit about four hundred feet. The bell was rung thence continuously till the train passed the crossing. While the whistle was sounding the two long and two short blasts, the train must have passed over a quite considerable part of the four hundred feet. The signal was loud enough

to be plainly heard at the crossing, and along the highway where the deceased was driving. The train passed over the space between the crossing and the point where it first began to sound the signal in about thirty seconds. It passed over the distance between the whistling post and the crossing in about twenty-three seconds. In blowing the whistle where it was blown, persons on the highway near the crossing had notice of the approaching danger some six or seven seconds earlier than they would have had if it had been blown at the whistling post. Surely with an adverse wind and this high rate of speed, a warning of thirty seconds rather than twenty-three seconds is evidence of attention and care rather than of negligence.

Adopting the language of the court in *Bailey* v. *Hartford & Conn. Valley R. R. Co.*, supra, "to call such an act when done in such a manner, negligent, seems a misapplication of terms." Under the rule laid down by this court the defendant was clearly not negligent. Under the rule laid down by the trial court the defendant was negligent and would have been negligent if it had blown the whistle at any point outside of the eighty rod limit, however near, without regard to the speed of the train, the condition of the weather or any other circumstance whatever.

The case at bar is "a sad case, and appeals powerfully to one's sympathy, but we must not allow it to become an occasion of injustice. The defendant is entitled to have the law fairly and impartially administered." *Nolan* v. *N. York, N. Hav. & Hartford R. R. Co.*, 53 Conn., 476.

In holding the defendant liable for full damages, I think the trial court committed an error in law, and that the judgment should be reversed.

LOOMIS, J., concurred in this opinion.

THE FARIST STEEL COMPANY *vs.* THE CITY OF BRIDGEPORT.

New Haven and Fairfield Cos., Jan. T., 1891. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

Although the fee of land between high and low water mark on the seashore is in the state, yet it seems to be the better opinion that the state cannot take it for public use without compensation.

But the question becomes unimportant where the charter of a city expressly provides that compensation shall be made for such land taken by the city in establishing harbor lines.

The charter of the city of Bridgeport provided that after the common council had decided to establish a harbor line, it should appoint a committee whose duty it should be to make the lay-out and report their doings in writing to the common council. The standing committee on harbor improvements reported to the council resolutions in favor of laying out certain harbor lines, and appointing a committee to lay them out, which resolutions the council adopted. The committee thus appointed reported and recommended a resolution for adoption by the council, laying out the harbor lines as proposed, which resolution the council adopted. Held not to be a legal lay-out of the harbor lines, the lay-out being by the common council and not by a committee.

Where the common council had previously established harbor lines it was held that it was not precluded from altering them without further legislative authority. A legal establishment of new harbor lines would be a legal discontinuance of the old lines without any direct action for that purpose.

Where a harbor line was established solely in order that an expensive and sightly bridge might not be hidden from view by buildings placed on each side of it, it was held not to be a public use for which lands could be taken.

[Argued January 20th—decided March 20th, 1891.]

APPEAL from an assessment of benefits and damages in laying out harbor lines by the defendant city; brought to the Superior Court in Fairfield County. Facts found and case reserved for advice. The case is fully stated in the opinion.

A. B. Beers and *M. W. Seymour*, with whom were *A. M. Tallmadge* and *H. H. Knapp*, for the plaintiff.

J. J. Phelan and *G. W. Wheeler*, for the defendant.

SEYMOUR, J. The finding of facts states that the plaintiff is the owner in fee of certain real estate in the city of Bridgeport consisting of uplands, and, as a riparian owner, of the mud-flats adjacent thereto, on the east side of Bridgeport harbor.

It further appears that in the year 1886 the common council of the city legally designated and established a harbor line on the east side of Bridgeport harbor, which line ran over the mud-flats of the plaintiff and others, and assessed benefits and damages resulting therefrom to the respective parties interested.

At that time, and for many years before, a bridge existed over the harbor with which certain buildings were connected along the sides of the east end thereof. In pursuance of a vote of the common council, passed December 5th, 1887, the city proceeded to lay out a new bridge or public highway in substantially the same location as that of the bridge above mentioned, which new bridge was completed and opened as a public highway about December 8th, 1888. At the time the new bridge was completed the buildings along the sides of the east end thereof were connected with it, and still continue to be so connected.

On the 3d day of September, 1888, the board of public works made the following report to the common council:— "That in their judgment it would be wise, before the completion of the said new lower bridge, to take such action as would prevent the erection of buildings, either on the north or south sides of the iron portion of said structure, and connecting therewith on either side. Such action should be taken however in accomplishing this purpose as will result in the least injury to private rights. The board suggests the advisability of condemnation by the city, for public use, of so much of the adjoining property as will be necessary to secure the result desired, and recommend that the matter be referred to some appropriate committee for action." This

report was accepted, and referred to the street committee by the common council.

On the 10th day of December, 1888, the committee on streets reported to the common council on the report of the board of public works, and made the following recommendation :—" That such action be taken as will result in preventing the erection of buildings on either the north or south sides of the iron portion of the new lower bridge. The committee fully agree with said board that this expensive and sightly structure should not be marred by placing buildings on either side thereof; and they further report that they have consulted the city attorney in reference to the subject, and, as a result of such conference, have come to the conclusion that the most desirable course to pursue, in order to accomplish the object desired, would be to establish harbor lines on both sides of said bridge."

The committee recommended the adoption of the following resolution :—" *Resolved*, that the committee on harbor improvements is hereby directed to take such preliminary action as will result in the establishment of harbor lines on both sides of the lower or Bridgeport bridge, extending from the present harbor lines at the western end of the eastern causeway of said bridge, westerly to the draw of said bridge." This report was accepted and the resolution adopted by the common council.

On the 7th day of January, 1889, the committee on harbor improvements reported on the report of the street committee relative to establishing harbor lines on both sides of the lower bridge, and recommended the adoption of the following resolution :—" *Resolved*, that the clerk is hereby directed to notify owners of property and parties in interest to appear before this common council, at the council room, on Monday evening, January 21st, 1889, at 8.30 o'clock, and be heard in relation to the establishment of harbor lines on the east side of Pequonnock river, as follows :—Beginning at a point in the harbor lines as already established, at the old wall or point of rocks, on property belonging to the Farist Steel Company, thence northeasterly in the direction

of the common center of Kossuth street and the new bridge, three hundred and forty feet, and thence northerly in a straight line to a point in the harbor line as already established at Howe's dock at the foot of Howe street; excepting that so much of said line as may lie upon or pass over the eastern approach to the new lower bridge shall remain inoperative and of no effect." The report was accepted, and the resolution adopted by the common council.

On the 21st day of January, 1889, the board of aldermen and the board of councilmen assembled in joint convention, and hearings were had relative to the establishment of said harbor line. On the 4th day of February, 1889, the committee on harbor improvements reported to the common council relative to the establishment of harbor lines on the east side of Pequonnock river, a hearing upon which was had before the common council January 21st, 1889. They recommended the adoption of the following resolutions:—

"*Resolved*, that harbor lines be and are hereby ordered, laid out and established, on the east side of Pequonnock river, north and south of the new lower bridge, commencing at the old wall or point of rocks on property of the Farist Steel Company, and extending northeasterly in the direction of the common center of Kossuth street three hundred and forty feet; and thence northerly, in a straight line, to a point in the established harbor lines at Howe's dock at the foot of Howe street.

"*Resolved*, that Messrs. John McNeil, Richard B. Cogswell and Charles R. Brothwell, be and are hereby appointed a committee, whose duty it shall be to make such lay-out of harbor lines, and report in writing their doings to the common council, which report shall embody a survey and particular description of said lines."

On the 18th of February, 1889, the committee reported, recommending the adoption of the following resolutions:—

"*Resolved*, that harbor lines, or dock lines, be and are hereby established on the east side of Pequonnock river, in accordance with a map thereof herewith submitted, and the following description of survey:—Beginning at a point in

the harbor line as already established, at the old wall or point of rocks on property belonging to the Farist Steel Company, thence extending northeasterly in the direction of the common center of Kossuth street and the new lower bridge three hundred and forty feet, and thence northerly in a straight line to a point in the harbor line, as already established, at Howe's dock at the foot of Howe street; excepting that so much of the line as may lie upon or pass over the eastern approach to said lower bridge shall remain inoperative and of no effect.

"*Resolved*, that the mayor appoint appraisers to estimate the damages and benefits resulting from the foregoing lay-out of harbor lines."

The resolutions were adopted, and the mayor thereupon appointed appraisers on said lay-out, who proceeded to assess benefits and damages thereon, and on July 1st, 1889, reported to the common council. In their report they did estimate, ascertain and determine that the appellant will receive an equal amount of damages and benefits from the establishment of the harbor lines. On the 15th of July, 1889, the common council accepted the report, whereupon this appeal was taken.

It seemed to be conceded on the argument that the report of the appraisers, that the appellant's damages and benefits are equal to each other, proceeded upon the theory that he is entitled to no damages on account of the establishment of the harbor lines. The finding states that a tract of land is taken by the lay-out of the proposed harbor lines, and the applicant is deprived of the use, benefit and worth of the same, and of all the privileges and franchises connected therewith, without compensation.

The first question therefore which we shall consider relates to the general right of the owner of lands abutting on navigable waters to damages for the legal establishment of a harbor line over the abutting flats, between high and low water marks.

In Connecticut the public is the owner in fee of the flats adjoining navigable waters up to high water mark, such

title being vested in the public for purposes of navigation and commerce. *Simons* v. *French*, 25 Conn., 346.

The owner of the adjoining uplands has the exclusive privilege of wharfing and erecting stores and piers over and upon such soil and of using it for any purpose which does not interfere with navigation, and it may be conveyed separately from the adjoining uplands. Over it he has the exclusive right of access to the water, the right to accretions, and generally to reclamations.

Because the soil, between high and low water marks, is held to be *publici juris*, the right of the owner of the adjoining upland in it is termed a franchise. But it is none the less a well recognized, substantial and valuable right. It constitutes, as the court says in *Simons* v. *French*, *supra*, speaking of the right of wharfage, like other franchises, a species of property which like other property is alienable by the owner, and alienable as well before the right has been exercised as it would be after a wharf had been actually erected.

It is claimed by the appellee that, inasmuch as the fee of the flats is in the state, therefore the state has the undoubted right, by itself or by those to whom it delegates the right, to take and use them for any public purpose without giving compensation therefor, so long, at least, as the upland proprietor has not appropriated them to such uses as he legally may.

There are cases which sustain such a claim. On the contrary there are cases which hold that riparian owners upon navigable waters have rights appurtenant to their estates of which they cannot be deprived, when once vested, except in accordance with established law and upon due compensation.

This, says Lewis, in his recent work on Eminent Domain, after reviewing the cases, seems the better and sounder rule. It certainly seems more in harmony with our Connecticut decisions that the right of wharfage, perhaps the most valuable franchise attached to the upland, is as much the sub-

ject of sale by the owner of the right before it has been exercised as it would be after.

The common council of Bridgeport in establishing harbor lines acts under the delegated power of the state. If the state might take the mud-flats of the appellant, in the legal establishment of harbor lines, without granting compensation therefor, on the ground that it owns them, and if the council representing the power of the state might, if it were so authorized, possess the same power, yet no such power is given or intended. The state has a right to give compensation and to require the city to do so; and this it has expressly done.

Section 38 of the city charter provides that the common council shall have power to designate and establish a line or lines, on or along either or both sides of Bridgeport harbor or Pequonnock river, or on any part thereof, from the mouth of the harbor to Berkshire mill, and in designating and establishing such line or lines for the purposes aforesaid similar proceedings in all respects in relation thereto, and in relation to benefits and damages therefor, shall be had, and the persons whose lands or mud-flats are thus taken and appropriated, or who are especially benefited or damaged thereby, shall have the same rights, and be subject to the same obligations and liabilities, as in the case of the lay-out, alteration or enlargement of highways, streets, public walks, etc., in said city.

Section 32 of the charter provides that before the common council shall determine to lay out, alter, extend, enlarge, discontinue or exchange any highway, street, public walk, etc., in said city, they shall cause reasonable notice to be given describing in general terms such proposed lay-out or alteration, and specifying a time and place when and where all persons whose land is proposed to be taken therefor may appear and be heard in relation thereto by the common council assembled in joint convention for such hearing; at which time and place, and at any meeting adjourned therefrom, the common council shall hear all the parties in interest who may appear and desire to be heard in relation thereto.

Section 33 provides that if, after such hearing, the common council shall resolve to lay out, alter, extend, enlarge, discontinue or exchange such street, highway, walk, avenue, park or landing place, they shall appoint a committee whose duty it shall be to make such lay-out or alteration and report in writing their doings to the common council; which report shall embody a survey and particular description of such street, highway, etc., or alteration thereof.

Section 34 provides, if said report shall be accepted, for the appointment of three judicious and disinterested freeholders of the city to estimate and appraise the benefits or damages, as the case may be, accruing or resulting to any person or persons from the taking of such land for public use or from such lay-out, alteration, etc. Said freeholders shall be sworn, and before making any such assessment of damages and benefits shall give reasonable notice to all persons interested of the time and place when and where they shall meet for that purpose. They shall meet at the designated time and place, and at such other times and places as they shall adjourn to therefrom, and shall hear all parties in interest who may appear; and they shall thereupon ascertain and determine what person or persons will be damaged by such taking of land or such lay-out or alteration, and the amount thereof over and above any damages they may receive therefrom; also who will receive an equal amount of damages and benefits therefrom. Thereupon they shall report to the common council. The report shall be continued to its next general meeting and published. Upon the acceptance of the report at the next meeting of the common council the same shall be recorded, and the common council shall cause a notice containing the names of the persons assessed, with the amounts of their respective assessments, to be published as in the section directed, and such publication shall be deemed to be legal and sufficient notice to all persons interested in the assessments.

Section 35 provides that upon the acceptance of the report of the freeholders, the survey and particular description which the charter requires to be made, (sec. 33,) shall

be signed by the mayor, or in his absence by the president of the board of aldermen, and recorded in the records of the board of aldermen.

Section 42 provides that any party who shall feel aggrieved by any act of the assessors in making any of the assessments of benefits or damages authorized in the charter, may make application for relief to the Superior Court or Court of Common Pleas in and for Fairfield County, which court may confirm, annul or modify the assessments, or make such order in the premises as equity may require.

These extracts from the charter show that whatever right the state might have to take the property of the appellant in the flats between high and low water mark, yet it has authorized the council to take it only upon the payment of just compensation therefor; and upon this appeal the appellant has, of course, a right to be heard upon the question of damages, if the other proceedings should be held to be regular, so that a legal assessment can be made.

But the appellant not only claims that the assessment gives it no compensation for the taking of its property, and is therefore unjust and illegal, but it also claims that the assessment was invalid, because, to state it generally, there has been no legal discontinuance of the harbor line established in 1886, and because the action of the common council in the matter of establishing the harbor lines in question has been irregular and illegal, so that no lawful lay-out of said lines has been made, and no legal assessment of damages and benefits has been or could be made thereon. The reasons are set forth particularly in the appeal and are based upon the facts stated in the finding and reservation.

We see no good reason for holding that the council, having in 1886 established harbor lines on the east side of the harbor, is thereby precluded from altering them by the subsequent establishment of new lines as proper occasion may require, without further legislative authority. We think, also, that the legal establishment of new harbor lines would, of itself, be, to all intents and purposes, a legal discontinu-

ance of the old lines, without any specific action declaring them to be discontinued.

We come now to the question whether the harbor lines were legally established according to the provisions of the charter.

That instrument, as we have seen above, provides that, in designating and establishing harbor lines, similar proceedings in all respects in relation thereto, and in relation to benefits and damages therefor, shall be had as in the case of the lay-out, alteration or enlargement of highways, streets, public walks, etc., in said city. That is, as will appear by reference to the proper section and adapting it to these proceedings, if, after certain preliminary steps, the common council shall decide to designate and establish a harbor line, they shall appoint a committee whose duty it shall be to make such lay-out and designation, and report in writing their doings to the common council, which report shall embody a survey and particular description of such harbor line.

By reference to the finding incorporated in the early part of this opinion it appears precisely what was done in relation to the lay-out, after the steps preliminary to the appointment of the committee to make such lay-out had been taken. To briefly summarize it:—February 4th, 1889, the committee on harbor improvements reported resolutions which the council adopted and by which a committee was appointed to lay out the harbor lines and report their doings to the council. February 18th, 1889, the last named committee reported and recommended resolutions for adoption, which the council adopted.

Now the appellant claims that it appears from an examination of the above proceedings in detail that there has been no legal lay-out and establishment of said harbor lines; that it appears, and that such is the fact, that no action whatever was taken by the committee respecting the lay-out and establishment of harbor lines, except to report back and recommend the acceptance of the resolution, in substance, passed by the common council February 4th, 1889; that the committee neither laid out nor established,

nor does their resolution purport to lay out and establish, any harbor line, but only to recommend that the same be established by the common council, and that the common council, in adopting the resolution, itself laid out and established such line.

This precise point, among others, was discussed in *Gregory* v. *City of Bridgeport*, 52 Conn., 40.* In that case a petition for widening a highway was referred by the common council to a committee. The committee subsequently reported as follows:—"The committee on streets and side-walks beg leave to report concerning the widening of the approach to the lower bridge, and recommend the adoption of the following resolutions:—

"*Resolved*, that the widening of the western approach to the lower bridge from the present north line of the street approaching the bridge, extending along the harbor seventy feet south on a line with the present wharf, and extending from the wharf westerly to the railroad, according to the map and survey thereof made by the city surveyor and submitted herewith, be accepted and approved, and the same be and become, after the final settlement of assessments, a part of the highway thereto.

"*Resolved*, that the mayor appoint a special committee of three judicious and disinterested freeholders to estimate and appraise the benefits or damages, as the case may be, accruing or resulting to any person or persons from said widening."

Upon this state of facts the court said:—"There is nothing here which purports, even, that the committee had laid

* NOTE. The head note of the case here referred to, by an error of the reporter, does not accurately present the point decided by the court. It should be corrected as follows:—

In the 8th line of the head note strike out the words "*a proper committee to refer such a matter to*," and insert "*without a reference to it for that purpose, a committee to make the lay-out.*" The last sentence of this paragraph would then read as follows:—"Held that a standing committee on streets and side-walks was not, without a reference to it for that purpose, a committee to make the lay-out under this provision of the charter."

In the 5th and 6th lines of the second paragraph of the head note, strike out "*even if the committee had been the proper one.*" REPORTER.

out the widened part of the street; * * * obviously the report is nothing more than a recommendation to the council that the widening should be made in accordance with the map and survey submitted." Again the court says:—"If what was done October 3d (the day the report was accepted), can be construed as a lay-out of the alteration of the street, the lay-out was made by the common council alone, contrary to the express provisions of the charter. The committee simply recommend the alteration described to the common council for their acceptance and approval. The council accepted and approved, and if, by so doing, the alteration was laid out, who did it? The committee by their report and recommendation do not pretend to have done it. They described the alteration, it is true, but this was necessary to enable the common council to know what alteration should be laid out. * * * It is clear, if there was any lay-out here, that it was done by the common council and not by the special committee, as the present charter requires. But there was no lay-out of this improvement, and consequently no basis for the assessment of damages or benefits, and the assessment was therefore void."

Manifestly, if that case is still an authority, there has been no legal lay-out and establishment of the harbor line in dispute.

It is claimed, however, that it is overruled on that point by *Hough* v. *City of Bridgeport*, 57 Conn., 290. It is true that it would seem from the case as stated in the opinion that the same question might have been made. If it was, there is no intimation that it was considered and decided, and no suggestion that anything therein contained overruled the point so explicitly stated in the former case. Instead of overruling, it distinguished the case of *Gregory* v. *City of Bridgeport* from the one then under consideration. The first held that, under the charter, which provides that if, after certain preliminary proceedings, the council shall resolve to lay out a street, it shall appoint a committee to make such lay-out, the standing committee on streets and sidewalks was not of itself, and without such special reference, such a com-

mittee as was intended by the charter. In point of fact, as the opinion shows, upon receipt of the petition for widening the highway, the council immediately referred it to the standing committee on streets and side-walks. That committee subsequently reported resolutions that the common council should order the widening to be made according to plans which it submitted. The resolutions were adopted, and furnished the first indication that the council resolved to make the lay-out. The charter was not followed, no committee was appointed to make the lay-out after the council had resolved that it should be made. The only committee which acted was the standing one on streets and side-walks, to which the matter was referred before the lay-out was resolved upon by the council.

Now in *Hough* v. *City of Bridgeport*, the standing committee on streets and side-walks was also appointed a committee to make the lay-out. Relying upon the general statement of the syllabus in *Gregory* v. *City of Bridgeport*, it is evident that the claim was made that such a reference was contrary to the charter. Thereupon the court distinguishes the two cases, and shows that, whereas in the former case the petition was referred to the standing committee immediately upon its receipt, not to make a lay-out but to examine and report what should be done, and no committee was appointed to make the lay-out after the council had resolved upon it, yet in the latter case the regular steps in this behalf were taken, and, though the lay-out was committed to the standing committee on streets and side-walks, it was as a special committee, appointed after the council had resolved to make the lay-out, and consequently the decision in *Gregory* v. *City of Bridgeport* was not applicable.

The second point made was that the committee appointed after the council had resolved upon the lay-out was not appointed to lay out the street, but to procure and report to the council a survey, etc. This the court says is a distinction without a difference, and that, taken in connection with its fellow resolution ordering the extension, it is to be construed as a direction to the committee to lay out the street

as well as to procure and report a survey of it. No other point which was in any respect common to the two cases was discussed or decided.

If the point made in *Gregory* v. *City of Bridgeport* and in the case at bar, that the council and not the committee made the lay-out, was made, the law respecting it, as laid down in the former case, was not in terms overruled. We are not disposed to overrule it nor evade it. Under the charter it is necessary, and upon general principles it is expedient, that a committee should make the lay-out. In theory, at least, it is not a mere formal thing which anybody can do, off hand, upon paper, but should be done carefully, and, as far as possible, with a view to the convenience of individuals, even after general directions have been given by the council.

One other point demands consideration. It is claimed that, even if all the proceedings were legal in form, yet there is a fatal objection to the validity of the assessment, in that the case itself discloses the fact that the harbor lines were established and the appellant's land condemned in order that the new bridge, that "expensive and sightly structure, should not be marred by placing buildings on either side thereof;" and not for any legitimate public use whatever.

The appellant says that, except for public uses, private property cannot be taken even upon the payment of just compensation. We presume that no one will question the correctness of that proposition. The taking of private property in the legal establishment of harbor lines is *primâ facie* a taking for public use. The legislature so considered it in granting the charter to the city of Bridgeport, and, though that fact is not conclusive, inasmuch as it is held almost universally that whether a particular use is public or not within the meaning of the constitution is a question for the judiciary, still there can be no question but that property taken in the legal establishment of harbor lines is taken for public use. But the right to establish harbor lines, and to take private property for that purpose, must be exercised in good faith and for a public use naturally connected with their

establishment. Private property cannot be taken for other than public uses under the guise of taking it for public use. There may be difficulty in many cases in applying this rule, as where nothing appears in the proceedings of the purpose for which the lines were established, and the presumption would be that they were established in the interest of navigation. But where, as in the present case, all the proceedings declare the purpose to be an ulterior one, which no one would claim to be a public one within the meaning of the constitution, when this purpose is spread upon the very records which are laid before us as containing the authority on which the assessment committee acted, we should be shutting our eyes to the real state of affairs, and permitting property to be taken under the excuse of the right of eminent domain in a case where no public use was contemplated, if we should decide in accordance with the appellee's claim. That would commit us to the doctrine that we are bound by the fact that it was a harbor line that was established, no matter for what purpose it appears to have been established nor how far it is removed from the harbor. We cannot accept that conclusion, but must hold that, whereas it appears from the records themselves, which are introduced to show the facts upon which the legality of the assessment depends, that the harbor lines were laid out for the purpose of preventing a new bridge from being marred by the building of structures connected with it which would obscure it, and not in the interests of navigation or any other public use, private property cannot be taken without violating constitutional rights.

It is unnecessary to consider the other questions which were discussed. Upon those already considered we advise the Superior Court to render judgment for the appellant, annulling the assessment appealed from.

In this opinion the other judges concurred.

FRANK A. ANDREWS *vs.* THE NEW YORK & NEW ENGLAND RAILROAD COMPANY.

FRANK A. ANDREWS AND WIFE *vs.* THE SAME.

EDWARD W. SMITH, ADMINISTRATOR, *vs.* THE SAME.

New Haven & Fairfield Cos., Oct. T., 1890. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

Where a highway crossing a railroad at grade is very little used, there is a less degree of vigilance required on the part of an engineer of a train approaching the crossing. The requirement of vigilance is to be measured by the total of danger.

An engineer is to be judged by the circumstances as they appeared to him at the time, and not as they appear to others afterwards.

The eighty rods from the crossing, at which point the law requires the blowing of the whistle, may be eighty rods in a direct line, instead of the curved line of the track. The purpose of the statute ought not to be sacrificed to its letter.

The real question is, was the whistle sounded, and in a proper manner, and substantially at the place fixed by law and where it would be likely to be heard by those for whose benefit it is required.

In a case where the law furnishes no definite rule as to what a party should do in particular circumstances and the general rule of law is alone applicable, the law necessarily leaves the two questions, what would a man of ordinary prudence have done in the circumstances, and was the conduct of the party that of such a man, to the decision of the triers. And if the facts upon which their decision is based are properly found, the decision is final and cannot be reviewed by the court.

[Argued October 31st, 1890—decided March 20th, 1891.]

THREE ACTIONS for injuries through the negligence of the defendant railroad company in the running of one of its trains; brought to the Superior Court in Fairfield County, and, after demurrers overruled, heard in damages before *Fenn, J.* The first action was for damage to the plaintiff by an injury to his wife; the second for damage to the wife from the same injury; and the third for the death of Sarah J. Smith, in the same accident, the suit being brought by her administrator. The three cases involved the same facts and were tried together. The court made a finding of the facts

and rendered judgment in each case for the defendant, and the plaintiffs appealed. The case is fully stated in the opinion.

G. Stoddard and *W. S. Haviland*, for the appellants.

E. D. Robbins, for the appellee.

ANDREWS, C. J. These were three cases tried together and all depending on the same facts. There was a hearing in damages after a demurrer overruled and a judgment in each case for nominal damages only.

The injury of which the plaintiffs complained happened at a grade crossing of the defendant's track in the town of Plymouth known as "Tolles's Crossing." That crossing is in a thinly settled locality. There are two houses within half a mile, at one of which Mrs. Andrews was living, with whom her aunt, Mrs. Smith, who lived in Bridgeport, was then visiting. There were in all four houses within a mile. Ordinarily from two to fourteen teams go over this crossing in a day. At the point of the crossing the general direction of the railroad is east and west; of the highway north and south. The railroad track curves slightly, the inner side to the south. The crossing is dangerous to persons on the highway going north when a train is going east. West of the crossing the view of the railroad from the highway and of the highway from the railroad is obstructed by rocks and embankments. At the time of the injury the obstruction was somewhat increased by vegetation—weeds, bushes and trees—growing within the right of way of the railroad. Such vegetation however caused very slight obstruction to sight and none at all to sound. The whistling post for trains approaching the crossing from the west is fourteen hundred and thirty-six feet west of the crossing measured by the curve of the track, but it is nearer measured in a straight line, but how much nearer is not found. There is another grade crossing a little east of Tolles's Crossing. The distance did not appear. The finding made by the judge of the Superior Court closes as follows:

"On the 20th day of August, 1887, at about one o'clock in the afternoon, Mary E. Andrews, one of the plaintiffs, and Sarah J. Smith, the intestate of the plaintiff Edward W. Smith, administrator, were driving in a buggy on the highway and approaching Tolles's Crossing from the south. Mrs. Andrews was sitting on the right hand side of the buggy holding the reins, and Mrs. Smith on the other side of the same seat. At this time the weekly pay train on the defendant's railroad, consisting of an engine and one car, which was running as the second division of a regular passenger accommodation train, ten minutes behind the first section, was approaching the crossing from the west. Upon the crossing the engine upon this train collided with the buggy, throwing out both occupants, instantly killing Mrs. Smith and very seriously injuring Mrs. Andrews.

"The train approached the crossing at the rate of about twenty-five miles an hour. As the engineer passed the whistling post he commenced blowing the usual crossing whistle, consisting of two long blasts followed by two short blasts. At the same time the fireman commenced ringing the bell, and continued ringing it until the engine had passed the crossing. No other signal was given. The whistle and bell, if listened for, could have been heard without difficulty by persons approaching the crossing from the south on the highway. Mrs. Andrews and Mrs. Smith possessed ordinary powers of sight and hearing. The engineer was on the side of the engine from which the ladies were approaching the crossing. He was looking ahead along the track. When he first caught sight of the horse the engine was about ninety feet west of the crossing and the horse's head and neck within ten feet of the track. He supposed the team was coming to a stop, but almost immediately he saw the team moving forward, urged as it seemed to him by the action of the occupants of the carriage. He did everything possible to avert the accident by stopping the train, but was so near the crossing that he was unable to stop the engine in time to prevent it. It did stop at a point two hundred and ten feet east of the crossing. He did not again sound the whistle of his engine. The horse

which the ladies were driving was gentle, not afraid of trains, and might have been stopped in time to prevent the accident if the ladies had kept watch along the track after it became possible for them to see the engine.

"It is impossible for me to see how these facts are legally sufficient to justify any finding of negligence on the part of the defendant or any violation of duty on its part. I therefore find that the defendant was not guilty of negligence. And as the conclusion reached, that the plaintiffs are entitled to nominal damages only, is based upon such want of negligence on the part of the defendant, I also omit to find contributory negligence on the part of Mrs. Andrews or Mrs. Smith, although clearly of opinion that a greater degree of vigilance on their part would have averted the accident."

What negligence is in the meaning of the law, and in what cases a finding of negligence or of no negligence by a trial court can be revised by this court, and in what cases such a finding cannot be revised, has been so recently and so fully considered in *Farrell* v. *The Waterbury Horse Railroad Co.*, (*ante* page 239,) that we have no occasion to consider it again. We adopt the discussion in that case as a part of the opinion in this.

One claim made by the plaintiffs is, that "the defendant was negligent in that its engineer failed to commence sounding the whistle of his locomotive when the locomotive was approaching and within eighty rods of the crossing as measured along the curved line of the track." The purpose for which the whistle is required to be sounded and the bell to be rung when the train is approaching a grade crossing, is that all persons who are about to cross the track at the crossing may have notice that the train is coming. Doubtless the legislature considered that eighty rods from the crossing was the point from which the signal would be the most effective. Generally this may be true. But in many cases this is not true, as shown by actual experience. Curves in the track and local conformations of the country often so affect the transmission of sound, that the signals, if given at the precise distance of eighty rods from the cross-

ing, would be of no avail. The purpose of the statute ought not to be sacrificed to its letter. If we assume that it was the duty of the engineer to sound the whistle not further away from the crossing than eighty rods, there is no reason why the distance must be measured by a curved line rather than a straight one. Sound travels in a straight line. It would seem that the straight line was the one to be preferred. There is nothing in the finding to show that by the straight line the point where the whistle began to sound was more than eighty rods from the crossing. After all, the real inquiry is—Was the whistle sounded? Was it sounded in a proper manner, and substantially at the place fixed by law, and at a place where it would be likely to be heard by those for whose benefit it is required? If so there was no negligence. Upon every one of these particulars the finding is clear and explicit in the affirmative.

As to the other claims made in this case, they are of such a nature that the law neither has furnished nor can furnish a precise and definite rule beforehand as to just what the parties should or should not do in order to avoid liability for their acts or omissions under the facts and circumstances as they occurred, and the general rule of conduct is alone applicable. The law therefore, of necessity, leaves the two questions, what would a man of ordinary prudence have done under the facts and circumstances of this case, and was the conduct of the plaintiff or defendant that of such a man, to the decision of the trier. And provided the facts upon which it is based are properly found, that decision is of necessity final and cannot be reviewed by this court.

But if we were at liberty to review these claims we should be entirely satisfied with the conclusion to which the trial court came. One of the claims is that the defendant was negligent in permitting the weeds and bushes to grow within its right of way, so as to obstruct the view of the approaching trains and so as to limit the opportunity which Mrs. Andrews and Mrs. Smith had to hear the signals of the train. So far as this claim rests upon any obstruction to the hearing it is disposed of by the finding, that being expressly

that the weeds, &c., did not obstruct the sound at all. In respect to the opportunity for seeing a train from the highway, the court makes this finding:—"At a point in the highway sixty-seven feet south of the crossing a person sitting in an ordinary buggy could see the top of the smoke stack of an engine one hundred feet west of the crossing. At a point in the highway thirty feet south of the crossing the engine could be seen one hundred and fifty-eight feet west; twenty-five feet south, one hundred and seventy-three feet west; twenty feet south, one hundred and ninety-one feet west; fifteen feet south, two hundred and twenty-six feet west; and ten feet south, two hundred and sixty-nine feet west. These measurements were made in the month of November, when the obstruction to sight from vegetation would be likely to be less than in August; but the court finds not materially less. Mrs. Andrews and Mrs. Smith had a gentle horse, one not afraid of cars. Surely these distances are abundantly sufficient to afford opportunity to see an approaching train in time to remain in a place of safety. If the defendant was negligent in not keeping down the weeds and bushes within its right of way, it was not a negligence that led these unfortunate ladies into a place of danger.

Another claim made by the plaintiffs is, that the engineer did not sound the whistle between the whistling post and the crossing; that the ringing of the bell was not sufficient; that this was a dangerous crossing to persons approaching it from the south and when a train was coming from the west; and that the defendant should have used means of warning commensurate with the danger. The plaintiffs, however, fail to note in this connection that this crossing was but little used. Sometimes not more than two teams a day crossed there and at the most not more than fourteen, so that while the crossing was in itself a dangerous one the aggregate of danger there was very slight—as slight almost as at any country crossing that could be found. The requirement of vigilance is to be measured by the total of danger.

In this part of the case the plaintiffs made another claim which is entitled to careful consideration. It is that after

the engineer saw the ladies and the team he did not do all that he might have done to prevent injury to them. He did not sound the whistle. The bell was ringing all the time. He tried to stop the train and in that particular did the best he could. The claim is that he should have sounded the whistle. The engineer is to be judged by the circumstances as they appeared to him at the time, and not as they appear to others after all the danger is passed and there is time to view the circumstances at leisure. The finding is that the engineer saw the head and neck of the horse when the horse was about ten feet south of the track. The engine was then about ninety feet west of the crossing, moving at the rate of twenty-five miles an hour—say thirty-six or thirty-seven feet in a second. Two and one half seconds was all the time in which he had to act. He had the right to act at first on the presumption that they would conduct themselves with ordinary care. Apart from this general presumption, the movement of the horse indicated that they were about to stop. By the time the horse was again urged forward some part of the two and a half seconds had elapsed. The whistle had been sounded properly, in a manner and at a place where it could have been heard, and the engineer had the right to believe it had been heard by them as they approached the track. The bell was ringing. The noise of the train itself could be heard more than the ninety feet. That they urged the horse forward into certain danger when the train was so near and in their full view, was the first indication to the engineer that they were acting without judgment from alarm or through rashness. Up to that instant he had no call to do anything more than had been done—to sound the whistle or to stop the train. He decided that their rashness would not be checked nor their alarm quieted by more noise. We are unable to say he did not decide rightly. In all other respects he did the best he could.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

JAMES L. MCCASKILL *vs.* THE CONNECTICUT SAVINGS BANK.

New Haven and Fairfield Cos., Oct. T., 1890. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

A savings bank pass-book, containing entries of deposits, is not negotiable by itself, nor upon a written order by the depositor directing the payment of the money to the order of a third person.

No depositor can convey to an assignee any greater right in the funds of the savings bank than he has himself, and any defense that would be good against the depositor would be equally good against his assignee, in the absence of facts to create an estoppel in favor of the latter.

A fraudulent check was, with knowledge of its character and with fraudulent intent, deposited by *H* in the defendant savings bank, which gave him a pass-book with the amount set to his credit. This pass-book was afterwards assigned by *H* to the plaintiff, who took it for a valuable consideration, but without inquiry and after he had reason to suspect the fraud. Held that the bank was not estopped by its entry of the deposit from denying its liability to the plaintiff.

The pass-book having been obtained of the bank by fraud, the bank was not to be regarded as having issued it.

It is the general rule that where representations are procured by fraud there will be no estoppel on the party making them, though made with the full intention that they should be acted upon.

[Argued October 28th, 1890—decided March 20th, 1891.]

ACTION by the plaintiff as assignee of a savings bank pass-book and holder of an order for money, to recover money represented by it, standing to the credit of the depositor on the pass-book; brought to the Superior Court in New Haven County, and tried to the court before *Robinson, J.* The court made the following finding of facts.

The defendant is a savings bank chartered by the state and doing business in New Haven. On December 23d, 1887, a person introducing himself as Michael Harrison, and representing that he lived at No. 68 Walnut street, in the city of New Haven, called at the banking house of the defendant and presented to the teller of the bank for deposit a check for $1,250, purporting to be signed by one D. D.

Stone, upon the Mercantile National Bank of the city of New York, payable to the order of Michael Harrison. Upon being informed by the teller that so large a sum as $1,250 could not be received by law from one person at one time, he requested that $750 be received in the name of Michael Harrison, and $500 in the name of Thomas Harrison, whom he represented to be his brother.

He having indorsed the check with the name of Michael Harrison, the teller believing his statements and that the check was genuine, received it and gave to him two pass-books, in the ordinary form of savings bank deposit books, the first in the name of Michael Harrison, numbered 29,007, and containing the entry, "1887, Dec. 23—To cash, $750;" the second in the name of Thomas Harrison, and numbered 29,008.

Michael Harrison was not known to any officer of the bank, nor was any identification of him given or required, other than his own statements, upon which and his appearance and manner the bank teller relied as being truthful and honest. The signature of the check was not known to the officers of the bank, nor did they make any inquiry, either at No. 68 Walnut street, or of the Mercantile National Bank, as to the identity of Harrison or as to the validity of the check.

The pass-books contained the following by-law of the bank and form of order.

"Sec. 2. Each depositor shall be furnished with a pass-book containing the by-laws of the bank, in which shall be transcribed his account with the bank, as entered upon the books of the treasurer; and every depositor receiving such a book shall be deemed and considered as assenting to and as bound by all the rules and regulations of the bank. When the deposits are withdrawn the pass-book shall be presented; and no payment shall be made except to depositors, or upon their written order, accompanied in all cases with the pass-book."

The following is the form of order.

(Town and Date.)

This Bank Book must be presented with the Order.

$..... .....

Treasurer of The Connecticut Savings Bank of New Haven, pay to ..... or bearer, ... dollars, on my deposit book, No..... .....

Witness.....

The check was in fact fictitious and fraudulent, and the person so paying the check to the bank did not live at 68 Walnut street, nor did any person live there named Michael Harrison.

The check was sent by the bank, in its ordinary course of business, to New York city for collection, and was returned protested; and the bank then upon inquiry first became aware that the check was fictitious and fraudulent, and that the man who presented and indorsed it was a swindler.

On the 11th day of January the bank caused notice to be published three days in one morning and one evening newspaper in New Haven, stating that the two books had been fraudulently obtained from the defendant, and warning all persons against buying or negotiating the same, as payment thereon had been stopped.

During the month of January, 1888, and for over three years before, the plaintiff was United States Consul at Dublin, Ireland. In the early part of that month a person calling himself Michael Harrison presented the two deposit books to the plaintiff, at his office in Dublin, and requested him to loan him a sum of money upon the book No. 29,007 as security, and to send the book to New Haven for collection. The man was an entire stranger to the plaintiff. The plaintiff declined to do so, and advised him to go to the Ulster Bank in Dublin, where the plaintiff did business, and have the bank send over one of the books for collection.

The man visited the office of the plaintiff socially several times after the first interview, and before the 27th of January.

On the 27th of January, at the suggestion of the plaintiff, he presented the book No. 29,007 to the Ulster Bank, and applied for a loan upon it. He was a stranger to the Ulster Bank, and the bank declined on that account to make the

desired advance. He then told the bank that the plaintiff would secure the amount he wanted, which was twenty-five pounds. The following arrangement was then made between Harrison, the plaintiff, and the Ulster Bank.

The bank took from Harrison the book No. 29,007, with an order for its collection, which order was as follows:

"DUBLIN, 27th Jan., 1888.

"To Treasurer Connecticut Savings Bank:

"Pay to Messrs. J. J. Stuart & Co., or bearer, seven hundred and fifty dollars (with interest thereon), on my deposit book No. 29,007. MICHAEL HARRISON.

"Witness: J. L. MCCASKILL, U. S. Consul, Dublin."

J. J. Stuart & Co. were the correspondents of the Ulster Bank in New York city.

The plaintiff, upon the delivery of this order and the book to the Ulster Bank, gave to the bank his draft as follows:

"£25. DUBLIN, 27th Jan., 1888.

"One month after date pay to my order at the Ulster Bank, College Green, Dublin, the sum of twenty-five pounds.

"J. L. MCCASKILL.

"MR. MICHAEL HARRISON."

This bill was accepted by Michael Harrison, and was indorsed by the plaintiff, and discounted for Harrison by the Ulster Bank. Since that transaction the plaintiff has not seen or heard of Harrison.

The Ulster Bank at once forwarded the book and order to its correspondents in New York city for collection. On the 9th of February, 1888, the book was presented to the defendant for payment, with the order, by the agents of J. J. Stuart & Co., and payment was refused on the ground of the fraud in obtaining the book. The fact of the refusal of payment by the defendant on this ground was cabled by

J. J. Stuart & Co. to the Ulster Bank, and the plaintiff was then advised of it by the bank.

On the maturity of the bill drawn by the plaintiff, and held by the Ulster Bank (March 1st, 1888), it was paid by the plaintiff. On the return of the deposit book to the Ulster Bank by its New York correspondents, the book was handed by it to the plaintiff.

In the plaintiff's transaction with the Ulster Bank and the man calling himself Michael Harrison, the plaintiff took no steps whatever to ascertain whether the book was a recognized pass-book of the defendant, or whether Harrison was a *bonâ fide* holder of it, or any fact relating to him bearing upon the good faith of his possession of the book. The fraudulent character of the book could have been readily ascertained by a cable inquiry of the defendant. The plaintiff had never held the book until, after actual knowledge of its fraudulent character, it was handed to him by the Ulster Bank. And in the transaction of January 27th, the plaintiff had reason to believe that Harrison's possession of the deposit book was tainted with some kind of fraud or illegality, and that he was not the *bonâ fide* owner of any just claim upon the defendant. The court finds that the plaintiff is not a *bonâ fide* holder of the book and order.

Upon the trial, after the pass-book had been identified as the one issued by the defendant to Michael Harrison, and the handwriting identified as that of the teller of the defendant bank, the defendant offered the testimony of Elliott H. Morse, its treasurer, to show that the check for $1,250 was fictitious, and that no other deposit had been made by Harrison. To this evidence the plaintiff objected, on the ground that the defendant was estopped to deny the representations contained in the book. The evidence was admitted, and the plaintiff excepted.

The plaintiff claimed:

1. That the pass-book constituted a negotiable instrument in law.

2. That if not such in law, it was made such by the contract, as between the original parties and their privies.

3. That the defendant by its negligence was estopped to deny its representation that $750 in cash had been deposited with the defendant by Harrison and would be paid to Harrison's order, saving rights which third parties might have previously acquired.

All of these claims were overruled, and judgment entered for the defendant to recover costs. The plaintiff appealed.

G. D. Watrous and *E. G. Buckland*, for the appellant.

1. The rulings of the court as to the plaintiff's *bona fides* are questions of law and are reviewable. *White* v. *Brown*, 14 How. Pr., 282, 286; *Hamilton* v. *Vought*, 34 N. Jer. Law, 187, 192; *Nolan* v. *N. York, N. Hav. & Hartford R. R. Co.*, 53 Conn., 471; *Bulkeley* v. *Keteltas*, 6 N. York, 387; *Burns* v. *Erben*, 40 id., 466. If not, they are conclusions of facts from facts specially found, and thus are reviewable. *Tyler* v. *Waddingham*, 58 Conn., 386; *Bennett* v. *N. York, N. Hav. & Hartford R. R. Co.*, 57 id. 425; *Dyson* v. *N. York & N. Eng. R. R. Co.*, id., 23; *Atwood* v. *Partree*, 56 id., 82; *Hayden* v. *Allyn*, 55 id., 289; *Mead* v. *Noyes*, 44 id., 489.

2. The plaintiff was not required to investigate as to the *bona fides* of Harrison's possession of the pass-book. There was no duty resting upon the plaintiff to ascertain "whether the book was a recognized pass-book of the defendant, or whether Harrison was a *bonâ fide* holder thereof, or any fact relating to him bearing upon the good faith of his possession of the book." His rights were created when he advanced the £25, not knowing or believing that Harrison's possession was fraudulent. The doctrine adopted by this court is that good faith rather than diligence is the standard by which a holder's right is determined, and diligence or want of it is immaterial except so far as it legitimately tends to establish or rebut the claim of a *bonâ fide* possession of the paper. *Ladd* v. *Franklin*, 37 Conn., 53, 64; *Hamilton* v. *Vought*, 34 N. Jer. Law, 192. The court in *Ladd* v. *Franklin* disapproves the doctrine laid down in *Hall* v. *Hale*, 8 Conn., 336.

3. Is the pass-book with the accompanying order negotia-

ble? The pass-book, with the order, bears a close resemblance to those instruments which are in law deemed negotiable; notably so to certificates of deposit. In the absence of decisions upon this point we must therefore reason from the analogies presented in the cases of certificates of deposit. A bank issuing a certificate of deposit in substance says that a certain amount of money has been deposited with it, payable to the depositor or order upon return of the certificate. If a pass-book means anything at all, it means that the amount of money mentioned therein has been deposited in the bank issuing it, payable to the depositor or order upon the return of the book accompanied by the form of order therein prescribed. A certificate of deposit is negotiable. *Kilgore* v. *Bulkley*, 14 Conn., 383; *Miller* v. *Austin*, 13 How., 228; *Fells Point Sav. Ins.* v. *Weedon*, 18 Md., 320. Why then is not a pass-book? Both are intended to denote the indebtedness of the bank to the depositor, *and both are intended to pass from hand to hand.* Certainly if not negotiable by the law merchant, it is at least so as to the parties herein, by virtue of the contract between them and those in privity with them.

4. But whether or not the pass-book was negotiable, the defendant is as to the plaintiff estopped to deny the representation contained in it, that there was $750 deposited with it, subject to the order of Michael Harrison. The elements here present are sufficient to constitute an estoppel *in pais*, to wit:—1. A false representation. 2. Ignorance of the truth, the result of inexcusable negligence. 3. The plaintiff relying on the representation and being ignorant of the facts. 4. The representation having been made with the intention that it should be acted upon. 5. The plaintiff having been induced to act upon the representation to his prejudice. 7 Am. & Eng. Ency. of Law, 12; *Roe* v. *Jerome*, 18 Conn., 138; *Preston* v. *Mann*, 25 id., 128; *Armour* v. *Mich. Cent. R. R. Co.*, 65 N. York, 122; *Bank of Batavia* v. *N. York, Lake Erie & West. R. R. Co.*, 106 id., 199. As to the first element, there is no dispute that the representation was a false one. As to the second element, we submit that

the omission of the defendant *even to attempt* to ascertain the genuineness of the signature on the check, to investigate as to the responsibility of the maker and payee, or to inquire at Harrison's pretended residence before issuing the pass-book, was inexcusable negligence. As to the third element, upon the facts found there never was any notice to the plaintiff of the forged check or of the falsity of the representations contained in the pass-book. The advertisement in the newspapers was not such notice unless actually received by him, and there is no claim that at the time of the transaction he had ever seen or heard of the advertisement. *Bank of U. States* v. *Sill*, 5 Conn., 112. Nor do the facts found justify the conclusion that there was any fraud or illegality from which such knowledge might be inferred. And even if the plaintiff had means of knowing the falsity of the matter, he was justified in acting upon the positive representations contained in the pass-book. *Watson* v. *Atwood*, 25 Conn., 320. As to the fourth element, there can be no doubt but that this pass-book, in common with other pass-books, was issued by the defendant with the intention that it should evidence the deposit of money, and that such deposit under prescribed rules might be withdrawn or transferred. Section two of the by-laws and the "form of order" clearly establish this intention. As to the fifth element, the plaintiff *did* rely upon the representation contained in the pass-book and upon nothing else. What else could he have relied upon? The finding that the plaintiff advanced £25, and this suit itself, are the best proofs that such reliance was of a character to result in substantial loss if the plaintiff is not permitted to enforce the estoppel. Even though the defendant did not intend to mislead the plaintiff, it is enough if the declaration was calculated to and did in fact mislead another acting in good faith and with reasonable diligence. It is good law and good sense that of two innocent parties, he whose acts have caused the loss must bear it. *Moore* v. *Metro. Nat. Bank*, 55 N. York, 47; *Armour* v. *Mich. Cent. R. R. Co.*, 65 id., 121; *Blair* v. *Wait*, 69 id., 116. This doctrine of estoppel applies independently of the

question of negotiability. It has grown up and has become firmly fixed in our law in the cases of transfers of stock, warehouse receipts, bills of lading, elevator receipts and non-negotiable notes. In every transaction where parties contemplate, or where usage supposes them to have contemplated, the possibility of transfer, this doctrine applies. Pomeroy's Remedies, § 160 *et seq.*; *Bridgeport Bank* v. *N. York & N. Hav. R. R. Co.*, 30 Conn., 275; *Winton* v. *Hart*, 39 id., 20; *McNeil* v. *Hill*, 1 Woolw., 96; *N. York, N. Hav. & Hartford R. R. Co.* v. *Schuyler*, 34 N. Y., 52; *McNeil* v. *Tenth Nat. Bank*, 46 id., 329; *Armour* v. *Mich. Cent. R. R. Co.*, 65 id., 123; *Bank of Batavia* v. *N. York, Lake Erie & West. R. R. Co.*, 106 id., 200; *Babcock* v. *People's Sav. Bank*, 118 Ind., 212; *Joslyn* v. *St. Paul Distilling Co.*, 46 N. W. Rep., 337.

C. R. Ingersoll, for the appellee.

LOOMIS, J. Upon the trial of this case, and upon the facts contained in the finding, the plaintiff's contentions relative to five questions were overruled by the court, and furnish the only foundation for this appeal. But as four of the questions embrace only two subjects, the questions for our review may well be reduced to three, as follows:—

First. Is the savings bank pass-book upon which the suit is predicated a negotiable instrument?

Second. Is the defendant bank estopped from showing that the seven hundred and fifty dollars which appears on that book to the credit of Michael Harrison, was in fact never deposited with the bank, nor any part of it?

Third. Did the court err in holding that the plaintiff was not a *bonâ fide* holder of the pass-book?

1. The first question we are constrained to answer in the negative. The pass-book was not negotiable by itself, nor by virtue of the written order signed by the pretended depositor directing payment to J. J. Stuart & Co. or bearer. In *Eaves* v. *People's Savings Bank*, 27 Conn., 229, the bank undertook to defend against the suit in favor of a depositor to recover the money deposited, upon the ground that the

amount had been paid in good faith to a person who brought the original pass-book to the bank, accompanied with an order good on its face, though in fact forged. This court held that the forged power of attorney was no power, and that the presentation of the book itself had no greater effect, because it was not negotiable. There was not a very full discussion of this point, but the court held that the rights of the depositors would be very insecure if the pass-book was held negotiable.

It may be suggested that if the book was accompanied with a genuine order for the payment of the money the rights of the depositor could not be affected, and that therefore the reasoning could not apply to the case at bar; but if we concede that the rights of the particular depositor who had given a genuine order to pay the money to another would not be rendered insecure by holding the instrument negotiable, yet it would seriously affect the rights of the depositors in their relation to each other and to the assets of the bank. A reference to some decisions of this court in respect to these relations will render the point more clear. In *Coite* v. *Society for Savings*, 32 Conn., 173, it was held that savings banks were "incorporated agencies for receiving and loaning money on account of the owners; that they have no stock and no capital; and that they are merely places of deposit where money can be left to remain or be taken out at the pleasure of the owner."

In *Osborn* v. *Byrne*, 43 Conn., 155, it was held that "a savings bank is an agent for the depositors, receiving and loaning their money; and its losses are their losses, and are to be borne by them equally, according to their interest. The depositors in savings banks bear the same relation to each other and to the assets of the bank that stockholders in other monetary institutions do to each other and to the property of the bank." In *Bunnell* v. *Collinsville Savings Society*, 38 Conn., 203, the defendant bank having met with a loss equal to twenty-four per cent of the deposits, the directors reduced the amount of each depositor's credit in that proportion. In an action by a depositor to recover of the bank the amount so

deducted, it was held that the defendant was merely the agent of the plaintiff to receive and hold his money, and that the loss was occasioned by his own act through the instrumentality of his agent, and that he could not recover. Now suppose in the last case the plaintiff, before or after the act of the directors reducing the amount of the deposits, had sold his book and given the proper order to some *bonâ fide* purchaser for full value, and the latter had brought such a suit against the bank to recover the original deposit in full. Could he recover any better than the original depositor? If he could, then the act of one depositor could injuriously affect the rights of all the others, for they would have to bear the additional reduction in consequence of paying one in full. It seems to us that no principle can be accepted which admits of such inequality and injustice, and it is contrary to the principles already adopted by this court in the decisions referred to.

In the case at bar, by reason of fraud, forgery and falsehood, Harrison obtained two pass-books from the bank, upon which appeared credits amounting to twelve hundred and fifty dollars, when in truth nothing had been contributed to the funds of the bank. If by assigning the books he made this fraud successful, the amount, of course, is virtually to be paid by the honest depositors. It is certain that Harrison, in his own name, could recover nothing at all in a suit against the bank, for he contributed nothing to its deposits. We think he should not be allowed by assigning his book to convert nothing into something, but that the nature and purpose of savings banks, and the relation of depositors to each other, as well as their mutual security, all require the application of the principle that no depositor can convey to another any greater right in the funds of the bank than he has himself, and that any defence on the part of the bank which is good against the original depositor, is equally good against his assignee, unless there are facts to create an estoppel.

The argument in behalf of the plaintiff founded upon an assumed analogy between certificates of deposit issued by

commercial banks and the pass-books issued by savings banks, is fallacious, for there is no such analogy. The two kinds of banks are created for widely different purposes. The former must have a capital of their own, and the purpose for which they exist is to facilitate commercial transactions over a wide territory, while the latter have no capital, and hold no relations to commerce; are neither adapted nor designed to aid commercial transactions, have a local and limited field for their operations, and hold no relation to any persons except their depositors and those to whom the depositors' money has been loaned. The purpose of the certificate issued by a commercial bank is to enable the person receiving it to obtain credit in the public markets and to carry his funds safely to remote places. On the other hand the savings bank pass-book is not issued with any design to induce third persons to give credit to the holder, but its sole purpose is to put in a shape convenient for the depositor and the bank, a statement of the accounts between them, and the order about which so much was said in argument is, in contemplation of the law, the mere appointment of some person as agent for the depositor to receive the money. In *Eaves* v. *People's Savings Bank*, *supra*, it is well termed "a power of attorney." By this we do not of course intend to have it implied that the depositor cannot sell his right to the money. Like any other non-negotiable chose in action it may be sold, subject to the equities and defenses between the original parties.

But the plaintiff further contends that the book, with or without the order, was made negotiable by contract. We are not quite sure that we apprehend the force of this point as it lay in the mind of counsel. There was no transaction with any one but Harrison, and by reason of his fraud that was no contract at all, and besides, as it is for the law to declare the negotiability of instruments, we do not see how the mere contract of the parties can be effectual to this end.

In further confirmation of the result we have reached that the savings bank pass-book is not negotiable, we refer to the following well considered cases. *Commonwealth* v.

Reading Savings Bank, 133 Mass., 16; *Smith* v. *Brooklyn Savings Bank*, 101 N. York, 58; *Witte* v. *Vincenot*, 43 Cal., 325.

In *Witte* v. *Vincenot*, it was held that "the pass-book of a savings bank was an account kept between the bank and the depositor, * * * showing the business transactions of the parties with each other. * * * It is not of itself a negotiable instrument, nor could any mere agreement of the parties to it have the effect to invest it with that character in a commercial sense. In this respect the account shown in the pass-book is not to be distinguished from the account of a merchant or tradesman kept with his customer in the same way, nor would the agreement of the parties to such account, that the account itself might be transferred to order, have any more effect upon the rights and remedies of any third party in the one case than in the other. * * * That a negotiable instrument may be transferred to order is clear; but it does not follow that every instrument which may be transferred to order is thereby necessarily become a negotiable instrument. A collateral agreement between the parties that an instrument in writing, not negotiable, might be transferred by the holder to order, would not alter the character of the instrument itself."

2. We come now to the question whether, upon the facts that appear in the finding, the defendant is estopped from showing that the sum appearing on the book to the credit of Harrison was in fact never deposited.

The precise claim of the plaintiff under this head is that the defendant was estopped by its negligence, which impliedly concedes that this is the one controlling fact to create the estoppel. But negligence on the part of the defendant is a fact not found by the court, and without such a finding there is no foundation at all for the plaintiff's claim. There was no specific duty resting upon the bank which, being omitted, constituted negligence as matter of law. There are doubtless facts and circumstances which as evidence would tend to show negligence, but they failed to convince the trial court of the fact, and so they amount to nothing

for the purposes of this review. This alone defeats the claim of estoppel; but there are other essential elements wholly wanting. The only representation on the part of the defendant was the entry contained in the pass-book, which was not made with knowledge of the material facts on the part of the defendant, nor was the party to whom it was made ignorant of the truth. The pass-book was obtained from the bank by gross fraud, and therefore it was not in law issued by the defendant bank. And where representations have been procured by fraud, except under very peculiar circumstances—such, for instance, as representations directly affecting the currency of negotiable paper, there will be no estoppel upon the party making them, though made with the full intention that they should be acted upon. But here there was no such intention. Bigelow on Estoppel, 2d ed., 450; *Wilcox* v. *Howell*, 44 N. York, 398; *Holden* v. *Putnam Fire Ins. Co.*, 46 id., 1; *Calhoun* v. *Richardson*, 30 Conn., 210; *Sinnett* v. *Moles*, 38 Iowa, 25.

Then, in addition to all these insuperable objections to the plaintiff's claim, we have the fact that the plaintiff himself was guilty of negligence and is not a *bonâ fide* holder of the pass-book.

3. But here the plaintiff claims that the court erred in finding that the plaintiff was not a *bonâ fide* holder of the pass-book. The fact was distinctly alleged in the complaint that he was a *bonâ fide* holder, and denied in the answer—presenting a distinct issue of fact, which the court upon all the evidence found adversely to the plaintiff. We think the finding is conclusive on this point.

There was no error in the judgment complained of.

In this opinion the other judges concurred.

HUGH DAILEY, AND TILTON E. DOOLITTLE, STATE'S ATTORNEY, v. THE CITY OF NEW HAVEN AND OTHERS.

New Haven and Fairfield Cos., Oct. T., 1890. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

A will gave, under different trusts, a large sum to sundry public charitable objects in the city of New Haven, and among them one fifth of the sum to the city to be held in trust and the income applied for the aid of "deserving indigent persons, not paupers;" with a provision that if any of the trusts should not be accepted the amount intended therefor should be divided proportionately in augmentation of such as should be accepted. A committee of the common council of the city, to whom the matter was referred, recommended that the bequest be not accepted. Before final action by the council the state's attorney and a tax-payer of the city brought a suit for an injunction to restrain the city from refusing to accept the bequest. On a demurrer to the complaint it was held—

1. That the city had no power to take and administer such a trust, it not being within the powers given it by its charter, and it not being liable, and having no legal right, to aid in the support of "deserving indigent persons, not paupers."
2. But that if the city had power to accept and administer such a trust, yet it had an equal right to decline it, no duty to accept it being imposed upon it by its charter or by the law.
3. That the declining of the trust would be only the exercise by the council of its discretion and judgment in a case proper for such exercise, and its action would not be restrained by a court of equity in such a case.
4. That, taking all the provisions of the charitable bequests together, it could not be regarded as the intention of the testator that a refusal on the part of the city to accept the trust, should defeat the trust.
5. That the gift in trust to the charitable object named was a valid one, not affected by either the want of power in the city to accept it or by its action in refusing to accept it, and that a court of equity would, if necessary, appoint a trustee to take charge of and administer the trust fund.
6. That the statutes giving power to courts of probate to appoint trustees in such cases, do not deprive a court of equity of its jurisdiction; but that, while the Superior Court retains its jurisdiction, it will exercise it only in cases where, except for its action, a legal trust would be defeated for want of a trustee to administer it.
7. That it is ordinarily the duty, and is clearly the right of the state's attorney, to bring suits to enforce public charitable trusts.
8. That in this case it would be his duty to apply to the probate court for the appointment of a trustee.

9. That in case of his failure to do so, such application might be made by any individual of the specified class of beneficiaries.

[Argued October 29th, 1890—decided March 3d, 1891.]

SUIT for an injunction against the declining, by the common council of the city, to accept and administer a testamentary trust under the will of Philip Marett; brought to the Superior Court in New Haven County. The defendants demurred to the complaint, and the case was reserved upon the demurrer for the advice of this court. The case is fully stated in the opinion.

L. Harrison and *J. W. Alling*, for the plaintiffs.

W. K. Townsend, for the city of New Haven.

H. T. Blake, for the trustees of the estate of Philip Marett.

S. E. Baldwin, for the executors, and the residuary legatees of Ellen M. Gifford.

H. Stoddard and *J. W. Bristol*, for Yale University.

SEYMOUR, J. The will of Philip Marett, late of the city of New Haven, gives one fifth of the remainder of certain estate "to the city of New Haven, to be held in trust by the proper authorities, and the income to be applied through such agencies as they see fit, for the supply of fuel and other necessaries to deserving indigent persons not paupers, preferring such as are aged or infirm."

On the 10th day of June, 1890, acting upon the report to the court of common council of a committee to whom was referred "the matter of the acceptance or rejection of the trust of $130,000 bequeathed to the city by Philip Marett, deceased, for the use of indigent poor, not paupers," the board of aldermen of the city passed a resolution "that the city of New Haven do not accept the bequest to it for the benefit of indigent poor not paupers, under and by the will

of the late Philip Marett." Thereupon a complaint was brought by Hugh Dailey, a resident tax-payer and elector of the city and town of New Haven, and Tilton E. Doolittle, as the state's attorney for New Haven County, against the city, its mayor, and the other parties interested in the remainder, one fifth of which was given to the city of New Haven as aforesaid. The complaint contained, among other allegations, the following:—

"7. A resolution is pending before the court of common council of the city of New Haven, in and by which it is proposed that the city of New Haven shall refuse to accept the trust of said one fifth part of said residuary estate so given in trust as aforesaid. Such resolution has been adopted by the individuals who compose the board of aldermen, part of said court of common council, and such resolution is likely to be adopted by the individuals who compose the board of councilmen of said city, and is likely to be approved by the individual who holds the position of mayor of said city.

"8. The members of said court of common council and the mayor of said city have no authority to decline the acceptance of said one fifth part of said residuary estate, so given in trust as aforesaid.

"9. The trust above mentioned, created by the will of said Marett, is a public charity, and the beneficiaries of said charity are not represented by the members of said court of common council or the mayor of said city, nor have such members of said court or said mayor any right to annul and destroy the public charity created by said will.

"10. The due administration of the public charity created by said will will tend to largely decrease the expenses for the care of paupers in the city and town of New Haven, and thus render unnecessary to a considerable extent the imposition of taxes to be paid for the support of such paupers; and the city of New Haven is wholly embraced within the limits of the town of New Haven and includes nineteen twentieths of the population and taxable property of the town of New Haven.

"11. The city of New Haven and the Young Men's Institute and"—(naming the other beneficiaries of said residuary estate,) "all claim an interest in said fifth part of said residuary estate, in case the city of New Haven declines and refuses to accept the trust created by said will, but none of said corporations propose to carry out the charitable intentions of the testator, as stated in the clause of said will herein referred to, even if they receive the funds in question.

"12. In case the city of New Haven refuses to accept the performance of the duties of said trust, the said Blake and Beardsley" (trustees, who now hold the remainder ready for distribution) "propose to regard the trust in favor of the public charity, as above described, terminated, and to pay over said sum of over $130,000, being the amount of said trust fund, to the city of New Haven in trust for library purposes, to" (naming the other beneficiaries of said residuary estate) "for purposes other than the supply of fuel and other necessaries to deserving and indigent persons, not paupers, in the city of New Haven, preferring such as are aged and infirm, as stated in said will."

Following these allegations was a prayer for judgment—"1st. That the city of New Haven, and its mayor, and the members of its court of common council, be enjoined from declining to accept said trust fund, or from declining to carry out the provisions of said will relating to the administration of said trust fund.—2d. If it shall be held that the court of common council of the city of New Haven have the power to refuse to accept said trust and to refuse to administer the same, and if the city of New Haven does refuse to accept or administer said trust, then the plaintiffs pray this court, as a court of equity, to take said fund so given for public charity, as stated in said will, into its own care, and to appoint suitable trustees to receive the same from said Beardsley and said Blake, and administer said fund according to the true intent and meaning of the said will of Philip Marett."

A temporary injunction was granted restraining the mayor of New Haven from approving any resolution or vote of the

court of common council of the city, whereby the city shall decline to accept the funds so given to the city by the will of Philip Marett, in trust for the public charity stated in the complaint. Thereupon a statement of facts was agreed upon by the plaintiffs, the city of New Haven, and Henry F. Peck, mayor of the city, they being the only parties that, up to that time, had entered an appearance. At their request the Superior Court reserved the case and the questions of law thereon arising for the consideration of this court. Subsequently, by leave of the court, the complaint was amended, and E. Edwards Beardsley and Simeon E. Baldwin were made parties defendant thereto and duly cited to appear. They appeared, assented and agreed to the agreed statement of facts theretofore filed, made answer to the complaint and filed a cross-complaint. Afterwards the city of New Haven and the mayor filed a demurrer to the complaint, and the case stands before us upon the questions arising upon the pleadings and upon the agreed statement of facts. The statement contains a series of questions which the court of common council instructed the city attorney to incorporate therein, and which, it is agreed in the statement, shall be reserved for the advice of this court.

The first question in natural order relates to the power of the Superior Court to grant the prayer of the complaint and enjoin the city of New Haven and its mayor and the members of its court of common council from declining to accept the trust fund or from declining to carry out the provisions of the will relating to the administration of the trust fund.

We unhesitatingly advise the Superior Court that it has no such power. If the city has a right to accept a trust of this character and administer it, which we shall presently consider, yet it has an undoubted right to decline to accept it. How can it be otherwise? It is not a duty imposed upon it by its charter or ordinances to accept and administer it. No one can compel another to accept a trust by naming him as trustee. If, in a given case, a refusal to accept would defeat the trust, it would be because the instrument creating it so provided. Courts will see to it that trusts do not

fail because of the refusal of the trustee named to act, unless it is certain that the settlor so intended. And this rule, which is a universal one, would have no meaning if trustees were legally bound to act when appointed. The law is well settled in respect to the power of courts to restrain the action of bodies like courts of common council. In the very recent case of *Whitney* v. *City of New Haven*, 58 Conn., 450, this court held that whenever such bodies are acting within the limits of the powers conferred upon them, and in due form of law, the right of courts to supervise, review or restrain is exceedingly limited. With the exercise of discretionary powers courts rarely, and only for grave reasons, interfere. Those grave reasons are found only where fraud, corruption, improper motives or influences, plain disregard of duty, gross abuse of power or violation of law, enter into or characterize the result. Difference in opinion or judgment is never a sufficient ground for interference. Courts of common council exercise an authority delegated by the General Assembly, which carries with it corresponding duties, and vests the delegated body with the right and duty to exercise the discretion and judgment incidental to the proper performance of what is delegated. Several other decisions in our state recognize the same sound doctrine.

The next question to be considered is, whether the city of New Haven can legally become trustee of the fund and administer the same. We shall look in vain in its charter for any express authority authorizing it to accept and administer trusts of the nature of that created by the will under consideration. Nor is the city of New Haven under any legal liability to support or aid "deserving persons not paupers"; indeed it has no legal power so to do. The rule is well established, and supported by numerous well considered cases, that municipal corporations have only such powers as are expressly granted in their charters or are necessary to carry into effect the powers so granted. It is a rule of great public utility, and courts should recognize and enforce it as a safeguard against the tendency of municipalities to embark in enterprises not germane to the objects for

which they are incorporated. Even towns, which, under our peculiar political history and policy, it was strongly urged in *Webster* v. *Town of Harwinton*, 32 Conn., 131, possessed, because of their independent character, large original powers, were held to have no original or inherent powers whatever, but only such as are either expressly granted by the legislative power of the state or are necessary to the performance of their duties as territorial and municipal corporations.

We conclude then, without further discussion, that the city of New Haven cannot legally become trustee of the fund under consideration and administer the same. Numerous other cases might be cited in support of this position, but we only refer to the *City of Bridgeport* v. *The Housatonic R. R. Co.*, 15 Conn., 475; *New London* v. *Brainard*, 22 Conn., 553; *Abendroth* v. *Town of Greenwich*, 29 Conn., 356; *Gregory* v. *City of Bridgeport*, 41 Conn., 76.

It was claimed in the argument that if the city has no power to accept and administer the trust, then it has no power to decline it. We do not see the force of this claim. An offered trust may surely be declined upon the very ground of want of legal power to accept. That the effect of a refusal of what could not be legally accepted might be open to discussion cannot limit the right. A case might easily arise where it would be highly proper that a trust should be publicly declined for that reason, so as to leave other questions which might arise under it unembarrassed by any claim which might be made from the failure of the trustee to decline.

It may be fairly assumed that, when the temporary injunction is removed, the city of New Haven will decline, in terms, the trust in dispute. But, whether it declines it or not, yet, having no legal power to accept and administer it, the question remains whether, in accordance with the second prayer of the complaint, the Superior Court, as a court of equity, will take the fund into its own care and appoint a trustee to administer it under the will. This can only be answered after a careful consideration of the true meaning

and effect of the words "should any of the trusts not be accepted," which precede the provision made for that emergency.

The will, after making certain bequests and devises, continues as follows: "The balance or remainder of such trust estate * * * I hereby direct shall * * * be appropriated, distributed and disposed of as follows, namely: One fifth part to the Connecticut Hospital Society in trust, the income to be applied to the support of free beds for the benefit of poor patients in said institution, giving preference to those incurably afflicted, if such are admissible. One fifth part to the city of New Haven" (being the clause in controversy and already herein quoted at length.) "One fifth part to the President and Fellows of Yale Collge, in trust, the income to be applied to the support of scholarships, or to such other purposes in the academical department as they may judge expedient. One tenth part to the New Haven Orphan Asylum, to be held in trust, and the income applied to the support of poor inmates therein. One tenth part to the St. Francis (Catholic) Orphan Asylum in New Haven, to be held in trust, and the income to be applied to the support of poor inmates therein. One tenth part to the city of New Haven in trust, the income to be applied by the proper authorities to the purchase of books for the Young Men's Institute, or any public library which may from time to time exist in said city. One tenth part to the State of Connecticut in trust, the income to be applied towards the maintenance of any institution for the cure or relief of idiots, imbeciles and feeble-minded persons. The appropriations specified above are to be made effective, notwithstanding any deficiencies or inaccuracy of description, so that my objects may not be defeated by any technicality or informality. Should any of the trusts not be accepted, the amount intended therefor shall be proportionately distributed in augmentation of such as may be accepted."

Does the language of the testator, taken alone or in connection with all the provisions respecting the remainder, indicate a purpose and intention on his part that the failure

of the city of New Haven to accept the trusteeship should defeat the trust? Was he probably more interested in the question who should administer it than whether it should be made effective? The intent to have the specified appropriations made effective is distinctly expressed. Except for the clause we are considering, the refusal to accept the trust would not affect it. The trust would not be allowed to fail for want of a trustee to administer it.

In *Storrs Agricultural School* v. *Whitney*, 54 Conn., 342, land was conveyed to a charitable corporation for a charitable purpose, with a proviso that if it should abandon such use it should pay the market value of the property as it received it, to the selectmen of Mansfield, to constitute a fund, of which the selectmen and their successors in office should be trustees, the interest of which should be applied by them to the aid of indigent young men fitting themselves for the ministry. This court said (p. 345:) "If the persons who should at any time hold office as selectmen of that town should decline the trust, such declination would not affect it; the trust remains, and the court would supply trustees upon proper application in behalf of any member of the specified class of beneficiaries. A charitable use will not be permitted to fall because the named trustee declines nor because of delay upon the part of the beneficiaries in asking for their rights." It is a rule which admits of no exception, that equity never wants a trustee, or, in other words, that if a trust is once properly created, the incompetency, disability, death or non-appointment of a trustee shall not defeat it. 1 Perry on Trusts, § 38; *Donalds* v. *Plumb*, 8 Conn., 453. Flint, in his work on Trusts and Trustees, § 274, says courts will execute a charitable trust if possible; even if vague or apparently tinged with illegality, if any other construction can be put upon it; and cites many cases in support of the proposition.

Upon the question of intent it may be fairly argued that it would be more natural for the charitable man, which the will shows the testator to have been, to be chiefly solicitous that the beneficiaries should receive the assistance, and not

who should administer it. The fact that he provides, in the very next clause after those above quoted, for the case of vacancy at any time in the trusteeship by death, resignation or otherwise, tends to show that he had no such partiality for the trustees named by him as to make the continuance of the trust depend upon its being administered by them in those cases where the trustees and the beneficiaries were really distinct and separate. The testator evidently had in mind two classes of beneficiaries, one where the real purpose was to benefit the trustee, and one where the trustee had no independent duty towards the beneficiaries, and was considered only as a medium through which the benefit would be applied to them. That is to say, some of the trusts were in effect, and evidently so intended, gifts to the trustee. The question whether it would be of advantage to the trustee to accept or not was the only real question, and a refusal might properly end the matter.

Certainly the bequest to the President and Fellows of Yale College, for the support of scholarships or such other purposes in the academical department as they may deem expedient, is of that nature. The direct benefit is to the college. By its very terms the trust is incapable of being administered by another. A refusal by the trustee named to accept would end the matter and make a case for the sensible application of the provision in the will regarding non-accepted trusts. But, as already suggested, in the clause under discussion the intent was to help only the beneficiaries. As the city had no corporate duty in respect to them it could have been inserted only for their benefit, and it is almost certain that the testator did not intend to provide that in this case the charity should fail unless administered by the city.

It is stated, moreover, in one of the briefs, that this testator drew his own will. Now, it would not be at all unnatural nor an unusual use of words for a layman to refer to the action of the beneficiaries of a trust by the language "should any of the trusts not be accepted." In this case he does not necessarily mean "should any of the trustees

decline to act." Taking into account the fact that, in one instance at least, as already shown, the trustee was also the beneficiary, it seems more natural to suppose that the testator, when he penned the words just quoted, had in mind only those cases where the party really intended to be benefited declined to be benefited.

On the whole then, influenced as we must be by the salutary rule regarding bequests to public charities, that, of two possible constructions, that which sustains the charity should be adopted, if not inconsistent with the intent of the testator, and, being satisfied that the intent of Mr. Marett was not to hinge his bequest to the "deserving indigent persons" on the action of the city in accepting or declining the trust, we hold that neither the refusal nor inability of the trustee to accept the trust defeats the same, but that the same is a good and valid trust notwithstanding.

The question now occurs, whether the Superior Court, as a court of equity, will take the fund into its own care and appoint a trustee to administer it under the will.

There can be no question of the power of the court so to do. In 1822 a statute was passed providing that when a testator had not provided for the contingency of the death, incapacity or refusal of a trustee appointed by him to accept and execute the trust, the court of probate having the probate of his will should have power to appoint a trustee. This statute was not understood to deprive a court of equity of its jurisdiction over the appointment of trustees. Judge SWIFT, in the second volume of his Digest, published in 1823, page 119, treating of the appointment and removal of trustees, says:—"The devisor or donor, in the instrument creating the trust, should appoint the trustees, and prescribe the mode of appointing others where they refuse to accept, die, or become incompetent to act; but in case of neglect to do it a court of equity may supply the deficiency by the appointment of proper trustees to execute the trust; and by statute courts of probate have that power."

Other statutes have since been passed regulating the proceedings of courts of probate with trustees, but this court

has meantime repeatedly affirmed the power of the Superior Court, as a court of equity, to supply trustees when necessary in order to preserve a trust. The statute now in force, (Gen. Statutes, § 491,) authorizes courts of probate, in certain cases, to appoint trustees. Under it the proper court of probate would be authorized to appoint a trustee to administer the fund in question. It does not however strip the Superior Court of jurisdiction. The two courts may be regarded as having concurrent jurisdiction. In the present state of the law there is a manifest propriety and convenience in leaving the matter to courts of probate, and it is the duty of those courts to act. While then the Superior Court retains its jurisdiction, it will exercise it only in cases where, except for its action, a legal trust would be defeated for want of a trustee to administer it.

As to the appearance of the attorney for the state as a party plaintiff, we see no valid objection. In *Proprietors of White School House* v. *Post*, 31 Conn., 240, while it was not necessary to decide the question of the duty of the state's attorney, as guardian of the rights of the public, in respect to public charitable trusts, yet the court clearly intimates that ordinarily it would be his duty, or at least his right, to bring suits to enforce them, in analogy to the practice in England, where the attorney general acts in such cases. We have been referred to no case to the contrary. The New York Courts seem to take a like view of the matter and it is approved in Perry on Trusts.

We think also that in this case the attorney for the state should apply to the probate court for the appointment of a trustee or trustees. In case of his failure so to do, such application may be made by any individual of the specified class of beneficiaries.

We have now considered all the points that are necessary to the decision of this case. Perhaps we have covered more ground than was absolutely necessary for that purpose; but, in consideration of the fact that here was a great public charity in which a large number of indigent persons are interested, we have felt constrained to make our decision

comprehensive enough to embrace whatever was fairly before us. The points decided all arise upon the pleadings and finding of facts, irrespective of the questions proposed by the corporation's counsel under the instructions of the common council, which, it is objected, are not properly before us. We have no occasion to discuss that objection, inasmuch as our conclusions seem to cover substantially the points raised by them, and either to furnish material for their answer or render answers unnecessary.

The Superior Court is advised to dismiss the temporary injunction, and if, within a reasonable time, it shall appear that the court of probate having jurisdiction of the matter has duly appointed a trustee, and that such trustee has accepted and given bonds according to law, then to dismiss the complaint. If within a reasonable time the court of probate does not appoint a trustee as aforesaid who shall duly qualify, then the Superior Court, as a court of equity, is advised to make such appointment, and take a good and sufficient bond conditioned upon the discharge of the duties of said trust according to law.

In this opinion the other judges concurred.

The State of Connecticut *vs.* The New York, New Haven & Hartford Railroad Company.

Hartford Dist., Oct. T., 1890. Andrews, C. J., Carpenter, Loomis, Seymour and Torrance, Js.

The statute with regard to the taxation of railroads, in force in the years 1880 to 1885, provided that the secretary or treasurer of every railroad company should, within the first ten days of January in each year, deliver to the comptroller a sworn statement of the number of shares of its stock and the market value, with sundry other items showing the condition of the company, and among them "the amount of cash on hand on the first day of said month;" and that the railroad company, on or before the 20th of January, should pay to the state one per cent upon the valuation of the property specified, after deducting from it,

among other things, the amount of cash on hand; and that this valuation, corrected by the board of equalization, should be "the measure of value of such railroad, its rights, franchises and property in this state, for purposes of taxation." A later section provided that the board of equalization should examine all statements returned to the comptroller, and that, if any were found incorrect, they should, within ten days after the time limited for making the same, make out, upon the best information they could obtain, the statements required, and leave a copy of the same with the company, and that the valuation of the several items contained in them should be final. The defendant railroad company had, during the years mentioned, made sworn returns as required, and had deducted from the valuation of the items specified a certain sum as "cash on hand." The board of equalization had approved one of the statements and had made corrections in all the others, but had made no change in the item of "cash on hand," and did not know that anything but strictly cash funds was included in the item. The state, claiming that the amount deducted as cash was much larger each year than the actual amount, brought a suit to recover the amount of taxes which the company had thus failed to pay. Held that, the board of equalization having acted upon the statements returned, its action was final as to all the items contained in them, and among them as to the item of "cash on hand."

The board having undertaken to act on the several statements, must be presumed to have done its entire duty, and, having acted upon some of the items, to have considered them all.

The provision of the statute that the board is to act upon the best information it can obtain, intends only such information as it can obtain in the limited time allowed and with its restricted powers.

By "cash on hand" in the statute is intended ready money, or that which in ordinary business usage is the same thing, as bank notes, checks, drafts, bills of exchange, certificates of deposit, and other like instruments which pass with or without endorsement from hand to hand as money or are immediately convertible into money.

An action by the state for the collection of taxes must be regarded as warranted by usage, if not authorized by the statute.

The tax on railroads running into other states is not unconstitutional as operating upon commerce between the states, but is wholly a tax on property, as property, located and used in this state.

The valuation of the property of the railroad company for the purpose of taxation, constitutes an "assessment" of the property, as that term is used in our statutes.

Evidence held inadmissible on the part of the railroad company that a former board of equalization had considered and approved the item of "cash on hand" made up in part of sundry securities now included in that item.

Correcting errors of mere computation never impairs the effect of a judgment.

[Argued November 19th, 1890—decided April 20th, 1891.]

State v. N. York, N. Haven & Hartford R. R. Co.

ACTION by the state to recover an amount claimed to be due from the defendant railroad company as unpaid taxes; brought to the Superior Court in Hartford County, and reserved, on facts found, for the advice of this court. The case is sufficiently stated in the opinion.

A. P. Hyde and *C. E. Gross*, for the plaintiff.

1. The law under which these taxes were laid does not violate the provision of the U. States constitution with regard to the regulation of commerce between the states. *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. R., 345; *Western Union Tel. Co.* v. *Massachusetts*, 125 id., 553; *Ratterman* v. *Western Union Tel Co.*, 127 id., 411; *Western Union Tel. Co.* v. *Alabama*, 132 id., 472; *McCall* v. *California*, 136 id., 104; *Nichols* v. *New Haven & Northampton Co.*, 42 Conn., 103, 122, 137. Nor does it violate the constitution by depriving the defendant of its property without due process of law. *State Railroad Tax Cases*, 92 U. S. R., 575, 604; *McMillen* v. *Anderson*, 95 id., 37; *Kentucky Railroad Tax Cases*, 115 id., 321, 339; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 id., 237; *Home Ins. Co.* v. *New York*, id., 594.

2. The right of the state to recover is not barred by the acceptance of the returns made by the company to the comptroller, by the board of equalization. The board never passed upon the item of "cash on hand" in the several returns. It is found that they did not know that anything but what was strictly cash or available as cash had gone into that item. Even a final judgment obtained by fraud of the opposite party or by accident or mistake, may be set aside and disregarded. *Pearce* v. *Olney*, 20 Conn., 544; *Dobson* v. *Pearce*, 12 N. York, 156; *Cole* v. *Cunningham*, 133 U. S. R., 107. Our own court has held such an acceptance not to be final in a similar case. *Coite* v. *Conn. Mut. Life Ins. Co.*, 36 Conn., 512. Besides this, the act of 1870, (now section 3942 of Gen. Statutes,) provided expressly that no action by the state to recover taxes from corporations should be defeated by reason of the board of equalization having "failed to perform" the duties required of them in such a case.

3. The main question of fact, and we deem it the only important question in the case, is, were the returns of the amount of cash on hand, in the several years embraced in this action, true or erroneous? The question is one solely for the court upon the construction of the law in this particular. What then was meant by the legislature in requiring the sworn statement of the amount of "cash on hand." This can be determined, so far as we can see, only from the language used, which by statute is to "be construed according to the commonly approved usage." Cash, as defined by Webster, means, primarily, "ready money; money in chest, or in hand; in bank, or at hand." By Bouvier cash is defined as "that which circulates as money, including bank bills, but not mere bills receivable." The expression in the statute is "cash on hand." This clearly means money, or its equivalent, that is immediately applicable to use by the railroad company in payment of debts or otherwise. It cannot embrace investments in stocks or bonds, or other property which may be sold for cash, or debts and loans which may be collected, however good such debts or loans may be considered to be. It must be money immediately applicable for use in payment of indebtedness. No other construction can be given to the expression that will make sense. "The use of the phrase 'actual cash payment' is emphatic and significant. It is wisely intended to exclude a construction by which *commercial securities*, of any description short of cash, may be regarded, by the aid of mercantile usage or otherwise, as substantially equivalent to cash." *Haggerty* v. *Foster*, 103 Mass., 19. If the construction which we claim is to be given to the term "cash on hand," then it is not denied that the amount stated as cash and deducted as such was several millions of dollars larger than the cash assets which the company actually possessed at the times when the several returns were made to the comptroller.

H. C. Robinson and *G. D. Watrous*, for the defendant.

ANDREWS, C. J. This is an action brought by the state

to recover certain arrears of taxes claimed to be due from the defendant for the years 1880 to 1885, both inclusive. The questions are reserved for the advice of this court.

This state has for many years practiced a special method of imposing taxes on railroads, and on some other classes of corporations, differing widely from the general method of taxation on other kinds of property. The statutes that were in force during the years above named respecting the taxation of railroads were sections five, six and seven of title 12, chapter 5, of the revision of 1875, as amended by chapters sixty and eighty-one of the acts of 1876, and sections eleven, twelve and twenty-one of the same title and chapter of that revision. These sections, with the amendments referred to incorporated, are as follows:—

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

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

of such railroad, its rights, franchises and property in this state for purposes of taxation; and this sum shall be in lieu of all other taxes on its franchises, funded and floating debt, and railroad property in this state.

"Sect. 7. When only a part of a railroad lies in this state, the company owning such road shall pay one per cent on such proportion of the above named valuation as the length of its road lying in this state bears to the entire length of said road. But in fixing the aforesaid valuation and length, neither the value nor length of any branch thereof in this state which the board of equalization shall determine to be of less value per mile than one fourth of the average value per mile of the trunk road, shall be included; but every such branch shall be estimated at its true and just value by the board of equalization, and such railroad company shall pay to the treasurer of this state one per cent on such value, at the time fixed for the payment of other railroad taxes; and when any such sum becomes due, and such company shall not then have the management and control of its road, or the road bearing its name, the person or corporation then owning or managing such railroad shall pay such sum to the state within the time above prescribed."

"Sect. 11. The board of equalization shall examine and correct all statements returned to the comptroller as required by either of the nine preceding sections; and if any person shall not make such return as prescribed, or shall make erroneous returns, said board shall, within ten days after the time limited for making the same, make out, upon the best information which they can obtain, the statement required to be made and returned by such person; and a true copy of each statement as corrected or made out by said board shall be returned to each cashier, treasurer, secretary, superintendent or manager; and the valuation of the several items of money, estate, amount and number, contained in such statement shall be final, and the sums required shall be paid according to it.

"Sect. 12. Every person who shall fail to return to the comptroller as prescribed in any of the preceding sections

of this chapter, any statement required to be returned, shall forfeit five hundred dollars to the state; and every person or corporation required by any section of this chapter to make any payment to the state, who shall fail to make it within the time therein limited, shall forfeit to the state twice the amount required for such payment."

"Sect. 21. No action commenced by the state against any person or corporation for the recovery of any sum in the nature of a tax, which he or it is required to pay by the provisions of this chapter, or for the recovery of the penalty for the non-payment thereof, shall be barred or defeated by reason of the omission or failure of the board of equalization to perform the duties required of them by this chapter."

In each of the years above named the treasurer of the defendant made out and delivered to the comptroller, within the first ten days of January, a sworn statement purporting and intended to be a true statement of the affairs of that company on the first day of the month, for the purpose of taxation and as required by law. In the year 1880 the board of equalization approved the statement so made by the defendant's treasurer, and the taxes for that year were afterwards paid by the defendant to the state, based on the statement so made and approved. In the year 1881 the board corrected the statement made by the treasurer by increasing the valuation placed upon the shares of the capital stock by him. The board made no other change. A true copy of the statement as thus corrected was returned by the board to the treasurer of the company. The taxes for that year were afterwards paid by the defendant to the state, based upon the corrected statement. In the years 1882, 1883, 1884 and 1885, the board corrected the statements sent to them by the defendant's treasurer, by increasing the valuation of the shares of the capital stock, but made no other change; and each year returned to the treasurer a copy of the statement so corrected by them; and each year the taxes were paid based upon such corrected statement.

It is claimed by the state that each year the amount of "cash on hand" was very much less than the sum mentioned

in the statements, so that in each of said years the defendant paid less taxes to the state than the state intended it should pay, and much less than it ought to have paid; amounting in all, with interest, according to the computation of counsel, to more than $125,000.

No claim is made that said statements were erroneous in any other respect.

We assent to the argument made by the counsel for the state, that the words "cash on hand," as used in said sixth section, intended ready money, or that which in ordinary business usage is the same thing. Bank notes, checks, drafts, bills of exchange, certificates of deposit, or other like instruments which pass with or without indorsement from hand to hand as money, or are immediately convertible into money, fall properly enough within the words "cash on hand." But there is no elasticity of speech to which the words of the statute can be subjected that will permit many of the things included by the defendant in its item of cash on hand to be regarded as cash. Loans to other railroads on long time, stock of other companies not intended to be sold, and other investments of like kind, are clearly not cash on hand. Cash on hand means money at hand ready to be used, actual cash or its equivalent, and actually on hand. The intent of the statute in this respect is now put beyond controversy by an amendment made in 1887.

The language now is—"The amount of money actually on hand in cash in the treasury or in the possession of the proper officers or agents of the company." This amendment does not change the meaning. It serves only to make misinterpretation impossible. The amount of the sums so improperly included in the item of cash on hand we have not found it necessary to compute.

None of the sections above quoted,—nor does any other section of the statutes—provide a means for the collection of the taxes so required to be paid. No levy, or execution, or other process in the nature of a distress, is authorized, nor is there any proceeding specified by which an unwilling corporation can be coerced to make payment. A statute

passed in 1881, now section 3901 of the General Statutes, while providing that any city, town, district or community in whose favor taxes are assessed, may recover the same by any proper complaint or proceeding at law, does not mention the state as being entitled to the same means to recover taxes assessed in its favor. Such actions have, however, been repeatedly brought in the name of the state and judgments therein rendered. And as the twenty-first section speaks of actions by the state for the collection of taxes due to itself, such an action as the present one must be regarded as warranted by usage, if not clearly allowed by the very words of the statute. *Coite* v. *Society for Savings*, 32 Conn., 173; *Coite* v. *Conn. Mut. Life Ins. Co.*, 36 id., 512; *Nichols* v. *New Haven & Northampton Co.*, 42 Conn., 103; *State of Connecticut* v. *Housatonic R. R. Co.*, 48 Conn., 44.

At the outset of the inquiry it is objected that the taxes here sought to be recovered are invalid for the reason that the method of taxation imposed on the defendant violates article 1, section 8, of the federal constitution, which provides that "the congress shall have power to regulate commerce among the several states." A tax so laid as to operate directly upon commerce between this and another state would undoubtedly be void; as for instance a tax laid directly upon an agency or an instrument of such commerce, or a license for carrying it on, or as a condition to its progress. The tax here imposed is not such an one. It is a tax upon property, as property, located and used in this state. *Nichols* v. *New Haven & Northampton Co.*, 42 Conn., 104; *State of Connecticut* v. *Housatonic R. R. Co.*, 48 id., 44. Such a tax is not forbidden by the clause of the constitution above cited. *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. R., 530; *Thomson* v. *Pacific R. R. Co.*, 9 Wall., 579; *National Bank* v. *Commonwealth*, id., 353.

The statutes of this state now in question do not provide any means by which the tax therein imposed can be collected. Any unwilling corporation can contest the whole tax, as to its validity or amount, or any part of it, in a suit just as the

defendant is doing in this suit. There is no way other than by a suit like the present one in which the collection of any tax imposed by these statutes can be compelled; and in such a suit any defendant may call into question the amount or the validity of the tax, as a whole or as to any part of it. The valuation of railroad property under these statutes and the assessment of taxes thereon is not final, in the sense that it constitutes a charge upon the property subjected to the tax or a liability fixed on the corporation owning it. That result can be attained and the tax actually collected only by a suit. Another objection is, that "the taxes sought to be recovered have never been assessed, and without assessment there can be no collection of taxes." The word "assessment," when used in connection with taxation, may have more than one meaning. The ultimate purpose of an assessment in such a connection is to ascertain the amount that each tax-payer is to pay. Sometimes this amount is called an assessment. More commonly the word "assessment" means the official valuation of a tax-payer's property for the purpose of taxation. If the latter is the sense in which the word is used in the objection it is fully answered in the finding. It clearly appears that the property of the defendant has been each year valued for the purpose of taxation. In the year 1880 the board approved the valuation of the defendant's treasurer, and so made that the official valuation. Each of the other years the board fixed the value themselves. The valuation so made included all the property of the defendant as represented in its capital stock, from which certain deductions were made before the basis was reached upon which the rate per cent of taxation was to be computed. It is argued in this connection that if there has been an assessment there has been a judicial determination of the amount of tax which it was the duty of the defendant to pay, and which cannot be revised or changed in this proceeding. The entire process of determining what sum the defendant ought to pay to the state in taxes in any year consists of several parts. The valuing of its entire capital stock is one part. But the whole value is not to be

taxed; only that part which bears a ratio to the whole equal to the ratio which the length of the defendant's railroad in this state bears to the entire length of its road. Then certain sums are to be subtracted and the computation of the percentage is to be made on what is left. If it be granted that the act of an assessor in ascertaining what property is subject to be taxed and in fixing its value for taxation is judicial in its nature, it is clear that calculating ratios or making subtractions are not judicial acts. Among other deductions to be made in fixing the amount of the defendant's tax is the amount paid for taxes on real estate not used for railroad purposes. Would it be claimed for a moment that subtracting such amount is a judicial act? So too subtracting the amount of cash on hand would not be a judicial act. If in respect to either of these sums there has been a mistake, we think either might be corrected without affecting any judicial act done by the board of equalization. Changing mere computation never impairs the effect of a judgment or decree; such for instance as correcting the computation of interest, or making additions or subtractions. The theory of the state in this part of the case is, that too great a deduction was made from the entire value of the defendant's capital stock for cash on hand, and that deducting a less amount would not affect the judicial character of the assessment.

We think the evidence of past members of the board of equalization was correctly admitted. The board was required to act "upon the best information which they could obtain." What that "best information" was could be shown by a process of exclusion, perhaps, better than in any other way. We also think the evidence of Mr. Yeamans was properly rejected. The action of one board would not be binding on a subsequent one; and in this case it is not pretended that the action of the former board had been made known to the one in question.

We come now to the last objection made by the defendant which we shall have occasion to examine. It is "that the action of the board of equalization in approving without

amendment the list for 1880, and correcting the lists for other years, is final and conclusive upon all parties."

The duties required by the board of equalization are contained in the eleventh section cited above. An analysis of that section shows that these duties are—(1) to examine and correct all statements returned to the comptroller; in case no statement, or an erroneous one, is made, then, (2) within ten days next after the time limited, to make out upon the best information which they can obtain the statement required to be made; and (3) to return to the treasurer, or other officer, a true copy of the statement so corrected or made out. The section then concludes:—"And the valuation of the several items of money, estate, amount and number contained in such statement, shall be final, and the sums required shall be paid according to it." That is, that the statement made out or corrected by the board of equalization,—a copy of which is returned to the tax paying corporation,—is final, and the taxes must be paid according to it. If then there has been a decision by the board of equalization in any or all the years involved in this suit as to the amount of cash on hand, such decision is by the terms of the statute, as well as by the opinion of this court in *Coite* v. *Conn. Mut. Life Ins. Co.*, 36 Conn., 535, final and conclusive, and the taxes having been paid according to such decision no more can be recovered.

In each of the years involved in this suit the board took action upon the statement sent by the defendant's treasurer to the comptroller. In 1880 they approved the statement so sent without change. In each of the other years they made out a statement,—a copy of which they returned to the defendant's treasurer—which they declared over their own signatures to be a true statement of the affairs of the defendant corporation for the purposes of taxation as required by law, as amended and corrected, or made out by themselves. Each of these statements contained the item of "cash on hand." Apparently the board of equalization did each year the very thing which the statute declares shall be conclusive. True, they did not change the item of "amount of cash on

hand." It is also true, from evidence now known, that such item was largely incorrect and should have been changed. But if the board acted upon it, and with the best information which they were able to obtain, their decision is final, however mistaken as to the real facts that decision may have been. *Sheppard* v. *Atwater Mfg. Co.*, 43 Conn., 448; *Stannard* v. *Sperry*, 56 id., 541.

The board of equalization has only ten days in which to perform its duties. The proper officer of each corporation is to send in to the comptroller the required statement within the first ten days of January in each year. The board of equalization must act within the next ten days, and the tax is required to be paid on or before the twentieth day of that month. The board is to act on the best information it can obtain. No duty to investigate or to make inquiry is imposed on them. They are not authorized to send for witnesses or to interrogate them if they should come, or to administer oaths or to require an answer. They have no power to require books or papers to be shown them or to examine in any way to obtain information. When the statute says they are to act upon the best information which they can obtain, it means the best information which they can obtain in the limited time and with the restricted powers which they possess. If they fail to find evidence which longer time or ampler powers might bring to their knowledge, the statute should be blamed and not the members of the board.

The board of equalization having undertaken to act on these several statements must be presumed to have done their entire duty. Having acted upon some of the items contained in each statement, presumably they considered and passed upon all. On this point however the evidence leaves no room for presumption. The testimony of the former members of the board is decisive. That evidence was to the effect that the board of equalization, at the time it made the corrected statements aforesaid and returned copies thereof to the defendant, had no knowledge that the item "amount of cash on hand" included anything except actual cash on

hand; that they relied entirely upon the truth of the treasurer's sworn statement as to the contents of that item. This testimony, whatever else it may show, proves that the attention of the board was called to the item of "amount of cash on hand," and that they in fact considered and passed upon it; and that in doing so they acted upon the best information they could obtain and upon that information found no occasion to change it.

The twenty-first section above quoted provides that no action commenced by the state for a tax shall be barred or defeated by reason of the omission or failure of the board of equalization to perform the duties required of them. In this case, as we have seen, the board had acted. So that there has been no omission or failure to perform their duties.

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

In this opinion CARPENTER, SEYMOUR and TORRANCE, Js., concurred. LOOMIS, J., dissented.

JOHN H. DONOVAN *vs.* THE COMMISSIONERS OF FAIRFIELD COUNTY.

New Haven & Fairfield Cos., Jan. T., 1891. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

The statute (Gen. Statutes, § 3050) which provides for the voting of towns upon the question of licensing the sale of liquor, provides simply that the vote shall be taken by ballot. Held that a ballot cast upon the question of license, at a town meeting where town officers were at the same time voted for, was not void because not placed in a separate box.

The act of 1889 concerning elections (Acts of 1889, ch. 247) has reference only to ballots containing the names of candidates for office. The placing of a ballot upon the license question in the same envelope with a ballot for town officers voted for at the same election, whatever would be its effect upon the ballot for the officers, would have no effect upon the ballot for or against license.

[Argued January 27th,—decided April 20th, 1891.]

APPLICATION for a writ of mandamus; brought to the Superior Court in Fairfield County, and heard, upon a demurrer to the principal paragraphs of the application, before *Robinson, J.* Demurrer sustained and judgment rendered for the defendants, and appeal by the plaintiff. The case is fully stated in the opinion.

A. H. Paige and *E. L. Staples*, for the appellant.

A. B. Beers, for the appellees.

SEYMOUR, J. This is an application for a writ of mandamus to compel the respondents to grant the applicant a license to sell spiritous and intoxicating liquors in the town of Huntington, if they shall find that he is, in their opinion, a suitable person to sell spiritous and intoxicating liquors within the meaning of the law and has complied with all the statutory requirements relating to the granting of licenses.

The questions submitted to this court arise upon the demurrer to paragraphs twelve and thirteen of the application.

Paragraph twelve alleges that, November 8th, 1890, the respondents refused to grant a license to the applicant upon his application, for the sole reason that on the first Monday of October, 1890, at its annual meeting, the town voted "no license," and because the respondents claim to have no discretion in the matter of the application because of that vote, although the respondents find no other reason against the granting of the application.

Paragraph thirteen alleges that the vote of Huntington at its annual town meeting on the first Monday of October, 1890, relating to license, was illegal and void, because at the town meeting there was no box marked "license" in which to deposit the ballots then and there cast by the voters on the license question, and because a separate box was not provided for the reception of said votes, and because the ballots then and there cast by the voters on the license question for and against the granting licenses for the sale of spiritous and intoxicating liquors, were placed in the official

envelopes, provided by the secretary of the state, to be used at said town meeting, together with the ballots then and there cast by the voters of the town in accordance with chapters 247 and 181 of the public acts of 1889.

The respondents demurred to the application on the ground —1st. That upon the facts as set forth in paragraphs 12 and 13 it appears that the vote of the town of Huntington cast on the first Monday of October, 1890, upon the question of license, was legal and valid, and that the vote was in favor of no license, and was not illegal and void as claimed by the plaintiff.

2d. Because upon the facts set forth in paragraphs 12 and 13 of the application it appears that the plaintiff is not entitled to a license under the laws of the state of Connecticut.

3d. Because upon the facts set forth in paragraphs 12 and 13, the respondents, as county commissioners of Fairfield County, could not legally grant a license to sell spiritous and intoxicating liquors in the town of Huntington, and any license that might have been or may be granted by them to sell spiritous and intoxicating liquors in said town would be in violation of sections 3051 and 3053 of the General Statutes of Connecticut and would be illegal and void under the provisions of said sections.

The Superior Court sustained the demurrer and dismissed the application. Thereupon the applicant took an appeal to this court.

The application, as we have seen, is brought to compel the county commissioners to exercise the discretion which the law requires them to exercise in towns where licenses may be granted. There is no application that such discretion should be controlled or directed. The respondents say that it appears from the application itself that they are not only not bound to exercise that discretion, but that it would be unlawful for them so to do, and that the facts stated in the application show that the town of Huntington at its last annual election voted against the granting of licenses in the town.

The applicant does not claim that a majority of the voters

of Huntington who voted at the last annual town meeting voted in favor of license. His application assumes the contrary, and attacks the reason given by the county commissioners for refusing the license, namely, that the town at its last annual town meeting voted "no license," upon the ground that such vote was illegal and void for the reasons stated in the thirteenth paragraph of his application.

If the law makes a vote upon the question of license illegal and void because no box marked "license," nor any separate box, is provided for the ballots,—or because they are placed in the official envelopes, in the manner stated in the application, then of course the courts cannot legalize it. But on the other hand, the law must be clear and explicit that would render void the deliberate action of a town upon this important subject.

Since 1872 the right of local option, as it is called, has been established in this state. At first there was no direction how the vote should be taken. In 1874 the law was amended by providing that the vote should be taken by ballot, and that was the prescribed method at the date of the vote in question. No statute however has been brought to our notice requiring a separate box to be provided for the reception of ballots for or against license, nor are we aware that any exists.

Nor is there any law in any way regulating the disposition of the ballot by the voter. The act of 1889 concerning elections, (Public Acts of 1889, p. 155, chap. 247,) has reference to ballots containing the names of candidates for office. The object was to prevent them from being identified in such a manner as to indicate who might have cast them. We need not enquire whether placing a license ballot in an envelope containing a ballot for officers named in the ninth section of that act, would justify a refusal to count the latter, and require the moderator to keep the ballots and envelope and return them to the town clerk in a separate package from the ballots for officers which are counted at such election. No such question arises here. Suffice it to say that the act has no reference to ballots cast for or against

license and neither added to nor repealed the then existing law upon that subject, which simply requires that the vote upon license should be taken by ballot. That was done in this case. The ballots were counted and the result declared and recorded. Of course there is no natural reason, that is, no reason founded in the nature of things, why a ballot actually cast for or against license in a town meeting legally held for the purpose of deciding that question, should not be counted. The object of the meeting is to discover the wishes of the voters. If that can be discovered it will be made effective unless some positive provision of law has been broken or disregarded in expressing it. No such provision has been broken or disregarded in this case. Nothing has been done with these ballots which the law says shall prevent their registering the will of the voter who cast them.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

DWIGHT LOOMIS *vs.* WALDO S. KNOX AND OTHERS.

Hartford Dist., March T., 1891. ANDREWS, C. J., LOOMIS, SEYMOUR, TORRANCE AND FENN, Js.

A held a mortgage on the homestead of *B*. Later *C* obtained a judgment against *B* and filed a judgment lien on the homestead and on a pasture belonging to *B*. Later *A* obtained a decree of foreclosure of his mortgage of the homestead, not making *C* a party. After the foreclosure took effect *A* conveyed the homestead by a warranty deed to *D*. *C* afterwards foreclosed his lien on the pasture and took possession of it, the value of the pasture being greater than the judgment debt. Afterwards *B* conveyed all his interest in the homestead to the plaintiff. Held that the plaintiff had a right to redeem the homestead from *D*, the grantee of *A*.

A judgment lien is a mortgage, and the lienor has all the rights of a mortgagee.

By virtue of his judgment lien *C* had the right of a second mortgagee to redeem the homestead mortgaged to *A*, which right was not cut off by the foreclosure of *B*, *C* not having been made a party.

There was left in *B* an equity by virtue of which he could redeem the judgment lien upon the homestead held by *C*, and by redeeming that judgment lien he would acquire the same right to redeem the first mortgage which *C* had.

And being possessed of such right he could convey it by any proper deed to the plaintiff.

The taking possession of the pasture by *C* under his foreclosure was the payment of the debt for which it had been a security, the land being of greater value than the amount of the debt. It paid the debt in the same way that a payment in money would have done.

This payment of the debt which *B* owed to *C* was a redemption of the judgment lien on the homestead, and clothed *B* with a right to redeem the first mortgage from *A*.

The deed from *B* to the plaintiff of all his right in the homestead would not have been rendered void by the possession of *A* under his foreclosure or of *D* as his grantee, if they had been in full possession. In giving the deed *B* simply passed to the plaintiff the right to redeem which he had acquired through *C*, and the possession of *A* would not have been adverse to the title of *C* as a second mortgagee.

If a mortgagee refuses to receive his money on tender after forfeiture, he will lose the interest upon it from the time of the tender.

[Argued March 6th—decided April 20th, 1891.]

SUIT for the redemption of mortgaged premises; brought to the Superior Court in Hartford County, and heard before *Fenn, J.* Facts found and judgment rendered for the plaintiff and appeal by the defendants. The case is sufficiently stated in the opinion.

A. F. Eggleston and *J. P. Andrews*, for the appellants.

1. The right to redeem mortgaged property is confined to those who have some legal or equitable interest therein. 2 Jones on Mortgages, § 1055.

2. Loomis acquired no such interest by the conveyances of February 24th, 1890. Harris had nothing to convey. He had foreclosed Wright, had obtained title absolute to the "pasture," and had thereby extinguished his claim. He no longer sustained any relation whatever to Wright or to Knox Brothers. "But in Connecticut it has long been considered as established law, and has so been repeatedly decided, that the taking of possession of mortgaged premises by the mortgagee under a decree of foreclosure is by operation of law an extinguishment of the mortgage debt.

It is deemed an appropriation of the thing pledged in payment of the demand for which it was a security." 2 Rev. Swift's Dig., 219; 2 Jones on Mortgages, § 950. As the land appropriated in this case (the pasture) was worth nearly three times the debt, there can be no question that the debt was "extinguished." If the debt was extinguished by this appropriation of the pasture in which Knox Brothers never had any interest at all, it is clear that Harris could not subsequently redeem the homestead. The effect of taking land under a foreclosure decree is, for all practical purposes, the same as taking it upon an execution. In other words, after title absolute, under a decree or after a levy of execution, the creditor no longer holds any relation whatever to the debtor. *Allyn* v. *Burbank*, 9 Conn., 151. It is true there was still outstanding on the land records a lien in favor of Harris upon the homestead, but as that lien was to secure the same debt that had become extinguished by an appropriation of the pasture, it thereafter ceased to have any virtue, and was and is a mere cloud on the title. This cloud on the title is the foundation of the plaintiff's claim. Upon it rests his whole case. How utterly unsubstantial it is a moment's reflection will show. Knox Brothers had foreclosed Wright, and he, having failed to redeem, their title to the homestead had become absolute. With the pasture they had nothing to do. They then discovered that Harris had placed a lien on the homestead as well as on the pasture. It would have been easy for them to have then gone to the Court of Common Pleas, and had the lien on the homestead discharged, on the ground that the lien on the pasture afforded Harris ample security for his debt of $180. Gen. Statutes, § 3039. But they discover that Harris does not care to assume the burden of redeeming the $5,300 mortgage upon the homestead, and has abandoned that lien and resorted to his lien on the pasture alone. This constituted a waiver or abandonment of his lien on the homestead. Neither a lien nor a mortgage can be the subject of several different foreclosure suits. If a mortgagee enforces his mortgage upon one piece only of the mortgaged property,

he thereby waives his lien on the remainder. 2 Jones on Mortgages, § 1463; *Mascarel* v. *Raffour*, 51 Cal., 242. Harris, therefore, had no interest in the homestead on February 24th, 1890, and his deed to Loomis conveyed nothing. But, aside from this, Loomis took nothing. If the original debt due from Wright to Harris can, upon any construction or theory, be regarded as still outstanding, the owner of that debt alone had the right to redeem Knox Brothers. Harris had assigned that debt to Austin months previous to February, 1890, and that debt, if any there was, is still owned by Austin. He was careful to exclude it in the assignment made to Loomis on February 24th, 1890. The law is well settled that the owner of the debt is entitled to the security—that a mortgagee cannot, by assignment, divorce the debt and its security. If there is any right still to redeem, it certainly is in Austin as the owner of the debt. *Huntington* v. *Smith*, 4 Conn., 235; *Bulkley* v. *Chapman*, 9 id., 5. If Harris had not previously assigned the debt to Austin, and if Austin had not carefully excluded the debt in his assignment to Loomis, there might be some reason for claiming that an assignment of the lien was intended to cover and carry the debt. As it is, however, the intent is too plain to admit of any such inference or construction.

3. But the counsel for the plaintiff say that Wright had the right to redeem from Knox Brothers on February 24th, 1890, and that this right passed to Loomis by the quitclaim deed of that date. Their claim is that a second mortgagee not foreclosed by the first mortgagee, may redeem the first mortgage, and then that the mortgagor may redeem the second mortgage, and thus acquire a new right to redeem the first mortgage, although such mortgage has already been foreclosed and the title become absolute in the first mortgagee. It may be questionable whether a lienor stands upon the same ground as a mortgagee. He has no title from the owner of the land, and no contract concerning the land exists between them. But assuming, for the sake of the argument, that a lienor is a mortgagee, does it follow, under the facts disclosed by the finding, that Wright, on the 24th of

February, 1890, had a right to redeem the Knox mortgage? The plaintiff maintains that this privilege existed in Wright under the decision in *Goodman* v. *White*, 26 Conn., 317. That case is utterly unlike the case at bar in every material point. The only question for decision there was, (as stated by STORRS, C. J.), "whether a mortgagee, having foreclosed a mortgagor without pursuing a like remedy against a subsequent mortgagee, has the right of redeeming the interest of the latter in the mortgaged premises, upon paying the debt secured by the subsequent mortgage." That question has no relevancy to the question in this case. Knox Brothers having foreclosed Wright, the mortgagor, without pursuing a like remedy against Harris, a subsequent mortgagee, are not here asking the right of redeeming anybody. They do not admit that any one but Wilson had any right or interest in the premises after February 5th, 1890. But the counsel for the plaintiff insist that the language of the opinion, in the cases cited, applies to this case. We do not see the application. In its opinion the court say that a foreclosure of the mortgagor by the first mortgagee does not affect the right of the mortgagor to redeem the second mortgage. With that doctrine we can have no quarrel. The trouble with the plaintiff's position lies in the facts. Wright had been foreclosed by both mortgagees, and the title of each had become absolute by his failure to redeem either. The court in *Goodman* v. *White* expressly say that if, in addition to a foreclosure by a first mortgagee, there is also a foreclosure by the second mortgagee, the right of the mortgagor is gone. And that is what the facts show took place in the case at bar. But in *Colwell* v. *Warner*, 36 Conn., 233, the court held that when the second mortgagee had foreclosed, the mortgagor could not redeem the first mortgage.

4. The court erred also in holding that a tenant of Knox Brothers, or of Wilson, as Wright admitted he was, had such possession as would enable him to pass a title to Loomis. Gen. Stat., § 2966; *Harral* v. *Leverty*, 50 Conn., 46; *Sherwood* v. *Waller*, 20 id., 262; *Sherwood* v. *Barlow*, 19 id., 471; 2 Jones on Mortgages, § 1258. If a mortgagor remains

in possession of the mortgaged premises after a decree of foreclosure, and the expiration of the time for redemption, he is a tenant at sufferance of the mortgagee or his assignee. *Ex'rs of Tucker* v. *Keeler*, 4 Verm., 161. A mortgagor cannot set up an adverse claim against his mortgagee until he has first surrendered the possession; and all who claim under him are tenants, subject to the same rule, whether they know of the relationship or not. *Reed* v. *Shepley*, 6 Verm., 602.

5. The court erred in holding that the alleged tender to Waldo S. Knox stopped the running of interest in favor of the plaintiff. Knox Brothers at the time of this alleged tender had no interest in the homestead, as the plaintiff well knew. Not only was the record of Wilson's deed on February 5th, 1890, constructive notice to them, but they had actual notice, as the finding shows, a week before this alleged tender. The fact that Knox Brothers, on February 5th, 1890, gave Wilson a warranty deed of the homestead, is of no consequence in this case or at this time. Loomis can derive no benefit from it in a suit to redeem.

6. The court also erred in rendering judgment against Knox Brothers. Not owning or claiming to own the property they cannot give a deed of it. They are in no respect interested in this suit. All that the mortgagor can claim on a bill to redeem is to have the mortgage canceled, and if the trial court goes further, and directs a conveyance of the premises to the mortgagor, that part of the decree will be reversed. *Merriam* v. *Barton*, 14 Verm., 500.

C. E. Perkins and *L. N. Austin*, for the appellee.

ANDREWS, C. J. This is a complaint praying to redeem certain mortgaged premises situated in the town of Suffield.

Prior to the 8th day of December, 1883, Halsey J. Wright was the owner of two tracts of land in that town, one called the homestead and the other the pasture. On that day he mortgaged the homestead to the defendants, Waldo S. and Wallace Knox—who are spoken of throughout the case as Knox Brothers—to secure his note for the sum of four thousand dollars and interest. On the 9th day of May, 1888,

Chauncey S. Harris, having obtained a judgment against Wright for the sum of one hundred and eighty dollars, including costs, placed a judgment lien therefor on the homestead, and on the fifth day of June following caused another lien to be placed on the pasture to secure the same judgment debt. On the 4th day of April, 1889, Knox Brothers obtained a decree for the foreclosure of the homestead, the time limited for the redemption being the 13th day of August, 1889. Harris was not made a party to the foreclosure and had no notice thereof. On the 5th day of February, 1890, Knox Brothers conveyed the homestead by a warrantee deed to Allen Wilson, who is the other defendant in the case.

Harris foreclosed his lien on the pasture, obtained title thereto, and took possession thereof on the 20th day of January, 1890. The pasture was of a value more than sufficient to pay the entire debt which Wright owed to Harris and all costs. Harris on said 20th day of January assigned all his interest in his judgment to Leverett N. Austin. On the 24th day of February, 1890, both Austin and Harris assigned all the remaining interest, if any, which they or either of them had in the judgment, to the present plaintiff; and on the same day Wright conveyed to the plaintiff all his right, interest and estate in the homestead. On the 8th day of March, 1890, Wright was put out of the possession of the homestead upon a judgment in ejectment obtained by Knox Brothers. On the 5th day of March, 1890, the plaintiff through his attorney tendered to Waldo S. Knox the sum of $5,650, that being the full amount due to Knox Brothers on the note of Wright, with all interest and costs. Knox refused to accept it. This action was brought on the 10th day of March, 1890. These are the controlling facts in the case.

The Superior Court passed a decree allowing the plaintiff to redeem, found the value of the use and occupation of the premises, and required the defendants to execute and deliver to the plaintiff a release deed and to surrender to him the peaceable possession thereof. The defendants appeal.

All the reasons of appeal are disposed of by answering

two questions. Did Wright himself have a right to redeem the homestead at the time he made the deed to the plaintiff? And if so, was that deed a sufficient one to authorize the plaintiff to redeem? If both these questions can be answered in the affirmative then there is no error. These questions imply, and we think the law is so, that whatever the power or privilege to redeem the plaintiff has must come from Wright. He obtained no such right from Harris or Austin.

It was decided by this court in *Beardsley* v. *Beecher*, 47 Conn., 408, that a judgment lien is a mortgage—a statutory mortgage. It therefore confers just such rights on the lienor as a mortgage would confer. The rights of the parties in this action are to be determined in the same way that they would be if Wright had made a second mortgage of the homestead to Harris on the 9th day of May, 1888, and on the 5th day of June of the same year had given a mortgage of the pasture as additional security to Harris for the same debt. By virtue of such a second mortgage Harris had the right to redeem the first mortgage held by Knox Brothers. The foreclosure of Wright, the mortgagor, by Knox Brothers,—Harris not being a party to that proceeding—did not cut off the right of Harris to redeem the first mortgage. His right to redeem that mortgage was left unimpaired. *Beers* v. *Broome*, 4 Conn., 247; *Smith* v. *Chapman*, id., 344; *Swift* v. *Edson*, 5 id., 531; *Mix* v. *Cowles*, 20 id., 427; *Thompson* v. *Chandler*, 7 Maine, 377; *Moore* v. *Beasom*, 44 N. Hamp., 215. There was also left in Wright an equity by virtue of which he could redeem the second mortgage owned by Harris, and by so doing would acquire the same right to redeem the first mortgage which Harris had, and become entitled himself to redeem that mortgage. *Goodman* v. *White*, 26 Conn., 317; *Colwell* v *Warner*, 36 id., 224; Jones on Mortgages, § 1057. If Wright became possessed of such a right to redeem the homestead, he might of course convey it by any proper deed to the plaintiff. It is just that right which the plaintiff claims to be exercising in this action. The first question then comes to this :—Do the

facts show that Wright did redeem the second mortgage on the homestead from Harris?

The taking possession of the pasture by Harris under his foreclosure was the payment of the debt for which it had been a security, the land being of greater value than the amount of the debt. *Bassett* v. *Mason*, 18 Conn., 131. It paid that debt in the same way that a payment in money would have done.

A payment by Wright of the debt he owed to Harris was a redemption of the second mortgage on the homestead and clothed Wright with a lawful claim by which he could redeem the first mortgage from Knox Brothers. As between Harris and Wright it can make no difference whether the debt was paid in money or was paid by the foreclosure of land. The debt was paid in either case. The second mortgage was redeemed in either case, and in either case the incidents of such redemption must follow, namely, the right to redeem the first mortgage.

It is claimed that the deed from Wright to the plaintiff is void for the reason that he was ousted of possession at the time it was given. The dates show that at the time he was still on the homestead. He was not put out till some days after. But the objection vanishes when it is remembered that in giving the deed Wright simply passed to the plaintiff the right to redeem which Harris had. As to that right if Harris was not ousted Wright was not. There is nothing in the case to show, nor is there any claim made, that Harris was ousted. The possession of Knox Brothers was not adverse to the title of Harris nor to any grantee of his title.

Knox Brothers may rightfully claim to have the full amount of their note with interest and all costs. Beyond that there are no equities in their favor. In their brief and in the oral argument it is intimated that the plaintiff is attempting in some way to do injustice to Wright. If that is so it does not entitle them to have anything more than their just dues. They may not do wrong to Wright because some one else is seeking to do so.

We understand the law to be as laid down in 2 Swift's Digest, 210, that if a mortgagee refuses to receive his money on tender after forfeiture, he will lose his interest from the time of the tender.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

ORVILLE S. MALLETT *vs.* WARREN E. PLUMB.

New Haven and Fairfield Cos., Jan. T., 1891. ANDREWS, C. J., CARPENTER, LOOMIS, and TORRANCE, Js.

Section 51, Gen. Statutes, provides that "the ballots cast at any town meeting for the election of town officers, shall, immediately after they have been counted, be returned by the presiding officer to the ballot box or boxes, which shall be locked, sealed, and deposited by him in the town clerk's office, so that the same cannot be opened without his knowledge, and the clerk shall carefully preserve the same with the seal unbroken for six months after such meeting." Held that where, upon an application for a recount, the judge is satisfied upon legal evidence that the ballots have not been tampered with or disturbed, they should be admitted in evidence even though some of the provisions of the statute have not been complied with.

Upon examining the ballots on a recount, three envelopes were found from which the ballots had been removed and it could not be ascertained what they were; one of the envelopes had not been endorsed, one bore a distinguishing mark, and one the name of the voter. Held that they were clearly illegal, and in the uncertainty as to what the votes were, could not be taken into the recount for any purpose.

One of the candidates was Orville S. Mallett, and one ballot was found with the name of Orville Mallett upon it and one with that of O. J. Mallett. The judge below found that there was no other person residing in the town of the name of O. S. Mallett or Orville Mallett or any similar name, and held that the ballots were intended for the candidate mentioned. Held that the evidence was properly admitted.

Section 48, Gen. Statutes, provides that "of the persons elected selectmen by any town, the person first named on a plurality of the ballots cast for them or any of them, shall be first selectman." Held to mean the person first named on a plurality of the ballots, as actually cast, and not the first named on a set of ballots or a party ticket.

The name of *M* was placed first on a party ticket for selectmen and that of

P on an opposing ticket. The first mentioned ticket received as a whole a plurality of the votes cast, but by reason of *M's* name being stricken from a few of the ballots a larger number of the ballots cast contained the name of *P* as the first name upon them. Held that *P* was elected first selectman.

By the striking of *M's* name from the head of any ballot cast, the next name after became the first name on the ballot.

[Argued January 23d—decided April 20th, 1891.]

PETITION to *Phelps, J.*, under Gen. Statutes, § 58, for the opening of the ballot box containing the ballots cast at the last preceding election for selectmen in the town of Trumbull and a recounting of the ballots, the plaintiff claiming to have been elected first selectman of the town, and the defendant holding the office and claiming to have been elected to it. The facts were found by a committee and a further finding made by the judge, and judgment rendered for the plaintiff. The defendant appealed. The case is fully stated in the opinion.

S. Judson, with whom was *C. S. Canfield*, for the appellant.

R. C. Ambler, for the appellee.

TORRANCE, J. At the annual town meeting held in Trumbull in October, 1890, Plumb, the defendant, was declared elected to the office of first selectman. Mallett, the plaintiff, thereupon brought a petition under the statute, before a judge of the Superior Court, alleging that he, Mallett, and not Plumb, had been elected to that office, and praying that it might be so adjudged and declared.

In the first four paragraphs of his petition the plaintiff alleged in substance that, at said election, he and one Nichols were the candidates for the office of selectman upon the ballots known as democratic ballots, and that Plumb and one French were the candidates for that office upon the ballots known as republican ballots; that the plaintiff was first named for that office upon the democratic ballots, and Plumb was first named therefor on the republican ballots; that

there were ninety-eight ballots counted for Mallett, one hundred and five for Nichols, one hundred and one for Plumb, and eighty-one for French; that there were therefore cast for selectmen at said election one hundred and five of the democratic ballots and only one hundred and one of the republican ballots; and that upon the plurality of the ballots so cast for selectmen or any of them the petitioner was first named. And upon this ground he claimed the office of first selectman, under section 48 of the General Statutes.

The defendant demurred to these allegations, on the ground that, upon the facts alleged, the plaintiff was not the person first named upon a plurality of the ballots within the meaning and intent of the law. The judge overruled the demurrer, and this is assigned as one of the errors upon this appeal.

The plaintiff further alleged, in substance, that certain ballots were cast for the plaintiff for said office at said election, which should have been counted for him, but were not; and that certain ballots cast for the defendant, upon which the defendant's name did not stand first, were counted for him as if his name stood first thereon.

The defendant in his answer alleged that the ballot box used at the election, and to which, after the election, the ballots had been returned, had not been locked, sealed, deposited and kept as the law requires; and on this ground he objected to the opening of the box and the counting of the ballots. The judge heard the parties with their evidence upon this part of the case, and found in substance the following facts:—

When produced in court the ballot box was locked but not sealed. There was an extra slide under the lid of the box which covered the aperture in the lid, and when the box was locked the slide could not be moved, and nothing could be put in or taken from the box without unlocking it or breaking it open. The ballots were counted and returned to the box by the counters out of the presence of the moderator. The box was then brought into the polling place and delivered to the moderator, who locked and delivered the same, with the key, to the town clerk, who was there present. Thereafter the moderator had no knowledge or means

of knowing whether the box or ballots had been in any way disturbed or tampered with.

The town clerk put the box that night in the town clerk's office, and next day deposited it in an up-stairs room, which was not kept locked, and placed the key to the box in a drawer, to which no one but himself and wife had access. The box, ballots and key remained in their respective places until produced in court. The members of the town clerk's family, his hired help, visitors at his house, and the public generally, had access to said room if occasion required. No evidence was introduced to show that the box or the ballots therein had been actually molested or in any way disturbed. And the judge found from the foregoing facts that the ballots found in the box were the same as were cast at said election "and that neither the box nor the ballots had been in any manner tampered with or disturbed."

The judge overruled the defendant's objection, and after all the other evidence in the case had been heard, and the arguments made, ordered the box to be opened, and the ballots counted by a committee. The action of the judge in ordering the box to be opened and receiving the result of the recount as evidence, is one of the errors assigned on this appeal.

The plaintiff's name is Orville S. Mallett, and it appeared upon the recount that ninety-seven ballots were cast for Orville S. Mallett, one ballot for Orville Mallett, and one for O. J. Mallett. Upon this part of the case the finding is as follows:—"It appeared that there was no other person residing in said town by the name of O. S. Mallett or by the name of Orville Mallett, or by any similar name, but no evidence was introduced to show specifically whether there was any person in said town or upon the registry list by the name of O. J. Mallett, nor to show whether any of such votes had been rejected by the counters or presiding officer. I find upon the foregoing facts, and from said ballots, that the ballots cast for Orville Mallett and O. J. Mallet were intended by the voters thereof to be cast for the petitioner as first selectman."

One of the reasons of appeal is based upon this ruling, and is as follows:—"Said judge erred in holding that said ballots cast for O. J. Mallett and Orville Mallett should be counted for the petitioner."

The record however does not disclose that the defendant made any objection on this part of the case, except to the admission of evidence as to "whether there was any person residing in said town by said names aforesaid." This evidence in such a case was clearly admissible, if the opening of the box and the recount were legal. Whether the evidence was objected to on this general ground, or on the specific ground that in such cases the court could not make enquiries of the nature of those objected to, is perhaps not quite clear. On the facts found the ruling in question was right and the specific objection was not well taken.

Upon opening the ballot box and recounting the votes, it appeared that Mallett had ninety-nine votes and Plumb ninety-eight votes for the office of first selectman, and that Nichols had one hundred and five votes for selectman.

If then the judge did not err in ordering the box to be opened, and in accepting the report of the committee appointed to make the recount, it would appear that Mallett was elected to the office of first selectman, and the question raised by the demurrer to the first four paragraphs of the petition would be of no importance in the case at bar.

The defendant however claims that the judge erred in ordering the box to be opened, and in accepting the report and result of the recount. The question then is, whether these claims of the defendant are well founded.

One of the claims of the defendant on this part of the case is, that unless the provisions of section 51 of the General Statutes have been fully complied with, the evidence was not admissible for any purpose. That section provides as follows:—"The ballots cast at any town meeting for the election of town officers shall, immediately after they have been counted, be returned by the presiding officer to the ballot box or boxes, which shall be locked, sealed and deposited by him in the town clerk's office, so that the same

cannot be opened without his knowledge. And the clerk in whose office such box or boxes shall be deposited, shall carefully preserve the same with the seal unbroken for six months after such meeting."

The finding upon this part of the case clearly shows that in the case at bar there was a gross disregard of the statutory provision. The question is, what is the effect of such conduct? Does it make the box and its contents utterly worthless as a source of evidence, and therefore inadmissible, as much so as if the statute had expressly so provided; or are the box and its contents admissible provided it can be shown to the satisfaction of the trier, as in this case, that neither the box nor the ballots had been in any manner tampered with or disturbed? We think the latter construction must prevail.

In all contested cases of this kind, the ballots cast, if they have all been returned to the box immediately after the election, and carefully kept in the same condition as when so returned, furnish in most cases the best evidence of the result of the election. The main object of the statute is to make this source of evidence still more available by throwing around it these safeguards.

The statute in question contains divers provisions all looking to this main purpose or object. It enjoins with equal explicitness the observance of *all* of these requirements, whatever may be thought of their relative importance. If the reasoning of the defendant is correct, then the non-observance of any one of these requirements shuts out the ballots as a source of evidence, and the main object of the legislature in enacting the statute is defeated, even in cases where the evidence makes it clear beyond question that the ballots have not been tampered with or disturbed in any way.

For instance, if the ballots have all been returned to the box, and the box itself has then been locked, sealed, deposited and kept, as the statute requires, but it turns out, as in this case, that the ballots were returned to the box by the counters in the absence of the moderator, instead of by the latter, as the law requires, in such a case the defendant

claims that the ballots cannot be used as evidence, even though it should be clear beyond doubt that they have otherwise been preserved intact and as the law requires. This in many cases would be sacrificing the substance to the shadow, would be obeying the letter that killeth rather than the spirit that maketh alive. We cannot consent to such a construction, unless the language of the statute imperatively requires it.

The statute does not expressly provide that a failure to comply with any one or all of its requirements shall be followed by any such consequence, and this silence is quite significant under the circumstances. The legislature might easily have so provided if such had been its intention.

Here was a well known source of evidence frequently resorted to in cases like the one at bar when it was available. The law permitted a resort thereto even before it threw around it the safeguards of the statute. It permitted the parties to prove, as best they could, by legal evidence, that the ballots had not been tampered with or changed in any way. The legislature intended to make this source of evidence still more, and not less, available. To accomplish this it prescribed certain requirements looking to the end in view, some of more and some of less importance, but enjoined the observance of all of them upon officials who might neglect their duty. It knew also that even if the officials performed their duty as to certain of the requirements, the box might be opened or the lock broken or the seal destroyed by accident or mistake or by purposive action on the part of others without authority, and that in other ways, which readily suggest themselves, the box or the ballots might be so handled or kept as to require evidence that the value of the ballots as a source of evidence had not been impaired or destroyed. If then the legislature intended to change all this, and to make the mere fact of non-compliance with any of the statutory requirements, or the want of a seal or a lock, or other defect of a like nature, conclusive against the use of the ballots as evidence, even in cases where it was clear that the ballots had not been tampered with or disturbed in any

way, we think it would have said so expressly, and not left it to doubtful inference.

The law seems to content itself with punishing officials who refuse to perform, or who fraudulently perform, certain duties imposed upon them with regard to this matter; it also punishes those who within a certain time after an election fraudulently abstract any vote from the box or fraudulently put any vote in the box, and there it seems to leave the matter.

We think the main object of the statute is best subserved by holding, as we do here, that where the trier is satisfied upon legal evidence that the ballots have not been tampered with or disturbed, they should be admitted in evidence, even though some of the provisions of the statute have not been complied with.

We hold, therefore, that it was not error to open the ballot box and admit the evidence as to the result of the count, merely on account of the claimed non-compliance with the provisions of the statute in question. The recount, however, further showed, and the judge finds, that the ballot box contained the following: "205 envelopes properly endorsed, from which the ballots had been removed and counted; one envelope not endorsed, from which the ballot had been removed and counted, but it did not appear for what candidates it had been counted; one envelope on which was a distinguishing mark, from which the ballot had been removed and counted; and two envelopes with the names of the voters who had cast the same written thereon, one of which had not been opened, and from the other the ballot had been removed and counted, but it did not appear what names were on it."

The ballot in the unopened envelope referred to in the above finding, was rejected by the judge; but the other three ballots which had been contained respectively in the envelope not endorsed, in the envelope with a distinguishing mark, and in the envelope bearing on it the name of the voter, could not at the time of the recount be ascertained, nor did it appear for whom they had been cast or counted,

and so they were not rejected. These three ballots were clearly illegal. Public Acts of 1889, chap. 247.

These three ballots thus entered into the result of the recount, as found by the committee and the judge, because neither the one nor the other could then tell which of the 208 apparently valid ballots in the box had been contained in the three envelopes, nor for whom they had been cast or counted.

The defendant objected to the report of the committee appointed to count the ballots on this ground, and claimed "that the result as reported and found could have no controlling effect, because it appeared that there had been counted, at the election, certain illegal ballots, and because it did not appear for which candidate said illegal ballots had been counted." This objection and claim the judge overruled, and this is assigned for error.

It further appears from the finding that no evidence in support of the allegations of the petition was offered, except the result of the recount as reported by the committee. The uncertainty arising from the fact that these three illegal ballots entered into and affected the result of the recount, vitiates the entire proceeding, and no finding could be legally based thereon. The burden of proof was upon the plaintiff to show that he was legally elected, and if the only evidence he offered was uncertain and legally worthless, it was as if he had offered no evidence, and the finding based upon such evidence can have no foundation in fact or in law.

It is by no means certain from the finding that the conclusion of the court that Mallett was elected to the office of first selectman is based upon the result of the recount. That conclusion is thus stated in the finding:—"The petitioner was first named on the ticket which had a plurality of the ballots cast for selectmen or any of them at said town meeting, and Elliott P. Nichols, named second on said ticket, had a plurality over all the other candidates." The language of this conclusion, as well as its position in the finding, seems to indicate that it is based upon the facts admitted by the demurrer to the first four paragraphs of the

petition, rather than upon the result of the recount. But if it is based upon the result of the recount, then for the reasons given we hold that the judge erred in overruling the defendant's objection and claim upon this part of the case.

This brings us to the principal question raised by the demurrer to the first four paragraphs of the petition. Section 48 of the General Statutes, upon which the claims of the parties on this part of the case arise, reads as follows: "Of the persons elected selectmen by any town, the person first named on a plurality of the ballots cast for them or any of them shall be first selectman."

The plaintiff's claim seems to be that, inasmuch as Mallett's name stood first on the Nichols ticket, he was elected, because Nichols had a plurality of the ballots cast at the election; and that this would be so even if Mallett's name had been erased from nearly every ballot that was cast for Nichols.

According to this claim, if the 105 ballots cast for Nichols were democratic ballots, and Mallett's name had been erased by the voters from all of them save one; and if French on the republican ticket had received no votes; then, by this one ballot, Mallett would be elected first selectman over Plumb, although the latter has 101 votes cast for him for the same position. This is the view of the law which the judge below seems to have taken.

The statute in question is perhaps susceptible of such a construction, for its meaning is by no means clear; but for several reasons we think it is not the correct construction. In the first place, such a construction ought not to be put upon language which is doubtful or uncertain, for it runs counter to the general rule that either a plurality or a majority of the votes cast is necessary to elect. "Our government and our institutions rest on the principle that controlling power is vested in the majority. In the absence of any provision of law to the contrary, the will of any community or association, body politic or corporate, is properly declared only by the voice of the majority." *State ex rel. Duane* v. *Fagan*, 42 Conn., 35. Section 45 of the General Statutes

provides that "in all elections of town officers a plurality of the votes cast shall be sufficient to elect, unless it is otherwise expressly provided by law." Election by a majority or a plurality is thus the general rule. Town officers must be elected by a plurality, unless it is otherwise expressly provided by law. It is nowhere otherwise expressly provided by law that the first selectman shall be elected by less than a plurality, unless such provision is contained in this 48th section. That section clearly does not expressly so provide, nor do we think it does so by necessary implication.

No good reason is shown for the existence of so marked an exception to the general rule; and if the legislature had so intended, it is reasonable to suppose that the language used would be so clear and explicit as to admit of no reasonable doubt. If that language does admit of doubt, we ought to adopt a construction in harmony with the general rule, if that be possible.

In addition to this, we think the statute itself, when fairly construed, does not favor the construction contended for by the plaintiff. The phrase "first named," as used in the statute in question, is somewhat ambiguous. It may mean the person whose name stands first on the ballot of his party when the voting begins. In such case he is said to "head the ticket." Used in this way, the phrase in question means the name standing first upon a *class* of ballots, namely, the "party ticket," so called, even though it should be found erased from many of the individual ballots actually cast. In this sense it could be claimed that Mallett was "first named" on all the democratic ballots cast for Nichols, even though his name had been erased from every one of them. If this meaning is to be given to the statute, then undoubtedly Mallett was elected first selectman.

That this was the meaning given to the statute by the judge who tried the case at bar is evident from the language of the finding, which is:—"I find the petitioner was first named on the *ticket*, which had a plurality of the ballots cast for selectmen or any of them at said town meeting." On the other hand the phrase in question may fairly mean the per-

son whose name stands first on any ballot actually cast, whether originally standing first thereon or not. In this sense, if the name originally standing first on the ballot cast is erased by the voter, then the person whose name is so erased is no longer "first named" on that individual ballot. We think the phrase "first named" is used in this last sense in the statute in question. The language of the statute is not "first named on a *ticket*" or *class* of ballots, but "first named on the *ballots cast*." In this sense, upon the facts admitted by the demurrer, Plumb is first named on 101 ballots cast, while Mallett is so named only on 98 of such ballots. If this is the true construction, and we think it is, then Plumb and not Mallett was "first named on a plurality of the ballots cast" for the selectmen or any of them.

For these reasons the decision appealed from is reversed and set aside.

In this opinion the other judges concurred.

Charles F. Michael *vs.* Austin Curtis.

Hartford Dist., March T., 1891. Andrews, C. J., Loomis, Seymour, Torrance and Fenn, Js.

The acceptance of personal property by a vendee, to relieve a contract for its sale from the statute of frauds, must be an actual receiving of the whole or some part of the property on the part of the vendee. An acceptance may be sufficient to pass the title and yet not sufficient to take the case out of the statute.

A contract void under the statute of frauds is void for all purposes.

A moved a barn upon the land of *B* with his consent, while negotiations were pending for its sale to *B*. Held that while these negotiations were pending *A* was tenant-at-will of *B*.

The sale not having been perfected, *A* remained a tenant-at-will of *B*, and so liable for use and occupation; though he would have had a reasonable time for the removal of the barn, during which he would not be liable for rent.

Michael *v.* Curtis.

Small damages and nominal damages do not mean the same thing. Where there is a real right involved the damages, even if very small, are substantial and not nominal. To deprive a party of these, by refusing him a new trial because they must be small, might do him a serious injustice.

[Argued March 4th—decided April 20th, 1891.]

ACTION to recover for the use and occupation of certain land of the plaintiff, and for damages for the breach of a contract; brought to the Court of Common Pleas of Hartford County and tried to the jury before *Taintor, J.* Verdict for the defendant, and motion for a new trial by the plaintiff for a verdict against the evidence and an appeal for error in the rulings and charge of the court. The case is sufficiently stated in the opinion.

J. J. Jennings, for the appellant.

F. L. Hungerford and *N. E. Pierce*, for the appellee.

ANDREWS, C. J. The substituted complaint on which this case was tried contained two counts:—the first one claiming damages for the use and occupation by the defendant of certain land of the plaintiff: and the second damages for a breach of a contract by the defendant. The cause was tried upon issues closed to the jury, and there was a general verdict in favor of the defendant. The plaintiff brings the case to this court on a motion for a new trial for a verdict against the evidence in the case, and also appeals, assigning as reasons of appeal divers rulings of the court in respect to evidence and in respect to the charge to the jury. The defendant filed exceptions, which are made a part of the record, and suggests that the same questions will again arise in case a new trial is had, and asks that these also may be decided.

The cause of action relied on in both counts grew out of the same transaction. The parties live in the village of Bristol, and are respectively the owners of land on opposite sides of Laurel street in that village. In August, 1888, ne-

gotiations were had between them through one Porch—they did not meet personally—the result of which was that Mr. Curtis moved a barn belonging to himself from his own land upon the land of Mr. Michael. Mr. Curtis claimed that a contract had been made by which he had sold the barn to Mr. Michael, that he was to remove it, as he had done, from his own to the land of Mr. Michael, and that Mr. Michael was to pay him for the barn when so removed the sum of nine hundred dollars. Mr. Michael claimed that, in addition to the barn and to the so moving it, Mr. Curtis, in consideration of the sum of money named, was to execute a writing agreeing that he would not for five years place a barn on his own land opposite to the land of him, Michael. Mr. Curtis denied that he had agreed to execute such a writing and refused so to do. Mr. Michael then notified Mr. Curtis to remove the barn from his, Michael's land, and that he should charge him one dollar a day for every day it remained on his land. Mr. Curtis then brought an action against Mr. Michael to recover the nine hundred dollars. To that action Mr. Michael made two defenses—the general issue, and a second defense in the nature of a plea in bar, setting up the agreement as he claimed it to be, and alleging that Mr. Curtis had refused to perform it. To that defense Mr. Curtis replied, denying the alleged agreement to execute such writing, and averring that the barn had been delivered to and accepted by Mr. Michael. To this reply Mr. Michael rejoined, denying that the barn had been delivered to or accepted by him. The issues were tried by a jury, and a general verdict, finding them in favor of Mr. Michael, was returned and accepted by the court. This verdict was rendered at the November term, 1889, of the Court of Common Pleas in Hartford County. The present action was brought to the same court at its September term, 1890.

We have examined all the evidence in the case, and are of opinion that the verdict on the second count was not against the evidence but clearly in accordance with it. There was no evidence, no substantial evidence, to prove

such an agreement as the plaintiff alleged in that count. The man Porch, through whom all the negotiations are said to have been made, was not called as a witness. The defendant denied that such a contract had ever been made. But if the terms of the contract had been shown, it was not a lawful and binding contract by reason of the statute of frauds. It was admitted that nothing had been paid to bind the bargain, or in part payment, and that there was no memorandum in writing. It was sought to avoid this objection by introducing the record of the former trial. It was claimed that that record showed an acceptance of the barn by Mr. Michael, and that the acceptance takes the case out of the statute.

That the acceptance of personal property by a vendee will relieve a contract for its sale from any objection on account of the statute of frauds is very true. But it must be such an acceptance as that statute mentions. The language of the statute is "accept and actually receive." An acceptance sufficient to take a sale of personal property out from the operation of the statute, must be an accepting and an actual receiving of some part or the whole of the goods on the part of the vendee. Does the record then of the former case show such an acceptance? It seems to us that it does not, either when regarded technically, or in the light of the claims then made by Mr. Michael.

An acceptance sufficient to pass the title of personal property from a vendor to a vendee may be, and often is, made without any actual receiving by the vendee of any part of the goods. On the former trial the question of acceptance was directly put in issue. It was asserted by Mr. Curtis and denied by Mr. Michael in their respective pleadings. It was then whether Mr. Michael had so accepted the barn that the title thereto had passed from Mr. Curtis to him. The verdict was in favor of Mr. Michael. And that verdict cannot be reconciled with a finding by the jury that Mr. Michael had so accepted the barn as to take the case out of the statute of frauds. An acceptance sufficient for the latter purpose would include one sufficient for the for-

mer. And if the jury had found an acceptance by Mr. Michael sufficient for the former, their verdict must have been the other way. Mr. Michael's testimony is, that when Mr. Curtis, at Mr. Jenning's office, refused to sign the writing, he told him, Curtis, to take the barn off his land. Presumably Mr. Michael gave substantially the same testimony on the former trial that he gave in the present one, so that the evidence upon which the jury found their verdict in that case did not indicate an acceptance by Mr. Michael, but a very emphatic refusal to accept. Besides, the contention of Mr. Michael throughout that trial was, that there had been no completed contract between himself and Mr. Curtis. He insisted that Mr. Curtis had refused to perfect the negotiations so as to make a binding contract; at the same time insisting that he had done nothing which made payment binding on him.

It is apparent that the rulings at the trial did not injuriously affect the plaintiff. A contract void under the statute of frauds is void for all purposes. Browne on Statute of Frauds, 114; *Carrington* v. *Roots*, 2 Mees. & Wels., 248; *Dung* v. *Parker*, 52 N. York, 494; *Dowling* v. *McKenney*, 124 Mass., 478.

In respect to the first count, which is for the use and occupation of land, an entirely different state of facts and of the law is presented. "It may be laid down generally that if a person by consent of the owner of land is let into possession without having a freehold interest or any certain term, and without circumstances which would show an intention to create an estate from year to year, he is tenant-at-will." 1 Washb. Real Prop., 591. The defendant moved his barn upon the land of the plaintiff while negotiations were going on by which he expected to sell the barn to the plaintiff. While these negotiations were pending the defendant was a tenant-at-will to the plaintiff. *Sarsfield* v. *Healy*, 50 Barbour, 245; Taylor's Landlord & Tenant, § 60. Had such negotiations ripened into a completed contract, then the tenancy-at-will would have been merged in the executed contract and relate back to the time when the barn was first

moved upon the land. But the negotiations were never perfected and the defendant remained tenant-at-will to the plaintiff, and so liable for use and occupation. *Gould* v. *Thompson*, 4 Met., 224. "If a party is let into possession under a contract of sale which goes off, he is liable for use and occupation at the suit of the vendor for the period during which he remained in possession after the contract went off; though he may not be for the occupation prior to the rescinding of the contract." Taylor's Land. & Tenant, § 637; *Howard* v. *Shaw*, 8 Mees. & Wels., 118; *Hull* v. *Vaughan*, 6 Price, 157; *Clough* v. *Hosford*, 6 N. Hamp., 231; *Alton* v. *Pickering*, 9 N. Hamp., 494; *Patterson* v. *Stoddard*, 47 Maine, 355. One so going into occupation would undoubtedly be entitled to have a reasonable time after the negotiation failed in which to quit possession, during which time he would not be liable for rent. *Smith* v. *Goulding*, 6 Cush., 155. The extent of the liability in such case is the reasonable value of the occupation. *Gould* v. *Thompson*, *supra*.

These rules of law govern the present case as shown by the first count of the complaint. All the evidence offered tended to show—it seems almost to have been conceded—that the occupation was of some substantial value, though perhaps not of a very great value. The plaintiff claimed more than five hundred dollars. The testimony offered by the defendant made it not more than thirty or forty dollars. Whatever it was the plaintiff was entitled to recover it. The judge called the attention of the jury to the claims of the parties in this part of the case, and gave them the correct rule by which their deliberations should be guided. But they disregarded it, and rendered a verdict which, as applied to the first count, was not only against the evidence, but was wholly without evidence to support it. It is apparent that the contest at the trial was in respect to the case made by the second count. The minds of the jury seem to have been so taken up with that part of the case that they overlooked the merits of the one made by the first count.

It is said that a new trial ought not to be granted to enable a party to recover nominal damages. This will not be

denied. Small damages and nominal damages, however, do not mean the same thing. Nominal damages mean no damages. They exist only in name and not in amount. But where there is a real, legal right involved in a case, the damages, even if very small, are substantial damages and not nominal. To deprive a party of these might be to do him a serious injustice.

There must be a new trial on the first count, but no new trial on the second count.

In this opinion the other judges concurred.

THE NEW ENGLAND MANUFACTURING COMPANY *vs.* JOHN H. STARIN.

New Haven and Fairfield Cos., Jan. T., 1891. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

A complaint was made returnable before "the City Court held at New Haven in and for the city of New Haven." The true name of the court was "The City Court of New Haven." There was no other court to which the description could be applied. Held to be so slight a misdescription that it could not be a ground of abatement.

In a suit brought by the plaintiffs against the defendant as a common carrier, for a failure to deliver their goods put into his hands for transportation, an important question was whether the goods were actually delivered to the defendant for transportation, and the testimony of the plaintiffs' agent, that he purchased the goods of a firm in New York, and directed the firm to ship the goods by the defendant, was received by the court, among other things, as going to prove the delivery of the goods to the defendant. Held—1. That the evidence was admissible for the purpose of showing the plaintiffs' interest in the goods, to identify them, and to show that they had authorized the New York firm to ship them by the defendant's line. 2. But that it was not admissible as evidence that they were in fact delivered to the defendant.

If erroneous evidence is considered and weighed in connection with proper evidence, it vitiates the result and produces a mistrial.

[Argued January 21st—decided April 20th, 1891.]

ACTION against the defendant, as a common carrier, for

the failure to deliver goods committed to him for transportation; brought to the City Court of New Haven and tried to the court before *Pickett, J.* Facts found and judgment rendered for the plaintiff, and appeal by the defendant for error in the rulings of the court. The case is fully stated in the opinion.

C. S. Hamilton, for the appellant.

H. C. White, for the appellee.

LOOMIS, J. This is an action against the defendant as a common carrier, upon a contract to transport for hire, from the city of New York to the plaintiff in the city of New Haven, a piece of plush cloth belonging to the plaintiff. The complaint was made returnable before "the City Court held at New Haven, in and for the City of New Haven," on Monday, August 11th, 1890. The defendant appeared by counsel and filed an answer to the merits of the case on the 8th day of September, 1890, and on the 17th day of the same month the plaintiff filed its reply and the pleadings were regularly closed. Afterwards, on the 27th day of September, 1890, the defendant's counsel filed his motion to erase the case from the docket upon the ground that the charter of the city of New Haven, by virtue of which the City Court was created, designates the court as "the City Court of New Haven," and not as in the complaint.

If so slight a misdescription is worthy of any notice at all, the objection should have been taken by plea in abatement. By first pleading to the merits the objection was waived.

The court that tried the case and rendered the judgment upon the issue tendered by the defendant, was "the City Court of New Haven" which confessedly had jurisdiction of the parties and the subject matter. The summons annexed to the complaint required the defendant to appear before "the City Court held at New Haven in and for the City of New Haven," and the defendant in compliance appeared before the City Court of New Haven and filed an

answer to the merits, inscribing the true name of the court on his plea, thereby impliedly admitting that the description in the summons sufficiently identified the court. The defendant was not in fact misled, and as there was but one court to which the description could possibly apply, he could by no possibility have been misled. So that, if there had been a plea in abatement filed, the defect must have been considered a mere circumstantial one, within the saving spirit, if not the letter, of section 1000 of the General Statutes.

The defendant further claims that the facts contained in the finding did not justify the court in rendering judgment for the plaintiff. This position however is so manifestly untenable that we pass it without any discussion, and proceed to the consideration of the only remaining question, which relates to the ruling of the court in admitting the testimony of Wm. H. Post, president of the plaintiff corporation, that he purchased the plush in question for the plaintiff of Cheney Brothers in New York at the time in question, and who also stated the contract made with Cheney Brothers as to the way and manner of shipping the goods. The defendant objected to the evidence, but the court admitted it, on the ground that it would tend to identify the goods in question, and the delivery of the same into the custody and possession of the defendant.

We think the evidence was admissible for some purposes, but whether it was properly received for the purposes mentioned by the court we will presently consider.

It was, we think, clearly admissible as part of the *res gestæ*, to show the plaintiff's interest in the goods, to identify them, and to show that he authorized Cheney Brothers to deliver the goods to the defendant for transportation to the plaintiff.

The legal doctrine applicable to such a case is well stated in 2 Cowen & Hill's Notes to Phillips on Evidence, Part 1, note 444, p. 585, as follows:—"To be a part of the *res gestæ* the declarations must have been made at the time of the act done which they are supposed to characterize, and well calculated to unfold the nature and quality of the facts

they were intended to explain, and so to harmonize with them as obviously to constitute one transaction. (HOSMER, C. J., in *Enos* v. *Tuttle*, 3 Conn., 250,) says: Suppose, for instance, that the goods consigned by *A* to *B* are injured by the defendant whilst they are in the hands of the carrier, in an action for the wrong, brought either by *A* or *B*, according to the circumstances, it would be competent to either of them being plaintiff, to establish his right of property in the goods by proof of such an agreement between them as either left the right of property and action in himself or vested it in him by the delivery to the carrier. This would be, it is true, nothing more than an agreement between *A* and *B*, to which the defendant was not privy; but it would be evidence against him, not as concluding any right of his without his assent, but as affecting the nature of the transaction itself, and showing to whom the injury was done. (1 Stark. Ev., 53.) See remarks of SUTHERLAND, J., in *Murray* v. *Bethune*, 1 Wend., 196. In the example put it might be material to see the letters which had passed between *A* and *B*, and the directions of *A* to his clerks or to the carrier, from which to infer the terms of the agreement and the identity and destination of the goods. In a late case the plaintiff sued out a foreign attachment against *B*, summoning the defendant as garnishee. The summons was served in November, 1828. On the 21st of the previous July the garnishee had thirty barrels of *B's* gin in his hands, which, by letter of that date, he was directed by *B* to hold, with the proceeds of that sold, if any, subject to the order of *G;* and, by letter of the August following, the garnishee had acknowledged that he held the gin and proceeds on account of *G*. These letters were at first excluded as not being evidence for the garnishee, under the notion that they were naked declarations; but on appeal the Supreme Court held them clearly admissible, as evidence of the agreement by which the gin was transferred to *G*. *Cox* v. *Gordon*, 2 Dev., 522."

The objection to the evidence in question, as well as the offer, was only a general one. If the court had received it

in the same manner without applying it to the proof of particular facts, no error could have been predicated upon it, for, where the offer of evidence and the objection to it are general and the court receives it in the same manner, if the evidence is admissible for any purpose it is always presumed to have been received only for the legitimate purpose, in the absence of any finding to the contrary. The difficulty in the present case arises from the fact that the court defined the scope and effect of the evidence by expressly admitting it for two purposes, namely, as tending to identify the goods and to show their delivery into the custody and possession of the defendant.

The testimony actually given by the witness is not related; we are obliged therefore to take it just as the record leaves it. The testimony called for by the offer was what goods the witness purchased of Cheney Brothers at the time in question, and what the contract or agreement was as to the way and manner of shipping the goods. That part of the ruling which received the evidence to identify the goods, as we have already seen, was correct, but it is not easy to justify the ruling in respect to the delivery. Would the contract as to the way and manner of shipment tend to prove that they were actually shipped in that manner? If so, then the mere production of any agreement would tend to show its performance. It would be a credit to human nature if the law could raise a presumption of the performance of all private duty in the same manner that it presumes the performance of official duty, but no such presumption at present exists. In the agreement referred to we may suppose that Cheney Brothers were to deliver the goods purchased by the plaintiff to the defendant for purposes of transportation as directed. They were the plaintiff's agents for that purpose. The very question implies the existence of competent evidence extrinsic of the agreement, and points at once to the agent who was to do the act, and not to the mere command of the principal that it should be done.

But the plaintiff claims that no harm was done the defendant by the ruling of the court even if it was erroneous,

because the defendant admitted in his answer that he received such a case or package as was delivered to him, which the plaintiff says was afterwards proved to contain the goods in question. If the contents of the package had been established by other independent evidence we should be very glad to avoid a new trial, with its consequent expense, far exceeding the value of the goods in question, but the record fails to show the controlling fact relied upon. True, it appears that there was other evidence tending to show the delivery of the goods lost, but such evidence was only considered in connection with the erroneous evidence in question. It is impossible for this court, as indeed it would be for the court below, after the trial is over, to separate the evidence into distinct parts, and to determine that the conviction produced upon the mind of the trier was owing exclusively to one part of the evidence irrespective of the other. If erroneous evidence was considered and weighed in connection with proper evidence, it vitiated the result and produced a mistrial.

There was error in the ruling complained of and a new trial is advised.

In this opinion the other judges concurred.

THOMAS J. VAIL *vs.* HENRY HAMMOND.

Hartford Dist., March T., 1891. ANDREWS, C. J., LOOMIS, SEYMOUR, TORRANCE and FENN, Js.

The statute (Gen. Statutes, § 1307,) which confers power on a court of equity to order a sale of property owned in common where in its opinion a sale will be more advantageous to the owners than a partition, applies only to cases of ownership; a person having merely an interest in property, but not a title, is not entitled to an order of sale.

And it does not confer on the court any power to order a sale to pay debts.

Where a sale was sought by one of two owners of a patent, not for the

purpose of dividing the proceeds, but of paying an indebtedness of the defendant to the plaintiff, it was held that the object was one for which the court could not order a sale.

Whether the court could order a sale for the purpose of dividing the proceeds between the owners: *Quære.*

The right of a patentee in a patent is property which is subject to the claims of a creditor, and may be reached by a proper proceeding in equity and applied to the payment of his debts.

And to accomplish this the court may require the debtor to execute a conveyance of the patent to a receiver; and this though the patent was issued by a foreign government.

The court below having found that the debtor had agreed that the patent should be sold for the purpose of paying the plaintiff for his advances, it was held that the order for a sale was in the nature of an order for a specific performance of that agreement.

A creditor's bill that is strictly such exists only in those jurisdictions in which law and equity are administered by separate tribunals. Where, as in this state, a creditor can in the same suit have judgment for his debt and the necessary equitable aid to obtain payment out of any property of the debtor, a creditor's bill is not necessary.

Where upon facts proved the plaintiff is entitled to relief, and there is more than one method in which the relief can be granted, it is for the court in the exercise of its discretion to select that one which is best, and the exercise of its discretion in the matter will not be a ground of error.

[Argued March 5th—decided April 20th, 1891.]

SUIT for an injunction, the appointment of a receiver for certain letters patent, a settlement of accounts between the parties, and an order of sale of the patents; brought to the Superior Court in Hartford County and heard before *F. B. Hall, J.* Facts found and judgment rendered for the plaintiff, and appeal by the defendant. The case is sufficiently stated in the opinion.

A. P. Hyde, with whom was *H. Cornwall*, for the appellant.

1. The courts of Connecticut have no power to order the sale of patents, because the court finds that it would promote the interest of the parties to have the same so sold. Under section 1307 of our statutes courts are authorized to order the sale of any estate owned by two or more persons when, in the opinion of the court, a sale will better promote the interests of the owners. We insist that this provision

of the statute refers only to property which is within the jurisdiction of the state court. It has been held that a patent issued by the United States government is not property within the jurisdiction of the state court. It cannot be attached; it cannot be ordered to be sold. *Ashcroft* v. *Walworth*, 1 Holmes, 152; *Gordon* v. *Anthony*, 16 Blatch., 234; *Carver* v. *Peck*, 131 Mass., 291. We do not claim that, in the case of actual insolvency or bankruptcy, the state court may not by personal decree against the owner of a patent compel him to assign it to his assignee, so as to be distributed among his creditors, nor that if a contract be proved to have been made between the owner of a patent and a third party, which entitles the third party to an interest in the patent, the state court might not by a decree against the owner of the patent compel him to specifically perform his engagement. But we do claim that the mere fact of joint ownership in a patent does not entitle our court to order a sale of the whole patent because they deem it to be for the interest of both parties so to do.

2. The plaintiff alleged in his complaint that his advancements with interest should be first repaid to him from the use or sale of the patented inventions and letters patent, and that thereafter all such inventions so made by Hammond, and the letters patent obtained therefor, and the tools and machinery and other property proper for the carrying out of the agreement, should become the joint property of Vail and Hammond equally. In the answer Hammond denies that the advancements were to be repaid from the sale or use of the patents, but that the same were to be paid for by a conveyance to Vail of one half of the patents; and this was the only contention between the parties, whether Vail had a lien upon the patents for the repayment of his advances, and then to own one half of the patents afterwards, or whether his advances were to be repaid by a conveyance of one half of the patents. The court has gone further, and found that the whole of the patents were to be sold—not merely enough to repay Vail, but the whole of the patents sold and the proceeds divided. This finding is not

responsive to the allegations, and was not authorized by the allegations and bill, and is a finding of a matter which is not in issue.

3. The court erred in refusing to allow the defendant to redeem the lien claimed by the plaintiff if it should be found, and retain an interest in these patents, or to limit the sale to so much of the patents as would repay the amount due Vail with costs and expenses. This was a vitally important question. In the complaint Vail only claimed that he had a right to be reimbursed from the sale or use of the patents for the money that he had advanced, and admitted that when so reimbursed the defendant had a right to hold one half of the patents then remaining. But upon the trial it was insisted that, no matter though Vail was reimbursed, Hammond, the inventor, must be deprived of all right or interest in his patents. The consequences are serious. If he could reimburse Vail and hold an interest in his patents, he could go forward and perfect them, make them valuable, and thus save his lifework. But the plaintiff insisted that he must not have any right to do so. He must be deprived of that right. This is not only unjust and cruel, but we believe that the court erred, as a matter of law, in refusing to allow him to redeem and retain an interest in his patents. The only justification for this action is found in the finding that the "sale thereof will best promote the interests of both the plaintiff and defendant." *Ager* v. *Murray*, 105 U. S. R., 126; *Ashcroft* v. *Walworth*, 1 Holmes, 152; *Gordon* v. *Anthony*, 16 Blatch., 234; *Carver* v. *Peck*, 131 Mass., 291; *Cooper* v. *Gunn*, 4 B. Monr., 594.

4. It is very clear that the court erred in ordering a sale of patents issued in England and in Canada, over which our courts have no jurisdiction. Even if patents issued by our government are held to be within the jurisdiction of our state courts, yet clearly patents issued by foreign governments are wholly beyond their jurisdiction.

C. E. Perkins and *A. Perkins*, for the appellee.

ANDREWS, C. J. The cause of action set forth in this complaint is based upon the breach of an alleged contract between the parties, both of whom resided in this state, to sell certain patents owned by the defendant, for the purpose of paying the plaintiff the advancements which he claims to have made to the defendant in respect to the patents.

The defendant demurred to the complaint and assigned various reasons of demurrer. Most of these point out grounds on which it was claimed that the complaint was multifarious. The demurrer was overruled. Before the hearing the plaintiff, by amendments to the complaint, and by changing the prayers for relief, removed the causes for which these reasons of demurrer were assigned. If it be true that the complaint was multifarious at first and there was error in overruling the demurrer, still we think by reason of the amendments such error did not injuriously affect the defendant, and that under section 1135 of the General Statutes it cannot be considered on appeal.

Another reason of demurrer was that the Superior Court, as a state court, had no power to order the sale of the defendant's interest in the patents on the ground that a sale would better promote the interests of the plaintiff and the defendant. Section 1307 of the General Statutes is that "courts of equitable jurisdiction may, upon the complaint of any person interested, order the sale of any estate, real or personal, owned by two or more persons, when in the opinion of the court a sale will better promote the interests of the owners; and of any real estate in which, or any portion of which, two or more persons may have different and distinct interests, when in the opinion of the court such real estate cannot be conveniently used and occupied by the parties in interest together and a sale will better promote the interests of the owners." The argument of the defendant is, that this statute applies only to tangible property which is within the jurisdiction of the courts of this state; and that a patent is not property within the jurisdiction of any state court.

The jurisdiction of a court of equity is ordinarily *in per-*

sonam, and not *in rem*. A state court, having jurisdiction of all the persons interested in a patent, might, perhaps, compel the sale of the patent, in a proper case, for the purpose of converting a joint ownership into several ownerships, as well as to compel the sale for any other purpose. The language of the statute is broad enough to confer such power. But we do not decide this. We purposely leave it undecided.

The real ground on which the demurrer should have been placed was, that the case made in the complaint was not one which authorized the court to order a sale under that statute. The object of the statute is to enable any joint owner, or owner in common with another, of real or personal property, to put an end to such joint ownership. "No person can be compelled to remain the owner with another of any real estate, not even if it became such by his own acts. Every owner is entitled to the fullest enjoyment of his property, and that can come only through an ownership free from dictation by others as to the manner in which it shall be exercised. Therefore the law affords to every owner with another relief by way of partition, and this regardless alike of the difficulties attending separation and the consequences to his associate. Rights to the use of running water and rights to dig ores have been declared to be subject to this law. But inasmuch as it might sometimes happen that by a partition the property would be practically sacrificed, the statute has opened the way of escape from such a result. It permits a court of equity to order the sale when in its opinion a sale will better promote the interests of the owners." *Johnson* v. *Olmsted*, 49 Conn., 517. This decision had reference to real estate, but the statute confers equal power on the court to order a sale in cases of the joint ownership of personal property. A series of decisions has shown that this statute applies only in cases of ownership. It does not mean that any person interested in any way in real or personal estate may bring a complaint and that the court must order a sale. But only those interested therein as owners are so entitled. *Spencer* v. *Waterman*, 36 Conn., 342; *Wilson* v. *Peck*, 39

Conn., 54; *Potter* v. *Munson*, 40 Conn., 473; *Ford* v. *Kirk*, 41 Conn., 9; *Johnson* v. *Olmsted*, 49 Conn., 509.

This statute does not confer any power on the court to order a sale of property for the purpose of paying debts. The plaintiff was not the owner of the patents in this case. He did not claim to be the owner; on the contrary he asserted that the defendant was the sole owner. He did not seek to be made the owner of them, but only asked that they be sold in order to pay him a debt. We think therefore this averment of the complaint should have been stricken out, either upon the demurrer or upon a motion to expunge. If, however, the other averments in the complaint require, or fully support, the judgment that was in fact made, then this averment may be treated as surplusage and has done the defendant no harm. *Sandford* v. *Thorp*, 45 Conn., 241.

Later in the progress of the case the defendant filed an answer and there was a hearing. The court found the issues for the plaintiff, and that there was an agreement between the parties that all the patents should be sold and from the avails of such sales the advances made by the plaintiff, with interest thereon, should be first paid, and the remainder of such avails after such payments should be equally divided between them. The court also found the amount of the advancements made by the plaintiff, that the defendant refused to proceed further under the agreement, or in selling or attempting to sell the patents, and that the plaintiff and defendant were unable to come to any agreement respecting their interest in the property, and thereupon appointed a receiver, ordered the defendant to convey the several patents to the receiver, and directed the receiver to sell the same and to apply the avails as set forth in the judgment.

The defendant insists that the judgment goes beyond the allegations of the complaint. He does not deny that the judgment, so far as it directs a sale of the patents for the purpose of repaying to the plaintiff the advancements he has made, is warranted by the averments of the complaint. But, he says, the court has gone further, and has found that

the whole of the patents were to be sold—not merely enough to repay the plaintiff—but the whole of the patents, and the proceeds divided; and in this respect he says the finding is not authorized by the allegations of the complaint and is a finding of matter not in issue.

This objection must be answered by a reference to the complaint. The first and the third paragraphs contain the averments necessary to be considered. The first is important in this respect only because it is by reference made a part of the third. The first paragraph alleges that the plaintiff was the owner of certain pistols and parts of pistols; that the defendant was a mechanic and inventor of skill and experience; and that they agreed that the defendant should devise some plan to convert such pistols and parts of pistols into sporting rifles; and that the plaintiff should advance all sums of money necessary for expenses and materials and for the hiring of other workmen. "And it was further agreed that all such sums so advanced by said Vail, with interest thereon, should be first repaid to him from the sales of such rifles and pistols, and that the remainder of such rifles and pistols, after such reimbursement, should belong equally to said Hammond and said Vail, and the net returns arising from the sales thereof should be divided equally between them." This was an agreement concerning property which was valuable not to hold but only to sell, and the agreement was made for the purpose of putting the property into a condition more convenient for sale, and so it became plain that the agreement alleged is one for the sale of the property and not for a holding of it in joint ownership.

The third paragraph alleges that "it was agreed by and between said Vail and said Hammond that said Vail should engage in obtaining the pending and other patents for such improvements then made or to be made relating to said system, on the same terms as said agreement (the one mentioned in the first paragraph) had been entered into; that is to say, that said Vail should advance all needed moneys for perfecting said improved system and method of making axes and procuring letters patent therefor, and making the

same available for use or sale, and that all such advancements should be first repaid to said Vail from the use or sale of said patented inventions or improvements and letters patent, and thereafter all such inventions or improvements so made by said Hammond, and the letters patent obtained therefor, and the tools, machinery and other property proper for the carrying out of said agreement, should be and become the joint property of said Vail and said Hammond equally, and all moneys and property arising from the sale or use of the same should be equally divided between them." It is impossible to read this paragraph without perceiving that the pleader had in mind, and intended to state, a contract between the parties that included as one of its terms the sale of the entire patents, and the division of so much of the avails as exceeded the amount of the advancements that had been made by the plaintiff. The answer denied any agreement whatever to sell the patents, either in part or in whole. It averred that the defendant was to convey a one half interest in the patents to Vail in payment for the advancements he had made and that they were to own and hold them together. If the defendant had then had any doubts as to the claim the plaintiff intended to make in regard to a sale of the patents, he might have asked and obtained an order for a more specific statement. He did not do so. He makes no claim that the finding of the court was not based upon sufficient and competent evidence. According to his claim now this evidence would not have been admissible. But he did not object to it. It seems to us that the finding and the judgment of the court in respect to the sale of the patents was fairly within the issue, and we are unable to see that the defendant was in any wise misled.

In this view of the complaint, (and laying out of it, as already indicated, the averment that a sale would better promote the interests of the parties) it is a creditor's bill seeking to apply these patents in payment of the defendant's debt to the plaintiff. It alleges the agreement between the parties pursuant to which the indebtedness arose, states the debt, and the fact that these patents were agreed to be

sold for its payment, the refusal of the defendant so to do, and that the defendant is without other property or estate from which the debt can be secured, and prays for a sale of the patents through an officer of the court, to the end that the indebtedness may be paid.

A creditor's bill strictly exists only in those jurisdictions where law and equity are administered by separate tribunals. A creditor first obtains a judgment in a court of law, and then seeks the aid of a court of equity to apply in payment of the judgment some property which could not be attached or taken on execution in the action at law. But in this state, where the same court administers both law and equity, and where legal and equitable remedies can be granted in the same action, a creditor can in the same complaint have judgment for his debt and also the necessary equitable aid to obtain payment out of any property of the debtor which the law court could not reach. The allegations of the complaint as summarized above are sufficient in substance and in form to sustain such a decree. No want of power in the court is suggested, and there was full jurisdiction over the parties.

It is settled by abundant authority that the right acquired by the patentee by the issue of a valid patent, is property which is subject to the claims of a creditor and may be reached by a proper proceeding in equity and applied to the payment of his debts. *Gillette* v. *Bate*, 86 N. York, 87; *Wilson* v. *Martin-Wilson Fire Alarm Co.*, 149 Mass., 24; *S. C.*, 151 Mass., 515; *Barnes* v. *Morgan*, 3 Hun, 703; *Pacific Bank* v. *Robinson*, 57 Cal., 520; *Fuller & Johnson Mfg. Co.* v. *Bartlett*, 68 Wis., 73; *Stephens* v. *Cady*, 14 Howard, 531; *Ager* v. *Murray*, 105 U. S. R., 126. And to accomplish this object the court may require the debtor to execute a conveyance of the patent to a receiver. *Pacific Bank* v. *Robinson*, *supra*; *Barton* v. *White*, 144 Mass., 281; *Keach Petitioner*, 14 R. Isl., 571; *Ager* v. *Murray*, *supra*; *Satterthwait* v. *Marshall*, 4 Del. Ch., 337; *Searle* v. *Hill*, 73 Iowa, 367; 3 Robinson on Patents, 660. And may also require the conveyance of a patent issued by another government. *Adams* v. *Messenger*, 147 Mass.,

185. It is conceded by the defendant that the court might compel such a conveyance in a case of insolvency. But the power of the court is no greater to compel the conveyance of a patent for the benefit of creditors generally, than it is to compel one for the benefit of a single creditor. Besides, if by possibility there was any defect or want of power in the court to make such an order, it would in this case be more than supplied by the agreement of the defendant to do this very thing. The order of the court in this respect would be in the nature of a specific performance of that agreement. *Binney* v. *Annan*, 107 Mass., 94; *Somerby* v. *Buntin*, 118 Mass., 279; *Nesmith* v. *Calvert*, 1 Wood. & Minot, 34; *Hartell* v. *Tilghman*, 99 U. S. R., 547.

It is stated in the finding that, after the decision of the issues in the case in favor of the plaintiff but before the judgment file had been signed or filed, the defendant requested the court to decree, and provide in the judgment file, that in case Hammond should, within a reasonable time after such conveyance to the receiver as might be ordered by the court, pay or cause to be paid to the receiver the sums found to be due to the plaintiff, and all outstanding bills, costs and expenses of the receivership, then the receiver should not sell the patents and property, but should convey one half thereof to the plaintiff and the other half to the defendant. The court declined so to do. The defendant assigned this as one ground of error. We cannot regard the refusal as an error in law. Having found the facts set out in the complaint to be proved and true, it was the duty of the court to so frame its decree as to secure to the plaintiff the relief to which those facts entitled him. And while this ought to be done in a way to be the least burdensome to the defendant, he cannot require that the rights of the plaintiff be sacrificed to his convenience. If there is more than one method that may be adopted, it is for the court in the exercise of its discretion to select that one which on the whole is the best. And such exercise of discretion is not ground for error.

As to the nipper patent, the objection seems to have been obviated by the form of the decree.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

JENNIE P. HOYT AND OTHERS *vs.* THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY.

New Haven & Fairfield Cos., Jan. T., 1891. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

The defendant, without permission, but supposing it to have been given, cut a shade tree standing in front of a vacant lot owned by the plaintiffs upon a borough street. In an action for an injury to the land from the cutting of the tree the court found that the lot was valuable as a site for a building of a high class and was for sale, that the tree was an ornamental shade tree, planted by the plaintiffs' ancestor and valued and cared for by them, and that it added $150 to the value of the lot, and that it was in plain view from the residence of some of the plaintiffs and from other improved property of theirs near by; and assessed the damages at $150. Held on the defendant's appeal—

1. That the damages to which the plaintiffs were entitled was compensation for their actual loss from the destruction of the tree.
2. That as the suit was for injury to the land, it would not have been enough to award as damages the mere value of the tree as wood or timber.
3. That an estimate in the damages of the probable injury to the sale of the lot, was not an estimate of speculative and remote damages.
4. That the finding was not to be construed as including in the $150 any sentimental value of the tree, but only its actual value to the lot.

[Argued January 27th—decided April 20th, 1891.]

ACTION to recover damages for the cutting of a tree on land of the plaintiffs; brought to the Court of Common Pleas of Fairfield County, and heard in damages, after a default, before *Perry, J.* Facts found and damages assessed at one hundred and fifty dollars, and appeal by the defendant. The case is fully stated in the opinion.

M. W. Seymour and *H. H. Knapp*, for the appellant.

1. The plaintiff has a right to recover for the damage actually proved to have been suffered, and for such only. Sedgw. on Dam., 553; 3 Sutherland on Dam., 373; *Bateman* v. *Goodyear*, 12 Conn., 575; *Johnson* v. *Gorham*, 38 id., 513; *Sutton* v. *Lockwood*, 40 id., 318; *Conard* v. *Pacific Ins. Co.*, 6 Pet., 262; *U. States* v. *Williams*, 18 Fed. Rep. 475.

2. The court erred in holding that the measure of damages should be based upon and include the sentimental value attached to the tree by the plaintiffs, in that (*a*) it "stood in plain view of the residence of some of the plaintiffs, and of other improved property of theirs," and (*b*) that the tree in question "had been planted by an ancestor of the plaintiffs and was cared for and valued as such by them." That the court in rendering the judgment complained of did in fact predicate it upon such sentimental value, is plain. The finding is as follows:—"As an ornamental shade-tree (for which purpose it had been planted by the ancestor of the plaintiffs, and was by them cared for and valued), it was worth $150, and added at least that amount to the value of the lot for any purpose in connection with which an ornamental tree was desirable. It stood in plain view from the residence of certain of the plaintiffs, and of other improved property of theirs near by." It is settled law that the court in estimating the damages for the injury done by us inadvertently to their property must recompense the plaintiffs for the injury actually received, and the wounded feelings of the plaintiffs or the injury to the æsthetic part of their nature are not a part of such recompense. 3 Sutherland on Dam., 367; Eggleston on Dam., 40, 129; Sedgw. on Dam., 553; 2 Greenl. Ev., § 253; Washb. on Easements, 612; *Ingraham* v. *Hutchinson*, 2 Conn., 584; *Argotsinger* v. *Vines*, 82 N. York, 308; *Gardner* v. *Field*, 1 Gray, 151; *Bixby* v. *Dunlop*, 5 N. Hamp., 456; *Yahooka River Mining Co.* v. *Irby*, 40 Geo., 479; *Perkins* v. *Hackleman*, 26 Miss., 41; *Parker* v. *Foote*, 19 Wend., 309.

3. The court erred in estimating remote or speculative damages. Turning to the finding we see that "the lot in front of which said tree stood was, at the time of the cutting,

enclosed by a high board fence, and not occupied by any building, but is centrally located in the borough of Stamford, and was and is available and valuable as a site for a high class of buildings, and was for sale. At the time of the cutting the lot was temporarily in use as a place for mixing tar and gravel for concrete walks." And in another place it says that "said tree as an ornamental shade tree added at least that amount ($150) to the value of the lot, for any purposes in connection with which an ornamental shade tree was desirable." It is apparent from this, in our judgment, that the court included in its estimate of damages the element of damage to the value of the lot, which the plaintiff would have sustained had the same been sold for building purposes or put to some other use than that to which it was in fact put. It is indisputable that this lot was used at the time as a place for mixing tar and gravel and that its value as such has not been injured; but the mind of the court was so impressed by the fact that the lot was a salable one and stood in that portion of the city occupied principally by residences, that he awarded damages based upon the value had the same been sold for a residence. If we are right in this we submit that the judgment of the court was erroneous in that it awarded remote or speculative damages. 1 Sutherland on Dam., 726; *Tallman* v. *Metro. Elevated R. R. Co.*, 121 N. York, 124; *Bixby* v. *Dunlop*, 5 N. Hamp., 456; *Fay* v. *Parker*, 53 id., 342; *Welch* v. *Ware*, 32 Mich., 77, 84.

N. R. Hart and *J. E. Keeler*, for the appellees.

LOOMIS, J. This is a complaint to recover damages for the unlawful cutting of a tree standing on the plaintiffs' land and of the alleged value of one hundred and fifty dollars. The defendant suffered a default, and upon a hearing in damages the court found the facts as follows, in addition to those admitted by the default:

"The elm tree in question stood in the outer edge of the sidewalk, in front of the lot described in the first paragraph of the complaint, and was, at the time of the cutting, about

thirty years old, with a trunk seventeen inches in diameter three feet from the ground, and had a top of handsome and symmetrical proportions and shape. As an ornamental shade tree (for which purpose it had been planted by the ancestor of the plaintiffs, and was by them cared for and valued) it was worth one hundred and fifty dollars, and added at least that amount to the value of the lot for any purpose in connection with which an ornamental shade tree was desirable. It stood in plain view from the residence of certain of the plaintiffs, and from other improved property of theirs near by.

"The lot, in front of which the tree stood, was at the time of the cutting inclosed by a high board fence, and not occupied by any building, but is centrally located in the borough of Stamford, in a residential portion thereof, and was and is available and valuable as a site for a high class of buildings, and was for sale.

"At the time of the cutting the lot was temporarily in use as a place for mixing tar and gravel for concrete walks. No evidence was offered by the plaintiffs to show that by reason of the cutting of the tree they had lost the sale of the property, or that any offer had ever been made for the purchase, or that the property had been injured as a place for mixing tar and gravel, or otherwise injured than by the cutting of the tree.

"The cutting of the tree was without permission from any of the plaintiffs, and was entirely without legal justification; but was done in good faith by the agents of the defendant, under a mistaken belief that they had permission so to do.

"The cutting, which consisted in removing the entire top of the tree, destroyed it as an ornamental or shade tree; but did not injure its value, to any material extent, for timber or fire-wood merely. The tree is still alive.

"The defendant claimed that, upon the evidence, the rule of damages by which its liability should be measured was the value of the tree for timber or fire-wood, which I find did not exceed $5.

"The court overruled this claim, and awarded the plaintiffs

$150 damages, as a reasonable compensation to them for the loss of the tree as an ornamental shade tree."

The defendant's contention is, that the court failed to apply to the above facts the proper rule of damages. The result depends, not upon the question what the abstract rule of law is, for that is well settled, but upon the true construction of the finding as to the rule which the court adopted.

The defendant in the first three assignments of error variously construes the finding as showing that the assessed damages included the sentimental value of the tree, or the value attached to it by the plaintiffs because it stood in plain view from their places of residence, or because it had been planted and cared for by an ancestor.

It seems to us that there is no adequate foundation for any such construction and that it is opposed to the explicit statement of the trial judge, who, after describing the tree and giving its size, situation and form, says:—"As an ornamental shade tree (for which purpose it had been planted by the ancestor of the plaintiffs and was by them cared for and valued) *it was worth one hundred and fifty dollars, and added at least that amount to the value of the lot*, for any purpose in connection with which an ornamental shade tree was desirable;" and then, at the conclusion, he said:—"The court overruled this claim" (that is, the claim that the rule of damages was the value of the tree for timber or fire-wood) "and awarded the plaintiffs one hundred and fifty dollars damages, as a reasonable compensation to them for the loss of the tree as an ornamental shade tree." So far from making the amount of damages depend on the peculiar or sentimental value of the tree to the plaintiffs, it is made to depend on facts which address themselves to other persons, that is, to ordinary purchasers of land for investment merely—the substance of the finding being that the lot was worth more in the market as a lot for sale with such a tree in front of it, than without it, by the sum of one hundred and fifty dollars.

The force of this part of the finding is not essentially impaired by the few expressions in the finding referred to in behalf of the defendant as having a sentimental import.

The reference to the ancestor as having planted and cared for the tree, and its situation with reference to the plaintiffs' residence, may have been intended by the court merely to characterize the tree as an ornamental shade tree and to emphasize that fact.

But all this is necessarily matter of supposition, and it is immaterial; for whatever may have been the purpose of introducing these facts, they came in without any objection. The court was neither asked to reject the evidence nor to determine its legal effect, and under these circumstances there is no presumption that the court made any improper use of these facts; and the finding shows on the contrary that the damages were based on the reduced pecuniary value of the lot occasioned by the act complained of.

Was this the correct rule, or should the court have given only the trifling value of the tree for fire-wood? The answer to this question will dispose of the remaining assignments of error. There is practically no difference between the parties as to the abstract rule. Both agree that for wrongs inadvertently done the plaintiff has a right to recover only the damage proved to have been suffered, but they differ in the mode of applying the rule.

To make a just application of the rule, it will not do to restrict the inquiry to the cutting of the tree, for the action is for a trespass to the land to which the tree was appurtenant, and not simply to the tree. There are of course cases where the value of the tree would cover the entire damage. It may have no important relation to the property upon which it is growing, and be of no use except for firewood. But an ornamental shade tree upon land available for dwelling houses has a very different relation to the land and may give it a special value.

The citation made by counsel for the defendant from 3 Sutherland on Damages, page 373, points out clearly the true distinction to be observed. "If the wrong consists in the destruction or removal of some addition, fixture or part of the premises, the loss may be estimated upon the diminution of the value of the premises, if any results; or upon the part

severed, considered either as part of the premises or detached; and that valuation should be adopted which will be most beneficial to the injured party; for he was entitled to the benefit of the premises intact, and to the value of any part separated."

The importance of such a distinction is most forcibly presented in the case of *Van Deusen* v. *Young*, 20 Barb., 19, by HOGEBOOM, J., who, in delivering the opinion of the court, said:—"Surely the damage would not be in all cases accurately measured by the market value of the wood or timber when cut. The trees might be a highly valuable appendage to the farm for the purpose of shade or ornament; or for other reasons they might have a special value as connected with the farm, altogether independent of and superior to their intrinsic value for purposes of building or fuel. As well might you remove the columns which supported the roof or some part of the superstructure of a splendid mansion, and limit the owner in damages to the value of these columns as timber or cord-wood, as to adopt the parallel rule in this case."

These distinctions were faithfully observed and properly applied by the court in the case at bar. The damage to the land is found much greater than the mere value of the tree for firewood, and the court adopted the valuation most beneficial to the plaintiff. Why then should there be any further contention upon the subject?

One argument to avoid this result is thus stated by the counsel for the defendant in their brief, when they say that, "the court having specially found that no evidence was offered by the plaintiff to show that by reason of the cutting of the tree the property had been otherwise injured than by the cutting of the tree, the amount of injury proved to have been done to the tree itself should be the measure of damages." In thus quoting the finding a serious mistake has been made, upon which the whole force of the argument depends. The court did not find that the property had not been otherwise injured than by the cutting of the tree, but that it had not been injured "as a place for mixing tar and gravel." Of course it had not been injured for that purpose,

and we could easily suppose hundreds of temporary uses in regard to which the cutting of the tree would have no effect. It must be borne in mind that the court expressly finds that this use of the lot for mixing tar and gravel for concrete walks was temporary. The argument, therefore, is both unsound and unjust, in that it attempts permanently to disparage and fix the character of the lot as one to which a shade tree could be of no possible use or value, because the passing temporary use did not require it. The determining factor in such a case can never be the mere temporary use, but rather the real purpose for which the land is available and valuable; and the court expressly finds, presumably upon competent testimony, that the lot in question was "available and valuable as a site for a high class of buildings."

A further contention on the part of the defendant is, that the court erred in assessing remote and speculative damages, that is, that the damages awarded were based upon the value had the lot been sold. We think there was nothing future or contingent about the assessment at all. The damage found was a present one—the immediate effect of the wrongful act, that is, the reduced value of the lot in consequence. The loss does not depend at all on the property being sold. The plaintiffs were in effect deprived of so much property as the premises were reduced in value. Whether sold or kept, the loss was the same. The principle and mode of assessment in this case is substantially identical with that which obtains in all actions for injury to property, where the rule of damages is the injury actually sustained, as in some actions for nuisance and waste; and the same is true also of many actions founded on contract, as in actions on policies of insurance where buildings are partially destroyed, or actions for false warranty.

Witnesses might perhaps differ more widely in judgment as to the pecuniary value of an ornamental shade tree to a building lot than in some other cases, yet, in contemplation of law, it would be capable of being placed on a cash basis. The damages could not be ascertained any better after an

actual sale than before, for the question how much more could have been obtained for the premises in their uninjured state would be still a matter of mere estimation.

We think there is ample authority to sustain the ruling of the court. *Harder* v. *Harder*, 26 Barb., 409; *Van Deusen* v. *Young*, 29 id., 9; *Whitbeck* v. *N. York Central R. R. Co.*, 36 id., 644; *Nixon* v. *Stillwell*, 52 Hun, 353; *Wallace* v. *Goodall*, 18 N. Hamp., 456; *Foote* v. *Merrill*, 54 id., 490; *Achey* v. *Hull*, 7 Mich., 423; *Chipman* v. *Hibbard*, 6 Cal., 162; *Ensley* v. *Mayor &c. of Nashville*, 2 Baxter, 144; *Kolb* v. *Bankhead*, 18 Texas, 228; 3 Sutherland on damages, 374; 2 Waterman on Trespass, § 1101.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

SAMUEL A. MILES, EXECUTOR, *vs.* CHARLES K. STRONG AND OTHERS.

New Haven & Fairfield Cos., Jan. T., 1891. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

A testate estate had been fully settled and distributed. A question afterwards arising as to the exact estate which a devisee took under the will, it was held that the executor could not maintain a suit for an adjudication of the matter by the court.

Where an executor had brought such a suit, it was held that he could not change it into a suit by himself as trustee under a deed from the devisee, and ask for the removal of a supposed cloud upon the title of that portion of the real estate.

Although the same person had been executor and was now trustee, the law regarded the executor and trustee as distinct persons.

And the causes of action could not have been originally joined in the same suit.

[Argued January 22d—decided April 20th, 1891.]

SUIT by an executor for the construction of a will; brought

to the Superior Court in New Haven County, and reserved, on facts found, for the advice of this court. The case is fully stated in the opinion.

W. B. Stoddard, for the plaintiff.

S. C. Loomis, for the defendant Ernest S. Miles.

G. P. Carroll, for all the other defendants.

TORRANCE, J. The record in this case discloses the following facts.

In April, 1879, one Selah Strong died, in the town of Milford in this state, leaving a will disposing of his entire property, consisting mostly of real estate in that town. He left a widow, one daughter, Julia T. Peck, one son, John P. Strong, and two grandchildren, Ernest Strong Miles, the child of a deceased daughter, and Selah W. Strong, the child of a deceased son. The plaintiff and John P. Strong were appointed executors of the will, which was duly probated. John P. Strong died in 1880, and the plaintiff, who is the father of Ernest Strong Miles, settled the estate as the sole executor.

By the will the widow was given the use of certain real and personal property in lieu of dower. She died in January, 1882. Within a few months after her death the entire property of the estate was set out and distributed to the devisees by regularly appointed distributors, who made return of their doings, and the same was duly accepted and approved by the probate court in July, 1882. All the debts of the estate were at that time paid, and the estate was fully and finally settled, and no appeal from any of the decrees of the probate court with respect to the settlement has been taken.

Under the will certain parcels of real estate were given to Ernest Strong Miles, subject to the charge of paying to the widow of the testator two hundred and fifty dollars each year during her life.

After fully describing the real estate, the will in the eighth clause contained the following:—"The foregoing devises to the said Ernest Strong Miles are subject to the charges aforesaid, to him and his heirs forever; provided, however, that if he, the said Ernest Strong Miles, shall die before he attains his majority, or without leaving lawful issue surviving him, and without having disposed of all the lands by this will devised to him, either by deed or by will, then, and in either of these events, it is my will that all said lands herein devised to the said Ernest Strong Miles, and not by him disposed of, shall descend to and be distributed among my heirs-at-law and those who legally represent them."

On the 19th of May, 1890, Ernest Strong Miles became of age, and on the following day he by deed conveyed to his father, in trust for the purposes specified in the deed, all of the real estate which had been devised to him by the will. Thereupon, on the 21st day of May, 1890, the plaintiff, as the sole executor of the testator, brought the original complaint in this case, making his said son, and all other persons interested in the estate in any way, parties defendant.

That complaint, among other things, alleged that "all lawful claims against the estate of the testator, and all legacies provided for by said will, have been paid, and all proceedings incident to the settlement of said estate, save the distribution thereof, have been had to the acceptance and approval of the said probate court."

It further alleged that various questions had arisen and various claims had been made by the defendants "relative to the construction and legal effect of the provisions contained in the 3d, 4th and 8th sections of said will."

These questions, as stated, were in substance that Ernest Strong Miles claimed to own both the real and personal estate given him by the will absolutely, while the other defendants claimed that Ernest had only a life-estate in the land. The complaint concluded in the form in ordinary use in complaints by an executor for the construction of a will.

The defendants, other than Ernest Strong Miles, filed an answer to this complaint, in which they alleged in substance

that the estate had been duly distributed in 1882; that they admitted that Ernest was the absolute owner of the personal estate that had been distributed to him; and that, whether Ernest had only a life estate in the real estate or some greater interest, was "a question dependent on circumstances and contingencies."

The plaintiff made no reply to this answer, but moved to amend his complaint by adding thereto a complaint by him as trustee under the deed aforesaid from his son Ernest, in which new complaint he alleged in substance the following facts: That the return of the distributors to the court of probate in 1882 contained this clause: "The lands distributed to Ernest Strong Miles are (subject to a charge of two hundred and fifty dollars a year to be paid to Catharine W. Strong, during her natural life,) to him and his heirs forever; provided however that if the said Ernest Strong Miles shall die before he attains his majority, or without leaving lawful issue surviving him, and without having disposed of all the lands devised to him by the will (either by deed or will), then, and in either of those events, said lands are to descend to the other heirs at law of the testator or those who represent them;" that Ernest was now of full age; that he had given the plaintiff a deed (a copy of which was annexed), of the real estate devised to him by the will, to hold in trust for Ernest; that the property included a certain piece of land with a dwelling house and other buildings thereon, which buildings were greatly dilapidated and out of repair; that said premises were worth eight thousand dollars, but in their present condition were unproductive and could not be rented until after large sums of money had been expended thereon for repairs; that Ernest had no money to provide for such repairs, and was physically incapable of earning money or supporting himself; that the plaintiff had entered into a contract with a Mrs. Smith, for the purchase of said premises by the latter for their full value; that the defendants other than Ernest claim to have an interest in said land bargained to be sold, the exact nature of which interest was to the plaintiff unknown; that

afterwards, this claim coming to the knowledge of Mrs. Smith, she refused to purchase said premises or to pay for the same; and that the plaintiff was uncertain whether he held the property as executor under the will, or as trustee under the deed aforesaid, and whether he had a right to sell the same absolutely or not.

He claimed an adjudication as to whether the estate had been legally distributed; and, if he held the real estate as trustee under the deed, he asked for a construction of the will so far as it related to the title of Ernest, and a discovery from the respondents "respecting their rights to the property devised to Ernest by will," and an adjudication thereon. If these claims were adjudged to be invalid, and a cloud upon the title of Ernest, he asked "that said cloud upon said title be removed and cleared away."

The defendants, other than Ernest, objected to the allowance of this amendment on divers grounds, which are embodied in a bill of exceptions allowed in the case. The court overruled the objections and "permitted the amendment to be filed, on payment of costs and on condition that bonds of prosecution be given."

The defendants then demurred to the complaint as amended, and to the relief sought, on divers grounds, the more important of which, in substance, are the following:— For misjoinder of causes of action, one being in favor of the plaintiff as executor under the will, and the other in favor of him as trustee under a deed from his son; or misjoinder of parties plaintiff, one being trustee and the other executor; because the estate had been fully settled eight years before the suit was brought and the plaintiff was no longer executor; and to the relief sought, because, on the facts stated, the plaintiff was not entitled to the same either as executor or as trustee.

At this stage of the proceedings the case, with all the questions which are or may be raised upon the record, was reserved for the advice of this court.

One question in the case is, whether the plaintiff, as executor, can maintain his complaint for a construction of the

will, under the facts as they appear of record. We think he cannot.

The entire property of the testator was distributed and disposed of under the terms of the will and according to law in 1882. The estate of the testator was then fully and finally settled, and the disposition made of the property by the executor was accepted and approved by the probate court, and the property has since remained and is now the sole property of the devisees and legatees. No appeals have been taken from any of the decrees made in the course of the settlement of the estate.

Of course then the duties of the executor ended in 1882, if they are ever to end, and he ceased to be executor when he had performed all the duties entrusted to him as such, and the full and final account of his stewardship had been finally accepted and approved by the probate court. After this he could maintain no complaint for a construction of the will to enable him safely to perform his duties as executor, for the simple reason that he had no such duties to perform. In addition to this, all the questions stated in the original complaint concerning which the executor claimed to be in doubt, relate entirely to the title of his son under the will, after the distribution.

The questions stated did not at all embarrass the executor in administering the estate. When this suit was brought no parties were making doubtful and conflicting claims upon him, and the estate was in fact settled without the slightest difficulty.

We hold therefore that the executor could not maintain the cause of action stated in the original complaint, and that the demurrer, so far as it relates to the matters stated therein, should be sustained.

Another question in the case is, whether the proposed amendment ought to be allowed.

Although the proceeding by which the trustee seeks to be admitted, as a party plaintiff in this case, to prosecute a new and distinct cause of action, is in the record called an amendment, it is not strictly of the nature of an amendment to

the original complaint. In reality it seeks the admission of a new party, with a new, distinct and separate cause of action against the defendants other than the plaintiff's son. The fact that the same individual is or was executor, and is also trustee, can make no difference in principle. In law the trustee and the executor are distinct and different persons.

The two causes of action have no necessary connection with each other. The cause of action stated in the original complaint grew out of the plaintiff's relation to the estate as executor, and had respect to his duties in the administration of the entire estate. The cause of action stated in the amendment grows out of his duties as trustee, under the deed from his son, and relates to a particular portion of the lands of the estate which had been devised to his son by the will, and asks for the removal of a supposed cloud upon the title to that portion of the real estate only.

We think it is clear that these separate and independent causes of action, in favor of distinct and separate persons, could not be originally joined in the same complaint, against the objection of the defendants. The causes of action are different, and the plaintiffs are different persons, each having no interest in or relation to the suit brought by the other. In the first place, these two causes of action do not come within any of the classes of cases which may be joined in the same complaint under the practice act. Gen. Statutes, § 878. In the next place, that act no where expressly or by implication permits distinct and separate persons, having causes of action against the same defendant or defendants as distinct, independent and separate as the two causes of action in the case at bar, to join as plaintiffs originally in one and the same suit. Nor can such joinder of causes of action, or of plaintiffs, be made afterwards, by way of amendment, against the objection of the defendant. The statute of amendments gives the plaintiff liberty to "insert new counts in the complaint or declaration which might have been originally inserted therein." Gen. Statutes, § 1023. Complaints for breach of contract may be changed into com

plaints for a tort, and complaints for a tort into complaints for breach of contract, under certain circumstances. Gen. Statutes, § 1024. Complaints may be amended so as to correspond with the facts proved, and to the relief to which the parties may be entitled. Gen. Statutes, § 1025. It is provided by statute, also, that all defects, mistakes and informalities in the pleadings or other parts of the record or proceedings, may be amended. Our statute of amendment and the practice act and rules are certainly quite liberal in the matter of amendments, and the joinder, misjoinder or changes of parties, as regards both plaintiffs and defendants; but we are not acquainted with any statute or rule or practice which would permit or sanction any such change and amendment as the one proposed in the case at bar, if objected to by the defendant.

We hold, therefore, that the joinder of two such distinct and independent causes of action in one complaint, and of two such plaintiffs in one action, ought not to be permitted against the objection of the defendants.

The plaintiff, however, seems to claim that the complaint as amended may be regarded as one now pending by the trustee alone to remove a cloud from his title; that the executor, with his original cause of action, may be regarded as having dropped out of the case; and that the plaintiff as trustee may be substituted in place of the plaintiff as executor. It is true the practice act provides that when an action has been commenced in the name of the wrong person as plaintiff, the court, if satisfied of this, may allow any other person to be substituted or added as plaintiff. But the original action in the case at bar was not commenced in the name of the wrong party by mistake, and the proposed amendment means the entrance not only of a new and different plaintiff, but one with a new and independent cause of action.

It may well be that, under our present practice, if *A* brings suit against *B* upon a certain cause of action, and it turns out that the cause of action stated was in favor of *C* rather than *A*, *C* may be substituted in place of *A* as plaintiff,

in the sound discretion of the court. But we are not prepared to say that where *A* sues *B* upon a supposed cause of action, which turns out to be no cause of action, *C*, with an entirely different and independent cause of action against *B*, can enter as plaintiff in that proceeding to prosecute that cause of action.

It may be said that if the present plaintiff, as trustee, is turned out of court for this reason, he can at once bring his action against the defendant, setting up the facts now attempted to be set up in the proposed amendment; that such a course would cause additional delay and expense to all concerned without any compensating advantages; and that if the same result can be accomplished with due regard to the rights of all by the allowance of the proposed amendment, the spirit, if not the letter, of our statutes and rules of practice requires that it should be allowed.

This argument is more plausible than it is sound. It leaves out of sight the fact that matters of this kind are regulated by statute and positive rule, and that we cannot and ought not to go beyond their provisions and requirements. The law has provided that under certain circumstances a third party may enter as additional plaintiff or as substituted plaintiff in a case pending in court between *A* and *B*. This impliedly prohibits his entrance as plaintiff under other or different circumstances.

If when there is a suit pending between *A* and *B*, the law permitted *C* and all others having separate and independent causes of action against *B*, to enter in that case against *B*'s objection, as simultaneous or successive plaintiffs, it might save expense and delay, and it might not. We think, as a rule, it would not, and that the granting of such permission would be very unwise.

But however this may be, it is sufficient for our present purpose to say that the law does not sanction, but impliedly forbids, such a practice. For these reasons we think the complaint cannot, against the objection of the defendants, be amended in the manner proposed.

We therefore advise the Superior Court to disallow the

proposed amendment, and for the reason herein given to sustain that part of the demurrer which relates to the original complaint and the relief therein sought, and to dismiss the present complaint.

In this opinion the other judges concurred.

First National Bank of Webster *vs.* James R. Alton.

Hartford Dist., March T., 1891. Andrews, C. J., Loomis, Seymour, Torrance and Fenn, Js.

M executed and gave to *W* the following instrument, receiving from him the property mentioned in it:—"March 4, 1889. Received of *W* one bay horse and one express wagon, for which I promise to pay him or his order one hundred and fifty dollars with interest five months from date, at First Nat. Bank, Webster. Said property to remain the absolute property of *W* until paid in full by me. And I hereby agree not to dispose of said property and to keep it in good condition as it now is. And should said horse die before said sum is fully paid I agree to pay all sums due thereon, and should said property be returned to or taken back by *W*, I agree that all payments made thereon may be retained by *W* for the use of said property." Held not to be a negotiable promissory note.

It is necessary to such a note that the amount stated in it should be payable absolutely and at all events. Here the contract gave *M* the right to return the property to *W*, in which case he would not be liable to pay what remained unpaid of the amount.

The instrument was endorsed by *W* and for his accommodation by the defendant, and the plaintiff discounted it for *W*, who received the proceeds. The plaintiffs in making the loan relied upon the endorsement of the defendant, and supposed the instrument to be a negotiable note, as did also *W* and the defendant, and the latter believed himself liable upon his indorsement upon failure of *W* to pay, and had stated to the plaintiffs that he understood himself to be so liable upon like paper shortly before discounted by them for *W* on his endorsement. Held that there was no legal implication that the money was loaned to the defendant and at his request delivered to *W*, or that the loan was made to *W* on the defendant's request and promise to pay if he did not.

[Argued March 3d—decided April 20th, 1891.]

ACTION against the defendant as indorser of a negotiable promissory note; brought to the Superior Court in Windham County, and tried to the court before *Prentice, J.* Facts found and judgment rendered for the defendant and appeal by the plaintiffs. The case is fully stated in the opinion.

W. S. Gould (of Massachusetts) and *C. E. Searls*, for the appellants.

1. The character of the instrument in suit is to be determined by the laws of this state, and not by those of Massachusetts. The finding is silent as to the place of endorsement, but the note was made in Connecticut, and the defendant resides here, and presumptively the instrument was endorsed by the defendant and delivered to Walker in Connecticut. It was therefore the intention of the defendant that his liability as endorser should be governed by our laws. 1 Daniels on Negotiable Instruments, § 899; *Greathead* v. *Walton*, 40 Conn., 226. There are no decisions by this court which are conclusive authorities on the question now being considered, but the reasoning of the court in a case hereafter cited is in the line of the plaintiff's contention. The question at issue is, therefore, open for adjudication in the light of principle, and in accordance with the trend of authority.

2. The instrument in suit is a promissory note. "A promissory note is (1) a promise to pay money, (2) at a certain time, (3) to a person named, (4) absolutely and at all events. The payment must not rest upon any contingency except the failure of the general personal credit of the person drawing or negotiating the same." 3 Kent Com., 12th ed., 92. The instrument in suit has the first, second and third of these essential qualities; has it the fourth also? To determine this question we must examine the legal significance of the words "absolutely and at all events." The bearing of these words is best found by transposing the words of the definition. Money is to be paid absolutely and at all events, according to the other conditions named in the note. These words are intended to exclude from the promise to pay money any contingency, condition, stipulation or reser-

vation, which, if incorporated, would affect, if not destroy, the liability of the maker to pay money, in the amount, at the time, and to the person named. If the liability of the maker to pay money, according to the other terms of the promise, is preserved, free from contingency, condition, stipulation or reservation, the character of the promise is fixed as a negotiable promise, and comes under the rules of the law merchant. In applying this rule the most obvious inquiry is—Can the instrument contain any language other than that which is required to convey the information required by the rule, and still retain its character of negotiable paper? And a further inquiry is—If it may contain other words and other expressions, what other words or expressions can it contain, without losing its character of negotiability? A negotiable promissory note may contain language not required to express the information suggested by the rule, and still retain its character of negotiable paper. *Cota* v. *Buck*, 7 Met., 588; *Towne* v. *Rice*, 122 Mass., 67; *Perry* v. *Bigelow*, 128 Mass., 129; *Collins* v. *Bradbury*, 64 Maine, 37; *Riker* v. *A. & W. Sprague Mfg. Co.*, 14 R. Isl., 402; *Protection Ins. Co.* v. *Bill*, 31 Conn., 537. The authorities seem to be conclusive in favor of the proposition, that the presence of the negotiable promise fixes the character of the instrument as negotiable paper, and that words and expressions, or even detailed and elaborate agreements, are not sufficient to destroy the effect of the negotiable promise, and that such an instrument is, in judicial construction, a negotiable promissory note with a memorandum attached, and not a memorandum agreement with a useless form attached. *Towne* v. *Rice*, 122 Mass., 67; *Collins* v. *Bradbury*, 64 Maine, 37; *Arnold* v. *Rock River Valley R. R. Co.*, 5 Duer., 207; *Heard* v. *Dubuque Co. Bank*, 8 Neb., 16; *Newton Wagon Co.* v. *Diers*, 10 id., 284; *Willoughby* v. *Comstock*, 3 Hill, 389; *Hodges* v. *Shuler*, 22 N. York, 114; *Mott* v. *Havana Nat. Bank*, 22 Hun, 354; *Hosstater* v. *Wilson*, 36 Barb., 307; *Protection Ins. Co.* v. *Bill*, 31 Conn., 534; *Heryford* v. *Davis*, 102 U. S. R., 235; *Arkansas Land & Cattle Co.* v.

Mann, 130 id., 69; *Chicago Railway Equipment Co.* v. *Merchants' Nat. Bank*, 136 id., 268.

3. The facts, as found, warrant the application of the doctrine of equitable estoppel to any attempt of the defendant to claim that the facts found do not justify such inference of law, or that he did not draw such order or make such promise. *Preston* v. *Mann*, 25 Conn., 118; *Stevens* v. *Dennett*, 51 N. Hamp., 324; *Horn* v. *Cole*, id., 287; *Hodges* v. *Shuler*, 24 Barb., 68, 82; *Audenreid* v. *Betteley*, 5 Allen, 382; *Pikard* v. *Sears*, 6 Ad. & El., 474. These cases establish the following propositions:—(1.) One who has influenced the conduct of another to the disadvantage of the latter cannot deny his liability to reimburse the person suffering by reason of such influence. (2.) There need not be any actual design that the representation should be acted upon. (3.) There need be no intention to defraud or deceive. (4.) Equitable estoppels are intended to promote and effectuate equity. The liberal views entertained by this court in the late case of *Mansfield* v. *Lynch*, 59 Conn., 321, as to the law governing the rights of the holder of money paid under a mistake of law, when in equity and good conscience he should not retain the sum so paid, warrants us in pressing with confidence for the application of the law of equitable estoppel under like circumstances, where the standing in court of the parties only is reversed. We say further that the plaintiff has the right to insert above the name of the defendant the contract as the defendant understood it when he endorsed the instrument, and we predicate our claim, not upon any technicalities of reasoning, but upon the following simple proposition:—that the name of the defendant as written upon the back of this instrument, and of the series of which it is one, was intended to convey, and was understood by the plaintiffs as conveying, the following request:—"Let Mr. Walker have $150, and I will pay if he does not." The name conveyed, and was intended to convey, and was understood to convey, this idea.

W. S. B. Hopkins, (of Massachusetts,) for the appellee.

FENN, J. In March, 1889, one William H. Walker carried to the plaintiffs' bank an instrument in writing, which read as follows:—

"$150. So. Woodstock, Ct., March 4, 1889. Received of W. H. Walker, this day, one bay horse, Vinton horse, one express wagon, for which I promise to pay said Walker or order one hundred and fifty dollars, five months from date, at First Nat. Bank, Webster, with interest at per cent. Said property to be and remain the entire and absolute property of said Walker until paid in full by me. And I hereby agree not to sell or dispose of, and to keep said property in good order and condition as the same now is. And should said horse die before said sum is fully paid, I hereby agree to pay all sums due thereon. And should said property be returned to or taken back by said Walker, I agree that all payments made thereon may be retained by said Walker for the use of said property. CHARLES H. MOORE."

This instrument was indorsed by Walker, and by the defendant, and Walker requested the plaintiffs to discount the same. The plaintiffs did so, crediting the proceeds to Walker. They relied largely upon the strength of the defendant's endorsement. The defendant had endorsed it at Walker's request, solely for his accommodation, and without consideration. All the parties, plaintiffs, defendant and Walker, supposed the instrument to be a negotiable promissory note. The plaintiffs had previously discounted similar instruments for Walker, bearing the defendant's endorsement, and prior to January 1st, 1889, one of the plaintiffs' directors asked the defendant for a statement as to his financial condition and the amount of his endorsements for Walker. The defendant gave the information, and said that he understood that he was holden to pay in case Walker did not. In June, 1889, Walker fled, making no provision for the payment of his indebtedness to the plaintiffs, who, when the instrument became due, caused it to be protested, and gave the defendant notice. Nothing appears in the finding in reference to Moore, or to the subsequent history of the property described in the instrument. The de-

fendant in the court below had judgment, and the plaintiffs appeal.

The plaintiffs' counsel, in their brief, say that the essential question in the case is, whether the instrument in suit is a promissory note; and in this statement we concur. They then quote from 3 Kent's Commentaries, 12th ed., 92, the following:—"A promissory note is (1) a promise to pay money, (2) at a certain time, (3) to a person named, (4) absolutely and at all events." Without stopping to consider whether an instrument might not contain all these elements and still fail to be a promissory note, we will come directly to the question whether the instrument declared on does contain them.

Nor will it be necessary to look at more than the last essential. Is there a promise to pay "absolutely, and at all events?" We think not. The transaction evidenced by the instrument is clearly of the nature of what has so often been the subject of discussion and consideration in this court, a conditional sale, or, in other words, an executory contract for sale. To hold it otherwise would be inconsistent with a score of cases in this jurisdiction, among which may be cited *Forbes* v. *Marsh*, 15 Conn., 384; *Tomlinson* v. *Roberts*, 25 id., 477; *Cragin* v. *Coe*, 29 id., 51; *Lucas* v. *Birdsey*, 41 id., 357; *Hine* v. *Roberts*, 48 id., 6. The *New Haven Wire Co. Cases*, 57 Conn., 352, may also be cited.

But it is not only a conditional sale, the condition being expressed in the same instrument with the promise to pay, and not apart from it as in most of the cases cited above, but the option to determine as to whether the sale shall become absolute is not, as in the case of *Appleton* v. *Library Corporation*, 53 Conn., 4, and the very recent case of *Beach's Appeal from Commissioners*, 58 Conn., 464, exclusively in the vendor, but, as in *Hine* v. *Roberts*, 48 id., 267, and *Loomis* v. *Bragg*, 50 id., 228, at the option of both. Indeed this option is very much more clearly expressed in the present case than in that of *Hine* v. *Roberts*. The language is—"Should said property be returned to or taken back by said Walker, I agree that all payments made there-

on may be retained by said Walker for the use of said property." Why provide what the rule should be in case of a return, if the vendee had no option to return, or what should be paid as compensation for the use of the property if the promise to pay the full value was absolute. If it were necessary to argue this matter further, the argument is already made for us in the opinion of the court, in *Hine* v. *Roberts*, which we here adopt; and the case of *Protection Insurance Co.* v. *Bill*, 31 Conn., 534, which is the case in this jurisdiction mainly cited and relied on by the plaintiffs, becomes an absolute authority against their position, since it does not appear upon the face of the instrument in suit that the maker's promise will, at any time, be absolutely enforceable, or that the event on which the duty of payment depends is one over which the payee or holder will have entire control.

It was the claim of the plaintiffs, contested by the defendant, that the character of the instrument in suit is to be determined by the laws of Connecticut and not by those of Massachusetts. The claim was manifestly made to avoid the effect, as an authority, of *Sloan* v. *McCarty*, 134 Mass., 245. We need not decide this question, for since the law of this state is so clearly against the plaintiffs' contention, it is unnecessary to determine whether that of Massachusetts is even more so. We need only add that we have carefully examined all the cases cited in the plaintiffs' able and carefully prepared brief, and that none of them in any sense conflict with the conclusions which we have reached. Those authorities were mainly cited to show that a negotiable promissory note may contain language not required to express the vital essentials of such an instrument and still retain its character as negotiable paper, and they abundantly establish such proposition.

Another claim made by the plaintiffs and overruled by the court below was that the law, upon the facts found, implied that the proceeds of the discount of the instrument credited to Walker, were either money loaned to the defendant and at his request delivered to Walker, or money loaned

to Walker upon the defendant's request and his promise to pay the same when due if not then paid by Walker, and that the plaintiffs might write over the defendant's endorsement the contract between the parties. And in support of this claim counsel especially rely upon "the liberal views entertained by this court in the late case of *Mansfield* v. *Lynch*, 59 Conn., 321, as to the law governing the right of the holder of money paid under a mistake of law, when, in equity and good conscience, he should return the sum so paid." Now, in response, it seems to us that there is little analogy between the case before us and that of *Mansfield* v. *Lynch*; that in order to do what the plaintiffs ask we should be obliged, by one of the fictions of law, to invent facts which do not exist, for the sake of applying thereto principles of doubtful equity; that if the law implied that the money credited to Walker was loaned to the defendant, or to Walker upon the defendant's promise to pay when due if not then paid by Walker, (a promise not in writing, to answer for the debt, default, or miscarriage of another), in either case, the implication would be contrary to the truth; that to allow the plaintiffs to write over the defendant's name such a contract, never made, would be to carry the invention one step further; that to hold, because the parties were mutually mistaken in the legal effect of the real transaction, justice would be subserved by the imputation in its place of a fictitious one, would be going further than we are aware that any court has yet gone, and beyond what it seems to us proper or right or safe to do.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

CHRISTOPHER SPENCER AND ANOTHER *vs.* CHARLES G. ALLERTON.

New Haven and Fairfield Cos., Jan. T., 1891. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

The act of 1884 (Gen. Statutes, § 1860), provides that "the blank indorsement of a negotiable or non-negotiable note, by a person who is neither its maker nor its payee, before or after its indorsement by the payee, shall import the contract of an ordinary indorsement of negotiable paper, as between such indorser and the payee or subsequent holders of such paper." Held—

1. That the statute intended to give to the contract of such an indorser the same certainty as to its import that the law gives to an ordinary indorsement of commercial paper.
2. That the legal contract implied by such an indorsement cannot therefore be varied by parol evidence of a different agreement.
3. That a third person, indorsing before and above the payee, is, as to him and subsequent holders, impliedly an indorser in the order in which he stands upon the paper.

As the law now stands, under the above act, if a third person indorsing a note intends to make any different contract from that of an ordinary indorser, he should write it out above his signature.

[Argued January 27th—decided April 20th, 1891.]

ACTION upon an indorsed note; brought to the Superior Court in New Haven County, and heard before *Fenn, J.* Facts found and judgment rendered for the plaintiffs, and appeal by the defendant. The case is fully stated in the opinion.

S. W. Kellogg, for the appellant.

1. In the early decisions in this state, as to the effect of a blank indorsement by a third party, there appears to have been an understanding of such party that the indorsement was made as surety for the maker, for the security of the note to the payee. When such an intention appeared the indorsement was held to be a guaranty to the payee, and the legal import of such an indorsement was held to be that the note when due should be collectible by the use of due

diligence. In *Beckwith* v. *Angell*, 6 Conn., 315, there was an express agreement by the party indorsing the note, that he would guarantee the note to the payee, in consideration of further forbearance. In *Perkins* v. *Catlin*, 11 Conn., 213, the evidence offered with the indorsed note was that the defendant understood his indorsement to be a guaranty to the payee. In *Laflin* v. *Pomeroy*, 11 Conn., 440, the indorser placed his name upon the back of the note in pursuance of an agreement, at the request of the payee, and was paid by the latter a special compensation for his indorsement. In *Castle* v. *Candee*, 16 Conn., 223, the defendant had full knowledge that he was indorsing the note for the security of the payee. The real intent of the parties could always be shown. Parol evidence has repeatedly been held to be admissible to show the real character of the indorsement, whether it was intended to be a guaranty, an ordinary indorsement of negotiable paper, or indorsed merely for the purpose of collection. *Perkins* v. *Catlin*, *supra*; *Riddle* v. *Stevens*, 32 Conn., 378. In the last case the note in suit was precisely like the one in suit here. The defendant had indorsed a blank note, after it was signed by the maker, and before it was delivered to the payee. The plaintiff, who was the payee, had required of the maker an indorser of the note before he would accept it, and the maker had procured the defendant's indorsement, and then sent the note to the plaintiff. The court admitted parol evidence to show that the defendant by his indorsement did not intend to guarantee the plaintiff, and had no knowledge that his indorsement was intended to be a guaranty. And this court held that the defendant was not liable, and that no agreement of guaranty being proved, the plaintiff could not recover. There is no element of an agreement for guaranty in this case. The most that can be claimed upon the finding is that the defendant indorsed Stevens's note. And the burden of proof is upon the plaintiffs to show that the indorsement was intended to be a guaranty for their security. Their secret intention, or their arrangement with Stevens to exchange notes, is of no sort of consequence unless that

intention and arrangement were made known to the defendant. The record is that there was never any conversation whatever between the plaintiffs and the defendant in relation to his indorsement. The finding says:—"Nor was there any evidence that the defendant had any knowledge that his indorsement of the notes was, or was intended to be, a guaranty to the plaintiffs. There was no evidence that the defendant had any knowledge of the exchange of notes by the plaintiffs and Stevens." There is not a single fact to show that the defendant had any knowledge that his blank indorsement was, or was intended to be, a guaranty to the payees of the note, or was anything more than any ordinary indorsement of negotiable paper. That was the indorsement the defendant supposed he was making, so far as the record shows. If it was intended by the parties to the note other than the defendant, that his indorsement was a guaranty for the security of the plaintiffs only, that intention should have been disclosed to the defendant. As Judge DUTTON well says in *Riddle* v. *Stevens*, "such an indorsement would be sufficient to put the payee, or person to whom it was offered, on his guard, and require of him, before he relies upon it, to make inquiry."

2. The law of Connecticut as to the legal import of an indorsement of a negotiable note by a third party, as settled by a long course of decisions, was entirely different from the law of other states, and has repeatedly been regretted or criticised by the judges of this court. See *Riddle* v. *Stevens*, *supra*; *Castle* v. *Candee*, 16 Conn., 238. The question came up in the case of *Ætna Bank* v. *Charter Oak Life Ins. Co.*, 50 Conn., 169, whether the indorsement was under our decisions a guaranty or only an ordinary indorsement of negotiable paper. It made no difference in that case whether it was the one or the other, as the suit was brought by the bank which had discounted the paper. The note was indorsed precisely as the notes here in suit, the payee indorsing below and after the third party. This court in that case, after referring to the peculiar law of Connecticut upon the legal import of such indorsements, and their

anomalous character as differing from the law of other states, uses this language, p. 189:—"Although it may be that in the vast increase in recent years of commercial intercourse between our own and other states and countries, this rule, confined and peculiar to Connecticut, operates to declare a contract in most instances different from the actual intent of the parties, relief is to be had only through legislative action." The relief suggested came by the statute of 1884. Gen. Statutes, § 1860. That statute was passed immediately after for the express purpose of changing the law of Connecticut and making it conform to the settled law of other states, and it was undoubtedly suggested by the remarks of this court in that decision. Before that statute the import of such an indorsement by a third party for the security of the payee was a contract of guaranty, peculiar to this state, especially in relation to negotiable paper. The statute changed the law of the state. It says that such an indorsement "shall import the contract of an ordinary indorsement of negotiable paper, as between such indorser and the payee or subsequent holders of such paper." What does that statute mean? We contend that it means just what it says; and that it was intended to change the long-settled law of the state to conform to the law of other states. There was the old law and the mischief to remedy, and the language of the statute is clear and plain for that purpose. It cannot mean simply that demand and notice of protest should be required in all cases of blank indorsement by third parties. That would not reach the mischief at all. If the statute was enacted, as we think, in consequence of the remarks of this court in the Ætna Bank case, it could not refer to mere demand and notice of protest; for demand was made and notice of protest given in due form in that case. The legal import of an indorsement by a third party was settled to be one thing before that statute; the statute made the import of such an indorsement to be an entirely different thing. Such being now the legal import of such an indorsement, the plaintiff cannot recover in this case, when the defendant had no knowledge that his indorsement

was, or was intended to be, a guaranty. Of course, it is competent for parties to make an agreement of guaranty since the statute as well as before; but to change the legal import of the indorsement in blank the agreement must be proved by some other evidence than the mere indorsement. It is worthy of notice that in every case of guaranty in this court since the enactment of that statute, an express contract of guaranty was made and proved to hold a party as a guarantor of a note. *City Savings Bank* v. *Hopson*, 53 Conn., 453; *Cowles* v. *Peck*, 55 id., 251; *Lemmon* v. *Strong*, id., 443; *Loomis Institute* v. *Hurd*, 57 id., 435; *Tyler* v. *Waddingham*, 58 id., 375. There is nothing ambiguous in the language of that statute. It tells what this contract of blank indorsement is in the plainest terms—an "ordinary indorsement of negotiable paper." If, as we contend, the purpose of that statute was to change our peculiar law as to the effect of blank indorsements (which was no part of the law-merchant), and make it conform to the law of New York and other states, the plaintiffs in this case, whose names would be first upon this note in the regular course of indorsements of negotiable paper, cannot recover of the defendant, whose regular place is that of second indorser on the note.

L. Harrison and *E. Zacher*, for the appellees.

SEYMOUR, J. On September 24th, 1884, the plaintiffs, at the request of one J. C. Stevens, gave him their accommodation note for two thousand dollars, payable in three months, and agreed to give him another three months' note of the same amount at its maturity. In exchange for this note Stevens gave the plaintiffs his six months' note of the same date for two thousand dollars, indorsed by the defendant. On the 27th of December, 1884, the plaintiffs gave Stevens their second note as agreed, with which he took up the first. When the second note became due the plaintiffs paid it. On the 2d of April, 1885, Stevens, in renewal of his six months' note, gave the plaintiffs his note for one thousand dollars,

payable in two months, and his note for a like sum, payable in three months, each payable to their order at the Yale National Bank. The defendant indorsed each of these notes in blank before Stevens delivered them to the plaintiffs. Afterwards the plaintiffs indorsed them, writing their names below that of the defendant. These notes were given by Stevens to the plaintiffs as a security for the loan by the plaintiffs of the sum therein mentioned, namely, of the sum to be raised by the discount of the above mentioned accommodation notes made by the plaintiffs. At each of the times when Stevens signed the notes, namely, on September 24th, when he signed the six months' note for two thousand dollars, and on April 2d, when he signed the two notes in renewal thereof (the indorsement of which is the subject of this suit), he and one of the plaintiffs were together at Stevens's office. Before the notes were delivered to the plaintiffs Stevens called the defendant into the office, and he then indorsed the notes in the presence of Stevens and the plaintiffs. There was no conversation in relation to the indorsements, nor was there any conversation between the defendant and the plaintiffs at any other time in relation thereto. There was no evidence of any agreement between them except such as the law imports from the blank indorsement which the defendant put upon the notes, as the same appears upon them, under the circumstances and upon the facts already detailed. Nor was there any other evidence that the defendant had any knowledge that his indorsement of the notes was, or was intended to be, a guaranty to the plaintiffs. There was no evidence that the defendant had any knowledge of the exchange of notes by the plaintiffs and Stevens. The notes of April 2d, 1885, were duly presented for payment at the bank but were not paid. Notice thereof was duly given to the defendant. The plaintiffs still own the notes and they are still wholly unpaid. At their maturity the maker was insolvent and without any property exempt from execution. These are the facts in brief as they are stated in the finding. The case, after a short explanation by the counsel for the defendant, was submitted to us

on briefs, and the questions discussed relate to the liability of the defendant upon the facts found. The finding is slightly complicated. To simplify the matter we copy one of the notes with its indorsements, the other being precisely similar, except that it is payable three months after date.

"$1,000. NEW HAVEN, CT., April 2d, 1885.

"Two months after date, I promise to pay to the order of I. S. Spencer's Sons one thousand dollars at Yale National Bank, value received, with interest. J. C. STEVENS."

(Indorsed.)

"CHAS. G. ALLERTON.

"I. S. SPENCER'S SONS."

In the year 1884 the legislature passed the following act:—"The blank indorsement of a negotiable or a non-negotiable note, by a person who is neither its maker nor its payee, before or after the indorsement of such note by the payee, shall import the contract of an ordinary indorsement of negotiable paper, as between such indorser and the payee or subsequent holders of such paper." Gen. Statutes, § 1860.

Before the passage of this act, by the law of this state as declared through a long line of decisions, from *Bradley* v. *Phelps*, 2 Root, 325, to *Ætna National Bank* v. *Charter Oak Life Insurance Co.*, 50 Conn., 167, the blank indorsement of either a negotiable or a non-negotiable note by a stranger to the note, implied, *primâ facie*, a contract on the part of the indorser that the note was due and payable according to its tenor; that the maker should be of ability to pay it when it came to maturity; and that it was collectible by the use of due diligence. And this was the law, it was held in the latter case above cited, whether the indorsement by the third party was for the better security of the payee or for the purpose of getting the note discounted. The same case, commenting upon our long established law on this subject, speaks of it as peculiar to this state, no part of the law-merchant, and the anomalous existence of which, eminent judges, while admitting, have regretted. The statute was doubtless intended to deliver our law from its anomalous position and bring it into harmony with the law-merchant

as it is interpreted in the great commercial centers of our country with which we are connected in business transactions involving the daily exchange of notes, bills and all manner of negotiable securities.

The statute is before this court for the first time, and we have given it the consideration commensurate to its importance. Under it it is at once apparent that the blank indorsement of a negotiable or non-negotiable note by a person who is neither its maker nor payee, whether before or after its indorsement by the payee, no longer imports a contract that the indorser will pay the note if, on the use of due diligence, it is not collected of the maker. It is no longer a contract of guaranty. But it imports, as between such indorser and the payee or subsequent holders thereof, a contract of an ordinary indorsement of negotiable paper, which is, by the law-merchant, a contract for payment conditioned on due presentment to the maker for payment and due notice of dishonor.

The full contract which the general commercial law implies from the indorsement of a negotiable promissory note on the part of the indorser, with and in favor of the indorsee and every subsequent holder to whom the note is transferred, is—(1) that the instrument itself and the antecedent signatures thereon are genuine; (2) that he, the indorser, has a good title to the instrument; (3) that he is competent to bind himself by the indorsement as indorser; (4) that the maker is competent to bind himself to the payment, and will, upon due presentment of the note, pay it at maturity, or when it is due; (5) that if, when duly presented, it is not paid by the maker, he, the indorser, will, upon due and reasonable notice given him of the dishonor, pay the same to the indorsee or other holder. Story on Prom. Notes, § 135.

Into this contract, under our statute, the indorser of a note, either negotiable or non-negotiable, though a stranger thereto, impliedly comes, as between himself and the payee or subsequent holder.

Thus far there is no difficulty and it is evident that *primâ*

facie at least, the defendant is an ordinary indorser and not a guarantor of the notes.

But the facts in this case require us to consider the provision of the statute that the indorsement therein mentioned shall import a contract of ordinary indorsement between the parties named, whether it stand before or after the indorsement by the payee.

Here the plaintiffs indorsed the note after the defendant, and the order of their names upon it accords with the fact. Such an indorsement falls within what BIGELOW, J., in *Clapp* v. *Rice*, 13 Gray, 403, calls "an anomalous class of cases," and which the text books generally call "irregular indorsements." It is impossible to harmonize the existing decisions in respect to the import of such an indorsement; they are very numerous, diverse and conflicting. Our statute may render much of the discussion of other jurisdictions valueless to us, except as a guide to its construction, if, upon examination, its language should appear ambiguous.

Does the statute, then, intend to go any further than simply to declare that, irrespective of the position of his name, a third person who puts his name on the back of a note is to be held as an ordinary indorser, and not as a guarantor? Or do the other provisions clearly indicate a purpose to leave no question open which would turn upon the relative position of the indorsements; and to provide that such third party, though indorsing before and above the payee, is, nevertheless, *quoad* him and subsequent holders, impliedly an indorser precisely in the order in which he stands upon the note?

We unhesitatingly incline to the latter construction.

The language of the statute standing by itself, and also as construed in the light of the greater weight of authority, seems to leave no room for doubt. Daniels, in his work on Negotiable Instruments, treating of the various decisions relating to the transfer of notes by indorsement, says, (sec. 713):—"When nothing appears but the instrument itself bearing a third person's name before the payee's, in a suit by the indorsee of the payee, the question next arises, what

is to be presumed to have been the contract and liability of such a person? It will be presumed in the first place, from the fact that the name is before that of the payee in order, that it was placed there before his in point of time, and was placed upon the note in its inception with a view of strengthening its credit with the payee and inducing him to take it; and, for the reason that such third person never was the legal holder of the paper, it is held by a number of authorities that he cannot be deemed an indorser, and must be regarded, *primâ facie*, as a joint maker. By others it is held that he is *primâ facie* a surety or guarantor, using those terms as the equivalent of joint maker; others consider that he is *primâ facie* only secondarily liable as a guarantor; while very many regard him as assuming the liability of a second indorser." "But," says the author, (sec. 714,) "it would seem to us that such a party ought to be regarded as *first* indorser. If he intended to be *second* indorser he should have refrained from putting his name on the note until it was first indorsed by the payee. By placing it first he enables the payee to place his own afterwards; and *primâ facie* the facts would seem to indicate such intention. There is nothing in the objection that there is no title in him to indorse away. Prior parties could not be sued without the payee's indorsement; but he, being an indorser, can be sued by any one deriving title under him. In fact his position seems to render his liability strictly analogous to that of the drawer of a bill upon the maker in favor of the payee, and so to regard it simplifies, as it seems to us, a question which, unless such analogy be followed, is exceedingly complicated and difficult." "When, (sec. 716,) the note is sued upon by the payee, it is held that the idea of the party before him being bound as an indorser is excluded. But this doctrine does not seem to us correct. The indorsement, it is true, is an irregular one; but it is quite similar to a bill drawn by the indorser on the maker, and to follow that analogy in all regards seems to us the simplest and most reasonable solution of the question. And there are a number of cases which regard such a party's liability as *primâ facie* that of an indorser."

Judge STORY, discussing the various decisions concerning irregular indorsements, says:—"When the note is negotiable and is indorsed in blank by a third person, not being the payee or a prior indorsee thereof, there, in the absence of any controlling proof, it is presumed that such person means to bind himself in the character of an indorser, and not otherwise, and precisely in the order and manner in which he stands on the note. If the note is not negotiable and the indorsement in blank is not a part of the original transaction, but subsequently made, then, in the absence of the like controlling proofs, it is deemed a mere guaranty, and the indorser liable only as guarantor." Story on Prom. Notes, § 480.

Randolph, in his recent treatise on Commercial Paper, goes extensively into the subject of irregular indorsements. Premising that it is a matter of frequent occurrence, in the United States especially, that one who is neither maker nor payee of a note places his name on the back of it at the time of its inception, he says the legal effect of such indorsements has been much discussed and variously decided. He discusses the numerous cases which follow the Massachusetts rule, and hold such indorser to be a joint maker, though now, by statute of 1882, he is entitled, like an indorser, to notice of dishonor; the also numerous cases which hold, as did our courts, such an indorser to be a guarantor; and the cases, in opposition to both of these views, which hold that such indorser contracts and becomes liable as an indorser, his position on the back of the note indicating that intention. In California and Dakota, he adds, (sec. 836,) "he is now by statute liable as an indorser to the payee. And so, by a recent statute in Connecticut, whether the note is negotiable or not, and whether he indorses before or after the payee." Randolph on Commercial Paper, sec. 829 *et seq.*

In *Hall* v. *Newcomb*, 7 Hill, 416, it was held that one who writes his name in blank on the back of a negotiable note before the payee indorses the same, is not liable as maker nor as guarantor. Thus says WOODRUFF, J., in *Hahn* v. *Hull*, 4 E. D. Smith, 670, overruling all the previous cases

to that effect. It was also held in *Hall* v. *Newcomb*, that the person so writing his name could be held liable to such payee as indorser. *Spies* v. *Gilmore*, 1 Comst., 322, is to the same effect. In *Moon* v. *Cross*, 19 N. York, 227, it was held that one who, for the accommodation of the maker, indorses his note payable to the order of a third person, is liable thereon to such payee as indorser. In that case, as in the one at bar, the third party indorsed the paper before it was indorsed by the payee. Thus it would appear that in New York the result reached by our statute was reached through the courts instead of through the legislature. The authorities quoted, by showing the various positions which have been taken respecting the matter under consideration, throw light not only upon the presumed intention of the legislature in passing the statute and the interpretation which should be given it, but show also the impossibility of harmonizing our law, under any interpretation of it, with the law of all our neighboring states.

From this examination of the authorities we feel the more assured in holding that the defendant, in the case at bar, upon the showing of the note itself, is an ordinary indorser, and may be held as such by the plaintiff, who is payee, and whose name appears as an indorser subsequent to that of the defendant.

So much for the contract which the statute imports.

A third question remains, namely, whether the contract which the statute imports can be varied by parol evidence, and, if so, when and how? The general expressions scattered through our reports, consequent upon our peculiar law respecting the contract *primâ facie* implied by the indorsement of a note by a stranger, make it a little difficult to give an answer that shall at first sight appear consistent with some of our decisions, or rather with some of the expressions used in some of our decisions. Indeed, the principle involved has been variously decided in different jurisdictions and at different times in the same jurisdiction.

In *Riddle* v. *Stevens*, 32 Conn., 378, after stating the contract which the law implies from the blank indorsement of

a note by a stranger, the case holds that this implication is however only *primâ facie*, and will yield to proof of the real character of the contract. Notes so indorsed, it says, have not the sanctity of ordinary negotiable paper and do not fall within the rules of the law-merchant; any person taking them, therefore, is put upon an inquiry as to the real character of the contract.

In *Beckwith* v. *Angell*, 6 Conn., 315, a third party wrote his name on the back of a non-negotiable note, under, as he claimed, a special parol agreement with the payee. It was decided that he might prove the special agreement when sued by the payee. The court said:—"The undertaking of an indorser is always collateral, unless made otherwise by a special agreement. But the defendant was not an indorser; because he was neither promisee nor indorsee. His contract was therefore necessarily *special* and whatever the parties chose to make it."

It appears from these and other cases which might be cited, that parol evidence has been admitted to prove the real contract entered into by a third party when he made a blank indorsement of a note, because such blank indorsement only *primâ facie* implied a contract of guaranty; and because, being anomalous and not the ordinary indorsement recognized by the law-merchant, it possessed none of its sanctity, but was its own sufficient notice of its irregularity.

But our courts have not failed to recognize and uphold the sanctity of a regular indorsement. The law on that subject was admirably stated by BUTLER, C. J., in *Dale* v. *Geer*, 38 Conn., 15. That case held "that the contract implied by law from a blank indorsement of a negotiable note before its maturity by the payee, is as certain and absolute as if written out in full, and parol evidence is not admissible to contradict it. This rule is applicable between indorser and indorsee, and it is not competent for the former to prove a cotemporaneous naked agreement that an unrestricted indorsement should be operative as a restricted one only, in bar of an action by the latter." "There are," says the opinion, "four classes of cases, in which, as exceptional

cases, and as between the original parties, indorser and indorsee, any relation, antecedent agreement, or state of facts, from which a controlling equity arises, may be pleaded and proved by parol in bar of an action on the warranty. Thus the relation of principal and agent may be shown, for the agent takes no title or warranty from the indorser, but holds as *agent*. So, secondly, it may be shown that the note was indorsed to the holder for some special purpose, and is holden *in trust*, as where it is indorsed and delivered for collection merely. * * * Thirdly, the relation of principal and surety may be shown, and that the indorsement was made at the request and for the accommodation of the immediate indorsee; for the equity of the relation forbids the enforcement of the contract. Such was the case of *Case* v. *Spaulding*, 24 Conn., 578. So, fourthly, it may be shown that there was an *equity* arising from an *antecedent transaction*, including an agreement that the note should be taken in sole reliance on the responsibility of the maker, and that it was indorsed in order to transfer the title in pursuance of such agreement, and that the attempt to enforce it is a fraud. Such was *Downer* v. *Chesebrough*, 36 Conn., 39. These exceptions illustrate the rule."

In *Allen* v. *Rundle*, 45 Conn., 528, the defendants had signed a writing on the back of the note as follows:—"For value received we jointly and severally guarantee the within note good and collectible until paid." Held, that it could not be shown by parol that the defendants, though in form guarantors, in fact undertook thereby to obligate themselves to pay the note. Nor that they made at the time a verbal promise to pay the debt. The court says:—"There is an anomalous class of cases where a third person, neither payee nor maker, puts his name on the back of a note before its indorsement by the payee, where by parol evidence such person may be held liable either as original promisor, guarantor or indorser, according to the nature of the transaction and the understanding of the parties." (Citing cases). "But in all these cases the indorsement is in blank and there is no written contract, and none is definitely implied

by law from the indorsement. In cases of blank indorse ments, where the contract is implied by law, it has the same effect as if written, and parol evidence is not admissible to contradict or vary it. The Supreme Court of Massachusetts, in the recent case of *Allen* v. *Brown*, 124 Mass., 77, held that parol evidence was not admissible to show that indorsers who indorsed a promissory note before delivery to the payee, were accommodation indorsers and sureties only."

In Story on Promissory Notes, sec. 146, note 1, many cases are cited to the point that the contract implied by law, from a regular indorsement, is as certain as if it were expressed in writing, and parol evidence is not admitted to vary it. To the same effect see Daniel on Negotiable Instruments, sec. 717, *et seq.* In Randolph on Commercial Paper, where much attention is given to the subject throughout the work, it is stated, sec. 778, that most authorities hold that the implications and intendments which the law-merchant has attached to blank indorsements of negotiable commercial paper, render them express and complete contracts which cannot be explained or varied by parol. See also Parsons on Notes & Bills, vol. 2, chap. 1, sec. 6, page 23.

Now, under our statute, the blank indorsement of a negotiable or non-negotiable note, by a person who is neither its maker nor its payee, before or after the indorsement of such note by the payee, can no longer be classed as an anomalous or irregular indorsement, nor will the rules applicable to such indorsements any longer apply. They cease to exist as the reason for them ceases. By the very terms and force of the statute such an indorsement becomes, to all intents, a regular, ordinary indorsement, and the rules applicable to the regular indorsement of negotiable paper apply.

Evidently, then, the judgment rendered by the court below for the plaintiffs in this case was correct. The defendant's case comes within none of the exceptions named in *Dale* v. *Geer*, *supra*. It comes nearest to the third exception. But in the case of *Case* v. *Spaulding*, 24 Conn., 578, given as an example of what was covered by that exception, the note was only apparently commercial paper, regularly indorsed.

In fact the defendant, a stranger to the note, indorsed it in blank at the request of the plaintiff, who afterwards indorsed it over the defendant's name and procured it to be discounted at the bank. As between the parties it was the case of a note indorsed in blank by a stranger, the *primâ facie* import of which was that the indorser would pay it if it could not be collected of the maker by the use of due diligence. But the law permitted the defendant to show the real contract, and he proved that his indorsement was intended as security for the bank only, and was made because the bank would not discount the note for the plaintiff on the security of the maker alone, but required an indorser. So the plaintiff, who was the payee, and the first indorser in order of names, though second in order of time, failed to recover.

In the case at bar the defendant indorsed the notes in the presence of their maker and the plaintiffs before they were delivered. There was no conversation at that time in relation to such indorsement, nor ever any between the plaintiffs and defendant in relation thereto, nor any evidence of any agreement between them different from that which the law imports from the blank indorsement of the defendant under the circumstances stated. Such circumstances certainly indicate that the indorsement was made for the security of the plaintiffs.

At their maturity the notes were duly presented for payment, but were not paid. Due notice of their dishonor was given to the defendant, and subsequently this suit was brought. We see no sufficient reason why, under the statute, the defendant must not be held as an ordinary indorser of negotiable paper.

As the law now stands, if a party intends to contract only as second indorser, he should see to it that the location of his name accords with such intention. If he intends to contract as guarantor or to make any different contract from that of an ordinary indorser, he should write it out above his signature.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

DAVID YUDKIN *vs.* ROBERT O. GATES, SHERIFF.

New Haven and Fairfield Cos., April T., 1891. ANDREWS, C. J., LOOMIS SEYMOUR, TORRANCE and FENN, Js.

The right of appeal from a lower court to the Supreme Court, given by Gen. Statutes, § 1129, depends upon the fact that the appellant is a party to the suit and not upon a determination of the question whether he is aggrieved by the decision appealed from.

Upon a writ of habeas corpus, where the plaintiff is held in custody upon a mittimus, the sheriff is the proper party defendant.

Gen. Statutes, § 3392, provides that "no person shall be committed to prison without a mittimus, signed by a proper magistrate, declaring the cause of commitment;" and sections 672 and 675 provide that no justice of the peace shall "act" in any cause where he is attorney for either party or has a pecuniary interest in the suit. A justice of the peace who was attorney and bondsman for costs in a suit brought by *A* against *B*, and bondsman for costs for *C* in another suit against *B*, in which suits *B's* body was attached, signed a mittimus in each case committing *B* to jail for failing to give bail for his appearance in court. Upon a writ of habeas corpus brought by *B* it was held—

1. That by the term "act" in the disqualifying statutes referred to, judicial action alone was not intended, but every act or proceeding in a suit.
2. But that the act of signing the mittimuses in the present case was a judicial act, inasmuch as it required a finding by the magistrate of the cause of commitment.
3. That the mittimuses were therefore not signed by a "proper magistrate," and were of no validity.

It seems that the mittimuses, being valid on their face, would protect the officer.

The signing of mesne process by magistrates disqualified to act in the suits is upheld by long and settled usage.

[Argued in advance of the term, on March 6th, and decided April 21st, 1891.]

HABEAS CORPUS in the Court of Common Pleas of New Haven County. Heard before *Deming*, *J.*, and judgment rendered for the plaintiff. Appeal by the defendant. The case is fully stated in the opinion.

J. W. Alling, for the appellant.

C. Kleiner, for the appellee.

FENN, J. This is a writ of *habeas corpus* in favor of David Yudkin, and against the sheriff of New Haven County, who made return to the Court of Common Pleas for said county that he held the body of the plaintiff by virtue of two warrants of commitment, issued upon two actions at law, by F. W. Holden, justice of the peace. The hearing was had upon the agreed statement of facts "that at the time of signing the mittimuses said Holden was the bondsman in both actions, that he was then the attorney of the plaintiffs in one of the actions, and that he was not otherwise interested in the suits." The court found that Holden was disqualified and not a proper magistrate, and that therefore the mittimuses were illegal and void, and ordered that the plaintiff be discharged; from which judgment the defendant appealed, both parties signing a stipulation that the case should be argued at this session of this court. A motion to dismiss was filed, on the ground that the defendant Gates could be in no way aggrieved by the judgment, no costs having been taxed against him, being, by the fact that the mittimuses were valid on their face, protected from any action against him for holding the plaintiff thereunder; that he had no natural right to the custody of the plaintiff, and so far as the defendant was concerned the only judgment is that the plaintiff be discharged; that it was to be presumed that all parties whose interests could be affected by the judgment had actual notice and might have availed themselves of their statutory right to be made parties; that, at any rate, in questions of jurisdiction the parties to the record determine the controversy; and that therefore the defendant was not, under the provisions of General Statutes, § 1129, entitled to appeal, and this court was without jurisdiction. It was decided that the question presented by this motion should be argued with the appeal and the decision reserved.

We think the motion should be denied. The statute referred to provides that if either party *thinks himself aggrieved*, he may appeal. This language plainly expresses, what we should hold to be the rule had the words "thinks himself" been omitted, namely, that the right to appeal depends upon

the fact of being a party, not upon whether it shall finally be determined that the decision is one by which he is aggrieved. Any other construction would involve the decision of the question raised, in a preliminary hearing as to whether it could be raised. The plaintiff does not deny that the defendant is a party. He was expressly made so, and the only one, by the plaintiff himself. If he was not a party, there was none except the plaintiff in the court below. Besides, we think that the sheriff is the real and proper defendant in such cases. It is the universal practice to make him such. It would not be necessary, in order to constitute him a proper party to the action, that he should have a pecuniary interest in the controversy, but it would be easy to see that he has or might have.

Coming to the main question in the case, we think the decision of the court below should be sustained; that Justice Holden was disqualified both by statute and at common law, and was therefore not a proper magistrate to issue the mittimuses under General Statutes, § 3392. By statute, under both sections 672 and 675, being attorney in one case, and the bondsman for non-resident plaintiffs in both, he was disqualified from acting. It was the claim of the defendant that by the word *act*, as used in these sections, judicial action in the actual trial of the case was meant. But this precise question has been decided otherwise in *New Hartford* v. *Canaan*, 52 Conn., 166, where this identical expression, in what is now the last part of section 675, was construed, and the court says:—"This language is so exceedingly broad, embracing in terms any act and any proceeding, that we do not feel at liberty to accept the ideas of the plaintiffs' counsel and restrict its application exclusively to an actual trial in court before the interested magistrate." The distinction between that case and the present is, that in the case cited this construction was used to prevent disqualification; in the present it will cause it; but we think, when the object of such statutes, which is, as was said in *Dodd* v. *Northrop*, 37 Conn., 216, to "secure the utmost fairness and impartiality," is considered, that (as is also suggested in that

case), the construction which is in furtherance of that object should be most liberal.

As before stated, we think the justice should be disqualified at common law, but we need not pursue the subject further than to cite the case of *Doolittle* v. *Clark*, 47 Conn., 316, the principle of which decision appears to be applicable to the present case.

We are fully aware that the broad construction which we have given to sections 672 and 675 of the statutes may appear to warrant the contention that the mere signing of writs of mesne process, whether of attachment or summons, is within the prohibition of the statutes. Indeed, we are by no means certain that we should hesitate to so hold, provided we felt at liberty to treat the question as of first impression. It would not, however, even be possible to so consider it. The uniform practice of the bar, and of all officers having authority to sign writs, has at all times been, and continues to be, opposed to such construction. The controlling force of such long continued practice is matter of elementary law. 1 Swift's Dig., 12, par. 16; *Keys* v. *Chapman*, 5 Conn., 171; *Gould* v. *Smith*, 30 id., 88; *Nugent* v. *Wrinn*, 54 id., 275; *State* v. *Hoyt*, 46 id., 338; *State* v. *Nyman*, 55 id., 18; *Flynn* v. *Morgan*, 55 id., 142; *In re Bion*, 59 id., 385. No such practice, so far as we know or believe, affects the consideration of the question now before us. Certainly from the nature of the transaction it would, if it existed at all, be necessarily comparatively very limited. Besides, there may be said, in support of the popular construction as to original writs, that it has always been understood and held that under our somewhat peculiar practice the signing of mesne process is a purely ministerial act. *Windham* v. *Hampton*, 1 Root, 175. The General Statutes, § 892, authorizes such signature by commissioners of the Superior Court, who are in no sense judicial officers, and as sections 672 and 675 relate only to justices of the peace, the literal construction of these statutes, if held to extend to the simple signing of writs of summons or attachment, would disqualify a justice from the performance of acts which a commissioner of the

Superior Court would not be disqualified to perform. Indeed, in the history of the statute, now section 672, it may be noticed that by an amendment, passed in 1882, the words "or signed" were included, thereby expressly making the signing one of the acts in relation to the writ, declaration or complaint, which disqualified a justice of the peace, and that the striking out of these two words was the sole object of a reenactment in 1884; while, on the other hand, it may be said in passing, that the last clause of section 672 clearly indicates that disqualification is not to be confined to the trial of the action, since a minor degree of interest, or a more indirect one, is declared sufficient to disqualify from that act.

The transaction under consideration is of a different character and not solely ministerial. The statute, section 3392, provides that no person shall be committed to prison without a mittimus. The object of the statute is not material; the requirement is absolute. The mere signing of a mittimus may be as purely ministerial as the signing of a writ of attachment or summons, if that were all; but it is not all. It may be also true that, as applied to a civil action, it is ancillary to the original writ. So indeed is an execution, to which it is much more clearly assimilated than to the original process, for like the execution, and unlike the writ, it is based upon, it presupposes, something in the nature of a judicial act—a judicial, or at least a quasi judicial finding. Every mittimus requires this. Therefore it is that they must be signed, not by a mere commissioner of the court, but by a proper magistrate. Gen. Statutes, § 3392. In 1 Swift's Digest, 607, it is said, speaking of a mittimus of the kind under consideration:—"If the person so attached is unable, or neglects or refuses, to procure bail for his appearance at court, the officer holding him *must* apply to some justice of the peace, who *may* grant a mittimus, by which he *must* commit him to jail." The absolute *must*, in both instances, relates to the officer; the discretionary or judicial *may*, to the justice. As above stated, every mittimus requires, as a precedent, a finding. If it issues in a criminal case, it requires a conviction, a binding over for want of bonds, or,

when not bailable, on probable cause found, or for want of bonds on appeal taken. If for sureties of the peace, as in *In re Bion*, 59 Conn., 372, under Gen. Statutes, § 695, that the complainant has just cause to fear, and that the accused has refused to find sureties. This finding may, as the nature of the case warrants, be made either by a court, magistrate or jury, and the mittimus may be signed by such magistrate or by the clerks of courts having such officer acting under and by authority of the court. But it is based upon, and can only come into existence as based upon, some precedent judicial act or finding. So also in civil actions, the execution issued upon final judgment, in a case where the body is liable, is itself in terms a mittimus, (Gen. Statutes, § 1155,) and can only be issued by the judge or clerk of the court, as the act of the court which made the finding which performed the judicial function of which such mittimus is the culmination. So, in the case of commitment on application of bail or surety, (Gen. Statutes, § 962,) the statutory procedure requires application to a justice of the peace in the county, the production of bail bond, or evidence of being bail or surety, and verification of application by oath or otherwise. So finally, in the case under consideration, the justice in fact found, as the record discloses, that the plaintiff's body had been attached by the officer by virtue of a writ of attachment, that he neglected and refused to give bail for his appearance, and that a reasonable time had been allowed him therefor; all of which, being conditions necessarily precedent to a commitment, require to be found, and in the finding and recital of which the justice followed, in identical language, the form sanctioned by universal and immemorial practice in such cases, and found in 2 Swift's Digest, 848. It is because we think that the interested justice ought not, upon any construction of the statutes, or by the principles of the common law, to be qualified to make such finding, any more than we think he would have been, with equal interest, to commit to reformatories, in cases where no appeal lay from his judgment, like *Reynolds* v. *Howe*, 51 Conn., 472, that we hold the act performed by the

justice, although no appeal lay therefrom, and perhaps the plaintiff had no right to be heard thereon before the justice, to be judicial in character, and, by reason of his disqualification, not within his jurisdiction, and therefore void. Though the mittimuses, being valid upon their face, would, we think, protect the officer.

There is no error in the judgment complained of.

In this opinion ANDREWS, C. J., and SEYMOUR, J., concurred. LOOMIS and TORRANCE, JS., dissented.

EDMUND M. FERGUSON AND OTHERS *vs.* THE BOROUGH OF STAMFORD.

New Haven and Fairfield Cos., Oct. T., 1890. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, JS.

The charter of a borough authorized it to provide a general system of sewerage and the warden and burgesses to defray so much of the cost as the freemen of the borough should order, by assessment on property benefited, the apportionment to be made by three disinterested freeholders appointed in a certain manner. The borough established a system of sewerage, and the warden and burgesses recommended the adoption of, and the borough adopted, a resolution that $25,000 of the cost should be assessed upon property benefited. A part of this sum was, by a committee of freeholders appointed by a judge of the Superior Court, assessed upon the plaintiffs as their portion for the benefit to their property. In a suit brought by them to set aside the assessment as void and as a cloud upon their title, it was held—

1. That the warden and burgesses were not required, in fixing upon the sum of $25,000 as the amount to be assessed for benefits, to determine what particular property was benefited by the sewer, and to what extent.
2. That it was not necessary that they should first try to agree with parties benefited upon the amount of the benefits.
3. That the apportionment of the sum assessed for benefits was to be made by a committee appointed by a judge of the Superior Court.
4. That it was not a reason for declaring the assessment void that it did not clearly appear whether it was for special or general benefits. Assessments for other than special benefits having never been sustained in

this state, there might reasonably be a presumption that an assessment was for special benefits unless the contrary appeared.

5. That if this presumption was not warranted, yet the court, after the plaintiffs had had the benefit of the improvement, would not, in the exercise of its discretion as a court of equity, set the assessment aside on the ground that it did not clearly appear that it was for special benefits.

6. That in view of the uniform practice of assessing property only for special benefits, the statute authorizing the present assessment, though not limiting it in terms to special benefits, would be construed as intending only such benefits.

7. That the assessment made upon the property of the plaintiffs by the committee was not rendered invalid by the omission of an order of the court accepting it. The committee, though appointed by a judge of the Superior Court, was not an arm of the court, and no acceptance of its report by the court was necessary.

8. That the remedy of a party dissatisfied with the assessment upon his property in such a case as this, was not by a suit like the present one, but by an appeal from the assessment.

In a suit in equity evidence may be received by the court to enable it to exercise its discretion wisely, that would not have been admissible as pertinent to the issues of fact in the case.

If a statute is rendered unconstitutional by one interpretation and will reasonably bear another which will save its validity, it is ordinarily to receive the latter.

[Argued November 7th, 1890—decided April 20th, 1891.]

SUIT to set aside an assessment of benefits for a city sewer as void and as a cloud upon title; brought to the Superior Court in Fairfield County and heard, upon a demurrer to sundry paragraphs of the complaint, before *J. M. Hall*, *J.* Demurrer sustained, and the remaining issues tried to the court before *Fenn*, *J.* Facts found, and judgment rendered for the defendant, and appeal by the plaintiffs. The case is fully stated in the opinion.

E. L. Schofield and *N. R. Hart*, with whom was *J. E. Keeler*, for the appellants.

S. Fessenden and *N. C. Downs*, for the appellee.

CARPENTER, J. In November, 1885, the borough of Stamford adopted a general system of sewerage for the use of the borough, and voted that $25,000 of the cost of con-

struction be defrayed by assessment upon the property of such persons as might be benefited thereby, and that the remainder of the cost, including damages and expenses, be defrayed by the issue and sale of bonds. Immediately thereafter the borough entered upon the construction of said system of sewerage, and completed it in December, 1888.

In February, 1887, the borough applied to a judge of the Superior Court for the appointment of suitable persons to ascertain and determine the apportionment of such assessment of benefits upon the property of such persons as were benefited thereby. Upon that application three persons were appointed, who made a report of their doings to the Superior Court in December, 1887. The portion of the assessment upon the property of the estate of John Ferguson, deceased, amounted to $674.36. That estate is now owned by the plaintiffs as tenants in common, and the assessment thereupon is the matter now in controversy. On the 4th of April, 1888, certificates of lien were filed in the office of the town clerk of Stamford, to secure the payment of said assessment. The object of the suit is that the assessment may be declared void, and that the cloud upon the plaintiffs' title, created by the certificates of lien, may be removed.

The principal questions arise upon the fifth and sixth paragraphs of the first count of the complaint, which are as follows:—

"5. The said warden and burgesses have at no time since the date of said meeting of said freemen, ascertained or determined, or attempted to ascertain or determine, whether the property of the plaintiffs hereinafter described was or would be benefited by said general system of sewerage; neither have they ascertained or determined, or attempted to ascertain or determine, to what extent, if any, said property of the plaintiffs was or would be benefited by said system of sewerage; nor have they made or attempted to make any assessment of benefits on said property of the plaintiffs to defray any part of the cost of said system of sewerage, otherwise than by the resolution set out in exhibit *C;* nor have they agreed or attempted to agree with the plaintiffs, or

either of them, as to the amount of benefit, if any, which said system of sewerage was or would be to the plaintiffs' said property, or any part thereof.

"6. Without said warden and burgesses having ascertained or determined, or having attempted to ascertain or determine, whether the property of the plaintiffs was or would be benefited by said system of sewerage, and without having ascertained or determined, or having attempted to ascertain or determine, to what extent, if any, said property of the plaintiffs was or would be benefited by said system of sewerage, and without having made, or having attempted to make, any assessment of benefits on said property of the plaintiffs to defray any part of the cost of said system of sewerage, and without having done any act or thing whatsoever in the matter of apportioning any assessment of benefits upon lands of the plaintiffs, and without having agreed, or having attempted to agree, with the plaintiffs or either of them as to the amount of benefit, if any, which said system of sewerage was or would be to the plaintiffs' said property or any part or portion thereof, an application was made in the name of the warden and burgesses to the Hon. Sidney B. Beardsley, a judge of the Superior Court, for the appointment of three judicious and disinterested freeholders of Fairfield County to ascertain and determine the apportionment of the assessment of twenty-five thousand dollars of the cost of said general system of sewerage, ordered and directed by the freemen of said borough upon the property of such person or persons as might be benefited thereby."

These paragraphs are demurred to as follows:—"The defendant demurs to paragraphs five and six, because the warden and burgesses of said borough of Stamford are not by law required to do any of the acts, the omission of which is complained of in said paragraphs; that the duties and requirements of said borough of Stamford, with reference to the acts, matters and subjects described and referred to in said paragraphs five and six, are wholly fixed, determined and provided for by the charter of the borough of Stamford and the amendments thereto, and that by the provisions of

said charter and amendments thereto said warden and burgesses are not required to do or attempt to do any of the acts the omission to do which is complained of in said paragraphs, and because sections three and four of said charter, and the amendments thereto approved April 5th, 1887, require and provide that the ascertainment or determination, or attempted ascertainment or determination, of whether the said property of the plaintiffs would be benefited by said system of sewerage, and the ascertainment or determination, or attempted ascertainment or determination, of the extent of such benefit to the plaintiffs' property, and the assessments of benefits on said property of the plaintiffs so far as said charter provides that such ascertainment of benefits or the extent thereof or that such assessment of benefits shall be made, the same shall be made by three judicious and disinterested persons, freeholders of said county, appointed by a judge of the Superior Court, for the purpose of enabling said warden and burgesses to defray so much of the cost of said system of sewerage as they shall order and direct to be assessed upon the property of such person or persons as may be benefited by said system of sewerage, in conformity to a direction and order of the freemen of said borough. Second. Because it does not appear that the plaintiffs have in any manner been injured by the failure of the warden and burgesses to do any of the acts, the omission to do which is complained of in said paragraphs." The demurrer was sustained. The Superior Court tried the issues of fact and rendered judgment for the defendant. The plaintiffs appealed.

The reasons of appeal are grouped under three general heads.—The first is that the court erred and mistook the law in sustaining the defendant's demurrer to paragraphs five and six of the first count, and to paragraph three of the second count of the plaintiffs' complaint, because—1. The warden and burgesses were required, before the appointment of freeholders, to ascertain and determine what property of the plaintiffs was or would be benefited by the system of sewerage. 2. To determine to what extent the

property of the plaintiffs was or would be benefited by the system of sewerage. 3. To make an assessment of benefits on the property of the plaintiffs. 4. To agree or attempt to agree with the plaintiffs as to the amount of benefits, if any, which said system of sewerage was or would be to their property.

The questions raised by these sub-divisions depend upon the construction of the charter. Prior to 1881 the power of the corporation over sewers was confined to the limits of the borough. 3 Special Laws, p. 257, sec. 7. In 1881 an act was passed amending the charter. Section first authorizes the borough to provide a general system of sewerage, and to locate one or more points of discharge in the waters of Long Island Sound; section second authorizes the issue of bonds for sewer purposes; and the third and fourth sections are as follows:—

"Sec. 3. The said warden and burgesses are hereby authorized and empowered to defray so much of the cost of said system of sewerage as the freemen of said borough shall order and direct, by assessment upon the property of such person or persons as may be benefited thereby; the apportionment of such assessments and of all benefits arising thereunder to be ascertained and determined in the same manner as is hereinafter provided for the assessment of damages.

"Sec. 4. Said warden and burgesses are hereby authorized and empowered, should it become necessary in order to carry out any system of sewerage contemplated by this act, to construct the same in any portion of said borough, in, through, over, into and along any highway, water-course, river, or public property, as they may find it expedient, and through, across or under any lands situate in said borough or outside of or beyond the corporate limits of said borough; provided that they first obtain the permission and consent thereto in writing of the owner or owners of such lands, and pay such owner or owners such sum as may be agreed upon with them as compensation for such privilege; and if such consent cannot be obtained, then the warden and burgesses

shall be, and they are hereby, authorized and empowered to build and construct such sewers without consent; provided also, that prior to the laying or construction of any such sewer or sewers the said warden and burgesses shall have paid to the owner or owners of the land or lands over, through, across or under which said sewers are to pass, such sum of money in damages as may be fixed and determined by three judicious and disinterested persons, freeholders in Fairfield County, who shall be appointed by any judge of the Superior Court; and the persons so appointed shall, within twenty days after their appointment, give notice in writing to the warden of said borough, and to the other parties interested, of the time and place when and where they will meet to attend to the duties of their appointment, and such persons shall make due return in writing of their finding and award to the Superior Court; and any and all other claims for damages arising hereunder, other than are hereinbefore provided for, shall be heard and determined by three judicious and disinterested persons appointed as aforesaid."

Section fifth provides for an appeal. 9 Special Laws, pp. 46–7.

In 1887 the third section was amended so as to read as follows:—

"Sec. 1. The said warden and burgesses are hereby authorized and empowered to defray so much of the cost of said system of sewerage as the freemen of said borough shall order and direct, by assessment upon the property of such person or persons as may be benefited thereby; the apportionment of such assessment and of all benefits arising thereunder to be ascertained and determined by three judicious and disinterested persons, freeholders in Fairfield County, who shall be appointed by any judge of the Superior Court; and the persons so appointed shall cause a notice of the time and place when and where they will meet to attend to the duties of their appointment, signed by them, to be published in two newspapers published in said Stamford at least three weeks successively before the time fixed in said notice for said meeting; and at the time and place men-

tioned in said notice, and at any meeting adjourned therefrom, said persons shall hear all the parties in interest who may appear and desire to be heard in relation thereto, and such persons shall make due return in writing of their finding and apportionment to the Superior Court.

"Sec. 2. The notice prescribed in section one of this amendment, whether made by persons already appointed by a judge of the Superior Court, under sections three and four of the amendment of said charter, approved March 16th, 1881, or who may be hereafter appointed under section one of this amendment, if given within sixty days after their appointment, shall be deemed sufficient and legal notice to all parties in interest." 10 Special Laws, p. 660.

Under the first general head the first three sub-divisions relate to the duty of the warden and burgesses in respect to the assessment of benefits. The plaintiffs' claim is that, before applying for the appointment of freeholders, it was their duty to designate the property of the plaintiffs which would be benefited, to determine the extent of the benefit, and to make the assessment. On the other hand the defendant claims that all the assessment which the charter requires of the warden and burgesses before the application was in fact made.

In the report which they submitted to the freemen of the borough at a meeting held November 11th, 1885, they recommended "that $25,000 of the cost of such construction be defrayed by assessments upon the property of such persons as may be benefited thereby, to be determined and ascertained in the manner provided by law." The freemen at that meeting voted as follows:—"*Resolved*, that the warden and burgesses are hereby authorized and directed to defray $25,000 of the cost of said general system of sewerage, adopted by the warden and burgesses, and approved by the freemen of the borough at this meeting, by assessment upon the property of such person or persons as may be benefited thereby; the apportionment of said assessment, and all benefits thereunder, to be ascertained and determined in the manner provided by law."

By a reference to the report of the freeholders it will be noticed that they made no assessment, in the sense in which that word is here used, but simply determined "the apportionment of the assessment of $25,000 of the cost of the general system of sewerage adopted and provided by the warden and burgesses of the borough of Stamford, and ordered and directed by the freemen of said borough, upon the property of such persons as may be benefited thereby."

On January 9th, 1888, the warden and burgesses adopted a resolution as follows:—

"Whereas, the persons appointed by a judge of the Superior Court, upon the application of the warden and burgesses of the borough of Stamford, have made return in writing to said court of their finding and apportionment of the assessments made to defray twenty-five thousand dollars of the cost of the system of sewerage, heretofore adopted by said warden and burgesses—*Resolved*, that such assessments, for defraying said sum, be made upon the property of the persons benefited, in accordance with the findings and apportionment herein referred to, and that the clerk be directed to cause to be published a notice signed by the warden or clerk of said borough, containing the names of the persons thus assessed, with the amount of their respective assessments, in each of the newspapers published in said Stamford, for two weeks successively."

Thus it clearly appears that the warden and burgesses in fact made the assessment of $25,000 in gross, upon all the property benefited. They did not themselves apportion that sum among the owners of the property, but they caused it to be done in exact conformity with the directions of the charter—"the apportionment of such assessment to be ascertained and determined by three judicious and disinterested persons," etc.

We do not think that the act of 1881, as amended by the act of 1887, under which the general system of sewerage was constructed, required the warden and burgesses to determine what property of the plaintiffs was benefited thereby, and to what extent, and to make the assessment

thereon, otherwise than they did by the proceedings above referred to.

The fourth subdivision under this head presents the question whether it was necessary for the warden and burgesses, before applying for the appointment of freeholders, to make an effort to agree with each land owner upon the amount of benefit which he should pay.

The charter of 1854 required the warden and burgesses to make the assessment of benefits and the apportionment thereof, but there was no provision requiring them to agree, or to try to agree, with each land owner benefited, before making such assessment and apportionment. 3 Special Laws, p. 257, sec. 9. If we turn to the acts of 1881 and 1887 we shall see that there is no such requirement in them; certainly none in express terms. In the charter of 1882 there is such a requirement; but that act does not apply to the general system of sewerage now under consideration. It expressly provides "that nothing herein shall be taken in any wise to repeal the act of 1881." The latter act relates solely to a general system of sewerage, and it was clearly the intention of the legislature that such system should be constructed under it, as it might be amended from time to time, and that the general charter of 1882 should not affect it.

The act of 1881 required the freeholders to be appointed by a judge of the Superior Court; the act of 1882 required them to be appointed by the warden, or, in certain cases, by the senior burgess. The subject matter being different, under the saving clause above referred to, there is no conflict, and both provisions may well stand together. So too in respect to trying to agree upon the amount of benefits; the act of 1882 requires it, the act of 1881 does not.

It seems to be claimed that the clause of section three of the act of 1881—"the apportionment of such assessments and of all benefits arising thereunder to be ascertained and determined in the same manner as is hereinafter provided for the assessment of damages," carries with it the same obligation to try to agree upon the amount of benefits to be

paid that is subsequently required in respect to damages. Such is not the express provision of the act, and no such inference can fairly be drawn from it. Damages and benefits are essentially different. Damage in each particular case stands by itself. That which one sustains is unaffected by that sustained by another, and there are as many cases as there are land owners. On the other hand, in this case a fixed sum is assessed upon all who are benefited, to be apportioned among them; there being but one case, to which each land owner is necessarily a party, and to some extent his interest is antagonistic to all the others. What he gains the others lose, and *vice versa*. If some are agreed with and others are not, freeholders are appointed to apportion among those who have not agreed. How are they to proceed? Are they to apportion the amount not provided for by the agreements among those not agreed? That might result in gross inequality. The terms of the statute manifestly do not contemplate such a state of things. Moreover, the parties to the several agreements and the freeholders might differ materially as to the proportion which the several landholders should pay. The result might be confusion and serious embarrassment. It may be said, and perhaps with truth, that the same consequences might result in a case arising under the charter of 1882. But we are not now construing that charter, and we have no knowledge as to the circumstances that may attend such a case. It is enough for our present purpose that the acts applying to the case before us clearly contemplate that the apportionment of the sum assessed, $25,000, among all the parties benefited, shall be made by the freeholders appointed by a judge of the Superior Court.

Under the fifth subdivision it is claimed that the act of 1887 is not retroactive, and does not apply to proceedings before them begun under the act of 1881. Perhaps we do not fully apprehend the force of this claim. The later act in terms purports to be an amendment of the prior. It takes away no right or privilege granted by the former, and is not at all inconsistent with it. It is remedial in its nature.

The first section prescribes the notice to be given by the freeholders appointed by a judge of the Superior Court; and the second provides that such notice, whether given by persons theretofore or thereafter appointed, if given within sixty days after their appointment, shall be legal notice, etc. It is too clear to require argument that the legislature intended that the act of 1887 should affect the act of 1881, and should apply to pending proceedings. In this we see nothing objectionable, as no rights are injuriously affected thereby. The construction of the act of 1881, if at all doubtful, is affected by the act of 1887, rather than by the charter of 1854.

The defendant demurs to the third paragraph of the second count. That paragraph is as follows:—"Said claimed assessments were made on large areas of land in no wise or sense specially benefited by said system of sewerage, and on lands owned, occupied and used by the borough of Stamford, one parcel thereof being a part of said sewerage system, and on public squares and parks belonging to said borough, and on lands not abutting upon any highway in said borough in which said sewer is constructed, and said pretended assessment was by said Hoyt, Baker and Ferris apportioned upon lands of the plaintiffs and others, without regard or reference to the value of said land, with or without improvements, but solely with regard to area; and by it large amounts were apportioned upon lands, including land of the plaintiffs, receiving little or no special benefit; and smaller amounts on lands receiving larger benefits; and unequal amounts on lands lying side by side and similarly situated and equally benefited; and said apportionment was not made uniform and proportional to the special benefits accruing to the several pieces of property respectively charged thereby."

The demurrer is as follows:—"1st. The defendant demurs to paragraph three of the second count of the plaintiffs' complaint, upon the ground that it does not appear that the plaintiffs were in any manner injured by the assessment of benefits made in the manner therein described. 2d. Because the remedy of the plaintiffs for such acts and for any injury

sustained by them thereby was and is by an appeal from such assessment, in accordance with the provisions of the charter of said borough of Stamford. 3d. Because from said acts the plaintiffs are not entitled in equity to the relief asked for in this complaint."

With regard to the first ground of demurrer. It is conceded that this paragraph does not allege injury in terms. The plaintiffs claim however that that is not necessary if it appears from the whole case that they have actually sustained injury. It will be noticed that the judgment which the plaintiffs claim is that the whole assessment may be declared void. Now it may be that if the assessment is void the law will imply injury. But it is not claimed that the assessment is void by reason of the facts alleged in this paragraph. If void for reasons alleged in other parts of the complaint then the plaintiffs have no use for this paragraph. If not void, then the implication of injury which the plaintiffs resort to fails. So that if the sufficiency of this paragraph depends upon the existence of injury, it will be difficult to sustain it.

The second ground of demurrer, that the plaintiffs' remedy, if any, is by an appeal, is well taken. It may be that if the facts suggested had been clearly and distinctly stated they would have shown a good reason for a re-assessment. But that, as the plaintiffs say, is not the remedy they want; they claim that the whole assessment is void and should be set aside. We are of the opinion that the paragraph does not show good reasons for that; consequently the demurrer, on the third ground, was properly sustained.

Under the second general head of the reasons of appeal, the plaintiffs say that the court erred because the amendments, (acts of 1881 and 1887) "do not limit the assessment thereby authorized to special benefits" and that "it does not appear that the claimed assessment against the plaintiffs' property was made for and limited to special benefits accruing thereto." In this they follow substantially the averments in paragraph two of the second count. The answer admits that "it does not appear that said proceedings

were taken for the purposes of an assessment for special benefits, or that the assessment made upon the plaintiffs' property was for special benefits accruing thereto, otherwise than is set forth in said resolutions, application and return referred to in said paragraph." The finding of the court is substantially in the same language.

Conceding that the record leaves it in doubt whether the assessment was for special or general benefits, is that a sufficient reason for declaring the assessment void?

The borough regarded a system of sewerages, what it was in fact, an improvement essential to the health and comfort of the community. For more than a quarter of a century such improvements have been paid for, in part, by an assessment of benefits upon those who are specially benefited. It is the usual method in such cases of exercising the power of taxation. Assessments for other than special benefits have never been sustained in this state. Is there, or is there not, some presumption that this is an ordinary case of special benefits until the contrary appears? Should it not be shown affirmatively that the assessment is in fact illegal before the court can set it aside?

Again. The improvement has been completed. All the community is enjoying its advantages. All the real estate in the borough, including that of the plaintiffs, has been enhanced in value thereby. The borough has become obligated to pay therefor the sum of $100,000, individuals have been assessed for $25,000 more, and of that amount the sum of $22,000 has been paid; of the unpaid balance over $600 is assessed upon the plaintiffs. They, while enjoying the advantages of the improvement, without showing that the assessment against them is unjust, call upon the court to interfere in their behalf and excuse them from paying their just and reasonable proportion of the cost. Is that a case which commends itself to the favorable consideration of the court? Will it be a wise exercise of the discretion of the court, upon the mere suspicion of an improbable possibility, to declare this assessment void and thereby throw this com-

munity into the confusion and embarrassment which must surely follow?

But are we not conceding too much? May not the statute be fairly interpreted as meaning only special or direct benefits? The word "benefits," when used unqualifiedly, is a comprehensive term, including direct or special benefits, and indirect or general. But when the connection in which it is used, and the subject matter to which it is applied, are such as to indicate that it is used in a limited or qualified sense, it is the duty of the court to give it that interpretation. It is used here in the charter of the borough. In the ninth section of the charter of 1854 it is qualified by the use of the adverb "specially." In the act of 1881 the adverb is dropped. But it is apparent that it is used in the same sense, and signifies special and direct benefits. This will appear more clearly perhaps from a consideration of the subject matter. It is used with reference to an improvement undertaken by the community for the general benefit of the community, but it results in a direct benefit to those who have immediate access to the sewer—a benefit in which those more remotely connected with it do not participate. Now for many years it has been the practice to assess as a betterment upon the property of persons so directly benefited, a portion of the expense. But these assessments have their limitations. Betterments may not be assessed upon those who are only benefited as members of the community at large; they may not be assessed to an amount greater than the amount of benefits conferred; and, like all other taxation, they should be apportioned, as far as possible, equitably among all who are in like manner interested. Now when the legislature authorized this borough to make this assessment, it will be presumed that it contemplated only assessments under the conditions, limitations and qualifications above referred to. The decisions of this court clearly justify this view. In *Cone* v. *City of Hartford*, 28 Conn., 363, the statute authorized an assessment for a sewer on persons "in any manner benefited thereby." As eminent a lawyer as the late Mr. Hungerford, while objecting

to the validity of the assessment on other grounds, made no claim that it was void because it was not limited to special benefits in terms. The assessment was sustained. In *Dann* v. *Woodruff*, 51 Conn., 203, we held that the words "specially benefited" were not used in any technical sense, and that it is not necessary to allege the fact in those words, but that it may be inferred from the facts which do appear. So too, if it is apparent that the word "benefits" is used in a statute in the sense of "special benefits," the statute will be so interpreted and enforced. A statute which will admit of two interpretations, one just and valid, the other unjust and invalid, will ordinarily receive the former. It is no part of the duty of the court to be astute in order to invalidate a statute; it will rather strive to so interpret it as to sustain its validity, and give effect to the intention of the legislature. We must therefore reject in this case the rule so strenuously urged, that if what may be done under one interpretation is unconstitutional, the statute is void altogether, although susceptible of an innocent interpretation. The views expressed above are perhaps a sufficient answer to the constitutional objection.

Another objection is that the assessment made by the committee is without force for the reason that the Superior Court "passed no order, judgment or decree relating to or accepting the same." No such order was requisite. The charter, neither in terms nor by implication, requires it. It will be observed that the proceeding is not in the Superior Court. The committee, although appointed by a judge of that court, is not an arm of the court, and the validity of its proceedings in nowise depends upon any action accepting or approving its doings. The legislature doubtless could have provided for such action, and could have further provided that each person interested in the assessment might appear and be heard relative to the same; might have provided in short that in that way each person might have his or her day in court. But it has not done so. On the contrary it has provided that each party might have an appeal from the assessment, not by way of remonstrance, but by an application for

a re-assessment. There can be no presumption that the legislature intended a remedy by remonstrance and also by appeal. The law contents itself by giving each party a day, not several, in court.

Of course if the assessment is invalid, or if the plaintiffs have been deprived of any constitutional right, then the fact that a large majority of the parties in interest have paid their assessment is no answer to the plaintiffs' case. On the other hand, if the assessment is valid, as we think it is, and the plaintiffs have been deprived of no constitutional right, as we think they have not, then the admission of that fact in evidence can have done the plaintiffs no harm.

Moreover, this is an equitable action. Whether the relief prayed for will be granted is to a considerable extent at the discretion of the court. If the evidence was offered and received, as we may presume it was, merely for the purpose of aiding the court to exercise its discretion wisely, we see no objection to its admissibility.

We find no error in the judgment.

In this opinion the other judges concurred.

American Casualty Insurance & Security Company *vs.* Orsamus R. Fyler, Insurance Commissioner.

Hartford Dist., March T., 1891. Andrews, C. J., Loomis, Seymour, Torrance and J. M. Hall, Js.

A writ of mandamus may issue where the duty which the court is asked to enforce is the performance of some precise, definite act, or is one of a class of acts that are purely ministerial and in respect to which the officer has no discretion, and the right of the party applying is clear and he is without other adequate remedy.

It will not be issued where the effect would be to direct or control an executive officer in the discharge of a duty involving the exercise of discretion or judgment.

Application was made by a foreign insurance company to the insurance commissioner of this state to be admitted to do business in the state.

The commissioner had extensive powers and duties in the supervision of the insurance business of the state but no statute in terms made it his duty to admit the applicant, and whether the duty existed was to be determined by a construction of the statutes relating to insurance. Held that the commissioner's construction of these statutes, under which he decided that it was not his duty to admit the applicant, was an exercise of judgment, and that if the court was of opinion that the construction was an incorrect one, it yet could not interfere by way of mandamus.

In an application for a writ of mandamus, the alternative writ must show on its face a clear right to the extraordinary relief demanded, and the material facts on which the applicant relies must be distinctly set forth.

All formal objection to the writ must be taken by a motion that it be quashed.

[Argued March 6th,—decided May 25th, 1891.]

APPLICATION for a writ of mandamus to compel the defendant, insurance commissioner of this state, to admit the applicant, a foreign insurance company, to do business in the state; made to the Superior Court in Litchfield County and by agreement of the parties transferred to Hartford County.

The plaintiff, the American Casualty Insurance & Security Company, was incorporated under the laws of the state of Maryland and located in the city of Baltimore. Its articles of association stated its objects to be as follows:—

"To make insurance upon vessels, freights, goods, wares, and merchandise; upon dwelling-houses, stores, and all kinds of buildings; upon all kinds of property, including credits, profits, and choses-in-action; against injury, damage, loss, or destruction, arising from any unknown or contingent event whatever. To make all insurance connected with marine risks, the risks of transportation of freight, persons and passengers, and the risks of inland navigation. To make insurance against fire, and all insurance connected therewith. To make insurance upon cattle and live stock. To make insurance upon steam-boilers and all engines, machinery and connections operated by steam, against explosions and accident, and to repair, alter, replace, make inspections of, and issue certificates of inspection upon, such boilers, engines, machinery and connections. To make insurance upon elec-

trical plants and appliances and all the connections thereof, against loss and damage caused remotely or directly, and to repair, alter, replace, make inspections of, and issue certificates of inspection upon the same. To make insurance upon plate-glass against breakage. To make insurance against the liability of employers or others for injuries to their employees or to others. To make insurance against loss or damage arising remotely, or directly, from the action of the elements, air, wind, lightning, storm, water, flood, cold, frost, snow, heat, fire, fire-damp, gases, steam, electricity, earthquakes, land-slides, rust, mildew, poisons, decay, insects, animals, wild or domestic; or by accident, negligence, trespass, theft, burglary, embezzlement, fraud, forgery, breach of trust, tort, or breach of contract. And in addition to such insurance business, to guarantee the payment, performance and collection of promissory notes, bills of exchange, contracts, bonds, accounts, claims, rents, annuities, mortgages, choses in action, evidences of debt, and certificates of property or values, and the titles to property, real or personal; to receive on storage, deposit or otherwise, merchandise, bullion, specie, plate, stock, bonds, promissory notes, certificates, and evidences of debt, contracts or other property, and to take the management, custody and charge of real or personal estate or property, and to advance money, securities and credits upon any property, real, personal or mixed, on such terms, and with all such powers of sale and other disposition thereof, as shall be established by the by-laws of the corporation."

The company on the 9th of July, 1890, applied to the defendant, as insurance commissioner of the state, for permission to carry on in the state the following kinds of insurance:—"Against loss and damage caused by accident to persons or property, arising from explosion of steam-boilers or other causes; employers' liability insurance; and the insurance of the fidelity of persons employed in positions of trust." With the application was sent a certified copy of the charter of the company, a sworn statement of its condition, and a certificate of the insurance commissioner of Mary-

land of the payment of its capital and of its compliance with the laws of that state. A hearing was had before the commissioner, and afterwards a re-hearing, and on the 14th of November, 1890, the commissioner wrote the secretary of the company the following letter:—

"Dear Sir: Since the re-hearing granted you I have given careful consideration to your application in behalf of your company for permission to do business in this state. Your charter is an extraordinary one. In view of this, and in view of the fact that its strange provisions have not yet been interpreted by any course of business, I do not feel that I should be justified in assuming the responsibility of admitting you into this state. If you are to be admitted I prefer that the courts should take the responsibility of ordering it."

The present application for a writ of mandamus was immediately after brought. It alleged the incorporation of the company, its powers under its charter, its compliance with the laws of Maryland, its application to the insurance commissioner and his denial of the application, and its compliance with all the laws of this state relative to the admission of foreign insurance companies to do business in the state; and closed as follows:—"Said company therefore moves this honorable court to issue a writ of mandamus requiring said Orsamus R. Fyler, insurance commissioner as aforesaid, to admit said insurance company to do the kind of business specified in its said application within this state, and to issue certificates of authority to its authorized agents to transact its said business within the same, upon their complying with all laws of the state governing such agents, or to signify cause to the contrary."

In the Superior Court the defendant moved to quash the application, and the court, (*Fenn, J.*,) granted the motion, and the plaintiff appealed to this court.*

FENN, J. Upon consideration of the questions presented

* The opinion of Judge FENN, which was given in writing, explains the ground of his decision, and is in other respects of value.

by said motion I am of opinion that the commissioner's duties to determine whether an applicant for a certificate has complied in all respects with the statutory requirements prescribed by this state, and the laws relating to the premises, involving, as it does, not only the direct application of statutory provisions, but the question of their applicability, as far as the nature of the business may admit, that is, how far they are applicable to kinds of business not directly and specifically provided for, are, and must be, not ministerial only, but that they require the exercise of official judgment, and rest in his sound discretion, in the exercise of a duty confided by law; and that this court cannot, by mandamus, either control the exercise of that discretion, or determine upon the decision which shall be finally given. But I am further of opinion that when the commissioner does in fact decide, or is satisfied, that all the statutory requirements and laws of this state have been complied with, the limits of all discretion and judicial action have been passed, for I do not think the commissioner is vested with other and further discretionary powers, as, for instance, to determine upon the policy of the state in reference to the admission of such companies. I am, indeed, further of opinion that comity permits a corporation, duly organized under the laws of a sister state, to transact its legitimate business, that is, such business as is authorized by its charter, within the limits of this state, unless such business is expressly or by necessary implication prohibited or restricted by our legislative enactment or by our public policy affirmatively declared by legislative or judicial authority; and however wise it might have been to have declared such policy, enacted such laws, or vested other and additional discretion in the commissioner, which would have warranted a refusal on his part, notwithstanding the compliance with statutory requirements and laws, I am unable to discover it in our jurisprudence. It follows, therefore, that if the commissioner has decided, or is satisfied, that all the statutory requirements and laws have been complied with, his remaining duties are purely ministerial, and his action can be controlled by mandamus.

Such being, in my opinion, the principles applicable, I am nevertheless embarrassed in reaching a decision by what seems to me to be a want of preciseness in the pleadings, which has enabled the parties to argue the questions from different standpoints, reaching, naturally enough, opposite, even if equally logical, conclusions.

The fourth ground of the defendant's motion to quash is, that "it does not appear that the defendant has not proceeded lawfully by deciding that the plaintiff *has not complied with all the laws of this state.*" On the other hand the plaintiff, having alleged such compliance, contends that the defendant, by a motion in the nature of a demurrer, admits such allegation; and further claims that the commissioner's letter of November 14th, 1890, made by reference part of paragraph four, demonstrates that the refusal was not on the ground of any non-compliance on the part of the plaintiff, and that the defendant did not decide that the plaintiff "has not complied with all the laws of this state." Now I am of opinion that a demurrer, or a motion to quash, in no sense admits allegations except in the restricted meaning; that it does not deny, but questions or tests what their legal sufficiency is, or would be, if true. If, in fact, the commissioner's discretion to determine whether the laws of the state have been complied with cannot be regulated, controlled or reviewed by mandamus, it would seem to follow that the commissioner would not be required to make such return to the plaintiff's allegations of such compliance as would directly put in issue, and lead to the trial, in this court, of the very question which the commissioner has sole jurisdiction of, and the Superior Court has therefore no jurisdiction to try. Such a result would seem strange. But would it not follow if it were held that the defendant could not test the legal sufficiency of the allegation, without such test being an admission which would oust the very jurisdiction which it was his object to maintain? As to the letter: I think such weight as it has is evidential, and the issue to be tried is not adapted to the introduction of evidence. If paragraph four, including the letter, is relied on as an allegation of the ground of

the commissioner's refusal, it is certainly very indirect and highly argumentative. If the plaintiff's application had contained a direct, concise averment that the commissioner *found* or *was satisfied* that the plaintiff had complied with all the statutory requirements and laws of this state relating to the premises, but refused a certificate, the issue which would have arisen, whether of law or fact, must, in my opinion, have been certain and determinate, and the difficulty in reaching a result, which I have endeavored to indicate, would not have been experienced.

Inasmuch as this is what the plaintiff claims the fact to be, and such claim formed the basis upon which the plaintiff's argument was made, and as, when the variant standpoints of the plaintiff and defendant became manifest on the hearing the plaintiff's counsel stated that they desired opportunity to amend, if in the opinion of the court such amendment became material, I have concluded to state my views, and to grant leave to the plaintiff, within a reasonable time, if desired, to file such amendment as the plaintiff may deem necessary; otherwise the motion of the defendant will be sustained.*

W. F. Henney and *A. L. Shipman*, for the appellants.

1. A corporation organized under the laws of one state may conduct its business in another, subject only to the restrictions of local law. This is the law of comity, and the rights conferred by it are absolute. *People* v. *Fire Asso. of Philadelphia*, 92 N. York, 311; *Merrick* v. *Van Santvoord*, 34 id., 208; *Bard* v. *Poole*, 12 id., 495; *Bank of Augusta* v. *Earle*, 13 Pet., 519; *Cowell* v. *Colorado Springs Co.*, 100 U. S. R., 55; *State* v. *Fidelity & Casualty Ins. Co.*, 39 Minn., 538.

2. The local restrictions upon a foreign corporation seeking to do business in a state must be affirmatively expressed in the local law. "If the policy of the state or territory does not permit the business of the foreign corporation in its limits, it must be expressed in some affirmative way; it cannot be inferred from the fact that its legislature has made

* No amendment was filed by the plaintiff.

no provision for the formation of similar corporations, or allows corporations to be formed only by general law." *Cowell* v. *Col. Springs Co.*, *supra.*

3. The policy of the state in this regard must be evidenced by its statutes on that subject. "When the state does not forbid, or its public policy, *as evidenced by its statutes*, is not infringed, a foreign corporation may transact business within its boundaries, and be entitled to the protection of its laws." *People v. Fire Asso. of Philadelphia*, *supra.*

4. There is nothing in the laws of Connecticut, upon the admitted facts set up in the motion for a mandamus, which forbids the applicant company to transact its business here. In *Am. & Foreign Christian Union* v. *Yount*, 101 U. S. R., 352, the court said, after citing *Cowell* v. *Colorado Springs Co.* with approval:—"In harmony with the general law of comity obtaining among the states composing the Union, the presumption should be indulged that a corporation of one state, not forbidden by the law of its being, may exercise within any other state the general powers conferred by its own charter, *unless it is prohibited from so doing, either in the direct enactments of the latter state*, or by its public policy to be deduced from the general course of legislation or from the settled adjudications of its highest court."

5. The company's right to admission by the express terms of the statute depends upon the fact of compliance with statutory requirements and laws, and not at all upon a finding by the commissioner to that effect. The commissioner's powers and duties are fully stated and limited in one comprehensive phrase in the statutes:—"The insurance commissioner shall see that all the laws respecting insurance companies are faithfully executed." Gen. Statutes, § 2820. The marginal note entitles this section, "Powers and Duties of Insurance Commissioner." It is clear, therefore, that he is not to make new laws, or establish a new state policy, or set up new standards of solvency, or to do aught else but to see that the laws as he finds them are enforced. *People* v. *Bell*, 119 N. York, 175; *Daly* v. *Dimock*, 55 Conn., 579. The powers thus conferred differ radically from the powers

given the Kansas insurance commissioner, on which the case of *Dwelling House Ins. Co.* v. *Wilder*, 40 Kansas, 561, turns. His function is to find facts, and he has "the sole and exclusive charge and control over said insurance department." There are undoubtedly matters with regard to which the insurance commissioner is vested with discretion by our statutes. He may examine into the methods of insurance companies, and may require them to discontinue illegal and improper methods of doing business. This power is given him over any kind of insurance business, but it must be exercised *subsequent* to the admission to do business in Connecticut. (§ 2224.) His action in such cases, however, can be reviewed by the Superior Court. (§ 2823.) There are numerous sections in our statute with regard to insurance, but none of the others have any application whatever to the case of a foreign insurance company asking admission into this state. To say that the admission of the applicant company depends upon the finding of the commissioner of the fact of its compliance with the laws, and not upon such compliance, would open the door to the perpetration of the greatest injustice and construe our insurance law into an absurdity. Such a construction would not only violate the plain provisions of the statute, but would be at war with the well-considered decisions of the most intelligent courts of the land. By that construction our courts would be ousted of jurisdiction to construe insurance statutes governing the admission of foreign insurance companies to do business here, and to correct the mistakes of law made by the commissioner. Such a construction would place Connecticut in the singular position of clothing the legal blunders of the commissioner with the dignity of final decisions of our highest court. Every instinct of justice suggests that the question of compliance with our laws in all these particulars should be entertained and determined by courts everywhere charged with the construction of statutes, and that whenever, as in this case, no other remedy is provided, the determination of such questions should be had upon proceedings in mandamus. *Daly* v *Dimock*, 55 Conn., 579; *Seymour* v.

Ely, 37 id., 103, 105. This precise question arose in the case of *State ex rel. Attorney-General* v. *Fidelity & Casualty Ins. Co.*, 39 Minn., 538. The court said:—"It is said on the part of the respondent that we ought not to entertain the proceeding because the determination of the question whether it should be licensed and admitted to transact its business in this state is committed by law to a branch of the executive department of the state, and that the judicial department of the state has no constitutional control over the action of the executive department. In this the counsel for the respondent fail to distinguish between the authority of the judicial department to control the action of executive officers, and the power and duty of the courts to determine, in causes before them, the rights of parties, although the legal propriety and effect of the action of executive state officers may necessarily be thus brought in question. . . . . The insurance commissioner, in granting certificates or licenses to foreign corporations to do business here, acts in a ministerial capacity. His determination and action are not judicial and final." See also *Hartford Fire Ins. Co.* v. *Raymond*, 70 Mich., 485; *State* v. *Chase*, 5 Ohio St., 528; *Tennessee & Coosa R. R. Co.* v. *Moore*, 36 Ala., 371; *Pacific R. R. Co.* v. *The Governor*, 23 Mo., 353.

6. When the commissioner acts under a mistake of law, and so refuses to grant the application and to license the agents of the applicant, mandamus will lie. *State ex rel. N. Eng. Mut. Life Ins. Co.* v. *Reinmund*, 45 Ohio St., 214; *Cincinnati &c. R. R. Co.* v. *County Commissioners*, 1 id., 77, 105; *Citizens' Bank* v. *Wright*, 6 id., 318; *Thomas* v. *Armstrong*, 7 Cal., 286; *Tennessee & Coosa R. R. Co.* v. *Moore*, 36 Ala., 371; *Gilchrist v. Collector of Charleston*, 5 Hughes, 1; *People ex rel. Kemp* v. *D'Oench*, 111 N. York, 359; *Chateaugay Ore & Iron Co.* v. *Petimer*, 128 U. S. R., 544.

7. If the court should be of opinion that it is necessary to state affirmatively in the motion for mandamus that the commissioner finds or is satisfied that the applicant has complied with all statutory requirements and laws, then we submit that that fact is sufficiently set up in the motion, on two

grounds:—1st. Paragraphs three and five of the motion fully cover this point in the statement that the company has complied with all statutory requirements and laws. If this were not enough the pleader would have to state in particular that he had complied with every statutory requirement by setting out the requirement and alleging compliance. 2d. The letter of the commissioner of November 14th, 1890, is made part of the motion, and definitely sets forth the reasons for rejecting the company's application. It contains no hint, even, that he is not satisfied that the company has complied with all statutory requirements and laws, but bases the rejection simply on the ground that our "charter is an extraordinary one.

E. D. Robbins, for the appellee.

ANDREWS, C. J. The plaintiff, a corporation organized under the laws of the state of Maryland, applied to the defendant, who is the insurance commissioner of this state, for permission to transact in this state insurance business "against loss and damage caused by accident to any person or property, arising from explosions of steam boilers or other causes, employers' liability insurance, and the insurance of the fidelity of persons employed in positions of trust." The defendant heard the application, and at the request of the plaintiff gave a second hearing. Then, after consideration, he declined to grant to the plaintiff the permission it had asked for. The plaintiff thereupon made application to the Superior Court for a writ of peremptory mandamus, commanding the defendant to admit the plaintiff to do in this state the kinds of business above mentioned. The defendant accepted service of the application so made to the Superior Court, and that application, by consent of all the parties, has been treated as the alternative writ.

On the return day the defendant came into court and moved that the alternative writ be quashed. The court heard argument, and indicated that the motion ought to be granted unless the writ should be amended, and gave the

plaintiff time in which to amend. The plaintiff neglected to make any amendment and the motion was granted. The plaintiff now appeals to this court.

In any case of mandamus, as the alternative writ is the foundation of all the subsequent proceedings, it must show upon its face a clear right to the extraordinary relief demanded, and the material facts on which the plaintiff relies must be distinctly set forth, so that they can be admitted or denied. If it does not do this it will be abated or held insufficient on a motion to quash. All formal objection to the writ must be taken by a motion to quash. *Fuller* v. *Plainfield Academic School*, 6 Conn., 532. And objections to the substance may be so taken. Moses on Mandamus, 202–206; Shortt on Mandamus, 397; High on Extr. Remedies, § 522; *Commercial Bank of Albany* v. *Canal Commissioners*, 10 Wend., 26; *State ex rel. Cothren* v. *Lean*, 9 Wis., 279.

The principle upon which persons holding public office may be compelled by a writ of mandamus to perform duties imposed upon them by law has been pretty clearly defined and strictly adhered to in numerous cases in this court and in courts of other states. *Freeman* v. *Selectmen of New Haven*, 34 Conn., 406; *Seymour* v. *Ely*, 37 id., 103; *Batters* v. *Dunning*, 49 id., 479; *Atwood* v. *Partree*, 56 id., 80; *U. States ex rel. Dunlap* v. *Black*, 128 U. S. R., 40; *U. States ex rel. Redfield* v. *Windom*, 137 id., 636; *Kendall* v. *United States*, 12 Peters, 524; *Decatur* v. *Paulding*, 14 id., 497; *United States* v. *Guthrie*, 17 How., 304; *Howland* v. *Eldredge*, 43 N. York, 457; *The People* v. *Brennan*, 39 Barb., 651; *Smith* v. *Mayor &c. of Boston*, 1 Gray, 72.

The principle set forth in these authorities is, that a writ of mandamus may issue where the duty which the court is asked to enforce is the performance of some precise, definite act, or is one of a class of acts purely ministerial and in respect to which the officer has no discretion whatever and the right of the party applying for it is clear and he is without other adequate remedy; and that the writ will not issue in a case where the effect of it is to direct or control an executive officer in the discharge of an executive duty involving

the exercise of discretion or judgment. The rule is stated very clearly by Mr. Justice BRADLEY in *U. States ex rel. Dunlap* v. *Black*, *supra*. He says:—"The court will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require the interpretation of the law, the court having no appellate power for that purpose; but where they refuse to act in a case at all, or where by a special statute or otherwise a mere ministerial duty is imposed upon them, that is, a service which they are bound to perform without further question, then if they refuse a mandamus may be issued to compel them." The same rule is given in High on Ext. Remedies, § 42, where that author adds:—"Indeed, so jealous are the courts of encroaching in any manner upon the discretionary powers of public officers, that, if any reasonable doubts exist as to the question of discretion or want of discretion, they will hesitate to interfere, preferring rather to extend the benefit of the doubt in favor of the officer." "A ministerial act is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act being done." *Flourney* v. *City of Jeffersonville*, 17 Ind., 169.

The subject of insurance engages nearly one hundred and forty sections of the General Statutes and covers more than thirty pages of the statute book. All these sections taken together form a complete and symmetrical branch of the executive government of the state which in common speech is called the insurance department. The defendant is at the head of that department. His duties are, generally, that he "shall see that all the laws relating to insurance companies are faithfully executed." This alone vests him with a wide range of discretion and judgment.

But in addition to this general description of his duties there are repeated sections which impose upon him in terms the exercise of discretion. Section 2822 vests him with authority at any time to "examine into the methods of busi-

ness of any company, corporation, association, partnership, or combination of persons, doing any kind or form of insurance business in this state." He may make orders binding upon such companies, and may apply for an injunction to control their business, or for the appointment of a receiver to wind it up. Sections 2829 to 2836 vest him with discretionary powers concerning fire and marine insurance companies. Sections 2857 and 2858 give him like powers concerning life insurance companies. By section 2869 he may apply for a receiver for any life insurance company and for the annulment of its charter. By section 2906 he may revoke the certificate he has issued to any insurance company incorporated by any other state, upon proof of its unsoundness. Section 2834 gives him discretion respecting the admission of fire and marine insurance companies into this state to do business. Section 2846 relates to foreign fire insurance companies; section 2867 to life insurance companies, and section 2893 to assessment insurance companies. Throughout all these sections the authority given to the defendant is administrative, or quasi judicial, rather than ministerial. *Perry* v. *Reynolds*, 53 Conn., 527.

It is admitted that there is no statute or rule of law that in terms makes it the duty of the defendant to admit the plaintiff to do in this state the kinds of business specified in its application. If it is his duty so to admit the plaintiff it is because such duty falls within the ordinary duties of his office; and this must be gathered from the construction of the insurance statutes. The defendant has construed these statutes as requiring, or at least as authorizing, him to refuse the plaintiff's application. The plaintiff insists that such construction is wrong. The whole contention of the plaintiff's counsel is that the statutes of this state respecting insurance, if construed in the light of the policy of this state towards the insurance companies of other states and in the light of state comity, would make it the duty of the defendant to grant the plaintiff's request; and they say that their interpretation of these statutes is too obviously correct to admit of dispute, and that therefore the duty which

they ask that the defendant should perform is purely a ministerial one. This contention, however, involves a contradiction. The construction of a statute is not a ministerial act; it is the exercise of judgment. If it is the duty of the defendant to admit or not to admit the plaintiff to do business in this state according to the interpretation to be put on the insurance statutes, then the admitting or refusing to admit involves the exercise of discretion and judgment. It is precisely the same kind of a duty which selectmen perform in respect to the admission of electors; *Perry* v. *Reynolds*, 53 Conn., 527; or assessors in respect to the liability of property to taxation; *Goddard* v. *Town of Seymour*, 30 Conn., 394. It is not a purely ministerial act and a mandamus ought not to issue.

If the court was of the opinion that the defendant's construction of the insurance statutes was an incorrect one it could not interfere by way of mandamus. That would be to substitute the judgment of the court for the judgment of the officer appointed by law, and would in effect make the court the insurance commissioner instead of the defendant.

"If a suit should come before this court which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a department. And if they suppose his decisions to be wrong they would, of course, so pronounce in their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction and in which it is their duty to interpret the act of Congress in order to ascertain the right of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it by mandamus act directly upon the officer and guide and control his judgment or discretion in the matter committed to his care, in the ordinary discharge of his official duties." *Decatur* v. *Paulding*, 14 Peters, 497. See also *United States* v. *Guthrie*, 17

Howard, 284; *Commissioner of Patents* v. *Whiteley*, 4 Wall., 522; *Gaines* v. *Thompson*, 7 id., 347; *Freeman* v. *Selectmen of New Haven*, 34 Conn., 406.

Tested by the authorities herein brought together it is plain that the alternative writ in this case does not state facts which entitle the plaintiff to a peremptory mandamus, and that the motion to quash was properly granted.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

JAMES H. HUNTINGTON AND ANOTHER *vs.* DAVID H. SHERMAN.

Hartford Dist., Oct. T., 1890. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

It is necessary to the recovery by replevin of chattels wrongfully detained, under Gen. Statutes, § 1323, that the plaintiff should have a general or special property, with a right of immediate possession.

The defendant occupied a shop owned by the plaintiffs as their tenant, and agreed that a quantity of tools in the shop, of which a list was made, should be pledged to them for an overdue bill of rent, the tools to remain in the shop and be used by the defendant in his business. In replevin afterwards brought for the tools it was held that there was not the right to the immediate possession required by the statute.

The contract between the parties did not constitute an actual pledge of the tools, but was only an executory contract for a pledge, and a delivery was necessary to consummate it.

Where such a contract is supported by a sufficient consideration, damages may be recovered for its non-performance, and a court of equity might decree its specific performance.

But in the present case, the only consideration being a pre-existing debt, with no agreement for forbearance and no change in the condition of the parties, the contract could not have been enforced.

[Argued October 8th, 1890—decided May 25th, 1891.

REPLEVIN for a quantity of tools; brought to the Court of Common Pleas for Litchfield County, and tried to the

court before *Roraback, J.* Facts found and judgment rendered for the defendant, and appeal by the plaintiffs. The case is fully stated in the opinion.

J. Huntington and *A. D. Warner*, for the appellants

W. Cothren, for the appellee.

LOOMIS, J. This is an action of replevin to recover the possession of certain personal property, consisting of tools and machines used by the defendant in his business as tinner, and particularly described in the complaint. The facts found by the trial court, so far as they are material to our present discussion, are as follows:—

The plaintiffs were partners in business in the town of Woodbury, and as such partners were the owners of a certain shop building there. The defendant leased the shop from the plaintiffs and occupied it as a tinner's shop. The implements and chattels mentioned in the writ of replevin were owned by the defendant and his partner Eli Sherman, as a partnership doing business in Woodbury under the firm name of E. & D. H. Sherman.

In the latter part of August or early part of September, 1887, the defendant owed the plaintiffs the sum of $96 as rent for the shop. At this time all the implements and chattels mentioned in the complaint were in the shop, and continued in the possession and daily use of the defendant in his occupation as tinner, and were not out of his possession until they were taken by the plaintiffs by a writ of replevin in January, 1888.

On or about October 1st, 1887, the defendant agreed by parol to turn out to the plaintiffs the implements and chattels mentioned in the complaint, as security for the $96 above mentioned, but no delivery of them was made to or possession obtained by the plaintiffs.

The only writing or memorandum made between the parties in relation to the transfer of the articles was a list of them made by A. D. Warner, one of the plaintiffs, in the

presence and with the aid of the defendant. Several days after the memorandum was made, the defendant agreed with the plaintiffs that the articles should remain in the shop until the indebtedness was paid.

On the 7th day of November, 1887, the plaintiffs wrote the defendant a letter notifying him to quit possession of the shop. On or about the 8th of November the defendant did quit possession and removed the implements and chattels in question, together with other personal property, to his residence near by, where he carried on his business with the tools until they were replevied by the plaintiffs in January, 1888. He has never paid the debt of $96 to the plaintiffs.

The essential elements of this action are clearly defined in section 1323 of the General Statutes, where it is expressly provided that the action may be "maintained to recover any goods or chattels in which the plaintiff has a general or special property, with a right to their immediate possession, and which are wrongfully detained from him in any manner."

The important contention in this case relates to the plaintiffs' title and right to immediate possession. No general property is claimed by them, but only an interest and right to the possession as pledgees to secure a debt due them from the defendant. The latter however if established will suffice, for by law the right to the immediate possession may be in one person while the title is in another. This frequently arises in cases of bailments for special purposes.

There is a distinction of controlling importance in this case between an executory pledge contract and an actual pledge. The essentials of the contract are—(1) a subject matter; (2) a debt or engagement; (3) a meeting of the minds of the parties that the subject matter shall be handed over to secure the payment or fulfilment of the debt or engagement. But to consummate the contract and constitute the pledge there must be delivery. Until this takes place there is no pledge, but only an executory pledge contract. If such contract is supported by sufficient consideration each

party may hold the other bound to perform it. Damages may of course be recovered for non-performance, and in some cases doubtless equity might decree specific performance.

In the case at bar the court expressly finds that "all the implements and chattels mentioned in the plaintiffs' complaint were in the shop, and continued in the possession and daily use of the defendant in his occupation as a tinner, and the same were not out of his possession until they were taken by the plaintiffs by writ of replevin," etc. And again the court in another connection says—"No delivery of the goods was made to or possession obtained by the plaintiffs." This is conclusive that there was no actual delivery. Was there any constructive delivery?

The sole foundation for the latter is the finding that "several days after the memorandum was made, the defendant agreed with the plaintiff that the articles should remain in the shop until the indebtedness was paid." But the circumstances ordinarily furnishing a basis for constructive delivery are wholly wanting; the goods were not at sea, nor in a warehouse, nor were they too ponderous to be readily moved, nor were they placed within the power and control of the plaintiffs. It is true the plaintiffs owned the shop where the goods were, but the defendant as lessee held lawful possession, and how long he would or could so hold was uncertain. The pledge agreement contemplated no time for surrendering the possession of the shop to the plaintiffs.

There was formerly very little disagreement among the authorities in regard to the proposition that to complete a pledge the pledgee must take possession, and that to preserve the pledge he must retain possession, (unless a re-delivery to the pledgor was made for some temporary purpose.) The greater number of authorities still continue to support this doctrine. *Beeman* v. *Lawton*, 37 Maine, 543; *Collins* v. *Buck*, 63 id., 459; *Walcott* v. *Keith*, 22 N. Hamp., 196; *Bank of Macon* v. *Nelson*, 38 Geo., 391; *Nevan* v. *Roap*, 8 Iowa, 207; *Ceas* v. *Bramley*, 18 Hun, 187; *Propst* v. *Roseman*, 4 Jones Law, 130; *Homes* v. *Crane*, 2 Pick., 607; *Bonsey* v. *Amee*, 8 id., 236; *Walker* v. *Staples*, 5 Allen, 34; *Kimball* v. *Hil-*

dreth, 8 id., 167; *Foltier* v. *Schroder*, 19 Louis. An., 17; Story on Bailments, 9th ed., § 297; Jones on Pledges, §§ 23, 27; Edwards on Bailments, §§ 176, 209, 223. See a review of the cases in a note, 49 American Decisions, p. 730.

We have observed however for several years a growing laxity on the part of judges and jurists in the application of the principles of constructive pledge delivery, until now it must be confessed there are authorities of great weight and respectability that hold that, as between the parties themselves, an actual delivery may not be necessary, and that the possession may be regarded constructively where the contract places it. *Keiser* v. *Topping*, 72 Ill., 226; *Tuttle* v. *Robinson*, 78 id., 332; *Martin* v. *Reid*, 11 C. B. (N. S.,) 736; *Easton* v. *German American Bank*, 127 U. S. R., 536; Schouler on Bailments, 182 to 185.

The exigency of the present case does not require us to decide whether the pledgor himself may not in some cases be the agent of the pledgee to take and keep possession for the latter, or whether there may not be cases where the possession may be considered constructively where the contract places it, for it is manifest that there must be in all cases a valid executory contract to uphold the transaction and secure the thing pledged to the pledgee while there is no actual change of possession. In other words, the executory pledge contract must have force and vitality enough to compel an execution of it, to be good between the parties.

In the present case there was, in the absence of actual delivery, no valid consideration. The only consideration was a pre-existing debt, but there was no agreement for forbearance, no change at all in the debt, and no change in the condition of the plaintiffs or defendant. In other words, there was no benefit whatever to the promisor and no detriment or inconvenience to the promisee.

Had there been an actual delivery of the things pledged, even without an agreement for forbearance, then the new duties and obligations imposed on the pledgee in respect to the care of the pledge would have furnished a sufficient consideration to support the transaction.

We conclude therefore that there was no right in the plaintiffs to the immediate possession of the chattels replevied and consequently no error in the judgment complained of.

In this opinion the other judges concurred.

HUBERT E. WARNER *vs.* CHARLES WILLOUGHBY.

New Haven & Fairfield Cos., April T., 1891. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

A parol promise, by a party for whom a building is being erected under a contract, made to a sub-contractor, that if the latter would not file a lien he would pay his bill if the principal contractor did not, and so much of it as the latter should fail to pay, with a neglect of the sub-contractor in consequence to file a lien, is within the statute of frauds and void.

[Argued April 21st—decided May 25th, 1891.]

ACTION on a promise of the defendant to pay the plaintiff for work to be done and materials to be furnished as a sub-contractor in the erection of a building, in case the principal contractor should not pay him; brought to the Court of Common Pleas of New Haven County, and tried to the jury before *Studley, J.* Verdict for the plaintiff, and appeal by the defendant for error in the rulings and charge of the court. The case is fully stated in the opinion.

C. H. Fowler, for the appellant.

E. P. Arvine, for the appellee.

SEYMOUR, J. The complaint in this case alleges, in substance, that one Humphrey contracted to erect a dwelling house for the defendant on the defendant's land. On the same day Humphrey made a contract with the plaintiff as a

sub-contractor, to do the mason work upon the house for seven hundred dollars. Before the plaintiff began to work under his contract he informed the defendant that he had made it and of the terms thereof, and stated that he should at once give written notice to him, the defendant, that he intended to claim a lien for the services he should render and the materials that he should furnish in performing the contract, and should file a mechanic's lien therefor in due time in the town clerk's office. And the defendant thereupon agreed that if the plaintiff would not give such notice nor claim nor file any lien upon said dwelling house and the premises on which the same stood, for services rendered and materials furnished by him in the construction thereof, he, the defendant, would pay him the contract price on his performance of the contract and for such work as he should do on the house, provided the same was not paid by Humphrey, or so much thereof as Humphrey did not pay. And, in consideration thereof, the plaintiff promised the defendant that he would not give any notice of such lien, or claim or file any lien upon the premises. The plaintiff did not give any notice of such lien nor claim nor file any lien upon the premises, and fully performed his contract with Humphrey. Humphrey paid the plaintiff a part of the contract price, but has never paid him in full, and the defendant refuses to pay the balance due upon the same.

The finding of facts gives the testimony of the plaintiff and his son respecting the agreement between the plaintiff and defendant. The plaintiff testified as follows:—"I said to Mr. Willoughby that I had just been burned by Mr. Humphrey's brother, and if I did the mason work to that house I wanted to secure myself and be sure I got my money when I got the work completed, and that the law provided for a sub-contractor that I should file a notice of lien. I asked him, I says—'You don't want a lien put on your house do you?' He says—'No; if you will keep off your lien I will see that you have your pay. The money all comes through my hands.' 'Well,' I says, 'then, Mr. Willoughby, I wont put on the lien.'" The plaintiff's son

testified to the same effect, and also that during the progress of the work he heard the defendant say he was perfectly satisfied with the way the plaintiff was doing his work and he should see that he had his pay; and that when the work was nearly completed the defendant said—"He has done me a good job and I am satisfied, and I will see he has his money, and when it comes to Humphrey he will have to come pretty near to living up to the contract."

The defendant objected to the testimony of the plaintiff and his son, which was all that the plaintiff offered to prove the contract and the terms thereof, on the ground that the promise as alleged was not in writing and was therefore within the statute of frauds. The court overruled the objection and admitted the testimony, and the defendant excepted.

The defendant denied that he made the promise alleged in the complaint or testified to as aforesaid.

Several requests to charge were filed by the defendant which were not complied with. The court, among other things, charged the jury as follows:—"If you find that it was agreed between the plaintiff and defendant that the plaintiff should not file a lien on the defendant's house, and that the defendant, in consideration of his not filing a lien, should see that he was paid for his work upon the house, that is, should pay him if Mr. Humphrey did not, and if you further find that the plaintiff did not file the lien and has not been paid, your verdict should be for the plaintiff to recover the balance remaining due him. If you find this contract to have been made, that is, the contract which the plaintiff has testified to, it is not necessary that it should be in writing. If in consideration that the plaintiff would not file a lien the defendant promised to see the plaintiff paid, that contract is a good and valid one. If this contract was made and the plaintiff did not file a lien, and was not paid in full by Humphrey, the defendant is liable for the balance."

The jury returned a verdict in favor of the plaintiff to recover one hundred dollars damages, and the defendant appealed.

A number of reasons for appeal are assigned. It will be

sufficient if we notice those which present the question whether the promise sued upon, testified to, and presented to the jury by the court as a valid promise, was within the statute of frauds.

It seems to have been understood by the parties and the court alike that the defendant did not agree that, if the plaintiff would forbear proceedings to place a lien upon the premises described, the defendant would pay him the seven hundred dollars or any part thereof for which he had contracted to do the work. No such promise is alleged or testified to. On the contrary the promise alleged and testified to is substantially the promise of which the court treated in its charge and instructed the jury to be a valid and binding one though not in writing, namely, a promise to see the plaintiff paid for his work, to pay if Mr. Humphrey did not. This is clearly not a direct undertaking to answer in the first instance. It was not understood by the parties that Humphrey was not liable to pay the plaintiff under the contract, or that his liability was affected by the undertaking of the defendant. Humphrey continued liable and in fact paid a large part of the contract price. The undertaking upon which the plaintiff relied was that of a person not before liable, for the debt or duty of another who continued liable to pay for the work performed under the contract. It was a collateral undertaking and within the statute of frauds.

The construction of the statute, and especially of the second clause thereof, has been so recently considered in *Dillaby* v. *Wilcox*, *ante*, p. 71, that it would be superfluous to consider it at any length here. The principles there laid down are decisive of this case. The court below was wrong in holding, upon the question of the admissibility of evidence and in its charge to the jury, that it was not necessary to the validity of the contract relied upon by the plaintiff that it should have been in writing.

There is error in the judgment appealed from and a new trial is ordered.

In this opinion the other judges concurred.

LOUIS H. BRISTOL, TRUSTEE, *vs.* THE ONTARIO ORPHAN ASYLUM AND OTHERS.

New Haven & Fairfield Cos., April T., 1891. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

A legacy was given to "The Canandaigua Orphan Asylum, at Canandaigua, Ontario County, New York." There was no orphan asylum of that name located at Canandaigua or elsewhere, but one named the Ontario Orphan Asylum was located there, and another named the St. Mary's Orphan Asylum. The testator's wife had a sister living at Geneva, in the same county, who was manager of the Ontario Orphan Asylum, and at her request he had visited the institution and had several times afterwards sent it money, and it was generally spoken of in Geneva and by her as the Canandaigua Orphan Asylum. The testator had spent two years in the latter part of his life and before the will was drawn in Geneva. The court below found that this asylum was the one intended by the testator. Held—

1. That the legacy was not void for uncertainty.
2. That the above facts could be shown by parol evidence.
3. That the finding of the court below was one of fact that could not be reviewed by this court.
4. That if it could be reviewed, the court below seemed to be right in its conclusion.

[Argued April 21st—decided May 25th, 1891.]

SUIT for the construction of a will, brought by the plaintiff as a trustee under it, to the Superior Court in New Haven County, and reserved on facts found for the advice of this court. The case is fully stated in the opinion.

S. E. Baldwin and *T. E. Russell*, for the Ontario Orphan Asylum.

S. Tweedy, for the heirs at law.

TORRANCE, J. The plaintiff is administrator with the will annexed of the estate of James Glynn deceased and also trustee under the will. After the payment of debts and legacies there remains in his hands, as residuary estate

applicable to the purposes of the trusts created by the will, a fund of about eighty thousand dollars, consisting wholly of personal property. The testator lived at New Haven, and was a citizen of New Haven when he made his will and when he died.

The will contains, among others, the following provisions:— "After the payment of my just debts and funeral expenses, I give and bequeath to my namesake, James Glynn Gregory, of Norwalk, Connecticut, the sum of five thousand dollars. All the rest, residue and remainder of my estate of every kind and description, both real and personal, to which I shall be entitled at the time of my decease, I give, devise and bequeath to my executors hereinafter named, in trust—

"First, to pay over the rents, income and profits thereof to my dearly beloved wife, Sarah Glynn, for and during the term of her natural life.

"Second, upon her decease, to pay out of said rents, income and profits, the sum of five hundred dollars per annum to my wife's sisters, Elizabeth P. Stoddard and Anne Stoddard, both of Geneva, New York, if they or either of them shall then be living, for the term of their natural lives and the life of the survivor of them.

"Third, to pay the balance of said rents, income and profits, after deducting said sum of five hundred dollars, to the Canandaigua Orphan Asylum, at Canandaigua, Ontario County, New York, during the life-time of the said Elizabeth and Anne, and the survivor of them; then to convey, transfer and pay over the whole of the said rest and residue of my estate to said Orphan Asylum.

"If the said Orphan Asylum is not incorporated, the income and estate which is by this will given to said Orphan Asylum shall be paid, conveyed and transferred in fee simple and forever to the person who, when the income or estate is to be paid, conveyed or transferred, shall be acting as treasurer of said Orphan Asylum, to be appropriated to its charitable uses and purposes and under its direction."

The widow of the testator died in the year 1890. The sisters of the widow, Elizabeth and Anne, are still living. The

testator at the time of his decease left a sister, who is now living in France; also certain nephews and nieces, children of a deceased sister.

At the testator's death there was not, and has not been since that time, nor is there now, any Orphan Asylum located at Canandaigua bearing the corporate name or title of the Canandaigua Orphan Asylum, nor any corporation, organization or association in existence bearing such name or title. One of the defendants, the Ontario Orphan Asylum, is a corporation, organized under the laws of the state of New York in 1863, and is located at the town of Canandaigua aforesaid, where it has an asylum for the protection, relief and education of orphan and destitute children in the county of Ontario. Another defendant, the St. Mary's Orphan Asylum and Academy, is also a corporation, organized under the laws of New York in 1855, and is located in said Canandaigua, where it has an asylum for the protection, relief and education of orphan and destitute children.

The trustee asks the advice of the Superior Court whether either of said two last named corporations, and if so, which, is entitled to take that portion of the income and principal of said trust fund which by the terms of the will is made payable to the Canandaigua Orphan Asylum. Also whether the provision in the will in favor of the Canandaigua Orphan Asylum is or is not void for uncertainty and indefiniteness. In the event of the gift being declared void, he asks the advice of the court upon the question to whom and in what manner the income and principal of the trust fund shall be paid.

All the persons and corporations interested have been made parties. In addition to the foregoing facts, the Superior Court finds, from certain parol evidence, the following facts:—In 1865 the testator married a Miss Stoddard of Geneva, New York. She had a sister who was manager of the Ontario Orphan Asylum aforesaid, who lived at Geneva, which is twenty-three miles by rail from Canandaigua. Both towns are in Ontario County. This sister asked the testator to contribute to the asylum in Canandaigua, and he gave to

her for it five dollars in 1866 and five dollars more in 1867. In the winter of 1867 and 1868 he visited the asylum with her, was pleased with its management, and gave it one hundred dollars, by his check payable to the Ontario Orphan Asylum. In 1868 he gave it one hundred dollars more, but whether by check or not did not appear. In 1867 and 1868 he spent most of his time with his wife and sisters at Geneva. At that time the asylum was commonly called at Geneva the Canandaigua Orphan Asylum, or the Orphan Asylum at Canandaigua, generally the former; and his sisters spoke of it in that way and never by the name of the Ontario Orphan Asylum. This asylum is under Protestant management. The St. Mary's Orphan Asylum and Academy is under Catholic management.

The testator was of Roman Catholic parentage, and was in his early youth brought up in that faith, but he was strongly opposed to the Roman Catholic church, and it did not appear that he had ever heard of this Catholic asylum. He was married in the Protestant Episcopal church, and attended its services occasionally, and whenever he went to church went there. He was a person of no decided religious views. His will was substantially prepared several weeks before it was executed, and a blank was left for the name of the orphan asylum which was to be the residuary legatee, that the testator might learn its corporate name. At the date of the execution of the will he directed to be inserted the name of the Canandaigua Orphan Asylum, saying that was the correct name.

These facts were found upon parol evidence, to the admission of all of which objection was made by the heirs at law. From these facts the court found, as a fact, that by the name "Canandaigua Orphan Asylum," the testator meant to designate the Ontario Orphan Asylum. The case is reserved for the advice of this court.

One of the important questions in the case is, whether the parol evidence was admissible. Whatever doubt there may be as to the corporation or orphan asylum intended by the testator, arises not from the words used in the will, but

from the fact that evidence outside of the will shows that there are two corporations in Canandaigua whose objects and character are correctly described by the words "Canandaigua Orphan Asylum," considered as words of description merely. Inasmuch as there is no corporation, association, society or organization of any kind in existence, whose corporate or real name is that of the "Canandaigua Orphan Asylum," we must regard the name used in the will as a designation of the object of the testator's bounty by description and not by name.

"A devise is never to be construed absolutely void for uncertainty but from necessity; if it be possible to reduce it to a certainty the devise is to be sustained. *Ut res magis valeat quam pereat.*" Powell on Devises, 421.

"There is no rule applicable to devises which requires the name of the devisee to be mentioned; it is only necessary that the description of the devisee be by words that are sufficient to denote the person meant by the testator and to distinguish him from all others. * * * And indeed it is true of much the greater proportion of devises, that the objects of them are designated by description rather than by name. * * * And no substantial reason is perceived why such a description is not as available in the case of a corporation as of a natural person. It is sufficient in both cases if the intention of the testator can be discovered by the language he uses, in connection with such evidence as is proper for the purpose of applying it." *Brewster* v. *McCall's Devisees*, 15 Conn., 292.

The evidence outside of the will in the case at bar thus showing that there are two corporations in Canandaigua which answer the description of the "Canandaigua Orphan Asylum," and which were in existence when the will was executed, it becomes necessary to ascertain which of them was intended by the testator. "That parol evidence is admissible for this purpose does not admit of doubt. It is the case of a latent ambiguity raised by the parol evidence, which discloses the fact that there are several such societies, and which therefore may be removed by the same species of evi-

dence; for it is a familiar rule that a latent ambiguity, that is, an ambiguity arising from extrinsic evidence, may be removed by extrinsic evidence." *Brewster* v. *McCall's Devisees*, 15 Conn., 293. See also *Ayres* v. *Weed*, 16 Conn., 291; *Am. Bible Society* v. *Wetmore*, 17 id., 181.

"Where the name used does not designate with precision any corporation, but when the circumstances come to be proved so many of them concur to indicate that a particular one was intended, and no similar conclusive circumstances appear to distinguish and identify any other, the one thus shown to be intended will take." *Dunham* v. *Averill*, 45 Conn., 86. See also *King* v. *Grant*, 55 Conn., 166. The evidence objected to was thus clearly admissible for the purposes for which it was offered.

Upon that evidence the court has found as a fact, that by the words "Canandaigua Orphan Asylum" the testator meant to designate the Ontario Orphan Asylum located at Canandaigua. Under the circumstances we must regard this finding as one of fact which this court will not review. If however we could review it, we should probably on the same evidence come to the same conclusion.

We therefore advise the Superior Court as follows:—

1. The Ontario Orphan Asylum is entitled to that portion of the income and principal of said trust fund which is made payable to the Canandaigua Orphan Asylum.

2. The St. Mary's Orphan Asylum and Academy is not entitled to anything under the will.

3. The provision in the will in favor of the Canandaigua Orphan Asylum, whereby a portion of the income and the whole of the principal of the trust fund are given to it, is not void for uncertainty and indefiniteness.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *vs.* ALMON H. FRENCH AND ANOTHER.

New Haven and Fairfield Cos., April T., 1891. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

An administrator is liable on his probate bond for only such damages as are equitably due to the person for whose benefit the action is brought.

Section 578 of Gen. Statutes provides that executors and administrators shall return inventories of the estates within two months after their bonds are accepted by the court; and section 579 provides for a forfeiture of twenty dollars a month for the neglect, to be recovered by any person who shall sue therefor. Held that this remedy is not exclusive, but that they are also liable to actions on their bonds.

All the personal property of a woman marrying in 1850, vested in the husband as trustee, under the statute then in force, without any act on his part. All the income from the property belonged to him in his own right, except so far as it was his duty to support his wife from it, and their children till they became of age. After the wife's death, if there were no children, all the accumulated income became absolutely his property.

The husband may by his own act divest himself of the trust, and the property then becomes the sole and separate property of the wife.

The fact that deposits in a savings bank stood in the name of the wife, with the knowledge and apparent acquiescence of the husband, would be strong evidence that he had divested himself of his statutory estate in the money, but not necessarily conclusive.

As a general rule the court will not grant a new trial to enable a party to recover merely nominal damages.

[Argued April 22d—decided May 25th, 1891.]

ACTION on a probate bond; brought to the Superior Court in Fairfield County, and heard before *J. M. Hall, J.* Facts found and judgment rendered for the defendant, and appeal by the plaintiff. The case is fully stated in the opinion.

C. Thompson and *A. M. Tallmage*, for the appellant.

S. Judson, Jr., and *C. S. Canfield*, for the appellee.

ANDREWS, C. J. The defendant Almon H. French as prin-

cipal, with the other defendant Joseph W. Johnson as surety, gave a probate bond to the state of Connecticut in the sum of five thousand dollars, conditioned that the said Almon, who had been duly appointed by the court of probate in and for the district of Bridgeport, administrator on the estate of Laura L. French, late of Easton in that district, deceased, and had accepted the trust, should faithfully perform the duties of that appointment according to law. This suit is brought by the consent of the probate court for the special benefit of Laura Hall, she being one of the heirs at law of the said Laura L. French. It is alleged in the complaint that the said Almon H. has not faithfully performed the duties of his appointment according to law in that he has neglected and refused to inventory, as a part of the estate of the said Laura, certain property which belonged to her at the time of her decease, namely—a bank book of the City Savings Bank, standing in the name of the said Laura and showing a deposit in her favor of $1,392.94; a like bank book of the People's Savings Bank, showing a deposit in her favor of $240.50; a like bank book of the Mechanics' & Farmers' Savings Bank, showing a deposit in her favor of $63.06; a like bank book of the Bridgeport Savings Bank, $1,255.23; and a western farm loan of $700.

The amounts appearing on these several bank books were afterwards found to be—The City Savings Bank, $1,312.64; the People's Savings Bank, $224.45; the Mechanics' & Farmers' Savings Bank, $530.60; the Bridgeport Savings Bank, $2,000; and the western farm loan, $700.

The defendant French admitted that he had in his possession bank books such as were described in the complaint, and he admitted that he had the western farm loan. But he denied that any of said property belonged to the said Laura except the sum of $500, part of the deposit in the Mechanics' & Farmers' Savings Bank, and the sum of $815.52, part of the deposit in the Bridgeport Savings Bank. These sums he inventoried and refused to inventory all the others.

It is the duty of an administrator to make an inventory

of all property and estate of his intestate which comes to his knowledge, and for any wilful neglect so to do he is liable on his probate bond for such damages as may be found equitably due to any one aggrieved. General Statutes, § 1115; *Moore* v. *Holmes*, 32 Conn., 553; *Blakeman* v. *Sherwood*, id., 324. The converse of these propositions is also true—that an administrator is under no duty to inventory property if it does not belong to his intestate, nor is he liable for any damages except such as are shown to be equitably due to the person for whose benefit an action may be brought.

The western farm loan may be laid out of the case. It is found to belong to the defendant French. It is also found that the deposit in the People's Savings Bank did not belong to the estate of the said Laura, but to the defendant.

The finding shows that of the amount appearing to be due in the City Savings Bank the original sum of $330, deposited January 21st, 1864, belonged to the estate of the said Laura. The residue is made up of sums deposited by the said Almon of his own money and the accumulated interest. This residue is found to belong to the said Almon. The finding also shows that the deposit in the Mechanics' & Farmers' Savings Bank consisted of the original sum deposited, $500, and the interest which has accumulated thereon, amounting to $51.20; and the deposit in the Bridgeport Savings Bank of the original sum of $825.52, and the accrued interest thereon, amounting to $1,224.48. These original sums are inventoried; the accrued interest is not.

In respect to all the sums represented upon the several bank books, interest as well as principal, the plaintiff claimed that as matter of law they belonged to the estate of the said Laura L. French. We are not able to concur in this claim. Almon H. French and Laura L. French were husband and wife. They were married in November, 1850, and lived together from that time until her death on the 14th day of October, 1887. They never had any children. During all the time Mrs. French was supported by her husband. By the statutes in existence at the time of their marriage all

the personal property of Mrs. French vested at once in her husband as trustee, without any act on his part. All the income from such property belonged to the husband in his own right, except so far as it was his duty to support her and any children there might be until they should become of full age. After the death of Mrs. French, there being no children, and he having supported his wife during her life, all the accumulated income of such property became absolutely the property of Mr. French. This we think is the rule that *primâ facie* applied to the property now in question. *Hinman* v. *Parkis*, 33 Conn., 188; *Mason* v. *Fuller*, 36 id., 160; *Plumb* v. *Ives*, 39 id., 124; *Hayt* v. *Parks*, id., 357; *Williams* v. *King*, 43 id., 569.

It is true that a husband may by his own acts divest himself of the trust which the statutes give him in his wife's property. If he does so, then the property becomes the sole and separate estate of the wife, and as to such property the rule above stated does not apply. *Comstock's Appeal from Probate*, 55 Conn., 214; *Adams* v. *Adams*, 51 id., 135. The plaintiff insisted that all the deposits in the several banks were the sole and separate estate of Mrs. French. But this was a question open to proof. The Superior Court heard evidence upon it and found that some part of the deposits belonged to Mrs. French and that other parts did not. The fact that all these deposits stood in the name of Mrs. French with the knowledge and apparently with the acquiescence of Mr. French, was evidence, and strong evidence, tending to show that he had divested himself of his statutory estate in the money; but we do not think it was conclusive. *Parkman* v. *Suffolk Savings Bank*, 151 Mass., 218; *Minor* v. *Rogers*, 40 Conn., 512; *Mowry* v. *Hawkins*, 57 id., 453; *Robinson* v. *Ring*, 72 Maine, 140; *Northrop* v. *Hale*, id., 275; *Marcy* v. *Amazeen*, 61 N. Hamp., 131. The finding of the Superior Court is binding upon us.

The questions asked of Mr. French and which were objected to but admitted, we think were fairly admissible as tending to show whether or not he had parted with his

interest in the property. The by-laws of the several savings banks were not in evidence.

There is no finding to whom the accumulated interest in the Mechanics' & Farmers' Savings Bank and in the Bridgeport Savings Bank belonged. Perhaps the court regarded these as the property of Mr. French, but it is not specifically so found. If these sums belong to Mr. French then he was under no duty to inventory them. But if, on the other hand, they belonged to Mrs. French, then they should have been inventoried as a part of her estate, and we do not think the remedy by section 579 of the statutes was an exclusive one. Notwithstanding that section we think any party aggrieved might have an action on the probate bond. Upon the facts it seems clearly to have been the duty of Mr. French to return an inventory of the sum of $330, part of the deposit in the Citizens' Savings Bank. There was a breach of his bond in not doing so.

Although there was a technical breach of his bond by the defendant French a new trial cannot be had. It does not appear that the plaintiff has suffered any damage. The statute above referred to (§ 1115 of the General Statutes) provides that "in actions on penal bonds containing conditions which have been broken, such damages only shall be assessed as are equitably due, and judgment shall not be rendered for the whole penalty unless it appears to be due."

There was no evidence in the case, nor was any attempt made so far as the finding discloses, to show that any sum was equitably due to the plaintiff by reason of any breach of the defendant's bond. It is certain that some portion of the property of Mrs. French will be expended in the necessary settlement of her estate, and it is possible that there may be debts which will exhaust the whole of it. In any event the damage to the plaintiff would be less than her aliquot part of the entire estate, and in the contingency just suggested her damage would be nothing. As a general rule this court will not grant a new trial to enable a party to recover merely nominal damages. *Briggs* v. *Morse*, 42 Conn., 260.

A new trial is not granted.

In this opinion the other judges concurred.

THE STATE *vs.* JOHN CONLAN.

New Haven and Fairfield Cos., April T., 1891. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

The right of a judge to hold a court over which he presides can be tried only in a direct proceeding wherein he is either a plaintiff or a defendant, and not in any collateral way.

[Argued April 22d—decided May 25th, 1891.]

APPEAL from a conviction in a criminal case in the Court of Common Pleas of New Haven County, on the ground that the judge holding the court did not legally hold the office of judge. The case is fully stated in the opinion.

D. Callahan, for the appellant.

G. H. Gunn and *W. H. Ely*, for the State.

ANDREWS, C. J. The defendant was prosecuted before the City Court in the city of New Haven for an assault on one Patrick Donnelly, and was found guilty. He then appealed to the Criminal Court of Common Pleas in that county. The case came on for trial in the latter court on the seventh day of April, 1891, when he filed a plea to the jurisdiction, alleging that "the Hon. Lucius P. Deming, who assumes to preside as judge of said court, is not a judge of the Court of Common Pleas for said New Haven County, because his term as a judge of the Court of Common Pleas for New Haven County expired on April 1st, 1891, he having been appointed by the General Assembly of the state of Connecticut for the term of four years from

and after April 1st, 1887, and said Deming has not been re-appointed to said office." The prosecuting attorney for the state demurred to this plea; it was overruled, and the defendant filed exceptions. He was then tried, found guilty, and sentenced to pay a fine. He now brings the case to this court by another appeal. It is conceded that the Court of Common Pleas had jurisdiction of the subject matter.

The question raised by the defendant's plea was one that the court could not properly try when presented in that form. It would be unseemly that a party charged with a criminal offense and brought to trial in a court of competent jurisdiction should challenge the authority of the judge holding the court, and compel him to pass upon his own title to the place. A due regard for the public convenience and security will not permit the authority of any judge by whom a court is held to be disputed in any summary manner. The right of every one acting in an official capacity under the color of and a belief in a lawful authority so to do, requires that the validity of his acts, so far as their validity depends upon his possessing that official character, shall be inquired into and determined only in some proceeding to which he is a party. The right of a judge to hold a court over which he presides can be tried only in a direct proceeding wherein he is either a plaintiff or a defendant, and not in any collateral way. *Plymouth* v. *Painter*, 17 Conn., 585; *Douglass* v. *Wickwire*, 19 id., 489; *Smith* v. *The State*, id., 493; *Brown* v. *O'Connell*, 36 id., 432; *State* v. *Carroll*, 38 id., 449; *Brown* v. *Lunt*, 37 Maine, 423; *McGregor* v. *Balch*, 14 Verm., 428; *Petersilea* v. *Stone*, 119 Mass., 465; *Sheehan's Case*, 122 id., 445; *Commonwealth* v. *Taber*, 123 id., 253.

The demurrer was properly sustained, and there is no error.

In this opinion the other judges concurred.

OLIVER T. OSBORNE *vs.* ALEXANDER TROUP AND ANOTHER.

New Haven and Fairfield Cos., April T., 1891. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

It is provided by Gen. Statutes, § 1116, that "in every action for a libel the defendant may give proof of intention; and unless the plaintiff shall prove either malice in fact, or that the defendant, after having been requested by him in writing to retract the libelous charge in as public a manner as that in which it was made, failed to do so within a reasonable time, he shall recover nothing but such actual damage as he may have specially alleged and proved." In an action for a libel the court below found that no evidence was offered by the plaintiff that the defendants were actuated by malignity towards him, but further found that the motive for the publication was improper and unjustifiable, which was found as a conclusion of fact from the character of the article and from the circumstances attending its preparation and publication, these showing that there was not a reasonably careful investigation as to the facts, and that there was no sufficient occasion or excuse for the publication, and a reckless disregard of the plaintiff's rights and of the consequences that might result to him. Held to be a finding of the existence of malice in fact.

And held to be a finding of fact that could not be reviewed by this court.

And that the court made this finding upon proper evidence.

And held that, where malice in fact is proved, the plaintiff is entitled to recover general damages, although the defendant gives proof of intention, no retraction has been demanded, and special damages have neither been alleged nor proved.

Evidence was admitted on the part of the defendants that, after the suit was brought, one of the defendants went to the plaintiff's attorney and proposed to settle the matter and to publish a retraction. Held that the court properly refused to let the defendants go further and prove what was said between themselves and the attorney as to the publication of the retraction and as to the settlement, either to disprove malice in fact or in mitigation of damages.

The plaintiff in cross-examining a witness called by the defendants asked certain questions to which the defendants objected as not germane to the direct examination. Afterwards the witness, in testifying for the plaintiff in reply, went over the same facts, which were material to the case, and no objection was made by the defendants. Held that the ruling of the court was within its discretion, and that, if it had been erroneous, the defendants were not harmed by it.

Upon the question whether the symptoms in a certain case of mental derangement were those of acute melancholia, as claimed by the plaintiff, or of morphine poisoning, as claimed by the defendants, the latter

offered as a witness a nurse who had attended a patient suffering from the use of morphine, for the purpose of showing that the symptoms of acute melancholia were different from those described by the plaintiff's witnesses and that those shown in the case in question were like those of a victim of the morphine habit. It appeared that she had received no medical education nor any training as a nurse, that she did not know what quantity of morphine would be given by a physician in a dose, and had no other knowledge of certain cases to which she referred than any woman of ordinary intelligence might have had under similar circumstances. Held that she could nôt be regarded as an expert, and that her testimony was properly rejected by the court.

[Argued April 23d—decided May 25th 1891.]

ACTION for a libel; brought to the Superior Court in New Haven County, and tried to the court before *Fenn, J.* Facts found and judgment rendered for the plaintiff for three hundred dollars damages, and appeal by the defendants. The case is fully stated in the opinion.

L. Harrison and *E. Zacher*, for the appellants.

1. The court erred in finding the defendants guilty of malice in fact. This point must be considered in the light of Gen. Statutes, § 1116, which reads as follows:—"In every action for libel the defendant may give proof of intention; and unless the plaintiff shall prove either malice in fact, or that the defendant, after having been requested by him in writing to retract the libelous charge in as public a manner as that in which it was made, failed to do so within a reasonable time, he shall recover nothing but such actual damage as he may have specially alleged and proved." This section was enacted in 1855 to protect newspapers from damages in those cases where items are published in good faith or without malice in fact. It certainly was not the intention of the legislature to leave it to the courts to infer from the language of the publication malice in fact, unless there was evidence to prove such malice. If the statute is to be construed as the court below has construed it, then there is no relief furnished by it to the newspapers. The common law protected newspapers to the extent that, in the absence of malice in fact, and with no allegation of proof of special damage, there could

be no judgment for a plaintiff, except where the charge contained language which was actionable *per se*. If the court can infer malice in fact from the mere language of the article complained of, then it is equivalent to saying it may in all cases find a judgment for the plaintiff, wherever the language is actionable in itself; and in some cases, under such a construction, the court might give substantial damages where none had been proved or alleged, and where the words were not even actionable *per se*. Such a construction of the statute being possible, it were better for the newspapers if it were repealed. The court finds that there was no evidence to show that the defendants were actuated by malignity or hatred toward the plaintiff. Mrs. Tyler and her friends believed the story that she was improperly confined, as described in the article published, to be true. When a considerable body of people who have knowledge of certain facts, believe a certain statement to be true, it furnishes strong evidence of the good faith of those who repeat or publish the story so believed to be true. If the story had been true, it was certainly the duty of the newspaper to publish it. No greater wrongs have been perpetrated at times than the improper confinement of sane persons by interested relatives. It is the duty of the press to turn the light of publicity upon private asylums. The defendants inquired of the city editor if the facts had been investigated and verified, and were informed that such was the case. The conduct of the principal defendant immediately after the publication shows that he was not actuated by malice. His interviews with the plaintiff's counsel and the publication of the retraction, show it. This court has in no case held that any such extreme meaning is to be put upon the words "malice in fact" as is attempted in this case.

2. Upon the finding of the court, and in the absence of any request on the part of the plaintiff for a retraction, and of any allegation or proof of special damage, and there being no evidence to show malice in fact except the inference drawn by the court as stated, the plaintiff was not entitled to a judgment. The object of the statute was to give news-

papers an opportunity to retract a libelous charge in as public a manner as that in which it was made. Note its language:—"To retract the libelous charge." If no request is made to retract the libelous charge then nothing but the actual damage specially alleged and proved can be recovered. The statute goes upon the theory that the charge must have been libelous. It cannot have been libelous unless it was malicious. Malice is an essential element to constitute a libelous charge. If the defendant by retracting a libelous charge can escape the payment of any damages except those that are specially alleged and proved, then it is certain that there must be cases, if the statute means anything, in which malicious articles may be published, and the defendant may escape the payment of damages if none are specially alleged, provided there is a retraction in a reasonable time. If this proposition is sound, then it is equally true that the defendant may escape the payment of damages in the case of certain libelous charges where special damages are not proved and there has been no written request for a retraction. If both these propositions are true, then the theory of the court in this case, in finding malice in fact and rendering a judgment for the plaintiff, must be unsound. An examination of the cases passed upon by this court since 1855 will not sustain the judgment rendered in this case upon the finding made. *Moore* v. *Stevenson*, 27 Conn., 27; *Hotchkiss* v. *Porter*, 30 id., 421; *Wynne* v. *Parsons*, 57 id., 77; *Arnott* v. *Standard Association*, id., 92. An examination of these cases leads to the conclusion that in cases under the statute, like the one at bar, the plaintiff must produce some other evidence than has been produced in this case to show malice in fact; and that if he fails so to do he is not entitled to recover.

3. The court erred in rejecting the testimony of Mrs. Forbes. The evidence spread out upon the record shows that she had had experience with morphine cases and melancholia cases. The claim of the defendants in this case was, that the symptoms from which Dr. Thatcher and Dr. Osborne, and the keeper of the Cromwell Asylum, deduced the

conclusion that Mrs. Tyler was insane, were precisely the symptoms which a morphine drugged person would show. It had appeared that Mrs. Tyler had been treated with morphine, and Mrs. Forbes had known her for years. She had never seen any symptoms of insanity in her. After she had been treated with morphine she exhibited the same symptoms that morphine patients show. Her symptoms were described by Dr. Thatcher, Dr. Osborne, and Dr. and Mrs. Hallock to prove insanity, and to justify their expressed opinion. It will be noticed that the questions asked of Mrs. Forbes were not questions which require the trained knowledge of a medical expert. She was only asked to state what symptoms the lady who was afflicted with the excessive use of morphine showed while she was in the hands of Mrs. Forbes, who was her nurse. This question was asked in various forms, and all were excluded. They are not questions of opinions, but questions of fact which she could have testified to. It will be a dangerous precedent to establish, that the opinions of physicians on questions of insanity can only be rebutted by the opinions of other physicians, when in ordinary cases no other physicians could be produced who ever had charge of the patient. If the opinions of physicians based upon facts cannot be contradicted by facts which non-medical witnesses testify to, we shall be putting altogether too much power into the hands of the medical profession in will and insanity cases. Medicine is not yet an exact science in its application to the body. It is certainly much less exact when it attempts to deal with the mental conditions of men.

4. The court erred in rejecting testimony offered by the defendants to show what took place between the defendants and the counsel for the plaintiff, before and at the time of the publication of the retraction. It could have been excluded only upon the ground that conversations between parties to bring about a compromise are excluded. That rule is intended to protect parties against the effect of admissions which might be against their interest, if they are made at a time when negotiations for a settlement are being made.

This rule has recently been discussed in the case of *Broschart* v. *Tuttle*, 59 Conn., 1. See also *Hartford Bridge Co.* v. *Granger*, 4 Conn., 142, 148; *Fuller* v. *Hampton*, 5 id., 416, 426; *Home Ins. Co.* v. *Baltimore Warehouse Co.*, 93 U. S. R., 527, 548. In this case the defendants did not offer to show any admissions made by the other side, but only to prove what was said between themselves and the plaintiff's counsel concerning the publication of a retraction. That was admissible, first, in mitigation of damages, and secondly, to rebut any inference of malice in fact, which the court below did not find in this case by any positive testimony offered by the plaintiff, but only as an inference from such circumstances concerning the publication as the admitted evidence showed.

5. The court erred in admitting the testimony of the plaintiff in the manner set forth in the record. If questions upon cross-examination are admissible or inadmissible entirely within the discretion of the court, and there is no limit to the discretion, then error cannot be claimed under this assignment. If, however, the generally understood rule is to prevail, it is difficult to see how those questions were germane to any questions concerning the treatment of Mrs. Tyler and the nature of the institution she was sent to.

J. W. Alling, for the appellee.

TORRANCE, J. The plaintiff brought an action for libel against the defendants, as publishers of a newspaper, and the case was tried to the court and judgment rendered in favor of the plaintiff for substantial damages. The court below made a finding of facts, and the case comes before us upon an appeal by the defendants.

In the reasons of appeal several errors are assigned. The first is general in its nature, and under the statute cannot be considered. The others will be considered in the order stated in the reasons of appeal.

The first of the claimed errors is thus stated:—"The court erred in rendering judgment for the plaintiff on the

finding, in the absence of any evidence showing that the plaintiff had ever requested the defendants to make a retraction in the manner provided by statute, and in the absence of any allegation or proof of special damages."

The record shows that no special damages were alleged or attempted to be proved. It also shows that the plaintiff never requested the defendants to make any retraction. The court does however find, as a matter of fact, and upon all the evidence in the case, "that there was malice in fact in the publication of the article complained of, and that said article was neither wholly nor substantially true;" that "the motive of such publication was wrong, improper and unjustifiable;" and "that there was not a careful or reasonable investigation as to the real facts, and no sufficient occasion or excuse for such publication, and that it was recklessly published in disregard of the plaintiff's rights and of the consequences that might result to him."

The published article complained of charged in substance that the plaintiff, in order to obtain the property of his wife's mother, persuaded her to make a will in his favor, and then, lest she should change or destroy the will, drugged her, and while she was unconscious from the effect of the drugs, caused her to be confined as a lunatic in an asylum.

The defendants, under section 1116 of the General Statutes, gave proof of intention. The court finds, from the evidence in the case, that the charges contained in the article were not true, and also "that there was malice in fact in the publication of the article complained of."

Assuming then for the present that the court has found upon proper evidence the existence of "malice in fact," within the meaning of the statute above referred to, it is somewhat difficult to see how the court erred in rendering judgment for the plaintiff for general damages. By the very terms of the statute, if the defendant gives evidence of intention, the plaintiff is barred of his right to recover general damages only in case he fails to prove "malice in fact" or a failure to retract upon request. If he proves "malice in fact" he is entitled to recover general damages, notwith-

standing the fact that the defendant gives proof of intention, or the fact that no retraction has been demanded, or the fact that special damages have neither been alleged nor proved.

Indeed, we perhaps do the defendant's counsel an injustice in supposing they make the claim in the form in which it appears in the reasons of appeal. In their brief it appears in this form:—"Upon the finding of the court, and in the absence of any request on the part of the plaintiff for a retraction, and of any allegation or proof of special damages, *and there being no evidence to show malice in fact except the inference drawn by the court*, as stated, was the plaintiff entitled to a judgment?" This form of the claim assumes that "malice in fact" has not been proved.

This is entirely different from the error assigned in the reasons of appeal, unless we assume that the former is but an amplification of the latter, and perhaps this is the fairest way to regard the matter. This assumes that the plaintiff has failed to prove "malice in fact." If this assumption is correct, then undoubtedly the court erred in rendering judgment for the plaintiff. If it is not correct, if the court has correctly found upon proper evidence the existence of "malice in fact," then the court did not err in rendering judgment under the circumstances as claimed.

This leads to the consideration of the next reason of appeal, which is thus stated:—"The court erred in finding that the defendants were guilty of malice in fact, upon the facts found by the court."

The court below has found that at no stage of the case did the plaintiff offer any evidence to show that the defendants were actuated by malignity, spite or hatred towards the plaintiff, nor does it find that this was the case in point of fact. But the court further finds as follows:—"But that the motive of such publication was wrong, improper and unjustifiable, I do find, as a conclusion of fact from evidence derived from the character of the published article, and from the fact that in my judgment the article itself, and the evidence offered of the circumstances attending its preparation and publication, prove that there was not a careful or rea-

sonable investigation as to the real facts, and no sufficient occasion or excuse for such publication, and that it was recklessly published in disregard of the plaintiff's rights and of the consequences that might result to him."

This we feel bound to regard as a finding of the existence of "malice in fact" within the meaning of our statute, as it has been construed in the following cases: *Moore* v. *Stevenson*, 27 Conn., 14; *Hotchkiss* v. *Porter*, 30 id., 414; *Wynne* v. *Parsons*, 57 id., 73.

In the case at bar the question whether such malice existed was a question of fact, to be decided by the trier. The conclusions drawn by the court below, that the motive of such publication was wrong, improper and unjustifiable; that there was no careful or reasonable investigation of the facts; that there was no sufficient occasion or excuse for such publication; and that it was recklessly made, in disregard of the plaintiff's rights and of the consequences that might result to him, must all be regarded, under the circumstances, as conclusions of fact. The evidence was of such a nature that the trier must determine, not only the facts which it established, but also the inferences to be drawn from such evidence and such facts. No general rule of law is applicable in such a case. Men equally honest, fair-minded and capable, might possibly draw different inferences as to whether there had been a reasonably careful investigation of the facts before publication, or whether there was a sufficient occasion or excuse for the publication, or whether it was made in reckless disregard of the rights of others. In such cases the trier or triers must of necessity determine whether "malice in fact" within the meaning of the statute existed or not, and the conclusions of the trier in such cases cannot, as a general rule, be reviewed as to the question whether it was or was not correctly drawn from the evidence and facts found. *Farrell* v. *Waterbury Horse R. R. Co.*, (*ante*, p. 239.) In accordance with these views the existence of malice in fact was held to be a question of fact, to be found by the jury, in *Moore* v. *Stevenson*, *supra*.

If however the question were one of law, which we could

review, we think the facts found justify the conclusions to which the court below came.

The real contention however of the defendants on this part of the case, as we gather from the brief, seems to be, that there was no legal evidence before the court from which the conclusions aforesaid could be drawn. The claim seems to be that the court below drew its inference chiefly, if not wholly, from the language of the publication itself. It is said in the brief:—"It certainly was not the supposition of the legislature which passed that statute, to leave it to the courts to infer from the language of the publication malice in fact, unless there was evidence to prove such malice." Again:—"If the court can infer malice in fact from the mere language of the article complained of, then it is equivalent to saying that the court may in all cases find a judgment for the plaintiff whenever the language is actionable in itself."

If the record furnished any foundation for such a claim it would be entitled to our serious consideration, but it has no foundation in fact. The record shows that the conclusions of the court were based upon "all the evidence in the case," upon "evidence derived from the character of the published article," and upon "evidence offered of the circumstances attending its preparation and publication." These "circumstances" were shown with minuteness and particularity. The language of the published article was only a part of the evidence, and, in connection with the other evidence, was a legitimate part of the evidence which the court might consider.

In speaking of the case of *Moore* v. *Stevenson*, 27 Conn., 14, this court, in the case of *Hotchkiss* v. *Porter*, 30 id., 421, said:—"By that decision it was settled that, under the act, the right of the plaintiff to recover general damages shall not depend on the mere legal presumption of improper and unjustifiable motive, derived from the fact of publishing that which is untrue, but upon the question whether such improper and unjustifiable motive has been proved or disproved, as a matter of fact, by evidence adduced for that purpose on

the trial; that the legislature did not intend to prescribe any new rule as to the kind or degree of malice, or as to the character or kind of evidence by which the existence of improper and unjustifiable motive should be proved; that all they intended was that the fact of improper and unjustifiable motive should appear in proof, and not be presumed; but whether in proof from *the character of the libel, the res gestæ or circumstances attending its publication*, or from evidence of other facts tending to show the real motive of the publisher, they did not intend to say." The conclusions of the court below thus seem to be based upon the kind of evidence which this court has said was legitimate and proper evidence.

The court below has thus, upon proper evidence, found as a fact the existence of "malice in fact," and, this being so, it did not err in finding the defendants guilty of "malice in fact," and it did not err in rendering judgment for the plaintiff for general damages.

The other errors alleged relate to the rejection and admission of evidence. The first relates to the rejection of the testimony of Mrs. Jane Forbes. The plaintiff had produced before the court as witnesses all the persons now living, and within the jurisdiction of this state, (including four physicians,) who had the charge of Mrs. Tyler, the mother-in-law of the plaintiff, during a period of mental derangement. They all testified to the symptoms of mental derangement manifested by her, which they considered evidences of insanity of the type of acute melancholia. The defendants, to rebut this evidence, offered no testimony from a physician or expert, but offered the testimony of Mrs. Forbes. She had known Mrs. Tyler for several years, but had not seen her at all during her sickness and derangement. She had on some occasions taken care of the sick in her own family, and had had for a few weeks the care of a person suffering from the morphine habit. Her testimony as to the symptoms manifested by the patient suffering from the morphine habit, whom she had attended for a few weeks, and her opinion based upon her experience as to the effect of morphine and other drugs upon the human system, was offered "for the purpose of

showing that the symptoms of acute melancholia were different from those described by the plaintiff and his witnesses, and also for the purpose of showing that the symptoms which Mrs. Tyler had manifested in her sickness were like those of the victim of the morphine habit whom Mrs. Forbes had attended."

Mrs. Forbes was really called as an expert, and the main purpose and object in calling her in rebuttal was that she might give her opinion as an expert. It is true that certain questions which did not call for an opinion were asked of her and excluded, but these were merely preliminary questions, and the answers to them would have been useless unless the witness had been allowed to express her opinion upon Mrs. Tyler's condition, based in part at least upon such answers. If she ought not to have been allowed to testify as an expert, then the action of the court in rejecting her testimony, as it is stated upon the record, was right.

The court has found that she had received no medical education, nor any training or education as a nurse; that she did not know anything about what quantity of morphine, bromide of potassium or chloral, were or would be given in any dose by any physician, and had no other knowledge of the cases to which she referred than any woman of ordinary intelligence might have had under similar circumstances. Under these circumstances the court did not err in rejecting her testimony.

The next error alleged is stated as follows:—"The court erred in rejecting the testimony offered by the defendants to show what took place between the defendants and the plaintiff's counsel before and at the time of the publication of the retraction."

It appears from the record that the present suit was instituted the next day after the publication of the alleged libel; that immediately after the institution of the suit one of the defendants made an investigation in order to ascertain the truth or falsehood of the published story; that he was informed that Mrs. Tyler had not been drugged, but had been temporarily insane, and was fully advised of her condition

when brought to and while at the asylum; and that he opened negotiations with counsel for the plaintiff for a compromise and settlement of the case, and offered as a part of such settlement to publish a retraction. After this testimony had been admitted, the defendants then offered to show what "was said or passed between themselves and the plaintiff's counsel concerning the publication of a retraction and the settlement of the whole affair." This was offered "for the purpose of its being considered in mitigation of damages, and also for the purpose of showing, in connection with the other testimony which had been admitted, that the defendants were not guilty of malice in fact." The court on the plaintiff's objection excluded the testimony.

We think this testimony was rightly excluded. The defendants were permitted to show what they did, namely, that they opened negotiations for a compromise and settlement of the case and offered to publish a retraction. What was said in so doing was of no consequence. They were also permitted to show that they did publish a retraction, and to put the published retraction in evidence. This was certainly all and perhaps more than they were entitled to show in regard to this matter, either to mitigate damages or disprove malice in fact. The defendants did not claim on the trial that the plaintiff's counsel had made any independent admissions or admissions of any kind in their favor during the negotiations for a compromise and settlement, and if they had, we cannot, in the present state of the record, say that such admissions would necessarily be admissible in evidence against the plaintiff. Nor does it appear that the defendants made any statements during the negotiations in their own favor that would have been admissible. It was not even claimed on the trial that the rejected evidence would have explained in any way the apparent delay in publishing the retraction. The publication was made October 29th, 1889, and the retraction was published December 30th, of the same year. If it had been shown to have been admissible for the purpose of explaining this apparent delay, still, inasmuch as the court has found that the retraction was published in a reasonable

time under all the circumstances, its rejection would have furnished no ground for a new trial. We think the evidence in question was admissible neither in mitigation of damages nor to disprove malice in fact.

The last error claimed relates to the admission of the testimony of Dr. Osborne. It appears from the record that after the plaintiff had rested the defendants called Dr. Osborne as a witness and asked him a variety of questions. On cross-examination he was asked by the plaintiff's counsel certain questions, detailed on the record, which were objected to by the defendants for the reason that they were irrelevant and not pertinent to the direct examination. The court held them to be germane and relevant and admitted the testimony. Afterwards the points in question were testified to more fully and in detail by Dr. Osborne in his testimony in reply, and without objection; and they were material to the case. Therefore, even if it should be conceded that the court erred in admitting the testimony objected to, still its admission cannot possibly have harmed the plaintiff. Moreover we think the court did not err in admitting it. To say the least, it was clearly within the discretion of the court, and we think the discretion was wisely exercised.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

RICHARD B. LEAKE, TRUSTEE, *vs.* THOMAS L. WATSON AND OTHERS.

New Haven and Fairfield Cos., Oct. T., 1890. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

A testator, after making a definite provision for his widow in lieu of dower, which she accepted, gave the residue of his estate to trustees, who were to hold one fifth for each of his four daughters, who were to receive the income for life "and the remainder to go to their heirs forever;"

with a provision that each one might, if she deemed it expedient, from time to time receive portions of the principal, not exceeding in all one half of it, nor more than one thousand dollars in any one year; the remaining fifth to be held in trust for the children of the testator's deceased son. One of the daughters died before the testator. Held—

1. That the bequests to the daughters contained in each case a gift to the daughter of an equitable life use of a fifth of the trust fund, and a further and distinct gift of what should remain of this fifth of the trust property to her heirs.
2. That the word "heirs" was a word of purchase and not of limitation, and was to be taken in its ordinary sense, as meaning the persons who, at the death of each daughter, would take from her by descent.
3. That the estate therefore could not vest, under the gift over, until the death of the daughter, at which time the persons who would take the remainder might be neither persons in being at the death of the testator nor the children of such persons.
4. That the gift over was therefore void under the statute against perpetuities.
5. That the invalidity of the gift over did not invalidate the whole bequest, the two being severable.
6. That the property thus given in remainder became intestate estate.
7. That the widow, having accepted under the will a definite share of the estate in lieu of dower, was not entitled to any part of this intestate estate.
8. That the gift of one of the fifths in question in trust for the children of the deceased son, being in all respects legal, they retained what was so given and also took one fourth of the intestate estate.
9. That each of the three daughters took absolutely her fourth of the intestate estate and had also a life use of one third of the fourth which went to the children of the deceased son, these children taking their share of the intestate estate subject to the life use of the daughters in it.
10. That the amount which each daughter might take under the provision that she might receive one thousand dollars a year from the principal of the trust fund, not exceeding in all one half of it, was to be determined by the amount of the trust fund as it stood in the mind of the testator, and not by its amount as affected by the withdrawal of the intestate estate from it.
11. That where the amount thus drawn from the principal, in the case of one of the daughters, was equal to the whole of her fifth of the trust fund as reduced by the withdrawal of the intestate estate, but not exceeding one half of the original trust fund, she was to be regarded as having exhausted the share of the fund legally held in trust for her, and to be the absolute owner of what remained of her share of the estate.

The act of 1821 abolishing the rule in Shelley's case, (now Gen. Statutes, § 2953,) does not conflict with or in any way affect the act of 1784 against perpetuities, (Gen. Statutes, § 2952.)

Under the statute against perpetuities the words "immediate issue or de-

scendants" have by repeated decisions been determined to mean children, and not grandchildren or other descendants more remote.

That statute applies equally to all gifts, whether of real or of personal estate.

It is a fundamental rule in the construction of wills that a testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless from the context it appears that he has used them in a different sense.

The word "heirs" in its primary legal meaning expresses the relation of persons to a deceased ancestor.

[Argued November 20th, 1890—decided June 1st, 1891.]

ACTION by a trustee to recover the value of certain stocks and bonds claimed to belong to the trust estate; brought to the Superior Court in Fairfield County. Facts found and the case reserved for advice. The case is fully stated in the opinion.

C. R. Ingersoll and *W. L. Bennett*, for the plaintiff.

H. Stoddard and *G. Stoddard*, for the defendant Watson.

J. W. Alling, for the defendants Mary E. Jennings and Elizabeth W. Hyde, daughters of Charles Bulkley, and Frederick B. Hyde and Charles B. Jennings, grandchildren.

TORRANCE, J. This is an action by the plaintiff as trustee of certain estate for Georgianna Nichols, under the will of her father, Charles Bulkley, against the defendant, to recover the value of sundry stocks and bonds, alleged to belong to the trust estate, and to have been received and sold by the defendant as a broker, with knowledge that the same were being sold and disposed of in violation of the trust.

Upon a former hearing before this court, on a reservation made by the Superior Court, it was found that the claims of the parties virtually called for the judicial construction of the will of Charles Bulkley, and that the questions involved could not properly be considered or determined without the presence, as parties, of all persons interested in and under the will. The case was therefore remanded to the Superior

Court, to give the defendants the opportunity to summon into the court, and make parties to the cause, all such interested parties, to the end that the measure of right in Mrs. Nichols to the shares set apart in trust for her, and all questions presented by the respective parties, might be finally determined in one proceeding. See the case of *Leake* v. *Watson*, 58 Conn., 332.

Thereupon in the Superior Court all persons interested in or under the will were made parties to this cause, and upon pleadings filed by them were heard by the court. The Superior Court made a supplemental finding, and, upon the facts found in the original and supplemental findings, reserved the case for the advice of this court.

Charles Bulkley died in October, 1875. At the date of the execution of his will, in April, 1875, there were living four children of the testator, to wit, Georgianna Nichols, Mary Elizabeth Jennings, Elizabeth Whitney Hyde, and Catherine Bulkley; also nine grandchildren, including three children of Charles H. Bulkley, a deceased son of the testator. Catherine Bulkley, one of the daughters, died before the testator. His other three children and his nine grandchildren survived him, and are all parties to this suit. Since his death three great grandchildren have been born.

One of the principal questions in the case as now presented, arises upon the construction of the fourth clause of Charles Bulkley's will, which reads as follows:—

"Fourth. All the rest, residue and remainder of my estate, real and personal, I give, devise and bequeath unto trustees, as hereinafter named, for the uses and purposes hereinafter set forth, as follows:

"One fifth to be held in trust, and the income, use, interest and improvement thereof to be paid over annually, or in more frequent installments, if deemed expedient and convenient by the trustees, unto and for the use and benefit of my daughter Mary Elizabeth, wife of Isaac Jennings; the remainder to go to her heirs forever; provided that said Mary Elizabeth may, if she shall deem it expedient and necessary, from time to time take and receive portions of the

principal, not exceeding in all one-half of such principal, and not to exceed the sum of one thousand dollars in any one year; such portion of the principal to be paid over by the trustees upon notice in writing so to do, and the receipt of said Mary Elizabeth to be a sufficient voucher to the trustees in the premises.

"Three other parts, of one-fifth each, to be held in trust in the same manner as aforesaid, with the privilege of receiving portions of the principal, for the use and benefit respectively of my other daughters, Elizabeth Whitney, wife of Rev. Frederick S. Hyde, Georgianna, wife of William B. Nichols, and my aforementioned daughter Catherine, with remainder to their heirs forever.

"And I appoint as trustees to execute the trust aforesaid, my wife, Elizabeth Bulkley, and my nephew, Oliver Bulkley, and direct that they be not required to give bonds for the performance of their duties as such trustees.

"The remaining one-fifth of said residue I give, devise and bequeath unto my wife, Elizabeth Bulkley, and Francis D. Perry, of Fairfield, to hold in trust, to appropriate the use, income, interest and improvement thereof for the support, maintenance and education of Annie E. Bulkley, Erastus B. Bulkley and Grace E. Bulkley, children of my deceased son Charles H. Bulkley, in such manner as they, the said trustees, shall deem proper and expedient; and using so much of the principal as said trustees may find necessary to do during their minority, and to pay over unto each, at attaining majority, all, or so much as said trustees may deem fit, of the share then due such one arriving at majority; and upon arriving at majority of the youngest living of said children, to pay over unto each child, or its heirs if deceased, the principal sum, or so much thereof as shall not have been before expended, to hold to them respectively and their heirs forever."

Whether the "rest, residue and remainder" spoken of in this fourth clause, consisted, at the time of Charles Bulkley's death, wholly of personal estate, or partly of personal and partly of real estate, and if of both, what proportion was

real and what personal, does not perhaps clearly appear from the record. Presumably it consisted of both, for the clause in question speaks of "my estate, real or personal," and the sixth clause gives the executors power to dispose of any and all of the real estate, except that described in the second clause of the will. However this may be, the record shows that the estate actually distributed to the trustees under this fourth clause consisted wholly of personal estate.

An examination of this fourth clause of the will shows clearly two things:—first, that whatever disposition the testator intended to make of any one of the shares given in trust for the daughters, that same disposition he intended to make of all; and second, that the clause in question, in the case of each daughter, contains, in form at least, two gifts, namely, one of the equitable life use to the daughters, coupled with certain rights, powers or privileges to take part of the principal, and a further gift of what shall remain of the trust property to their heirs. The fourth clause as clearly in form contains these two gifts, as the second clause contains a gift to the wife of the life use of the homestead and a gift over to the children or their heirs.

The defendant claims, in substance, on this part of the case, that if the fourth clause does in fact contain two such distinct gifts, the gift of the remainder to the heirs is void, because it violates the provisions of our statute against perpetuities. The plaintiff, on the other hand, claims that the clause in question either does not contain two such distinct gifts, or, if it does, that the gift of the remainder over does not come within the prohibition of the statute.

The first question then is, whether the clause in question contains in fact, as well as in form, a separate and distinct gift of the remainder to the heirs of the daughters.

In support of his claims upon this point the plaintiff says, in substance, that in the sentence, "the remainder to go to her heirs forever," the word "heirs" is used as a word of limitation; that the testator intended to vest in Mrs. Nichols an equitable life estate, together with a remainder in fee,

which would descend to her heirs, and which she could not alien.

In short, the plaintiff claims that this clause is to be interpreted as giving the fee to Mrs. Nichols, without the power to dispose of it or to incumber it in any way to the prejudice of the heirs, to whom it would eventually go by descent and not by purchase.

The argument in support of this claim seems to be, that inasmuch as the remainder is to go to her heirs, the testator intended them to take such remainder in the character of heirs, and not as purchasers, and that to accomplish this their ancestor must take a fee, but without the power to dispose of it or incumber it.

The intent of the testator is to be ascertained from the language employed, and if the language here in question is given its natural and ordinary meaning, it is difficult to see how any such claimed effect can flow from it. In the first place, it should be remembered that the property actually held in trust was in fact personal property and not real estate. The will was made in April, 1875; the testator died in the fall of that year; and the estate was distributed within six months after his decease. At the time of the distribution the estate, amounting to nearly three hundred thousand dollars, consisted almost entirely of stocks and bonds. It is quite reasonable to suppose that both at the time the will was drawn and at the decease of the testator, the estate consisted almost entirely of personal property. If so, it is difficult to believe that either the testator or the draughtsman had in mind the creation of estates in fee or in tail in this personal property.

In the next place, it is apparent that the will was drawn by one familiar with legal conceptions and legal terminology, and quite capable of expressing himself in language which admits of little or no dispute. When he uses the word "heirs" elsewhere as a word of limitation, he leaves no room for doubt that he intended so to use it. When he uses it as a word of purchase, it clearly appears that he intended so to use it. When he gives a life estate, as in the

second clause, he leaves no room for doubt as to the kind and nature of the estate given. In making the gift of the life use to the daughters and of the remainder to their heirs, the testator makes use of substantially the same language employed by him in the second clause to give a life use to his wife and a remainder to the children and their heirs. The fact that he thus uses substantially the same forms of expression in both cases, prompts the belief that he used them intentionally, and in order to effect the same purpose, namely, to give a life estate to one person and the remainder to others as purchasers.

If the testator, in the fourth clause, intended to create and vest in his daughters some kind of an estate in fee or in tail, which the daughters could neither incumber nor dispose of in any way to the prejudice of their heirs, it is but natural to suppose that he would have used different language from that employed in the second clause. In the second clause of the will the word "remainder" seems to be used in the technical sense of the term, while in the fourth clause it can hardly be said to be so used. By the word "remainder" in the fourth clause the testator seems to mean what shall be left of the personal property, (of which he must have known the trust fund would largely if not wholly consist,) after the decease of the daughters. The language used is apt and fit to convey a life estate to the daughters, and also to convey by will to others designated as her heirs, such a remainder after the death of the daughters. It is not apt and fit to create and vest in the daughters an estate of the kind and nature claimed by the plaintiff.

On the whole then, to construe these devises to the daughters and their heirs as the plaintiff here claims, is, we think, to do violence to the language used, and to derive from it an intent which cannot be derived therefrom if that language is to bear its ordinary and natural meaning.

There is nothing in the other parts of the will that favors the plaintiff's claim, and we know of no rules of construction which require us to put such an interpretation upon the language of this will as the plaintiff here contends for. We

therefore think that this fourth clause of the will contains in fact, as well as in form, a devise to Mrs. Nichols of an equitable life estate in the trust property, and also a distinct, substantive gift to other persons designated as her heirs, of something which she was in no event to take, namely, that which should remain of the property after her death.

The next question is, whether this devise to the heirs comes within the prohibition of our statute against perpetuities. That statute reads as follows:—"No estate in fee simple, fee tail or any less estate, shall be given by deed or will to any persons but such as are, at the time of the delivery of such deed or death of the testator, in being, or to their immediate issue or descendants; and every estate given in fee tail shall be an absolute estate in fee simple in the issue of the first donee in tail." Gen. Statutes, § 2952.

The solution of this question depends chiefly upon the meaning of the word "heirs" as used in the sentence, "the remainder to go to her heirs forever." If it means the immediate issue or descendants of persons in being at the death of the testator, within the meaning of the statute, then the gift over is valid. If it means any and all persons who can inherit from them or who can take their estate under the statute of distribution, then the defendant claims that the gift over is void. In what sense then is the word "heirs" used in the sentence quoted?

As we have already said, it is not here used as a word of limitation. It is used to designate the persons who are to take, under the will, what remains of the trust property after the death of the daughters. When the word "heirs" is used in a will to point out legatees or devisees, the primary legal meaning of the word will be given to it, unless the context shows clearly that the testator used it in a different sense; and in its primary meaning when thus used it expresses the relation of persons to a deceased ancestor. *Cushman* v. *Horton*, 59 N. York, 149; *Gold* v. *Judson*, 21 Conn., 616; *Rand* v. *Butler*, 48 id., 293; *Haley* v. *City of Boston*, 108 Mass., 579; *Fabens* v. *Fabens*, 141 id., 399; *Millett* v. *Ford*, 109 Ind., 159. This rule was followed also in the cases of *Alfred* v.

Marks, 49 Conn., 473, and of *Anthony* v. *Anthony*, 55 Conn., 256.

As before stated, this will is drawn by one who seems to be quite familiar with technical legal terms, and their legal signification. In the first clause of the will the phrase is, "said property is to go to my children or their heirs *per stirpes*." In the third clause the testator gives to his wife one third part of the residue of his estate "to her and her heirs forever." In the fourth clause, in the gift to the children of his deceased son, when the trust estate is paid over to them at majority, it is to be paid over "unto each child, or its heirs if deceased," and is to be held by them "and their heirs forever." In all of these instances the context shows quite clearly whether the word "heirs" is used as a word of limitation or of purchase, and, if of purchase, whether it means heirs generally or only children or immediate issue.

But in the fourth clause, where the devise is made to the heirs of the daughters, the word "heirs" stands alone and unqualified, as a description of the persons who are to take the remainder. In using the word "heirs" here, did the testator mean to exclude the issue of persons unborn at his decease, who might be alive at the death of a daughter, and would be her "heirs" in the legal sense of the term? He has not expressly said so. On the contrary he uses a word which includes such issue, lineal or collateral.

The sense in which the word "heirs" is here used must be ascertained from the language of the will, and taking the will as a whole. But, upon examination, it is quite evident that there is nothing in the context or other parts of the will that favors the view that he meant the children or immediate issue of a daughter. The fact that when he uses the word "heirs" elsewhere in the will as a word of limitation, or as meaning children or immediate issue, he leaves little or no doubt as to the sense in which he uses it, favors the view that, in the case of his daughters, the word "heirs" is to have its primary and ordinary meaning.

We are not at liberty to guess what he means; we must

ascertain his intent, if it can be ascertained at all, from the language he uses. One of the fundamental rules in the construction of wills is that a testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense. As we have seen in this case, it not only does not appear from the context that the testator, in the gift to the heirs of his daughters, used the word "heirs" in other than its strict primary meaning, but, on the contrary, the context rather forces us to hold that he did so use it here.

On the whole, looking at the entire will and reading it in the light of the accepted rules of construction and interpretation, we think the word "heirs" in this gift over, in case of the daughters, means the person or persons who, at the death of each daughter, answer the description of heirs in the legal sense; that is, those who would take by descent or by distribution from each deceased daughter.

If this be so, then it is obvious that the estate so given does not and cannot vest in any person or persons until the event of each daughter's death, because until then her "heirs" cannot be ascertained; and also that the person or persons who will take the remainder of the estate held in trust, may be neither persons who were in being at the death of the testator nor the children of such persons.

The child or children of one of the three great grandchildren, born since the death of the testator, may by possibility be the heir or heirs of Mrs. Nichols. Would a gift by will to such a child or children, who should be living at the death of Mrs. Nichols, be a void or valid gift under our statute against perpetuities?

The answer to this question depends upon the meaning of the words "immediate issue or descendants," as used in the statute. If these words include only the "children" of persons in being at the death of the testator, then clearly the gift would be void; but if they also include the issue or children of persons not in being at the death of the testator, but living at the death of Mrs. Nichols, then such a gift

would be valid. If the question as to the meaning of these words were an open one, arguments founded upon the object and purpose of the statute, upon the language employed to effect that purpose, and upon a general course of reasoning, would be entirely proper and admissible. But this is not the case. The question as to the meaning of these words is no longer open for discussion. This statute has been in existence for more than one hundred years, and cases involving the meaning of the words in question have been frequently before this court. In every such case wherein the present question has been discussed, so far as we are aware, this court has uniformly held that these words mean the children of some person in being, and not his grandchildren or other descendants not immediate.

If repeated decisions of a court of last resort can settle any question relating to the construction of a statute as ancient and important as the one now under consideration, then the meaning of the words "immediate issue or descendants" in this statute must be regarded as finally settled. It is true our earlier reports do not contain many cases wherein the present question is considered, but in the later cases the question has been ably argued by counsel and fully and fairly considered by the court. What construction the court and the profession put upon these words at a comparatively early period, may be seen from the opinions in the case of *Allyn* v. *Mather*, 9 Conn., 114. In that case HOSMER, J., says:—"That an estate for life in the plaintiff * * * contravenes no rule of law is indisputable. He is the immediate issue and descendant of a person in being at the time the will was made, and hence is capable of taking the estate as a purchaser. This construction however would defeat the testator's general intent, * * * for the son of Richard, on the established principle of law, as well as by our statute, being the issue of unborn issue, cannot take the estate otherwise than by descent."

In the same case DAGGETT, J., in a dissenting opinion upon another part of the case, agrees with the majority of the court upon this point. He says:—"By our statute (which

however is only in affirmance of our common law), it is provided that no estate shall be given by will to any persons but to such as are in being, or to the *immediate* issue of such as are in being, at the time of making the will. This was the common law of Connecticut when the testator died; and it is obvious, therefore, that no persons can take as purchasers after the issue of the grandson, Samuel Allyn. The issue of this grandson can take directly and by way of purchase, because they are the immediate descendants of a person in being at the making of the will; but with them the capacity of taking by purchase terminates."

Here it will be observed that both Judge HOSMER and Judge DAGGETT speak of our statute as affecting the capacity of parties to take under a will. If they are the issue of unborn issue, they cannot take. In this respect our statute differs from some other statutes and rules against remoteness.

So far as we know, no other case involving a discussion of the provisions of this statute came before this court until the case of *Jocelyn* v. *Nott*, in the 44th Conn., in 1876. The court in that case put the same construction upon the statute as had been put upon it in the case of *Allyn* v. *Mather*, by Judges HOSMER and DAGGETT.

Since that time cases involving the application or construction of the provisions of this statute have been quite frequently before the court, and it is unnecessary to do more than refer to them. The point in question was directly involved in the following cases:—*Rand* v. *Butler*, 48 Conn., 293; *Alfred* v. *Marks*, 49 id., 473; *Wheeler* v. *Fellowes*, 52 id., 238; *Andrews* v. *Rice*, 53 id., 566; *Anthony* v. *Anthony*, 55 Conn., 256.

The provisions of the statute were also considered and discussed to some extent in *Tappan's Appeal from Probate*, 52 Conn., 420, and in *Farnam* v. *Farnam*, 53 id., 261, and in both cases the judges seem to have been agreed upon the point here in question. We have been unable to find any case in our reports wherein this question has been decided otherwise, though doubtless cases may be found in which a

gift may have been obnoxious to the statute if the point had been made.

It is strenuously claimed, however, that this view of the law is in conflict with the provisions of section 2953 of the General Statutes. That section first appeared on the statute book in 1821, and reads as follows:—"All grants or devises of an estate in lands to any person for life, and then to his heirs, shall be only an estate for life in the grantee or devisee." The statute against perpetuities first appeared on the statute book in 1784. It is claimed that the later statute requires us to assume that the devise of which it declares the legal effect is a valid one; that either it recognizes such a devise as not in conflict with the statute against perpetuities, or it means that, if there is any conflict, the old statute shall yield to the new.

The statute of 1821 was passed for a specific purpose, namely, to abolish what was known as the "Rule in Shelley's case." Under the operation of that rule the question of remoteness in the gift of the remainder over to the heirs could seldom arise, for the word "heirs" was rigorously held to be a word of limitation and not of purchase. This in most cases defeated the intention of the giver, and the statute was passed to remedy this evil. It assuredly was not passed to enable remote grantees or devisees to take an estate by purchase in cases where a gift to them would be void under the statute of 1784.

There is no conflict, real or apparent, between the two statutes. The one embodies in statutory form an old and important rule of public policy; the other spent its force in abrogating a harsh, technical and arbitrary rule of common law. The mere fact that the statute speaks of grants or devises to the heirs of the grantee or devisee for life, is of little or no weight. It means such grants or devises when they are not obnoxious to the statute against perpetuities. That there may be such gifts, in form at least, is certainly true. A devise to *A* for life, and then a gift of the remainder to his heirs in fee, is good to-day, if by heirs the testator means the children of *A*. It was in such cases that the

"Rule in Shelley's case" was frequently applied, contrary to the true intent of the testator. In speaking of the case of *Bishop* v. *Selleck*, 1 Day, 299, Judge SWIFT says that the testator in using the word "heirs" manifestly meant children, yet the operation of the "Rule in Shelley's case" changed the devisees' life estate into an estate in fee. 1 Swift's Digest, 82. Neither the statute nor the rule it abolished had the slightest reference to the statute against perpetuities.

In view then of the purpose for which the statute of 1821 was enacted, we think it would be a very strained construction of it to hold that, either expressly or impliedly, it modifies, changes, or in any way affects the statute against perpetuities.

But even if we were dissatisfied with the construction thus uniformly and for so long a period put upon this statute of 1784, we should feel bound to follow the precedents unless very cogent reasons were shown for a departure therefrom. No such reasons have been shown in this case, and we think the construction put upon the statute is a natural and reasonable one.

By the decisions of this court, also, it has been determined that the provisions of the statute apply to devises, bequests and legacies equally; that is, to all gifts made by will, whether the property attempted to be given be real estate or personal property, or both together. *Alfred* v. *Marks*, 49 Conn., 473; *Anthony* v. *Anthony*, 55 id., 256.

In the case at bar, as we have seen, the issue of unborn issue may be the heir or heirs of Mrs. Nichols at the time of her decease. That such a possibility makes the gift over to the heirs of Mrs. Nichols obnoxious to the statute, has also been determined by this court beyond all question. *Jocelyn* v. *Nott*, 44 Conn., 59; *Rand* v. *Butler*, 48 id., 293; *Alfred* v. *Marks*, 49 id., 476; *Wheeler* v. *Fellowes*, 52 id., 244.

The decisions of our own court have thus, in a series of cases involving substantially the points now in question in the case at bar, settled them in favor of the defendant's claim, and render further discussion unnecessary. We hold, there-

fore, that the gift or devise of the remainder over to the heirs of the daughters is void.

The next question is, what becomes of such remainder? That remainder, as we have seen, and at least so far as the present defendant is concerned, consists entirely of personal property. The rule, as settled by this court in such cases, is that where, as in the present case, the gift over is void, and there is no other disposition made of it in the will, the property so attempted to be given is intestate estate. *Jocelyn* v. *Nott*, 44 Conn., 55; *Adye* v. *Smith*, id., 60; *Rand* v. *Butler*, 48 id., 293; *Bristol* v. *Bristol*, 53 id., 242.

This leads us to consider what provisions of the will are in any way affected by this failure of the remainder over to the heirs of the daughters. So far as we can see, the provisions made in the second and third clauses of the will for the wife of the testator, are in no way affected by the failure of these remainders to the heirs of the daughters. These provisions undoubtedly gave to the widow more than she would have obtained by way of dower, and as one of the distributees, and were made in lieu of dower. She accepted them and has enjoyed the benefits of them since 1876. It was plainly not the intention of the testator that she should have any other share in his estate, for he evidently did not contemplate that any part of it would become intestate estate. When she accepted the offer in the will, she parted with her vested right to dower, and took instead the testamentary compensation by virtue of a contract then made. *Security Co.* v. *Bryant*, 52 Conn., 311. Under these circumstances, we think the widow is not entitled to any share of the intestate estate resulting from the failure of the remainders over to the heirs of the daughters. Indeed she does not make any such claim here, nor did she claim or receive any portion of the property of the testator, which became intestate by the death of Catherine Bulkley before the testator and was distributed in 1876. This one fifth of the residue which was given in trust for Catherine Bulkley, with remainder to her heirs, was treated by all concerned as

intestate property, and distributed as such. This part of the testator's property may therefore be laid out of the case.

The one fifth part of the residue given to the widow and Mr. Perry, in trust for the children of Charles H. Bulkley, the deceased son of the testator, is obviously not affected in any way by the fact that the remainders over to the heirs of the daughters are void, but remains as a valid disposition of that part of the estate.

So far as we can see, the only provisions of the will in any way affected by the failure of these remainders, are those in the fourth clause of the will, providing trust estates for the benefit of the three living daughters.

Before considering to what extent, if any, these provisions are affected by the failure of the remainders over, it will be well to notice certain facts as they appear of record. The record shows that in 1876 there was distributed and set apart to the trustees of each of the three living daughters, the sum of $44,981.81, to be held in trust for each of them under this fourth clause. At that time all of the parties in interest who were of full age joined with the guardians of those who were not, in a writing under seal, accepting and approving of such distribution, which writing was accepted by the court of probate and recorded on its records. Since that time the fund so set apart for each daughter's life use has been kept separate and distinct for such purpose. It is necessary also to bear in mind that the actual intent of the testator, so far as it can be known from the language used, was undoubtedly that each daughter should at all events have the income for life of the trust fund, and also the right to take, at the rate of one thousand dollars in each year, one half of the principal. This is his main, leading intent with respect to the daughters, and the gift over to their heirs of what should remain after the death of each, was undoubtedly of secondary importance in the mind of the testator.

It is also manifest that the testator actually intended that Mrs. Nichols and her heirs should have the sole benefit of the one fifth set apart for her and them, and that the children of the deceased son should have no part of that. He gave

those grandchildren by the will what was equivalent to the share given to each daughter and her heirs, and did not perhaps even contemplate that they would ever receive any other portion of his estate. But this last intent, on account of the statute, is invalid, and cannot be carried out as a whole. Part of his estate is intestate, and the grandchildren will take their share of it under the law. What then is their share? The answer to this depends upon the validity and effect of the provisions made in favor of the daughters.

If we hold that the provisions of the fourth clause for the benefit of the three living daughters must wholly fall with the fall of the remainders over, then of course there would be no trust fund; the entire fund distributed to the trustees of each daughter would be estate absolutely intestate; one quarter of it would, under the statute of distributions, belong to each daughter, and one quarter of it to the children of the deceased son. Or we might say that in the above contingency each daughter would take, under the statute, three quarters of the share set apart to her trustee for her use, and the children of her deceased brother would take the other quarter. So far as the present case is concerned it makes no difference in fact which of the above views of the matter we take; that is, it is all the same in the present case whether we regard each daughter as taking three quarters of the fifth set apart to her trustees, and the brother's children as taking one quarter of that, or each daughter as taking one quarter of the three fifths and the grandchildren the other quarter. Perhaps however, for the sake of clearness, it will be better to consider the matter in question as if the rights of Mrs. Nichols and the grandchildren were alone concerned. How then are the provisions of the will in favor of Mrs. Nichols affected by this failure of the remainder over to her heirs?

A question somewhat similar to this was considered in the case of *Andrews* v. *Rice*, 53 Conn., 566, where this court said:—"In answering that question we must ascertain the intention of the testator as to the object of those trusts, and whether that object is so independent of and severable from the illegal object that it can be carried into effect, with due

regard to the legal rights of all the parties interested, without annulling any of the legal provisions of the will and without adding thereto. If the leading and primary object was to accumulate a fund for illegal distribution; or if the trusts were strictly subservient or auxiliary to such an illegal distribution, so as to be themselves tainted with illegality; or if they are so connected therewith that they cannot be separated and carried into effect without involving consequences substantially and materially different from what the testator intended, they too must fall with the illegal distribution."

In the will here in question, one of the leading purposes of the testator was to provide for Mrs. Nichols an income for life. To this end he gives her the life use of one entire fifth of the residue of his estate. Not content with this, and apparently upon the supposition that such income would or might be insufficient, he gives her the right to take, in sums of one thousand dollars per year, the principal of the trust fund, to the extent of one half thereof. We cannot see that this purpose of the testator to provide Mrs. Nichols with a source of income for life is so connected with the remainder over, that if the latter fails the former cannot be carried out. The two are quite distinct and severable.

Nor do we see that these provisions in favor of Mrs. Nichols are so inconsistent with the legal rights of other parties that they cannot be carried out with due regard to those rights; nor that, if carried out now, they involve consequences substantially or materially different from the testator's legal intent; nor that in carrying them out we are adding to or annulling any of the legal provisions of the will. If the testator had made these provisions in favor of Mrs. Nichols, and there left the matter, without making in fact or attempting to make any disposition of the remainder over, there could, we think, be no doubt that these provisions would be valid. If Mrs. Nichols were the sole distributee of the testator, such a provision in her favor would be perhaps inoperative in fact, because of the superior rights she would obtain under the statute, but the provisions themselves would be

valid provisions. Mrs. Nichols however is not the sole distributee of the remainder of the fifth set apart for her use. The children of her deceased brother are entitled to one quarter thereof, subject to the rights of Mrs. Nichols. What then are those rights?

At the time of the distribution of the one fifth of the residue to her trustees, Mrs. Nichols, under the statute of distributions, was, as against the grandchildren, entitled to three quarters of such fifth absolutely. This three quarters part could not be held in trust after a demand made to convey to her, nor would the provisions of the will have any application to that part, because her rights as distributee were superior to and inconsistent with her rights under the will, and ordinarily, when such rights meet in one person, the lesser merge in the greater.

This would not apply to the remaining quarter however. As to that, whatever rights she has she obtains under the will. We think, under the will, she is clearly entitled to the equitable life use of this remaining quarter, and that the grandchildren take it subject to that right. But under the will she is also given the right to take one half of the principal of the trust fund in sums of one thousand dollars in each year. This is a right as important and valuable as that of the life use. Here is a clearly expressed intention that Mrs. Nichols may take, if she lives so long, in sums of one thousand dollars each year, a sum equal to one half of the trust property set apart to her trustees. We think the right so given to her was, in effect, the gift of a sum equal to the half of the trust fund set apart for her life use, as it existed at the death of the testator, to be taken in sums of one thousand dollars each year, if she lived long enough to take it. She was to have this if she deemed it expedient and necessary to take it, in addition to the life use of the entire fund. It turns out, however, that under the statute of distributions she is entitled to three quarters of this fund absolutely, and as her rights to this part, under the statute, are superior to and inconsistent with her rights under the

will, the rights given to her under the will can, as to this part, have practically no operation.

If the right here in question is to operate at all, it can operate only on the one fourth part of the fund which goes to the children of her deceased brother subject to her life use. We see no valid reason why such right may not be exercised upon that portion. Suppose she took one half of this fifth under the statute, and the children of the deceased brother took the other half; clearly in that case the children would take their half subject to her life use, and also subject to her right to take the entire principal of their half under the will. For, under the construction we have put upon the will, the testator has given the life use of the entire fund to Mrs. Nichols, with the power to take, under the will, a sum equal to one half of the entire fund, if she lives long enough to do so, and has legally said nothing about the disposition of the remainder. This is a valuable and valid gift. She has this right in addition to and independent of the rights she acquires to the fund as distributee, and whatever rights the children have as distributees to the portion of the estate we are now considering, they take them subject to the rights of Mrs. Nichols under the will. And all this is equally true where Mrs. Nichols takes, as here, three quarters instead of one half.

We therefore hold that, as between Mrs. Nichols and the children of her deceased brother, at the time of the distribution in 1876, Mrs. Nichols took three quarters of the trust fund set apart for her use absolutely; that she took the equitable life use of the remaining quarter; and the right to take, under the terms of the will, the principal of that remaining quarter, in sums not to exceed one thousand dollars in any one year, until she had received such a sum as would equal one half of the entire trust fund, as it then was, if she lived long enough to do so, or until the principal of that quarter was exhausted.

The record shows that the widow of the testator and Oliver Bulkley were the trustees of Mrs. Nichols. They together, or rather Oliver Bulkley as acting trustee, managed

the trust fund for Mrs. Nichols down to August, 1885, when he resigned and the widow was appointed sole trustee. Up to this time Mrs. Nichols had taken and received, under the will, in ten consecutive years, the sum of ten thousand dollars of the principal. This was very nearly one fourth of the entire trust fund distributed to her trustees. In August, 1885, it appears that, on account of these payments and some losses sustained, the balance of the principal of the trust fund remaining in the hands of the widow, as sole trustee for Mrs. Nichols, was $28,745.58. This was less than three quarters of the entire fund distributed to her trustees in 1876. It was after this time that the defendant, Mrs. Nichols, and her mother, the trustee, first began to have the dealings in question in this case. Such dealings resulted, as the record finds, in the loss of the entire balance of the trust fund, claimed by the plaintiff to amount to over $35,000. After this, in November, 1887, the mother of Mrs. Nichols was removed from the position of sole trustee for her daughter, and the plaintiff, who is the husband of one of the daughters of Mrs. Nichols, was appointed sole trustee in her place. Immediately after his appointment the plaintiff, as such trustee, made demand of the defendant for all the trust property which it was claimed the defendant had received from Mrs. Nichols and her mother, the sole trustee.

Certain facts are found upon the record, and certain questions arising thereon have been made and argued before us, regarding the notice which the defendant had that he was dealing with trust property, which was being sold and disposed of in violation of the trust, and regarding the disposition of part of the property to Mrs. Nichols, and other questions. In the view we have taken of the case it becomes unnecessary to consider or decide any of these questions.

The result we have arrived at shows that Mrs. Nichols had the absolute right to three quarters of the fund set apart for her use; that she had the equitable life use of the remaining quarter; and that she had the right to appropriate to herself in sums of one thousand dollars each year the entire principal of the remaining fourth, if she lived long enough to do so.

She had already taken ten thousand dollars before she began to deal with the defendant. Since then she has lived long enough to take, and has in fact and in effect, by her dealings with the fund, and with the consent of the trustee, her mother, taken the balance of the fourth part, so far as this defendant is concerned. As distributee of her father, and under his will, Mrs. Nichols clearly had the right to do what she did with this claimed trust fund, so far as the present case and this defendant are concerned.

Upon the facts found, as to the dealings between the defendant and Mrs. Nichols and her then trustee, we think the defendant is subrogated to all the rights which Mrs. Nichols had or has to the estate which so came into his hands. It is true in point of fact, and regarding the matter from one of the points of view before suggested, that Mrs. Nichols and her sisters are entitled, as distributees, to one quarter each of the entire fund distributed or set apart in 1876 to the trustees for them and each of them, and the children of the deceased brother to the other quarter. But this makes no difference in fact and effect in the result to which we have come.

Viewed from this standpoint, Mrs. Nichols has, under the will, exhausted her share of the principal of the fourth which would go to the children, and has in fact had and spent the fourth to which she was entitled absolutely as distributee. Under these circumstances, in any future distribution which may be necessary, or which may be made of any part of the fund now held in trust for the other two daughters, the share that Mrs. Nichols might be entitled to would be offset by the amount which she has already had, and that alone would be distributed, or rather allowed, to her as her share; the balance would be distributed to the other sisters. And if at the death of them or either of them, they shall not have taken, under the will, at the rate of one thousand dollars per year, that part of the remaining fourth which goes to their brother's children subject to their rights under the will, then such part as so remains will be distributed to said children. The result is the same from either point of view.

Although technically then the plaintiff, as trustee, might be entitled to hold, as such, some part of the funds which came into the hands of the defendant, yet he would be so entitled only until demand was made upon him by Mrs. Nichols, or by the defendant in her right, to transfer to her or him the trust property discharged of the trust.

We think that, so far as Mrs. Nichols and this defendant, and the questions in this case are concerned, final distribution of the estate was made in 1876.

Under these circumstances we think the interest of all parties will be best subserved by advising the Superior Court to render judgment for the defendant, and for the reasons hereinbefore given we so advise that court

In this opinion LOOMIS and SEYMOUR, Js., concurred. ANDREWS, C. J., and CARPENTER, J. dissented.

GEORGE E. SOMERS *vs.* THE CITY OF BRIDGEPORT.

New Haven & Fairfield Cos., Jan. T., 1891. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

By a city charter the board of police commissioners, by whom the policemen were to be appointed, consisted of the mayor and two members from each of the two great political parties, the mayor to preside and have a vote only in case of a tie, and any action requiring a concurrence of three members. There being policemen to be appointed, a resolution was offered at a regular meeting of the board when all were present, appointing certain persons named. Thereupon two members announced that they should not vote, but remained in the room. The mayor put the resolution to vote, and two members voted for it, and the other two refrained from voting, and the mayor thereupon declared the resolution passed. The two non-voting members protested against this ruling. Held that the silence of the non-voting members when the vote was put was a concurrence in the passage of the resolution and that it was legally passed.

Their previous declaration that they should not vote, and their subsequent protest, were of no avail.

A city ordinance provided that a schedule of the amounts due the members

of the police force, signed and approved by the police commissioners, should be handed to and examined by the city auditor before being presented to the common council. Meetings of the police commissioners had been called to act on the matter, but two members absented themselves and a quorum could not be obtained. Without waiting further for its action the common council passed a resolution paying the policemen. Held that it was competent for the council to waive the provisions of the ordinance, which was for the protection of the city, if in its judgment justice required it, and that its resolution to pay the policemen was legal.

[Argued January 22d—decided June 1st, 1891.]

SUIT for an injunction to restrain the defendant city from paying salaries to certain policemen; brought to the Superior Court in Fairfield County and heard before *Robinson*, *J.* Facts found and judgment rendered for the defendant, and appeal by the plaintiff. The case is fully stated in the opinion.

A. B. Beers and *J. C. Chamberlain*, for the appellant.

1. By the terms of the present revision of the charter of Bridgeport it is the duty of the mayor to nominate and of the council to confirm four police commissioners, two from each political party, who shall have the sole power of appointment and removal of the members of the police force. The charter further provides that the mayor shall be *ex officio* chairman of the board, and shall preside at its meetings, but shall have no vote except in cases of a tie; that three members, exclusive of the mayor, shall constitute a quorum, and "that the concurrence of three of them shall be necessary for the transaction of business." This latter provision must mean something more than that three must take part in the transaction of business, for the provision that three shall constitute a quorum means that. It must mean, in fact, that three members shall *agree* that a certain thing shall be done or not done, while the other one may be absent, or present and disagree. In the case of a tie vote, this concurrence of three is effected by the vote of the mayor. Under the former charter the police commissioners had not the power of appointment, but merely nominated to the common

council. The present plan was adopted for the purpose of making the police force of the city non-partisan and divorcing it utterly from politics. *Samis* v. *King*, 40 Conn., 298. The evil was great. A remedy was sought and supposed to be found in the granting of new powers to this board, making them the sole appointing power, and so regulating their course of procedure that they would be in fact as well as theory non-partisan, and this could be done only by making "a concurrence of three" necessary for the transaction of business. This meant an active concurrence and not a passive one. That a deadlock might arise does not militate against our view of it, for that was just what was intended when either party attempted to take a partisan advantage of the other, and is the only way to compel non-partisan action; and on the other hand it was the last thing to be feared where other business was to be transacted. What is the meaning of the word "concur"? Webster says:—"It is to meet on the same point; to agree; to act jointly; to unite in opinion; to assent;" and that concurrence is "a meeting of minds; agreement in opinion; union in design; implying joint approbation." How can it be said that the commissioners who stated that they would not vote upon the resolution or have anything to do with it, agreed, or acted jointly, or united in opinion, or assented to the transaction of the business; or that there was a meeting of minds, or an agreement in opinion, or a union in design, in the matter of making the appointments? The record states that but two intended to concur or did concur as a matter of fact. Is it so that the other two must, as a matter of law, be construed as having so concurred, although they said they would not vote, did not vote, and protested after the vote was announced? The decisions in other cases where a like requirement as to the manner of election exists, say not. *State* v. *Gray*, 23 Neb., 365; *Com.* v. *Wickersham*, 66 Penn. St., 134; *State* v. *Suterfield*, 54 Mo., 391; *State ex rel. Williams* v. *Edwards*, 114 Ind., 581; Dillon's Mun. Corp., 4th ed., §§ 230, 292. The reason for following these decisions is doubly apparent in this case, where the course which two of the

commissioners pursued is, as we claim, the exact manner in which they were expected by the legislature to stop the action of this board, when a portion of it should try to take a partisan advantage of the other portion, and the only manner in which the exact division of political power which lies at the foundation of the whole plan can have any effect. *Samis* v. *King*, 40 Conn., 306. Certainly, if they must either remain silent and have their votes counted "Aye," or vote in the negative and make a tie, and thus give the mayor the casting vote, which must be presumed to go party-wise, those who builded this structure have labored in vain and nothing has been effected by the amendment to the charter.

2. These appointments being illegal, the men have no title to their offices and are not entitled to pay for any service they may render, as the right to recover for such services belongs only to an officer *de jure*. *Samis* v. *King*, *supra*. This being true, a case of irreparable injury exists, as the plaintiff is a tax-payer, his money is being taken from him without his consent, and is threatened to be applied by the municipality to illegal purposes. The right to an injunction in such cases has always been recognized.

3. Even if this were not all true and these men were legally appointed, the plaintiff is still entitled to the relief sought. As a tax-payer of the city he has a right to insist that all the safeguards regulating the expenditure of his money shall be preserved, and that none of it shall be paid out except in the manner pointed out by the instrument which gives the power to take it away from him. By the legal ordinance of the city the common council shall not order bills of this character paid until they have been examined by the auditor and certified to as correct by these commissioners. And the language of the charter must govern here, and "the concurrence of three of them is necessary for the transaction of any business." Except as the charter gives them power to act, these commissioners are private citizens, and the approval of two of them is of no more validity than that of any other two citizens. It follows, then, for this reason, if for no other, that the injunction should be

continued until such time as the salaries proposed to be paid to these men have been approved by the proper officers. Should these officers refuse to act when they ought to do so, there is a way to compel action, but until such course had been taken no salaries should have been paid these men.

G. W. Wheeler, for the appellee.

CARPENTER, J. This is an equitable action to restrain the defendant from paying salaries to certain policemen. There are two grounds on which it is claimed an injunction should issue: first, that the policemen were not legally appointed; and second, that the steps taken for their payment did not conform to the requirements of the city ordinances.

Their appointment devolved upon a non-partisan board of police commissioners, consisting of the mayor and two members from each of the two great political parties. The mayor presided, and could vote only when there was a tie. Any act of the board required the concurrence of three members.

In consequence of including West Stratford in the city limits, the common council, on March 19th, 1890, directed the board of police commissioners to appoint four additional patrolmen on the police force. On the 1st of July, 1890, a patrolman died, so that there were five to be appointed. On the 19th of July, the board being in session, a member introduced a resolution appointing the men in question. Thereupon two members announced that they would not vote upon it or have anything to do with it. The mayor put the question on the passage of the resolution; two members voted for it, two refrained from voting either way, and the mayor declared the resolution passed. The non-voting members protested, but the proceeding was recorded as declared. The men thus appointed entered upon the duties assigned them, and performed the services for which they now claim payment.

A city ordinance provides that a schedule of the salaries or pay of the officers and members of the police force, signed

and approved by the police commissioners, shall be handed to and examined by the auditor before being presented to the common council. The pay-roll of the police force, containing thereon the names of the five men in question, was presented to the council of the city for payment, and approved by the mayor and two of the commissioners. It had not been otherwise approved by the board, as on two occasions meetings of the board had been called for the purpose of approving it, but on each occasion only two members with the mayor were present. The common council directed payment. Soon after this the present suit was brought and a temporary injunction served. Upon these facts the Superior Court dissolved the injunction and dismissed the complaint. The plaintiff appealed.

1. Were the patrolmen legally appointed? Action was taken at a regular meeting of the board at which all the members were present. The board had been directed four months before to appoint four additional patrolmen to supply a want caused by the annexation of West Stratford to the city. A short time before one had died, so that, in the judgment of the common council, five more policemen were needed. An attempt to supply this need was met by two of the commissioners, not by any objection to the time or manner of making the appointment, nor by any objection to the character or competency of the men, but simply by a refusal to take any action in the matter. We are not told what their motive was; nor are we at liberty to indulge in conjecture. On the face of the record they appear as obstructionists, and as such we must treat them. As it was the duty of the board to appoint, it was their duty to act. By their refusal to vote they neglected their duty. The needs of the city demanded action. Sound policy requires that public interests should not suffer by their inaction. Had they voted against the resolution there would have been a tie, and the mayor would have given a casting vote. Had he voted in the affirmative the legality of the appointment could not have been questioned. But they did not vote although present. Their presence made a quorum.

A quorum was present, and all who voted, voted in the affirmative. Why was not the mayor justified in declaring the resolution passed? The silence of the non-voting members was acquiescence, and acquiescence was concurrence. Their previous declaration and their subsequent protest avail nothing. The test is, not what was *said* before or after, but what was *done* at the time of voting.

Counsel for the plaintiff contend that the legislature contemplated—indeed intended, that either party might at any time, if they suspected that the other intended a partisan advantage, take the course pursued in this case, and thus produce a dead-lock. We do not so read the charter. If that had been the intention it would have been more effectually accomplished by denying to the mayor the power to give a casting vote. The object of that provision was to prevent a dead-lock, and we see no evidence of an intention to vest in two members the power to cause one. It was doubtless supposed that all the commissioners would be fair-minded men, and that they would strive to agree upon a police force composed of the best men selected from both parties. If all the members really desired to accomplish that result, and acted like reasonable men, they could hardly fail. Unfortunately human nature is such that there was a possibility, even a probability, that occasionally the commissioners might not agree. The legislature, recognizing such an emergency, wisely provided that the mayor might untie the vote, deeming it far better for the community that there should be a partisan police rather than no police at all.

Upon principle two members could not, by inaction, prevent action by the board. Being present, it was their duty to vote. Had they done so, a result would have been certain. The most that they could have done would have been to make a tie; and then the mayor, by his vote, could have passed or rejected the resolution. Their presence made a quorum and made it possible for the board to act. It would be strange if by their mere neglect of duty they could accomplish more than they could by direct action. The legal

effect of their silence was an affirmative vote. And so are the authorities.

The 127th section of Angell & Ames on Corporations, 10th edition, reads as follows:—"After an election has been properly proposed, whoever has a majority of those who vote, the assembly being sufficient, is elected, although the majority of the entire assembly altogether abstain from voting; because their presence suffices to constitute the elective body, and if they neglect to vote it is their own fault, and shall not invalidate the act of the others, but be construed an assent to the determination of the majority of those who do vote. And such an election is valid, though the majority of those whose presence is necessary to the assembly, protest against any election at that time, or even the election of the individual who has a majority of the votes; the only manner in which they can effectually prevent his election, is by voting for some other qualified person:" citing *Oldknow* v. *Wainwright*, 2 Burr., 1017; *Rex* v. *Foxcroft*, id., 1020; *Crawford* v. *Powell*, id., 1016; *Oldknow* v. *Wainwright*, 1 W. Bla., 229.

The principle thus enunciated has been sanctioned and applied by some excellent authorities in this country. *Inhabitants of First Parish in Sudbury* v. *Stearns*, 21 Pick., 148; *Attorney Gen.* v. *Shepard et al.*, 62 N. Hamp., 383; *Walker* v. *Oswald*, 68 Md., 146; *St. Joseph Township* v. *Rogers*, 16 Wall., 644; *County of Cass* v. *Johnston*, 95 U. S. R., 360; *State ex rel. Shinnick* v. *Green*, 37 Ohio St., 227; *Rushville Gas Co.* v. *City of Rushville*, 121 Ind., 206.

There are cases which seem to regard those present and not voting as voting with the minority. *Commonwealth* v. *Wickersham*, 66 Penn. St., 136; *Launtz* v. *The People*, 113 Ill., 137.

Proceeding upon that theory we should come to the same result—a tie, untied by the casting vote of the mayor. He was not required to give a formal vote; the declaration of the result was sufficient. *Small* v. *Orne*, 79 Maine, 81; *Rushville Gas Co.* v. *City of Rushville*, 121 Ind., 212. But the weight of authority regards the non-voting members as

assenting to the action of the majority, whether in the affirmative or negative. In some instances a statute requires a majority of the whole number; or, as in the Pennsylvania case, (*Commonwealth* v. *Wickersham*, *supra*), a majority of those present. In such cases those not voting are necessarily counted with the minority. But in the absence of some special provision of that nature, so counting them might result in absurd consequences or serious inconvenience. In many instances the silent vote added to the minority would change the result; and in all cases it would be necessary to ascertain the number present and not voting, which would be attended with much inconvenience. But a presumed acquiescence in the result is attended with no such consequences. Hence we think that is the better view.

It is suggested that the "concurrence of three," necessary for the transaction of business, means an active concurrence and not a passive one. We do not think so. A passive concurrence may be, and often is, just as effectual as an active one. Silence is oftentimes as significant as speech, and conduct frequently contradicts words. Here then we had the "active concurrence," by their vote, of two members; a "passive concurrence," by their silence, of the other two; which, in legal effect, was an *agreement by all* that the resolutions should pass.

2. Is the failure to comply with the city ordinance, under the circumstances, a sufficient reason for continuing the injunction?

That ordinance was not intended to put it in the power of any one or more of the city officials unjustly to deprive the members of the police of their regular pay. An attempt to use it for that purpose is an abuse rather than a legitimate use. The ordinance was designed for the protection of the city by providing an orderly and systematic method of paying its bills. It was competent for the council to waive its provisions, if, in its judgment, justice required it. The direction to pay was a waiver. It is no part of the duty of a court of equity to enforce by injunction an ordinance enacted for the benefit of the city, when the city has waived it,

unless it clearly appears that tax-payers are likely to suffer unjustly. It does not so appear in this case.

There is no error in the judgment.

In this opinion LOOMIS, SEYMOUR and TORRANCE, Js., concurred. ANDREWS, C. J., dissented.

JAMES TERRY *vs.* ROLLIN D. H. ALLEN.

New Haven & Fairfield Cos., Jan. T., 1891. ANDREWS, C. J., LOOMIS, SEYMOUR, TORRANCE and FENN, Js.

An estate in remainder in personal property, dependent on an estate for life, will, where necessary, be protected by a court of equity.

Where there is no trustee this protection is given by requiring the party having the life use to give security that the property will be forthcoming at the termination of his estate.

But this case where arising under a will is now provided for by Gen. Statutes, § 559, which provides that a court of probate may require the legatee for life to give such security, or may appoint a trustee if it is not given.

Where a testator gave personal property to a trustee to hold and manage, and pay the income to his widow during her life, and after her death to deliver it to his children, and the trustee had given a probate bond for the faithful discharge of the trust, it was held that the remaindermen had adequate security and that the fact that the trust fund was mismanaged by the trustee and in danger of suffering a loss was not a sufficient reason for the interference of a court of equity.

[Argued March 4th—decided April 20th, 1891.]

SUIT in equity by a remainder-man against the defendant Allen, as a testamentary trustee, charging him with wasting the trust fund, and praying that he be compelled to replace the funds lost or wasted and that he be ordered not to invest any part of the fund in other securities than those in which trustees are permitted by law to invest; brought to the Superior Court in New Haven County and heard before *Robinson, J.* Facts found and judgment rendered for the

plaintiff, and appeal by the defendant. The case is fully stated in the opinion.

C. R. Ingersoll and *W. W. Hyde* for the appellant, contended that the Superior Court had no jurisdiction to settle the accounts of the defendant as testamentary trustee, and that such jurisdiction belonged wholly to the court of probate; that the court erred in holding that trustees under the laws of this state have no right under any circumstances to invest in other securities than those specifically mentioned in the statutes referring to investments by trustees; and that the court erred in holding that the interest of the plaintiff in the trust fund as a remainder-man was sufficient to sustain the suit.

H. Stoddard and *J. W. Bristol*, for the appellee.

1. The Superior Court has jurisdiction of the subject matter of this action. The question is, whether, *in the absence of all notice to adverse parties in interest*, of the allowance of the trustee's accounts by the probate court, the statute of 1881 (Gen. Statutes, §§ 498, 499), has deprived the Superior Court of its former well-established equitable jurisdiction over the accounts of testamentary trustees and over the execution and administration of such trusts committed to their charge. Trusts and their administration are, in the absence of statutes to the contrary, within the exclusive jurisdiction of courts of equity. *Donalds* v. *Plumb*, 8 Conn., 446; *Cowles* v. *Whitman*, 10 id., 121; *Proprietors of White Schoolhouse* v. *Post*, 31 id., 259; *Parsons* v. *Lyman*, 32 id., 572. Extensive equitable jurisdiction is conferred upon the Superior Court by statute. Gen. Statutes, § 74; *Isham* v. *Gilbert*, 3 Conn., 166.

2. This action then is within the jurisdiction of the Superior Court, unless it is within the exclusive jurisdiction of the probate court, or unless the two courts have concurrent jurisdiction and the probate court has already become possessed of the subject matter of this controversy. Courts of probate are courts of strictly limited powers and

have no common law jurisdiction independent of statute. *Wattles* v. *Hyde*, 9 Conn., 10; *Prindle* v. *Holcomb*, 45 id., 11. Although testamentary trusts were not frequent before 1822, yet they were not unknown, and such as then existed were under the control of, and enforced by, the Superior Court as a court of equity after equity powers were conferred upon those courts. Courts of probate up to that time had no cognizance of them. *Isham* v. *Gilbert*, 3 Conn., 166; *Prindle* v. *Holcomb*, 45 id., *supra*. Between 1822 and 1853 jurisdiction over such trusts and trustees was very sparingly given to courts of probate. The only statutes passed during this period relating to testamentary trusts, empowered the courts of probate to appoint persons to execute such trusts "in cases of death or incapacity of trustee" (1822), "to remove trustees for cause" (1831), and regulating proceedings upon the resignation of trustees (1832). In 1853 an act was passed requiring trustees, conservators and guardians to render annual accounts to the court of probate, and this statute continued in force, substantially unchanged, until the act of 1881, already cited, was passed. Under this act it was held by the U. States Circuit Court for this district, in *Parsons* v. *Lyman*, 32 Conn., 566, that the settlement of accounts of testamentary trustees is a matter of equity jurisprudence, and does not properly belong to courts of probate; and that jurisdiction over such accounts is not given to them by the laws of Connecticut. This court, in *Prindle* v. *Holcomb*, *supra*, came to the same conclusion as to the construction and effect of the act of 1853. In *Clement* v. *Brainerd*, 46 Conn., 174, (decided in 1878), a bill in equity was brought to the Superior Court, for an account and payment to the petitioners of money in the respondent's hands as trustee. This court held that the bulk of the estate was in the respondent's hands as executor, and that the Superior Court had no power to order him to distribute the property, but with reference to another portion of the estate which had been given him specifically as trustee, the court entertained jurisdiction and ordered an account. On this point LOOMIS, J., delivering the opinion, says: "The West Hart-

ford real estate stands upon a different ground from the other property. That was devised to the respondent in trust for the benefit of Henry W. Goodwin, during his natural life, with power to sell the same and invest the avails, and upon the death of the said Henry, to pay and deliver the same in equal portions to his children. The respondent, in pursuance of the power so given him sold that estate, and thereby assumed all the responsiblities of a trustee under the will in respect to it. He is, therefore, liable to account for the same in this suit." In that case the distinction between the jurisdiction of the Superior Court over an executor as such, and over a testamentary trustee, is sharply drawn. In the one case jurisdiction was declined; in the other entertained. No change was made in the law after the decision of *Prindle* v. *Holcomb* and *Clement* v. *Brainerd* until the act of 1881 was passed. That act is an enabling act. It does not purport to deprive the Superior Court of its former jurisdiction over testamentary trusts or trustees, but it confers a new jurisdiction upon the probate courts over a subject matter not before within their cognizance. This is made plain by the light of the law as it previously existed, and of the mischief intended to be remedied thereby. In the language of SHIPMAN, J., in *Parsons* v. *Lyman*, "the jurisdiction over such trusts and trustees has peculiarly pertained to these courts from the earliest times, and an act withdrawing them from that jurisdiction must be plain and specific. That jurisdiction will not be ousted by mere implication." A general grant of jurisdiction to the probate courts does not confer exclusive cognizance of the subject matter of the grant, and an examination of the Connecticut cases shows this beyond the possibility of cavil or dispute. *Warner's App. from Probate*, 30 Conn., 253; *McKenzie's App. from Probate*, 41 id., 607; *Davenport* v. *Olmstead*, 43 id., 67, 76; *Jones's App. from Probate*, 48 id., 60; *Security Co.* v. *Hardenburgh*, 53 id., 169; *Lockwood's App. from Probate*, 55 id., 157; *Dickerson's App. from Probate*, id., 223; *Webb* v. *Lines*, 57 id., 154; *Buckley* v. *Leffingwell*, id., 163; *Hull* v. *Holloway*, 58 id., 210; *Lepard*

v. *Skinner*, id., 329. In all these cases a grant of power to the probate court has not deprived the Superior Court of its former jurisdiction, and there is no reason or propriety in the contention that in the present case the act of 1881 has a different effect. Even in regard to probate matters proper, such as the enforcement of the duties of executors and administrators, this court has never held that in all cases would a court of equity decline jurisdiction. On the contrary, its language has been carefully guarded in this particular. *Sheldon* v. *Sheldon*, 2 Root, 512, 514; *Strong* v. *Strong*, 8 Conn., 408; *Beach* v. *Norton*, 9 id., 182, 196. It is evidence of the correct construction of this act, that since its passage the Superior Court, in the exercise of its original jurisdiction, and this court on reservation or appeal therefrom, has in repeated instances entertained jurisdiction over trusts and testamentary trustees. *Simmons* v. *Hubbard*, 50 Conn., 574; *Andrews* v. *Rice*, 53 id., 566; *Bell* v. *Towner*, 55 id., 364; *Hull* v. *Holloway*, 58 id., 210. These cases show that, in the judgment of the court and profession, this statute did not grant exclusive jurisdiction to the probate courts over testamentary trusts, and a decision to a contrary effect would deal a fatal blow to the conclusiveness of the judgments rendered in those cases. And the probate court did not acquire jurisdiction of the subject matter of the suit by reason of the filing of annual accounts by the trustee, for it is alleged in the plaintiff's answer to the defendant's plea to the jurisdiction and admitted by the defendant's demurrer thereto, that no notice of any hearing upon the accounts was given. It is a fundamental principle of all jurisprudence, that no one is bound by the judgment of a court unless he has had notice and opportunity to be heard. *Starr* v. *Scott*, 8 Conn., 480, 484; *Parsons* v. *Lyman*, 32 id., 576; *Lawrence* v. *Security Co.*, 56 id., 423, 442.

3. The defendant on the trial of the cause claimed that the only remedy of the plaintiff was on his probate bond for the faithful performance of his duty as trustee, and that he could not in this suit be held to respond for his conduct as trustee. The court overruled this claim. Its want of merit

is apparent. This action seeks not only an account, a proper subject for the interference of a court of equity, but also for a judgment "directing that said trustee shall not hereafter * * * invest * * * any part of said trust fund except in securities * * * permitted by law." A *cestui que trust* may compel a trustee by bill in equity to perform his duty, even though the damage would not be irreparable. 2 Lewin on Trusts, 853, 855; *Balls* v. *Strutt*, 1 Hare, 146; *Webb* v. *Earl of Shaftsbury*, 7 Ves., 487; *Reave* v. *Parkins*, 2 Jac. & W., 390; *Milligan* v. *Mitchell*, 1 Mylne & K., 446; *Attorney Gen.* v. *Mayor of Liverpool*, 1 Mees. & Cr., 210; *Dance* v. *Goldingham*, L. R., 8 Ch. App., 902. On the other hand, no such relief can be obtained by an action on a probate bond. In such an action damages only can be recovered for an ascertained default, and the specific relief here demanded cannot be had except by the aid of a court of equity.

4. The statutes furnish the sole rule by which the defendant trustee must be governed in his selection of investments of the trust fund. Gen. Statutes, §§ 495, 1800; Acts of 1889, ch. 224, 251. None of the investments condemned by the judgment of the Superior Court in this cause are within any of the classes of securities authorized. The statute is not merely permissive; it is compulsory upon trustees if they desire to avoid personal liability. If the testator in his will had employed this precise language in reference to a trust fund created thereby, there would hardly be room for question as to its construction. But the statute is a provision incorporated by the supreme power of the state into every will creating a trust and governed by the laws of this state, unless the testator expressly provides otherwise therein. If trustees are not bound to follow the directions of the statute relative to the securities in which they may invest, what purpose does the statute serve? It cannot be reasonably contended that a trustee is *ipso facto* absolved from liability if he invests in accordance with its provisions. He must still use, in making a selection from among the authorized securities, a sound discretion and the

prudence exercised by the average man in the conduct of his own affairs. This is the rule applied to trustees under wills containing powers of investment. *Learoyd* v. *Whiteley*, L. R., 12 App. Cases, 727; *Rae* v. *Meek*, L. R., 13 App. Cases, 558; *Harvard College* v. *Amory*, 9 Pick., 446. The same rule is laid down in 2 Swift's Digest, 117, in these words:— "The trustee is not answerable for having applied the trust property, even to what turned out a losing adventure, if done without fraud or negligence, and *if within the scope of his authority.*" There is manifestly no difference whether this authority is conferred by will or by statute. Within the scope of his authority, however prescribed, he must be free from "fraud and negligence."

5. By the general rules of equity regulating the investment of trust funds and apart from the statute, the defendant trustee is clearly liable. "The general rule is," in the language of Justice GRAY of the U. S. Supreme Court (*Lamar* v. *Micou*, 112 U. S. R., 465,) "everywhere recognized, that a guardian or trustee when investing property in his hands, is bound to act honestly and faithfully, and to exercise a sound discretion, such as men of ordinary prudence and intelligence use in their own affairs." *Emery* v. *Batchelder*, 78 Maine, 233; *Kimball* v. *Reding*, 31 N. Hamp., 374; *Harvard College* v. *Amory*, 9 Pick., 446; *Hunt, Appellant*, 141 Mass., 515; *King* v. *Talbot*, 40 N. York, 76; 2 Swift's Digest, 117. The defendant has clearly failed to exercise the requisite degree of prudence and discretion in making these investments. The rule prohibits a trustee from speculating with a trust fund; its preservation and safety is his first and highest duty; so that upon the termination of the trust it may be delivered unimpaired to those entitled to it. The defendant cannot excuse himself by the plea that any of these securities were a favorite form of investment by the testator in his lifetime. The testator was at liberty to speculate with his own money, but the position of a trustee is far different. He is dealing not with his own property, but with that of others. *Adair* v. *Brimmer*, 74 N. York, 546; *McCullough* v. *McCullough*, 44 N. J. Eq.,

313. In the latter case the court in its opinion said in reference to this subject:—"The fact that the testator made such investments will not justify the trustees in continuing them. His position as the owner of the fund in his own right was vastly different from the position of confidence and responsibility which the trustees occupied." The defendant trustee committed a breach of trust in investing the fund beyond this jurisdiction. *Ormiston* v. *Olcott*, 84 N. York, 339, 344; *McCullough* v. *McCullough*, 44 N. J. Eq., 313. In *Rush's Estate*, 12 Penn. St., 378, GIBSON, C. J., delivering the opinion of the court, said:—"A chancellor would not authorize money to be invested in a country to which his jurisdiction would not extend." The same doctrine was held in *Stuart* v. *Stuart*, 3 Beav., 430, and in *Bethel* v. *Abraham*, L. R., 17 Eq., 24.

6. The interest of the plaintiff is sufficient for the maintenance of this action. A *cestui que trust* may compel a trustee to perform his duty even though his interest be contingent. 2 Lewin on Trusts, 853. "Any person whose rights are endangered by an improper or unauthorized investment may apply to the court for redress." 1 Perry on Trusts, § 467. See also *Dance* v. *Goldingham*, L. R. 8 Ch. App., 902; *Rae* v. *Meek*, L. R., 13 App. Cas., 558.

SEYMOUR, J. James Terry, senior, died April 19th, 1871, leaving a will, the third and fourth clauses of which read as follows:

"*Third.* I give, devise and bequeath one third of all the remainder of my personal estate to my friend, R. D. H. Allen and his successors, in trust, to hold and manage the same, and to pay over to my said wife, Valeria Terry, all the interest, rents, dividends and profits thereof, during her natural life, to her sole and separate use and upon her sole receipt, and at her death to cause the same to be divided as given in the next section of this will.

"*Fourth.* I give, devise and bequeath all the rest, residue and remainder of my estate, real and personal, of every name and nature, in equal proportions to all my children

living at my death, and to the issue of such as may then be deceased, if any, said issue taking by representation, and any child hereafter born to me to share in this devise, to them and their heirs; provided, however, that if any of my children shall die after my decease and before arriving at the age of twenty-one years without lawful issue, the share hereby given to said child or children shall be divided equally among my surviving children and their issue in the same manner as if said child or children had deceased during my life."

The will was duly probated in the court of probate for the district of Plymouth, and the testator's estate was duly settled and distributed in that court. There was distributed to the defendant Allen, as trustee under the third section of the will, more than sixty thousand dollars in value of personal property, consisting of money, stocks, bonds, notes and securities of various kinds. Mr. Allen accepted the trust and qualified, giving bonds with surety in the amount of seventy-five thousand dollars for the faithful performance of his duties as trustee, and has continued to the present time to act as trustee, and now holds the trust fund. A surety on his bond has since the filing of the same become insolvent; otherwise, so far as appears, the bond is good and sufficient.

On the 3d of September, 1889, the plaintiff brought his complaint against Rollin D. H. Allen, Edward Clinton Terry, and Cornelia Hunter, therein alleging that he, the plaintiff, and said Edward and Cornelia, are the children of the testator James Terry and the only legatees under the fourth clause of his will. Said Edward and Cornelia were made defendants because unwilling to be plaintiffs, and subsequently the said Valeria Terry, widow of the testator, was made a party defendant.

The complaint in substance alleges that since said trust funds came into the possession and control of the trustee he has invested large amounts of the trust funds in unauthorized securities, whereby a serious loss has already occurred to the trust fund and further losses are imminent; that said

trustee has unlawfully changed investments from good and legal investments to those not warranted by law, and invested in stocks, bonds, notes and other securities not permitted by law, whereby large losses have occurred to the *corpus* of the fund; that many of said unlawful investments were made in securities bearing a large rate of interest or income, and that the *corpus* of the trust estate has been wasted and injured, to give the life tenant a large income; that many of said investments were made for the purpose of increasing the income of the life tenant at the expense of the remainder-men; that considerable sums have been paid by the trustee to the widow as income, interest or profits of the trust fund which properly belong to and are a part of the trust fund itself; that such unlawful and unauthorized investments were made by the trustee at the request and desire and with the concurrence of the life tenant and for the purpose of increasing her income, to the detriment of the plaintiff and the other legatees; and that the trustee neglects and refuses to manage the trust fund in conformity to law and equity, but persists in so managing it as to cause large losses to the trust fund itself and to give the life tenant a much larger amount of income, profit and interest from the trust fund than she is properly entitled to. Thereupon the plaintiff demands judgment—1st. That the trustee shall restore the trust fund to its original integrity and replace said wasted and lost trust fund in proper and lawful investments and securities.—2d. That the trustee shall not hereafter purchase or invest in any way any part of the trust fund except in securities in which trustees are permitted by law to invest.—3d. That the trustee be directed to withhold all earnings, interest, increment, dividends and profits arising from the trust fund and properly payable to said Valeria Terry in the future, until he has retained a sufficient amount in his hands to replace the amounts so unlawfully paid by him to her, with interest thereon.

The plaintiff subsequently filed specifications of the unauthorized and illegal investments claimed by him to have been made by the defendant trustee, so far as he was then

informed of the same, and as appeared by the books of account filed by the defendant in court.

It will be unnecessary, in view of the conclusion to which we have come, to consider several questions which were raised at the trial below and ably argued before us. The defendant in the first instance filed a plea to the jurisdiction on the ground that during all the time he had been trustee he has annually rendered his trustee account to the probate court of the district of Plymouth where the testator's estate was settled and within which he, the trustee, resides; that upon the rendition of said account, copies of which are appended to the plea, said court received and recorded the same respectively, and took such further action thereon as appears upon said copies; that by reason of the facts in said plea stated the probate court at the time the action was brought had acquired and then fully had jurisdiction of the subject matter of the complaint, with full jurisdictional power to adjust and allow the accounts of the defendant as such trustee with said estate and all parties interested therein, and to secure the due execution of all trusts and duties of the defendant in respect thereto, and that therefore the Superior Court is without jurisdiction to render the judgment demanded.

The plaintiff answered the defendant's plea to the jurisdiction. The defendant demurred to one paragraph of the answer, which demurrer was overruled, and the defendant's plea to the jurisdiction was overruled and the defendant ordered to answer over.

One paragraph of the answer filed in compliance with the last mentioned order is as follows:—"This defendant further says that said estate is now in process of settlement in the court of probate for the district of Plymouth; that he has, from time to time, submitted to said court his accounts as required by law, which accounts have been duly accepted and approved by said court; that he is under bonds in said court for the proper administration of said trust estate, which bonds are ample to protect the persons entitled to the remainder of said funds on the termination of said trust

against any loss; and that, while some of the said investments may to-day have a market value less than the price originally paid therefor, he believes they will all ultimately prove good investments."

The finding of facts states the claims made by the defendant which were overruled. Among them is the following: "That as said trustee had given a bond of sufficient amount and security to the court of probate for the faithful performance of his duties as trustee, he could not now be held to respond to a court of equity for his said conduct as trustee."

The appeal is grounded, among other reasons, upon the overruling of the plea to the jurisdiction, the taking jurisdiction of the matters set out in the complaint, specification and answer, and in holding the interest of the plaintiff to be sufficient to enable him to maintain this action.

It will appear from the foregoing that, as already suggested, several interesting questions were presented by the pleadings. But it was claimed by the defendant that, upon the facts, the plaintiff had no such interest as would entitle him to maintain his action. As this claim strikes at the root of the matter it should be at once considered.

The interest created by the will in favor of the plaintiff is a remainder in personal property, dependent upon an estate for life. It was held in *Langworthy* v. *Chadwick*, 13 Conn., 42, that a remainder in personal chattels dependent on an estate for life may be created by grant or devise; and that the interest so created will be protected in chancery. The court says: "It was formerly held that the person entitled in remainder might call for security, from the legatee for life, that the property should be forthcoming at his decease, (citing several cases.) But this practice has been overruled; and chiefly on the ground that to decree such security would be improperly to interfere with the will of the testator. And the course now is for the remainder-man to call for the exhibition of an inventory, to be signed by the legatee for life and deposited in court. When, however, it can be shown that there is danger that the property will be either wasted,

secreted or removed, a court of chancery will interfere to protect the interest in remainder by compelling the tenant for life to give security. And such we suppose to be the well-settled practice in Westminster Hall. * * * Indeed, the same regard to the intention of the testator which forbids a court of chancery to decree that security shall be given where there is no danger, would seem to require such interference when that intention is likely to be defeated by the conduct of the devisee for life. This highly reasonable principle has been recognized in this country and was fully adopted by the court in *Hudson* v. *Wadsworth*, 8 Conn., 348. See also 2 Swift's Dig., 154; 2 Kent's Comm., 287; 2 Paige, 123."

The protection, it will be observed, which the court of chancery affords, is to require adequate security. And this is the protection which was subsequently provided by statute, through courts of probate, for persons interested in remainder, in cases where no trustee is named for such estate during the continuance of the life estate. Pub. Acts, 1865, p. 74; Gen. Statutes, § 559. In such cases this court has assumed that the protection so afforded was adequate and appropriate. *Clarke* v. *Terry*, 34 Conn., 176; *Sanford* v. *Gilman*, 44 Conn., 461; *Security Company* v. *Hardenburgh*, 53 Conn., 169.

In this case a trustee for the estate during the continuance of the life estate was provided by the testator. He accepted the trust and qualified as trustee, giving bonds in accordance with law. It is not claimed that the bond is not good and sufficient. He is required by the will not only to hold and manage the trust estate and pay over to the widow all the interest, rents, dividends and profits thereof during her natural life, but at her death to cause the same to be divided as in the will provided, and his bond, of course, is conditioned upon his discharge of all his duties as trustee. The interest in remainder is protected in the same way it would have been had the property gone into the hands of the legatee for life where no trustee is named or appointed. The remainder-men are protected and are entitled to be al-

ways protected by a good and sufficient bond against loss on account of any mismanagement of the estate. As remaindermen they are entitled to no more. They have no interest in the income. They have no present claim upon the trust fund. Should the life estate terminate to-day, a good and sufficient bond stands between them and possible loss on account of any illegal management or investment of the trust funds. Unless they are negligent in failing to see to it that a good and sufficient bond is always provided, they will have like protection whenever the life estate terminates.

Upon principle we do not see our way clear in such a case to yield to the claim of the plaintiff that he may now compel the trustee to defend his investments and his management of the fund, and call upon the courts to prescribe in advance a rule by which such investments shall be governed. The plaintiff cites upon his brief from Lewin on Trusts, instances where he states that *cestuis que trust* may interfere with the management of their trustee. The reasons why *cestuis que trust* interested in the investment and management of the fund, as the source of their income, and not in its preservation only, to be handed over to them unimpaired in amount, should have that power, are not conclusive of the case in hand. In this case the plaintiff can in no proper sense be called a *cestui que trust*. The property belongs to the remainder-men, divested of the trust, immediately upon the death of the widow. The provision in the will that the trustee shall cause the same to be divided in no practical sense alters his relations to the defendant.

We are constrained to hold, therefore, in this case, that the plaintiff has full and sufficient protection and is not entitled to the relief which he demands.

There is error in the judgment appealed from.

In this opinion the other judges concurred.

WILBUR FIELDS *vs.* SIDNEY V. OSBORNE AND ANOTHER.

New Haven & Fairfield Cos., April T., 1891. ANDREWS, C. J., CARPENTER, LOOMIS, SEYMOUR and TORRANCE, Js.

The act of 1889 concerning elections, (Session Laws of 1889, ch. 247,) provides in the first section that all ballots shall be printed and of uniform size, color and quality, to be determined by the secretary of the state, and "shall contain, in addition to the official endorsement, only the names of the candidates, the office voted for, and the name of the political party issuing the same;" the ninth section provides "that if any envelope or ballot shall contain any mark or device so that the same may be identified in such manner as to indicate who might have cast the same, it shall not be counted;" and the eleventh that "all ballots cast in violation of the foregoing provisions, or which do not conform to the foregoing requirements, shall be void and not counted." Held—

1. That the word "For," prefixed to the names of the offices, did not necessarily make the ballots void, though the word could be so used as to become a distinguishing mark within the ninth section; and that it did not render the ballots void in this case.
2. That ballots were void which described the office of town clerk in a town election as follows:—"For town clerk and *ex officio* registrar of births, marriages and deaths"— the town clerk being made by statute the registrar of births, marriages and deaths, but there being no office of that name and it being no part of the name given by statute to the office of town clerk.
3. That the following words upon the ballots rendered them void—"For Judge of Probate, Henry H. Stedman"—there being no election at that time of judge of probate.

A caucus of the republican party was held, pursuant to notice, two days before a town election, for the purpose of nominating candidates for the town offices to be filled at the election. Immediately after it was organized a plan for making up a citizens' ticket from candidates of both political parties was advocated, and after discussion it was voted that the republican caucus adjourn and that a citizens' caucus be organized. Thereupon ten or fifteen members of the democratic party who were present, but had not participated in the proceedings, came forward and acted with the republicans who were present, about fifty in number, in nominating a citizens' ticket, the candidates upon which were taken from both parties. A collection was taken for the expense of printing the tickets. No steps were taken to effect a permanent organization of a citizens' party or to provide for its further existence. The republican party issued no tickets and no ballots were used at the election except those headed "Democratic Ticket" and "Citizens' Ticket." Held that the ballots were issued by a political party within the meaning of the statute.

[Argued April 21st,—decided June 1st, 1891.]

PETITION to *J. M. Hall, J.*, under Gen. Statutes, § 58, which authorizes a judge of the Superior Court, on petition, to hear and decide upon contested claims to city and town offices. Facts found and case reserved for advice. The case is fully stated in the opinion.

L. Harrison and *E. Zacher*, for the petitioner.

W. L. Bennett, for the defendants.

SEYMOUR, J. This petition was brought under section fifty-eight of the General Statutes. The petitioner alleges that he was a candidate for selectman at the annual meeting of the town of Branford held on the first Monday of October, 1890; that he verily believes he received a sufficient number of votes to elect him; that he was not declared elected, but, on the contrary, the respondents were declared elected selectmen for the then ensuing year.

The facts upon which his claim is based, so far as they are important to the decision of the case, are in the petition stated as follows:—That more than one hundred ballots were counted for the respondents which were illegal and void and ought not to have been counted, "because they had upon them other words, and contained other words, than the names of the candidates, the office voted for, the name of the party issuing the ballot, and the official endorsement; and such words were not alterations or changes of the ballot within the provisions of section 12, chapter 247, of the Public Acts of 1889. Said one hundred and more ballots were cast in violation of the provisions of said act and did not conform to its requirements, because they did not contain the word "Republican" or the words "Republican Party," but did contain, at the top of the ballots, the words "Citizens' Ticket." Said one hundred and more ballots also contained, at the bottom of said ballots, the following illegal words:—"For Judge of Probate, Henry H. Stedman." Thereupon the petitioner prays that he may be granted a

certificate entitling him to hold and exercise the duties and powers of a selectman in said town.

The case was heard and reserved for the advice of this court.

In respect to the first claim, the circumstances attending the origin and history of the citizens' ticket are detailed in the finding. We extract such as are to the purpose.

Pursuant to public notice a republican caucus was held on October 4th, 1890, for the purpose of nominating candidates for the town offices to be filled at the town meeting to be held on the sixth of October. Immediately after the caucus was organized a plan for making up a citizens' ticket from candidates of all political parties was advocated. After discussion it was voted that the republican caucus adjourn and that a citizens' caucus be organized. Thereupon some ten or fifteen democrats, who were present but had not participated in the proceedings, came forward and acted with the about fifty republicans who were present, in nominating the citizens' ticket. The candidates nominated were republicans, except those for town clerk, treasurer and one grandjuror, who were democrats. A general collection was taken to defray the expense of printing the ticket. No committees were appointed at the caucus to carry out its purposes nor were any steps taken to effect a permanent organization of a citizens' party or to provide for its further existence. The chairman of the republican town committee procured the printing of said citizens' tickets and caused them to be placed in the booths on election day. The republican party issued no tickets, and no ballots were used at the election except those headed "Democratic," and those headed "Citizens' Ticket."

Previous to the caucus in question there had been no call issued for a citizens' caucus nor any organized political party in the town of Branford known as the citizens' party, but there had been some talk among a few republicans and democrats about the possibility of having a citizens' caucus, and of turning the republican caucus, that had been called, into a citizens' caucus.

Occasionally, in previous years, town officers have been elected in the town on tickets denominated "citizens'" tickets.

We are abundantly satisfied from the facts stated in the finding that, for the time being, and for the purposes of the election under consideration and within the meaning of the law requiring the ballots to contain the name of the party issuing them, there was a citizens' party in Branford.

The element of time is not essential to the formation of a legal party; it may spring into existence from the exigencies of a particular election, and with no intention of continuing after the exigency has passed. To hold the contrary would be to strike a blow at that independence in political action upon which the good government of a locality may depend. Nor can the number of voters that must unite in order to form a legal party be prescribed by law without violating one of the fundamental theories of popular government.

If it is shown, as it is in this case, that an independent political party was formed, that it assumed a distinctive name, and that the ballots which it issued sought the suffrages of the people under no false title, but bore the name of the political party issuing them, it is enough, so far as the point now being considered is concerned. To hold otherwise would be to abridge rights which are not only generally held to be sacred, but which it is of the utmost importance to preserve.

The petitioner lays some stress upon the finding that the real object and intent of holding the citizens' caucus was to nominate a ticket to defeat a certain candidate for selectman who had already been nominated at the democratic caucus, by nominating another democrat who had been an unsuccessful candidate for the same office in such democratic caucus. That may or may not have been a laudable object. We have no data from which to judge. But no one will seriously contend that courts can inquire into the motives which underlie the formation of political parties. Nor is the further suggestion sound, that because the real object

of the caucus failed of accomplishment and the hoped-for candidate for selectman was not nominated, therefore no citizens' party was formed. Notwithstanding such failure a citizens' ticket was nominated and a citizens' ballot issued and voted.

The second reason stated in the petition for granting the certificate is, because "said one hundred and more (citizens') ballots also contained, at the bottom of said ballots, the following illegal words:—'For Judge of Probate, Henry H. Stedman.'"

It appears that the citizens' caucus, in addition to the town officers that could be voted for at the annual town meeting, also nominated Henry H. Stedman for the office of judge of probate, who, by statute, could only be voted for, for that office, at the election held for state officers, etc., on the Tuesday following the first Monday of November thereafter, and that each of the citizens' tickets had upon it the words "For Judge of Probate, Henry H. Stedman." It also appears that the democratic ballots issued and cast at said election contained, after the words "For town clerk," the words "and *ex officio* registrar of births, marriages and deaths."

The act concerning elections passed in 1889, for the purpose of securing uniformity in the ballots used at electors' meetings and at all regular town and city elections, made certain express provisions as to the contents, among other things, of such ballots. The first section requires that, "in addition to the official endorsement, the ballots shall contain only the names of the candidates, the office voted for, and the name of the political party issuing the same." The ninth section provides that if any ballot "shall contain any mark or device so that the same may be identified in such manner as to indicate who might have cast the same, it shall not be counted," etc. All ballots cast in violation of the provisions of the act, or which do not conform to the requirements thereof as contained in the sections preceding the twelfth, said section declares "shall be void and not counted," with a proviso which does not affect this case.

Now there can be no question but that the legislature intended to say that a ballot which failed to accord with certain specifically enumerated requirements should be void, irrespective of all considerations as to the intent or effect of such failure. It considered uniformity an important means of preventing fraud, and there were certain matters in which uniformity could be expressly provided for. But ballots which satisfied the expressed standard of uniformity might yet be made to lack entire uniformity, and so be identified, by various devices which the legislature could neither provide against nor foresee; so section nine was added. As it stands, therefore, there are certain particulars so clearly stated in the act that it can be seen at a glance whether a given ballot conforms to them. As to them there is no room for construction. It is not within the province of the court to say what the consequence of the failure to conform shall be; the act itself fixes it. Though, ordinarily, there can be little difficulty in deciding whether a ballot conforms to the requirements of the first section of the act, yet not everything can be settled by mere inspection. For instance, it is a question of fact, to be proved, whether the party whose name the ballot contains in fact issued it. The meaning and intent of the words "the office voted for," used in describing the contents of the ballot, may be open to construction, and the question whether that provision has been violated may depend upon circumstances. But whether the ballots in question, which in fact contained the words "For Judge of Probate, Henry H. Stedman," in addition to the official endorsement, the names of the candidates who could be legally voted for, the office voted for, and the name of the political party issuing the same, complied with the requirements of the law, admits of no discussion. At the time the ballots were issued and cast there was no election for judge of probate. That office could not be filled at a town election. The title of the office and the name of the candidate were foreign to the ballot and were inserted in violation of the express and unambiguous terms of the act.

So too in respect to the words "and *ex officio* registrar of

births, marriages and deaths," contained in the democratic ballots, they were inserted in violation of the act. There is no such office as that named in the ballots. Chapter 181 of the Public Acts of 1889 gives the names of the town offices to be filled at town elections. Among them is the office of "town clerk." Section 98 of the General Statutes provides that town clerks of the several towns shall be, *ex officio*, the registrars of births, marriages and deaths in their respective towns, except in towns where such registrars are elected under special laws. Nowhere in the statutes are town clerks called anything but town clerks. It needs no argument to prove that the duties performed *ex officio* by the incumbent of an office form no part of the legal title of the office, unless it is so expressed.

It being clear that the words "For Judge of Probate, Henry H. Stedman" on the citizens' ballots, and the words "and *ex officio* registrar of births, marriages and deaths" on the democratic ballots, both come within the express prohibition of the law, what is our duty? If it was doubtful whether the act applied to them, if their legality depended upon a construction of the meaning or the language of the act, our duty might not be plain. If they could be held to fall within the prohibition of any mark or device, contained in the ninth section, instead of within the express prohibitions of the first section, then it would be our duty to inquire whether they constituted a mark or device by which the ballot might be identified in such manner as to indicate who might have cast the same. But no. A plain provision of the law is violated in a point concerning which the act does not authorize us to inquire into the intent or the consequences of the violation.

In short, the legislature has seen fit to say that, if a ballot contains the addition to its specified contents which these do, it shall be void. Unless we are prepared to hold the act unconstitutional we cannot disregard its requirements. If it is harsh and unreasonable, the remedy is with the legislature that enacted it, and not with the courts which are bound to respect it. In regard to provisions which are plain

on their face, which are not dependent upon the question of good faith or the actual or possible result of disregarding them, we can only say again, in the language of the majority opinion in *Talcott* v. *Philbrick*, 59 Conn., 478, "we are relieved of any obligation to inquire into the necessity or reason of such requirement; and we are not at liberty to dispense with anything that is required, whatever the reason for it may be, or even if without any apparent reason at all. The legislature has spoken, and obedience is our first and only duty. It is at liberty to throw around the ballot box such safeguards and regulations as it may deem proper, and it is the duty of the citizen to conform thereto. Some inconvenience is not too great a price to pay for an honest, pure ballot."

The conclusions to which we have thus come are themselves decisive of the case. In addition however to the claims already considered, the record shows that the defendants claimed that the democratic ballots are illegal because the word "for" is printed on each of them before the name of every office named therein. This presents a question of some difficulty, and because it does we are satisfied that we have come to a correct solution of it. If it was plain and clear that the act, in limiting the contents of the ballot to the official endorsement, the names of the candidates, the name of the political party issuing the same, and "the office voted for," prohibited the use of the word "for" before the title to the office, we should be bound, upon the principles which we have herein already recognized as sound, to declare the ballots void for that reason.

But that the statute so intended is not plain and clear. On the contrary the language is ambiguous. There is room for honest and intelligent men to differ as to its meaning. The record in this very case shows that the state secretary, in a notice concerning elections issued in August, 1889, immediately after the act went into force, and before any discussion had arisen upon the point in hand, enclosed a printed form for a town ballot. This was sent to every postmaster and town clerk, and to the respective chairmen of the dem-

ocratic and republican committees in every town in the state, and the form of ballot so sent contained the word "for" before the title to every office named therein.

It is a matter of public notoriety also that ballots prepared by different persons equally determined to observe the requirements of the law, have in some cases contained the word "for" in juxtaposition with the offices voted for, and sometimes omitted it. The republican ballots as well as the democratic ballots in the case before us contained the word.

We refer to these instances in confirmation of our position that the language under consideration is in fact ambiguous. If ambiguous it is the proper subject of construction. In discharging the duty of construing it so that the voter shall not be deprived of his vote except upon a plain and unambiguous provision of the law, we feel bound to hold that the act does not, in terms and expressly, nor by necessary construction, prohibit the use of the word "for" before the title to the office. It follows therefore that neither its use nor the failure to use it necessarily and of itself invalidates a ballot. The question of illegality is remitted to the provisions of the ninth section of the act. If the regular ballots issued by a political party contain the word "for" before the title of the offices therein named, then it cannot be held to be a "mark or device," so that the same may be identified, in such manner as to indicate who might have cast the same, and therefore is not obnoxious to that provision. If the regular ballots of a political party omit the word "for," in the connection stated, then the use of the word on some of the ballots cast, inasmuch as it would be a mark or device by which the same might be identified, would be illegal. Each case must be governed by its own circumstances and be decided as a question of fact under the principles herein stated.

Upon the facts in this case we hold that the ballots in question were not illegal and void because of the use of the word "for."

They were however illegal, as we have already stated, for another reason. Being illegal, there is no foundation for the petitioner's claim that he was elected selectman, and his

petition, which was based upon that claim, must be dismissed. We so advise.

In this opinion CARPENTER and LOOMIS, Js., concurred. ANDREWS, C. J., and TORRANCE, J., concurred in the judgment, and fully in so much of the opinion as discusses the "for" ballots; but in the other parts of the opinion they concurred because they felt bound by the case of *Talcott* v. *Philbrick*, and did not intend in so doing to change or modify what was said by them in their dissenting opinion in that case.

SUPPLEMENT.

SHEPAUG VOTING TRUST CASES.

Superior Court, Fairfield County, October Term, 1890, before ROBINSON, J.

A syndicate purchased a majority of the capital stock of the Shepaug Railroad Company, which was placed in a voting trust to continue for five years, or until a consolidation was effected with some other railroad company, or it should be dissolved by agreement. A trust company was to act as trustee, and was to take the title and issue certificates to the members of the syndicate of the shares in it held by each, and was to vote on the stock as directed by a committee of the syndicate. The apparent object of the arrangement was simply to extend the railroad to tide-water and form a connection there with a certain other road, but there was a secret purpose to make a profit for themselves out of the construction contracts which they as directors of the railroad company would be able to make. After they had purchased the majority of the stock they made themselves directors and officers of the road and one of their number its president. The syndicate made *S*, one of their number, their financial agent, and, it being necessary to borrow money to pay for the stock purchased, had a large portion of the trust certificates issued directly to him and they were pledged by him in raising the money. They were by their terms transferable and had powers of attorney printed upon them which were signed in blank by *S*. Before the connection at tide-water could be effected *S* failed and went

into insolvency. The loans were not paid and the pledged certificates were sold at public sale and most of them were bought by the plaintiffs. The certificates thus bought covered 7000 shares of the capital stock. The plaintiffs also purchased 3300 shares of the stock which had not gone into the trust, making their entire holdings 85 per cent of the whole capital. After the plaintiffs had acquired these trust certificates and this stock they notified the trust company that they revoked the powers given by the trust agreement and demanded that the stock represented by the certificates should be transferred to them upon a surrender of the trust certificates, but the trust company refused to make the transfer. Held:—

1. That the trust agreement was void as in violation of the duties of the directors of the railroad company, and against the policy of our law.
2. That the plaintiffs had the right to revoke the powers given to the trust company by the trust agreement, and to have transferred to them, on surrender of the trust certificates, as many shares of the stock as the certificates represented.
3. That the trust certificates were quasi negotiable.
4. That if the plaintiffs bought the trust certificates for the purpose of getting control of the railroad company, that fact alone did not constitute a reason for refusing the relief sought.
5. That although the members of the syndicate became partners in the project which they undertook, yet the trust certificates were individual and not partnership property, and the stock which they represented was not subject to partnership claims, or to an accounting between the plaintiffs and other certificate holders.

After the syndicate had acquired the control of the Shepaug Company, the directors caused two contracts to be entered into by the company, one with *R* to build an extension of the road to the state line and thence to a point in the state of New York, a railroad corporation of that state becoming a joint party with the Shepaug Company in the contract. The other contract was a ninety-nine years traffic contract with the New York company. Under the first contract a large amount of first mortgage bonds of the Shepaug company, issued for the purpose, was to be used to build the extension. A statute (Acts of 1889, ch. 166) provided that railroad companies might build branch roads provided they were found by a judge of the Superior Court, upon application and a hearing, to be of public convenience and necessity. No such finding had been obtained in this case. Held:—

1. That the contract with *R* was on its face illegal, being a contract to aid in building the road of another corporation in another state.
2. That the Shepaug Company had no authority to build the branch to the state line, there having been no finding by a judge of its being of common convenience and necessity.
3. That the contract was also void as being part of a fraudulent scheme.
4. That the traffic contract, being in aid of the fraudulent scheme, was void so far as the Shepaug Company was concerned.
5. That the plaintiffs' application to have these contracts set aside was not an

improper interference, on their part as stockholders, with the internal affairs of the company.

6. That the fact that the trust company and the committee of the syndicate voted in favor of the construction of the extension of the road and of the issue of bonds for the cost of it, did not estop the holders of the trust certificates from setting up the illegality of the proceeding.
7. That one of the plaintiffs who was a director and voted at a directors' meeting in favor of the *R* contract, was not necessarily estopped, as a certificate holder or stockholder, from setting up its illegality; as it was a contract that ought not to be upheld, there was, under the facts, a *locus penitentiæ* which the court ought to allow him.
8. That a vote of the directors after the suit was brought, with a written agreement of *R*, putting a construction upon the terms of the *R* contract that would avoid its illegal operation, and agreeing that it should not be so used, could not affect the case.

It is provided by Gen. Statutes, § 1927, that "no person shall vote at any meeting of the stockholders of any bank or railroad company, by virtue of any power of attorney not executed within one year next preceding such meeting, and no such power shall be used at more than one annual meeting of such corporation." The power given by the trust agreement to the trust company to vote upon the stock of the syndicate, had been given more than a year before the vote upon the *R* contract, and had been used at one annual meeting. Held that the power thus given was equivalent to a power of attorney, and that under the policy of our law, as declared by the statute mentioned, this power could not be legally given for five years or for an indefinite period.

Certain members of the syndicate, who were made defendants, set up as a part of their defense that the stock represented by the trust certificates was held by them as partners, and claimed that there was a defect of parties because all the partners had not been brought in. Held that as this was no part of the plaintiffs' case they were not bound to bring them in, but it was for the defendants, whose case created the necessity, to bring them in if they desired to have them made parties.

It is the policy of our law that an untrammeled power to vote shall be incident to the ownership of stock in a corporation, and a contract by which the real owner's power is hampered by a provision that he shall vote as some one else dictates, is entitled to no favor.

This is not entirely for the protection of the stockholder himself, but to compel a compliance with the duty which each stockholder owes his fellow stockholders, to use his vote for the general interest.

TWO SUITS in equity, brought by William H. Starbuck and others against the Mercantile Trust Company and others, and by Jabez A. Bostwick and others against George D. Chapman and others, (the defendants being with a few exceptions the same in both cases,) to the Superior Court

in Fairfield County, and heard before *Robinson, J.* The cases involved the same general facts and were tried together. The following facts were found by the court.

The Shepaug, Litchfield & Northern Railroad Company was chartered by the legislature of this state in the year 1887.* Under this charter, the bond-holders of the Shepaug Valley Railroad Company were permitted to organize this new corporation with the rights, powers and franchises of the last named company; and from that year to the present time the Shepaug Company have owned a railroad running from Litchfield to Hawleyville in this state. There is at the latter place a connection with both the Housatonic and the New York & New England railroads. The whole number of shares of the capital stock of the Shepaug Company is 12,000.

In March, 1889, George D. Chapman, one of the defendants, and certain persons whom he associated with himself in the enterprise, conceived the idea of obtaining control of a majority of the capital stock of the Shepaug Company, and, under such control, of extending the Shepaug road to a connection, at tide water, with the New York, New Haven & Hartford Railroad at Saugatuck in this state. Their real purpose in obtaining this control, and the real ends which they had in view and desired to attain thereby, were the above mentioned extension of the Shepaug road, and the building of other branches for the Shepaug Company, and the making of a profit for themselves out of the construction contracts therefor, which, in that position of control, they might dictate or cause to be entered into with the Shepaug Company. These profits were not to be shared with other stockholders, but to go to Chapman and his associates exclusively. To carry out this purpose Chapman and his associates formed a syndicate, under a partnership agree-

* To save space the names of corporations and parties that are frequently repeated are abbreviated:—The Shepaug, Litchfield & Northern Railroad Company is called the Shepaug Company; the Mercantile Trust Company, the Trust Company; and George K. Sistare & Sons, the Sistares. Other abbreviations will be understood without explanation.

ment, the terms of which were that the partners should furnish what money was necessary to purchase 6100 shares of the stock of the Shepaug Company for $200,000, and 5900 other shares of the same stock, if required, at the rate of $20 per share; and also to furnish what money should be necessary to make such extension and to build other branches; and, further, that the 6100 shares should be placed in a voting trust, to last till a consolidation of the Shepaug Company with some other railroad company, or for five years, unless sooner terminated by unanimous consent of all the parties holding trust certificates issued by the trustee; and that the profits to accrue from the building of the proposed extension and branches should go to this partnership, to be shared *pro rata* according to their contribution to this partnership fund.

The members of this partnership were George D. Chapman, Marcus W. Robinson, Richard S. Barnes, the firm of George K. Sistare's Sons, the Central Construction Company, Robert Dunlap, Robert L. Read, and Silas H. Witherbee, now deceased. Chapman was to furnish one fourth of the funds necessary, the Sistares one half, which they subsequently divided equally with one W. B. Howard, and Barnes, Dunlap, Read, and Witherbee, were together to furnish the remaining one fourth. The Central Construction Company were to furnish money, but what proportion did not appear; but, from the dealings of Chapman with that company and his relation to it, his and its interest and share, and his and its obligations to the syndicate in the matter of furnishing funds, if not identical, were united. Chapman's son, Lucian T. Chapman, was the president of the Construction Company, and his wife owned the majority of the stock.

To obtain this control, Chapman and his associates, in that name, subsequently entered into a contract with one Edwin McNeill, then president of the Shepaug Company and one of its large stockholders, to purchase 6100 shares of the stock of the company and to pay therefor the sum of $200,000; and by a subsequent agreement contracted with McNeill to purchase 5900 other shares at $20 per share.

The 6100 shares of stock so to be purchased it was agreed should be placed in the hands of the Mercantile Trust Company, and the $200,000 was to be paid in different sums and at different times to the trust company to the credit of McNeill. McNeill was not the owner of all this stock, but the shares were to be obtained by him from the several owners.

The 6100 shares of stock were delivered as agreed, and paid for out of funds furnished by the members of the syndicate; and 2435 other shares were purchased by the syndicate and paid for out of funds furnished by them. All these shares were delivered to the trust company, and all of them were subsequently transferred to the trust company, under a trust agreement which Chapman and his associates selected as the instrument by which to carry out the object of their partnership agreement. This trust agreement is dated April 26th, 1889, and is known in these cases as "Exhibit A." The parties to this agreement were Chapman and his associates, in that name, party of the first part; the Mercantile Trust Company, of the second part; and Harold Clemens, Marcus W. Robinson, and Lucian T. Chapman, "the committee," party of the third part.

These 8535 shares of the stock of the Shepaug Company still stand in the name and remain in the possession of the trust company. Said Barnes obtained from some source, and turned over to the trust company for syndicate purposes, the additional number of 66 shares; so that the whole number of shares of this stock that went into the trust was 8601.

Chapman was the managing partner of the syndicate, and so acted with their knowledge and consent, and by their consent directed its policy and business. The Sistares (who were then a firm of bankers in New York city) were selected by this syndicate as its financial agents to raise funds for syndicate purposes when necessary. It became necessary to raise such funds; and the syndicate did, through the Sistares, in fact raise the larger portion of the money needed to purchase the control of the Shepaug Company and to meet the other purposes and objects of the syndicate. And

accordingly Chapman and his associates from time to time directed the trust company to issue trust certificates to the Sistares as called for in the trust agreement, until there had been issued to them an amount representing 7785 shares of the stock. Out of this lot, trust certificates representing 900 shares were subsequently exchanged for trust certificates in favor of the Construction Company; and other trust certificates, representing 700 shares of the stock, were also issued to the Construction Company; all by a like direction of Chapman and his associates. Trust certificates were thus issued by the Trust Company upon all but 116 shares of the stock placed in the trust. $100,000 worth of the trust certificates issued as aforesaid to the Sistares belonged to them absolutely; and the balance of the number issued to them they were authorized by Chapman and his associates to pledge. W. B. Howard, who subsequently took one half of the Sistares' interest in the syndicate, owned absolutely the trust certificates that were issued to him out of the portion issued to the Sistares.

Almost immediately after this syndicate had obtained a controlling interest in the stock of the Shepaug Company, they took the direction of the affairs of the company. Through this voting trust a majority of the directors were taken from the members of the syndicate. Chapman was made the president, and Clemens the vice-president of the Shepaug Company. W. Z. Brown, the treasurer of the Construction Company, was made the secretary of the Shepaug Company.

On the 8th of April, 1890, the Sistares failed, and made an assignment in insolvency to one H. J. Davison. They had pledged for syndicate purposes, from time to time, some of the trust certificates issued to them. Both they and the syndicate were unable to redeem them, and they were sold at public auction to meet the loans for which they were pledged. These certificates were in different lots and to different banks and banking institutions. A portion of the trust certificates which some of the plaintiffs now hold, came in this manner through the Sistares. The Howard trust

certificates, representing 3350 shares, came directly to the plaintiff Bostwick from Howard; and no objection is made by the defendants to the title of these.

The Construction Company still holds a portion of the trust certificates issued to them. A portion of those formerly issued to that company, to wit, an amount representing 800 shares, has been transferred to one of the plaintiffs, George F. Cummings, for J. A. Bostwick. These were also pledged for a loan which was not met at maturity, and the certificates were sold, and were bought by Cummings. Chapman also holds trust certificates representing 400 shares of the Shepaug stock, which he bought at an auction sale. These also had been pledged by the Construction Company to secure some loan for the syndicate purposes. These trust certificates Chapman has pledged for a loan to himself. The plaintiffs are the owners now of trust certificates representing 7000 shares of the stock of the Shepaug Company, and owners of 3300 shares of the capital stock which never went into the trust. The greater portion of the plaintiffs' purchases of trust certificates and shares of stock were made between June 6th and 17th, 1890. The latest purchase was made by Bostwick August 7th, 1890. This was the purchase of the Howard trust certificates heretofore referred to.

I find that the plaintiffs knew of the trust agreement, and its terms as they appeared on the face of it. They also knew the terms of the trust certificates when they purchased them. But none of the plaintiffs knew of the terms of this partnership, or knew that such terms entered into and secretly formed a part of the trust agreement, as they in fact did. Between the members of this syndicate the terms of the partnership agreement were treated as a part of the trust agreement. The plaintiffs took the title to these trust certificates for value, and without knowledge or notice of any right or interest of this syndicate or its individual members therein, and without notice or knowledge of any such right or interest in the shares of stock represented thereby. They took them without notice of any infirmity growing out of the Sistares' manner of dealing with such certificates, and

without notice that they held the title to them in any sense as trustees, or that they had violated any terms of any trust that they were held under by them. The Sistares had dealt with these trust certificates precisely as they were directed to do by Chapman and his associates; and the latter were entirely cognizant of their manner of dealing with them and assented to it.

Dunlap, one of the syndicate, is not made a party to these proceedings by either the plaintiffs or the defendants. Witherbee, another of the syndicate, died June 8th, 1889. His executor qualified in the state of New York, but has never qualified in this state. The Sistares are not made parties; neither has Davison, their assignee in insolvency, been cited in. Clemens, one of these defendants, was one of the partners of the Sistare firm.

The plaintiffs made no application to the corporation itself or to the board of directors of the Shepaug Company for redress of the grievances complained of in these suits. It would not have been reasonable to require them to do so, or to require them to ask for action in conformity with their wishes touching the Ripley contract and the traffic contract hereinafter referred to, within the corporation itself or through the directors. Both were in the hands and control of this voting trust, and under the control of this syndicate, in whose interest and at whose instigation the acts complained of had been done. Any application for redress, either to the corporation or to the board of directors, under these circumstances, would have been useless.

I do not find that any of the plaintiffs have been guilty of any misconduct in the matter of the purchase of the trust certificates or of the stock. Neither has it been established that the real object of their purchase of these securities, or of the bringing of these suits, was to serve the interests of a rival railroad company or companies, or for any improper or meddlesome purpose.

The plaintiffs are strangers to this partnership and this partnership agreement. No account of the partnership has ever been taken, and no balance of profits and losses has

been struck. The voting trust was executed April 26th, 1889, and the voting power therein was used at the annual meeting of the stockholders in November, 1889, and it is proposed to use it at another annual meeting.

Some time in 1889 it was decided by the syndicate and the directors of the Shepaug Company, to abandon the project of the extension to Saugatuck mentioned in the trust agreement, as too costly, and therefore impracticable.

On the 15th of March, 1890, the plan of a different extension was taken up by the syndicate and the directors. This plan contemplated an extension to tide-water at Portchester, to connect with the N. York, N. Haven & Hartford Railroad; and on the date last named the Construction Company entered into a contract with a corporation known as the New York & Ridgefield Railroad Company, to build a railroad from some point at or near Danbury in this state, to Portchester in the state of New York. This company was in the hands of the syndicate and under its control, so that this contract was made. They had obtained its rights in some way by the promise of the payment of money, which was subsequently furnished and paid by the check of the Sistares. The plan of the syndicate was eventually to bring the Shepaug road down to Danbury by a branch, and to connect with this New York & Ridgefield Railroad.

The terms of this contract have never been carried out by the Construction Company, and the contract is forfeited; but there is a parol understanding that it may be resumed if the Construction Company hereafter desires to build the railroad under its terms.

On the 10th of April, 1890, at a meeting of the stockholders of the Shepaug Company, a vote was passed authorizing the issue of $300,000 of bonds to be secured by a mortgage upon its railroad property and franchise. It was further voted that the bonds or any part of them, or the proceeds of the sale thereof, be used for the purpose of building such branches as the directors might deem expedient to be built, and for acquiring such additional connections as in the opinion of the directors would increase the business and earnings of the com-

pany, and generally to provide such further and additional facilities as in the opinion of the directors would enable the company better to fulfil the purposes of its incorporation; and that the executive committee of the directors be authorized and empowered to sell the bonds, or any of them, and turn over the proceeds of the sale into the treasury of the company for the above purposes. This vote was preceded by a preamble, which recited that it was proposed that the company should borrow not exceeding $300,000, and secure the repayment of the same by its bonds, not exceeding the amount so borrowed, and secure the bonds by a mortgage of its property, for the purpose of constructing branches, providing for its outstanding obligations, and other lawful purposes.

At the same meeting another vote was passed, instructing the executive committee to take into consideration the construction of a branch line from a connection with the line of this company at or near New Preston station, to Lake Wauramaug, in the town of Washington; and to proceed with the construction of it when they deemed it for the interest of the company. And another vote, instructing the same committee to take into consideration the construction of a branch line from a connection with the line of the company's railroad at or near Hawleyville station to the city of Danbury, and to proceed with the construction of the same when it might be deemed for the interest of the company.

Neither of these is the branch in dispute in this case, except so far as a branch from Hawleyville to Danbury might be included in the one proposed from Hawleyville to the state line. The building of the disputed branch has not otherwise been acted upon by the stockholders of the Shepaug Company. No application has ever been made to a judge of the Superior Court for authority to build the branch from Hawleyville to the state line, and no such judge has found such branch to be of public necessity and convenience. The $300,000 of bonds referred to in the above vote were subsequently issued, and are now in the hands of Chapman, or under his control.

On the 21st of August, 1890, a meeting of the directors was held at Litchfield, at which there were present Chapman, Robinson, Barnes, Clemens, E. I. Chapman and Brown. Notice of the meeting, as required by the by-laws, was not given, and some of the directors, not receiving notice, were not present.

At this directors' meeting of August 21st, 1890, the directors passed a vote authorizing and directing the officers of the company forthwith to execute and deliver the contracts known in these cases as the Ripley construction contract, and the Croton Valley traffic contract. This scheme had its birth but a few days prior to the execution and delivery of the contracts representing it. The parties to the Ripley contract were the Shepaug Company, the Croton Valley Railroad Company, and John D. Ripley. The parties to the traffic contract were the two railroad companies. The Croton Valley Company has no railroad, and is a New York corporation, and began its corporate existence some time in 1885. It proposed to build a railroad from the Hudson River to the Connecticut state line at a point about two miles from Ridgefield. It has but little property, and but a small amount has ever been paid in on its capital stock, and there is nothing that leads the court to conclude that any more will be paid in.

The Ripley contract provides that Ripley shall build a railroad from Hawleyville to a point two miles beyond Ridgefield at our state line, and thence to Croton Point in the state of New York. The Shepaug Company and the Croton Valley Company agree therein to pay Ripley for such work, in their bonds or cash, upon such terms as in the contracts respectively appear. The sum of $85,000 out of the Shepaug bonds, the Ripley contract provides shall go to George D. Chapman, agreeably to a vote passed by the directors at the same meeting of August 21st, 1890.

The trust agreement, so far as Chapman and his associates and the committee are concerned, originated in and had as its prominent factors, secret and improper objects, terms and purposes, which continued down to and entered into

the making of this Ripley contract and this traffic contract. Both of these contracts, and any claimed modifications of the Ripley contract, were entered into to carry out such objects and terms and to serve purposes of private and personal profit and advantage to Chapman and his associates and the committee, and not to profit the other stockholders of the Shepaug Company. These contracts are injurious and oppressive to the company and its stockholders, and were entered into by the directors and officers of the Shepaug Company with full knowledge that they were of that character, and would embarrass the company, the shareholders and the trust certificate holders, and injuriously affect their rights and interests in the railroad property.

If the Shepaug Company are obliged to carry out this Ripley contract, it will require further bonding of the road, and seriously impair the financial condition of the company, and leave its stock of little value.

The traffic contract is to run ninety-nine years by its terms, and, if carried out, will necessitate the building of the branch from Hawleyville to the state line, a distance of eighteen miles, at an estimated cost of $1,200,000.

In authorizing these contracts and in executing and delivering them, there was, on the part of the directors, and Chapman, the president of the Shepaug Company, a disregard of the interests of the company and its stockholders. It was an attempt on their part to carry out a plan to hold the property and available securities and assets of the company under their control, that Chapman might obtain this $35,000 of the company's property, and that their own individual purposes might be served, and it was not done for the common good of the company and its shareholders.

Chapman neither expended money for, nor incurred liabilities in behalf of the Shepaug Company, to the amount of $35,000. No part of this sum was justly chargeable to the company. If he expended any such sum of money or incurred liabilities to that amount in the manner he claimed, such money was expended and such liabilities incurred in behalf of the Construction Company, and the syndicate of

which he was the head and manager. The directors, when they authorized the execution of the Ripley contract, and authorized the payment to Chapman of this $35,000, had knowledge that it was for no debt of the Shepaug Company.

On the 13th of September, 1890, after proceedings had been commenced in the Bostwick case, the directors of the Shepaug Company held a meeting, at which they passed a resolution which in substance declared that it is not the intent of the Ripley contract that any of the bonds of the Shepaug Company should be used to build any portion of the railroad of the Croton Valley Company. Ripley signed a memorandum assenting to this interpretation. The Croton Valley Company does not appear to have taken any similar action. This vote and memorandum were to affect the pending suit. Alexander McNeil was present at this latter meeting. The minutes of the preceding meeting of August 21st, were not read or approved. No action was taken touching the traffic contract, and there is no evidenec that any mention was made of it at the meeting.

The plaintiffs have notified the Trust Company that they revoked their powers under the trust agreement. On September 2d, 1890, the plaintiff Bostwick notified Ripley that the construction contract which he had entered into, so far as the Shepaug Company was concerned, was illegal. On September 12th, 1890, the plaintiffs Starbuck and Bostwick tendered and offered to surrender to the Trust Company the trust certificates held by them, and made a demand for an equal number of shares of the stock of the Shepaug Company. The Trust Company declined to transfer such stock to them.

The Trust Company is justly entitled to $1,720.20 as compensation and for disbursements by it in the matter of the execution of the trust.

S. E. Baldwin and *C. C. Beaman*, for the plaintiffs.

G. Stoddard, for the Mercantile Trust Company.

C. H. Blair and *C. C. Keeler*, for intervening defendants.

C. A. Seward, *H. Stoddard*, *C. C. Higgins* and *W. B. Glover*, for the other defendants.

ROBINSON, J. Upon the facts found by the court it is claimed, in the Bostwick case, that an injunction ought to issue to restrain any further action to confirm, ratify, or carry out the Ripley contract, and to restrain the use or delivery of the $300,000 of bonds of the Shepaug Company under or in furtherance of this contract, or in any manner not authorized by the company's charter; and further, that an order should issue that the bonds be delivered up to the treasurer of the Shepaug Company; and that an order or decree declaring the Ripley contract unauthorized, illegal and void as respects the Shepaug Company, should be issued. And in the supplemental complaint in the Bostwick case, it is asked that a decree be entered, declaring the traffic contract for ninety-nine years void, and setting it aside; and a removal of the directors of the Shepaug Company is also asked for.

This Ripley contract, the court has found, had in it corrupt elements. It was in part consummation of, and to carry out, the illegal terms of the partnership agreement between George D. Chapman and his associates. The appropriation by it, and by the vote authorizing it, of $35,000 to Chapman was a fraud on the company and its stockholders, and furnishes, as it seems to the court, sufficient reasons for its interference, and the granting of the principal claims of the plaintiffs.

And further, it is an agreement on its face to use the bonds of the Shepaug Company, and those hereafter to be issued on the proposed extension from Hawleyville to the state line, to aid in building the line of another corporation.

But it is claimed by the defendants that the directors of the Shepaug Company do not put this construction upon the contract; and that they have said so by a vote at the meeting of September 13th, 1890, after this suit was begun,

and further that the same shall not be so used, and that Ripley does not put this construction upon it and has said so by a written memorandum. It is insisted that this objection is therefore removed. It is not claimed that the Croton Valley Company, the other party to this contract, has given its assent to any such construction or modification.

The terms of the contract are plain and explicit. They give Ripley the right to the bonds of the Shepaug Company, and of the Croton Valley Company, for the building of the line of road, and of the whole of it. If this contract was one which it was not proper to make, and one which it was not intended to make, and one which must bear an interpretation which was not intended, and requires alteration to make it what it was intended, why should the court allow it to remain, and why should it be held to be the real contract of the parties and one that expresses the real intention of the parties to it?

The contract is there in all its original force and vigor of terms, without any modification on the face of it or appended to it, and as long as it is in existence in its present form and terms, the court must look at it as it is in fact. This vote was passed to affect the pending suit, and I cannot consent to turn these plaintiffs out of court because of this tardy interpretation, even though concurred in by Ripley.

But it is claimed by the defendants that, if this Ripley contract can be construed as appropriating bonds of the Shepaug Company to build the line of the Croton Valley Company, this furnishes no legal objection to the contract; and they refer the court to the case of *Nashua Railroad Company* v. *Lowell Railroad Company*, 136 U. S. R., 356.

This case, in my opinion, does not sustain the claim of the defendants. The suit was brought by the Nashua Railroad Company to compel the defendant company to an accounting under a contract for the management of the two roads by one; a contract that had been in existence and operated under for many years with success and profit to both corporations. The defendant corporation and the manager of the business under this contract, built at its own ex-

pense a depot in the city of Boston, and by the contract was to build it at its own expense. But after a lapse of time the increased and increasing business of the two corporations working together under this contract required, in order that they should hold this business and carry it on for the joint benefit of both contracting parties, the further outlay of a large sum of money in alterations in and about the depot in question. This money so expended was admitted to have been upon the exclusive property of the defendant, but it was voted by the directors of the plaintiff company that the interest of seven per cent on this outlay should be treated as a part of the operating expenses of the plaintiffs' and defendants' railways under the contract above mentioned.

The plaintiff company complained that by this vote and action a large amount of the net earnings was thus diverted from them, and claimed that their directors had no authority for the vote permitting it. The court in deciding this point says: "As a general rule we should not hesitate to say that the directors of the Nashua Company (the plaintiff) could not authorize, without the previous approval of its stockholders, the construction of a passenger station at a city in a state foreign to that in which it was created and to which its own road did not extend, or the payment of any portion of the cost of construction. Such expenditures would not be considered as falling within the ordinary scope of their powers." "But," the court says further, "the fact that the increased facilities provided at Boston were necessary to enable the joint management to retain its extended business, in which the Nashua Company (the plaintiff) was of course directly interested, changes the position of the directors of that company with reference to such expenditures and brings them within the general scope of the directors' powers." And the court accordingly refused the application of the plaintiff.

It will be observed that the facts in the above case are so different from the facts in this that it does not furnish support or authority for the defendants' position. As it seems

to the court the case supports the plaintiffs' claim far more than it does the defendants'.

But the defendants say that from the Ripley contract is now eliminated any right, authority or agreement that the Shepaug Company's money shall go to build any part of the Croton Valley line, and that the Shepaug bonds are now by the claimed modification to be used solely to build the branch of the Shepaug road from Hawleyville to the state line; and that all objectionable features to the contract are thus removed. Is this so?

That depends upon whether the company itself had at that time any authority to build this branch from Hawleyville to the state line. If they had not, then the contract should not stand. I am satisfied that the company had no such authority. The statute of 1889, which is made an amendment to the charter of every railroad company in this state, provides that "any railroad company in this state may build branches from its main line or from any of its leased lines, provided that the construction of such branch is found by a judge of the Superior Court, upon due application, after such reasonable public notice as such judge may order, to be of public necessity and convenience." It is not claimed that the provisions of this statute have been complied with. They are authorized to build only such branches as a judge of the Superior Court has decided to be of "public necessity and convenience." No judge has passed upon this question and no application has been made to any judge of the Superior Court for that purpose.

The company itself had no authority to build this branch, and the stockholders have never authorized or assumed to authorize the building of it.

But it is said that there was a vote of the stockholders of the Shepaug road, April 10th, 1890, which in effect authorized the directors to build such branches as they might deem expedient to be built, and to acquire such additional connections as in the opinion of the directors would increase the business and earnings of the company, and generally to provide such further and additional facilities as in the opinion

of the directors would enable the company better to fulfil the purposes of its incorporation; and the bonds to be issued were to be used for this purpose, by the terms of this vote. It is claimed that under the cover of this vote the directors were acting when they voted to build the branch in dispute. They say they were authorized by this vote to build this branch, so far as authority from the stockholders is needed. Let us see what the stockholders had in view at this time.

At this period a connection at tide-water at Portchester with the N. York, N. Haven & Hartford Railroad was the enterprise on hand, and in the month preceding this meeting the Construction Company, heretofore mentioned, had entered into the contract with the New York & Ridgefield Railroad Company to build a railroad from some point at or near Danbury to Portchester. This was the connection referred to in this vote; and the other resolutions passed at this same meeting show what branches the stockholders had in view and what was meant by the vote above referred to. In one of these resolutions it is the branch to Lake Wauramaug, and in the other the branch from Hawleyville station to the city of Danbury when the same might be deemed for the interest of the company, so that the only branches, or connections thus intended were by the New York & Ridgefield Railroad from Danbury to Portchester, the branch from Hawleyville to Danbury to connect with it, and the branch to Lake Wauramaug off at the north. Neither of these is the branch in dispute, or covers any part of it, with the exception of the branch to Danbury. The branch in dispute is to extend about nine miles beyond Danbury to the state line. The branch to Danbury is only a part of the distance from Hawleyville to the state line.

At the time of these resolutions the branch from Hawleyville to the state line had not been considered by the directors or the company. This scheme did not have its birth until several months after these votes had been passed, and, as before suggested, they were in fact passed with reference to altogether different branches.

But assuming that the language of these votes is broad

enough to cover and authorize any branch in whatever direction or over whatever route the directors might think it proper to build one; is this vote to be construed as authorizing the building of any branch not permitted by the charter of the company or some amendment thereof? Is it to be construed as authorizing the directors to build a branch in defiance of law, and one in effect forbidden by the act of 1889? Is it to be construed to authorize the building of anything but lawful branches, after lawful authority obtained from the appointed tribunal. I am of the opinion not.

The defendants say the law as it stood at the passage of these resolutions permitted them to build this disputed branch. I can find no law in existence at that time that authorized the railroad company to build any branch which had not first been found by a judge of the Superior Court, upon application and public notice, to be of public convenience and necessity. This branch, which it is proposed to build under this Ripley contract, is not of this character and is not so claimed by the defendants; and the court is of opinion that the company have no authority to build it.

Now should either the Ripley contract or the traffic contract be allowed to stand? It is found that the latter is a contract for ninety-nine years, with a corporation which has little real existence beyond its articles of association. It has no railroad, and the Shepaug Company's road is eighteen miles distant from the nearest point of the proposed road of the Croton Valley, and it has no present authority to build any connecting branch, if there were a railroad to connect with. It is found that this trust agreement, so far as Chapman and his associates are concerned, originated in and had as prominent factors secret and improper objects, terms and purposes, which continued down to and entered into the making of both the Ripley contract and the traffic contract. It is found that both these contracts were entered into to carry out such objects and terms and to serve purposes of personal profit and advantage to Chapman and associates and the committee. It is found that these contracts are oppressive and injurious to the Shepaug Company and its

shareholders, and were entered into by the directors and officers of the Shepaug Company with full knowledge that they were of that character, and would embarrass the company, its shareholders and the trust certificate holders, and injuriously affect their rights and interests in the railroad property. It is further found that if this Ripley contract were carried out it would seriously impair the financial condition of the Shepaug Company and leave its stock of little value. And there are other facts which I will not here repeat, that should have a controlling influence.

The court cannot give its countenance to contracts that are in fact oppressive and injurious to the company and its shareholders,—contracts to obtain a personal profit and gain to directors and officers, or in which there is a fraudulent appropriation of the funds of the company to its president, or contracts that are inspired by such an agreement as the facts show this trust and syndicate agreement to have been.

It is claimed by the defendants that the court should not entertain the plaintiffs' application because it is an application by the stockholders to the court to interfere with reference to domestic or internal affairs of the corporation, which they say cannot be done except under very peculiar circumstances and to a very limited extent.

I feel jnstified in saying with reference to this claim, that the facts disclose sufficiently peculiar circumstances to warrant the court in entertaining the application of the plaintiffs. In the case to which I am referred by the defendants for the doctrine of this claim, *Hawes* v. *Oakland*, 104 U. S. R., 453, the court says: "The exercise of this power (the power of the court of equity) in protecting the stockholders against the fraud of the governing body of directors or trustees, and in preventing their exercise in the name of the corporation of powers which are outside of their charter or articles of association, has been frequent, and is most beneficial, and is undisputed." And the court adds that perhaps the best assertion of the rule under discussion is found in the case of *MacDougall* v. *Gardiner*, 1 Ch. Div., 13, in which substantially the following language is held:—"Nothing connected

with internal disputes between shareholders is to be made the subject of a bill by some shareholder on behalf of himself or others, unless there be something *ultra vires* on the part of the company, *qua* company, or on the part of a majority of the company, so that they are not fit persons to determine it."

And the Supreme Court of the United States further suggests in this same case of *Hawes* v. *Oakland*, that the courts of this country, outside of the federal courts, have in numerous instances admitted the right of a stockholder to sue, in cases where the corporation is the proper party to bring suit, but that they limit this right to cases where the directors are guilty of fraud or a breach of trust, or are proceeding *ultra vires*. And on page 460 of the same case the court says:—"We understand the doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity, in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist, as a foundation of the suit, some action, or threatened action, of the managing board of directors or trustees of the corporation, which is beyond the authority conferred on them by their charter or other source of organization, or such a fraudulent transaction completed or contemplated by the acting managers in connection with some other party or among themselves or with other shareholders, as will result in a serious injury to the corporation or to the interests of the other shareholders; or where the board of directors or a majority of them are acting for their own interest in a manner destructive of the corporation itself or of the rights of the other shareholders, or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity." In my opinion the facts in the case we are considering bring it clearly within the rules thus laid down by the United States court.

It is claimed that Alexander McNeill, in the directors'

meeting of September 13th, 1890, assented to the Ripley contract by presence and vote, and therefore should not be allowed to set up its illegality as a stockholder or certificate holder. Assuming that he did assent to it, it is a contract which the court thinks ought to be set aside, and if he assented to it, at that place and time, there is under the facts a *locus penitentiæ* which the court will concede to him.

It is further suggested that the trustee and the committee named in the trust agreement voted in the affirmative for branches, and for the issue of $300,000 of bonds and the mortgage to secure them, and that this action inheres in the trust certificates into whosesoever hands they come, and that such holders are estopped from setting up the illegality of such action.

But this is not an application to set aside these bonds and that mortgage; neither is it an application to set aside some part of the vote of the meeting held April 10th, 1890, for that is the meeting to which the objection refers. On the contrary, it is an application to set aside certain contracts not at that time contemplated, by one of which contracts it is proposed to make an unjustifiable use of these bonds. It is further an application to compel the placing of these unused bonds in the hands of the treasurer of the corporation that issued them. It is an application to set aside the traffic contract and the Ripley contract, entered into many months after this vote, and not contemplated at the time of this vote by any one connected with the company; and it is only because the directors propose to use some of these bonds to carry out the Ripley contract in constructing an unauthorized branch or extension, and otherwise to improperly use the rest of them, that they take any place or perform any part in this application or in these proceedings. But there are other facts found that forbid giving force to this objection.

In view of the disposition which I make of other questions in this case I will pass over the one growing out of the lack of notice for the meeting of August 21st, 1890.

In the Bostwick case the court orders a permanent injunction to issue as prayed for. It further orders the $300,000

of bonds of the Shepaug Company to be delivered without delay into the hands of the treasurer of the Shepaug Company. The court decrees that the Ripley construction contract was unauthorized, illegal and void as respects the Shepaug Company, and that the traffic contract with the Croton Valley Railroad Company is also void, and therefore should be set aside.

In the Starbuck case the court is asked to decree a permanent injunction against the Mercantile Trust Company to restrain it from voting on the stock standing in its name, at any future meeting of the Shepaug Company, according to the direction of the committee named in the trust agreement, or in any way except as authorized by the true owners of the stock respectively; and a permanent injunction against the Shepaug Company, to restrain it from receiving any such votes. The court is also asked to issue an order that the Trust Company transfer to the plaintiffs respectively the stock, now standing in its name, which is equitably owned by the plaintiffs respectively. And there is also sought an injunction to restrain Harold Clemens, Marcus W. Robinson, and Lucian T. Chapman, the members of the committee, from attempting to perform any further acts under said contract and power of attorney.

In this case it is found that the plaintiffs have in fact revoked the voting power in the trust agreement; but the defendants claim that as a matter of law they cannot do this. The character of this trust, so far as the Trust Company is concerned, is a dry trust. The Trust Company has no beneficial interest whatever in the shares of stock which are made the subject of the trust. They have no interest in favor of which they can claim a continuance of the trust. Neither has the committee named in the trust any interest which they, as such committee, can set up for the continuance of the trust. This committee or a majority of them are made an attorney to determine how the Trust Company shall vote in matters coming up in stockholders' meetings. So I say this committee, as such, has no interest that it can set up for a continuance of the trust. It has no benefi-

cial interest in the subject matter of the trust, and in fact no powers, duties or functions in the trust other than above stated.

But it is said that this voting trust is to run five years, and that during the five years the voting power is not revocable except by unanimous consent of all holders of trust certificates. Can this be insisted upon against the demands of these trust certificate holders? Cannot these certificate holders revoke this voting power, notwithstanding this provision in the trust agreement?

The court in the case of *Griffith* v. *Jewett et al.*, 15 Weekly Law Bulletin, 419, recently held the following language in a case similar in some respects to this one:—"If such demand be not complied with, the party holding the entire beneficial interest in the stock cannot cast the vote thereof, while it may be voted upon by one having no interest in it or in the company; and so it may come to pass that the ownership of a majority of the stock of a company may be vested in one set of persons, and the control of the company irrevocably vested in others. It seems clear that such a state of affairs would be intolerable, and is not contemplated by the law, the universal policy of which is that the control of stock companies shall be and remain with the owners of the stock. The right to vote is an incident of the ownership of stock, and cannot exist apart from it. The owners of these trust certificates are, in our opinion, the equitable owners of the shares of stock which they represent, and being such, the incidental right to vote upon the stock necessarily pertains to them. They may permit the trustees, as holders of the legal title, to vote in their stead if they choose; but when they elect to exercise the power themselves, the law will not permit the trustees to refuse it to them."

The propriety and soundness of the doctrine of this case, and the necessity of its application, can have no better or more forcible illustration than in the facts and situation of the matter before us. The plaintiffs own 10,300 shares of the stock of this Shepaug road or its equivalent, and, if the

contention of the defendants be sound, are shut out for several years from any voice in the election of officers and in the policy and management of the corporation.

If I follow the doctrine of this case, as I feel compelled to, the conclusion must be that these plaintiffs, in the absence of any other well grounded objection, have the right to revoke the voting power in this agreement.

But it is said that the case of *Griffith* v. *Jewett* differs from this, in that the power in the former case was irrevocable, while in this it is to last for a term of years only, and, being such, is not against the policy of the law.

It seems to the court that the surrender by a stockholder of his power and right to vote on his stock for the term of five years is contrary to the policy of the law of this state. Were this a power of attorney in formal terms, no claim would be made but that it was not only contrary to the policy of the law of this state, but in direct conflict with our statute, which says that "no person shall vote at any meeting of the stockholders of any bank or railroad company, by virtue of any power of attorney not executed within one year next preceding such meeting; and no such power shall be used at more than one annual meeting of such corporation." Gen. Statutes, § 1927. This statute tends to disclose what the policy of the law of this state is, touching the matter of the surrender by a stockholder of his voting power to some one else. It would seem that it is opposed to such surrender for an indefinite period or for a period of five years. Evidently it was thought a longer surrender of the voting power would result disastrously in many ways.

It cannot be denied that as much disaster might follow to the business and the finances of a corporation and the interest of stockholders, where the voting power is yielded up in a five years voting trust, as by a five years power of attorney. The difference between an irrevocable power and a power irrevocable for five years, is a difference in degree and not in principle. A five year voting power, irrevocable for that time, would furnish time enough and opportunity

enough to realize all the evils which our one year statute is manifestly intended to guard against.

It is the policy of our law that an untrammeled power to vote shall be incident to the ownership of the stock, and a contract by which the real owner's power is hampered by a provision therein that he shall vote just as somebody else dictates, is objectionable. I think it against the policy of our law for a stockholder to contract that his stock shall be voted just as some one who has no beneficial interest or title in or to the stock directs; saving to himself simply the title, the right to dividends, and perhaps the right to cast the vote directed, willing or unwilling, whether it be for his interest, for the interest of other stockholders, or for the interest of the corporation, or otherwise. This I conceive to be against the policy of the law, whether the power so to vote be for five years or for all time. It is the policy of our law that ownership of stock shall control the property and the management of the corporation, and this cannot be accomplished, and this good policy is defeated, if stockholders are permitted to surrender all their discretion and will, in the important matter of voting, and suffer themselves to be mere passive instruments in the hands of some agent who has no interest in the stock, equitable or legal, and no interest in the general prosperity of the corporation.

And this is not entirely for the protection of the stockholder himself, but to compel a compliance with the duty which each stockholder owes his fellow-stockholder, to so use such power and means as the law and his ownership of stock give him, that the general interest of stockholders shall be protected, and the general welfare of the corporation sustained, and its business conducted by its agents, managers and officers, so far as may be, upon prudent and honest business principles, and with just as little temptation to and opportunity for fraud, and the seeking of individual gains at the sacrifice of the general welfare, as is possible. This I take it is the duty that one stockholder in a corporation owes to his fellow-stockholder; and he cannot be allowed to disburden himself of it in this way. He may shirk it

perhaps by refusing to attend stockholders' meetings, or by declining to vote when called upon, but the law will not allow him to strip himself of the power to perform his duty. To this extent, at least, a stockholder stands in a fiduciary relation to his fellow-stockholders. For these reasons I hold that this trust agreement is void as against the policy of the law of this state.

And why is not the voting power surrendered in this trust agreement the equivalent of a power of attorney, and why has not the right of this Trust Company and this committee to control and cast the vote upon this stock, if at any time they had any legal right to exercise it, ceased to exist? It is now more than one year since the voting power was executed, and that power has been used already at one annual meeting. Why is not this voting power in this trust agreement, and the attempt of this trustee and this committee to exercise it now, a disobedience of our one year statute above quoted?

It is claimed that it is not a power of attorney because the Trust Company holds the legal title to the stock. It is said that the right to vote on the stock is not dissociated from the legal title to the stock in this instance. But does this reply quite answer the objections created by the facts in the case, and is it quite true that the voting power here is not dissociated from the legal title? An examination of the trust agreement discloses that the Trust Company is a mere agent, with no beneficial interest in the stock. It holds the title, but the real owner is somebody else. The Trust Company is simply the hand to cast such ballot as this committee directs. The committee is also but an agent, but without the legal title to the stock or any title to it. It is the head, and the Trust Company is the hand; simply that. The committee direct, control and select what vote shall be cast, and are the agents and attorneys to perform this very essential part of the act of voting.

The trust company is one of the parties to the trust agreement, and it holds the legal title to the stock, and as such holder of the legal title it has in this trust agreement

surrendered all a voter's power except the mere manual act of casting the selected ballot. It has in this trust agreement in effect surrendered to this committee the power to select the ballot. It has conceded to this committee the power to demand that it shall vote as they direct. What remains then in this trustee of the voting power, beyond being the mere hand, the use of which this committee is given the right to demand for this purpose at any stockholders' meeting? Is not the full voting power to all intents and purposes in this committee, and is it not so by delegation? It seems to me that the voting power in this trust agreement falls within the spirit and intent of the prohibition of our statute heretofore referred to, and is terminated by lapse of time and the use of it already at one annual meeting.

It is insisted that there is nothing illegal, *per se*, in the pooling of stock to carry out a scheme of extension authorized by law and favored by the corporation. This may be true under proper limitations, and when this is all there is to the scheme; but when underlying that pooling contract there is between the members of the syndicate, who are directors or a majority of the directors of the corporation, a secret agreement which enters into this pooling contract, and forms the object of its creation, and by which they are to take to themselves the profits arising from such extension, or from the contracts which they as directors make, elements of unfairness and opportunity for fraudulent and dishonest practices are introduced, which the court cannot too severely condemn. Such a pooling contract or voting trust is in violation of the most elementary principles of law governing the dealings of trustees with trust property and their *cestuis que trust.*

In the case of *Barnes* v. *Brown*, 80 N. York, 535, the court in commenting upon this subject said:—"It is true that the plaintiff while acting as a director of the corporation held a fiduciary relation to it. He was a trustee of the corporation and was under the same disability which attaches to all trustees in dealing with trust property and in transacting

the business pertaining to the trust. He could not act as trustee and for himself at the same time, and he would not be permitted to make a profit to himself in his dealings with the corporation. It is against public policy to allow persons occupying fiduciary relations to be placed in such positions as that there will be constant danger of a betrayal of trust by the vigorous operation of selfish motives." In the case of *Butts* v. *Wood*, 37 N. York, 318, the court uses this language:—"The rule that one holding a position of trust cannot use it to promote his individual interests, by buying, selling, or in any way disposing of the trust property, is now rigidly administered in every enlightened nation, and its usefulness and necessity become more apparent." But this doctrine is too well known and too universally recognized to require reference to further authority. It is fundamental, and by it must stand or fall all dealings of a director with the property of his corporation.

But the defendants claim that if there is a defect of parties, as the plaintiffs say there is, such defect must defeat the plaintiffs' suit. I do not think this claim can be sustained. The plaintiffs have not contended that there was an absence of any parties necessary to the determination of their right to revoke this voting power and to demand a transfer of the shares of stock represented by these trust certificates; but they set up in their pleadings that there is a defect of parties in the proceedings in the nature of a counter-claim instituted by certain intervenors, members of this syndicate, in which they claim a division of the shares of stock of the Shepaug Company now in the hands of the Trust Company.

It is true that certain members of the syndicate are not parties to this suit, but these persons could not be necessary to a determination of the plaintiffs' right to the relief sought, unless these shares of stock, represented by the plaintiffs' certificates, were claimed by the plaintiffs to be partnership property. But the plaintiffs make no such claim as this, but quite the contrary. It is the defendants who claim this by their intervention suit and counter-claim. It is for the

parties who set up the partnership title and interest as a basis for their claim for relief, to bring in all who are interested in the settlement of partnership matters and in a division of partnership assets. This the intervenors have not done.

But it is said that the purchaser of a trust certificate becomes a partner in the original partnership by express agreement in the trust certificate, and is therefore bound, not only to carry out the partnership agreement, but also, if the partnership is to be wound up, to bring all partners into court for a distribution of the assets. The principal factor in this claim is that the purchaser of one of these trust certificates becomes, by express agreement in the certificate, a partner in the original partnership. Neither the trust certificate nor the trust agreement contains any reference to any partnership or the terms of any partnership; neither contains any statement that any such partnership ever existed. This court cannot declare these plaintiffs parties to a partnership agreement, about which, or its terms, they never heard and never knew until they were disclosed on the trial. But it is insisted that in the trust agreement is placed the form of the trust certificate, which contains a clause which recites that the holder of the certificate, by accepting the certificate, duly assents to the trust agreement. Now it seems to the court that the most that can be claimed from this is, that the holder of the trust certificate assented to the terms of the trust agreement as they appeared on the face of it, and not to the underlying secret partnership agreement. The holder of each trust certificate, by the terms of the certificate, is to receive his dividends upon it, as for the number of shares of stock represented by his certificate; and upon the determination of the trust is to receive just as many shares of the capital stock as his trust certificate names. There is no hint that he may receive any less, or that an accounting of partnership matters may be required, or that his interest may be or is likely to be diminished, or that his shares of stock, as represented by the trust certificate, are to be subject to any obligation or losses

of any partnership. In short the trust certificate represents and is evidently intended to represent, each holder's separate and distinct number of shares of the stock put in trust. The trust certificates were individual property as soon as they were issued to an individual, and represented so much individual ownership of stock that was tied up in a voting trust, the ownership of which stock could be evidenced in no better or more satisfactory manner; and if the certificates were individual property and represented so much individual ownership of stock, this stock so represented was not partnership property, and the purchase of a trust certificate under these circumstances could have no effect to make the buyer a partner in a partnership whose terms and existence he was not apprised of. These plaintiffs, I am satisfied, are not partners in this syndicate, and the stock represented by their holdings of trust certificates is not subject to partnership claims or inquiry.

But the claim is made that the trust certificates are not negotiable, or even *quasi* negotiable; that they are only personal contracts upon which may be founded a claim for relief in equity; but that such right inheres in the personal contract, and not in the ownership of any stock in a corporation; and that this right cannot be enforced until all the parties to the contract and in interest are brought before the court.

Each of these trust certificates contains the language that "the holder hereof is entitled to receive at the office of said trust company his ratable share of any dividend paid upon the deposited stock, and upon the termination of the trusts under which said stock was deposited, the holder hereof will be entitled to receive from this company, upon surrender of this certificate, an equal number of shares of the capital stock of said railroad company. The interest of the holder hereof in the shares of stock represented by this certificate is assignable by transfer solely upon the books of the Mercantile Trust Company kept for that purpose, either by the holder hereof in person, or by his attorney, upon the sur-

render of this certificate." This form of certificate is made a part of the trust agreement.

The trust agreement contains this further provision, "that the party of the second part (the Trust Company) upon the termination of this agreement shall, upon the surrender of the certificates issued in pursuance of the trust agreement, transfer and assign to the registered holders presenting the same, certificates for the number of shares of stock deposited with it, that such registered holders may be respectively entitled to under the said trust certificates."

It will be seen that the certificates are to govern as to the number of shares which each holder is to be entitled to, and are made transferable; and further that, if not negotiable in the strict sense of that term, they have a *quasi* negotiability similar to certificates of stock. And not only is the certificate made transferable, but the holder's interest in the stock represented by the certificate is made transferable upon the books upon surrender of the trust certificate.

When it is borne in mind that the persons who created this trust, and moulded it into this shape, and with these provisions for easy and expeditious transmission of the trust certificates from hand to hand and the holder's interest in the stock thereby represented, voluntarily parted with all such interests as are hereinbefore mentioned, it would seem that this claim of the defendants should not have much weight in a court of equity. It seems to the court that this objection is without any force or strength unless the defendants or the partnership have some interest in the stock represented by the trust certificates in the plaintiffs' hands, and unless there in fact existed some infirmity attaching to the trust certificates or the stock which would have defeated their use of them and their claim to the stock represented by them.

But the court has held that none of the defendants or this syndicate have any interest in these trust certificates or the shares of stock represented by them, and the facts show that no such infirmity existed. The court has found that George K. Sistare's Sons acted in the matter of pledging these cer-

tificates within the instructions given them by the syndicate.

But I cannot agree with the defendant's counsel that these trust certificates have not a *quasi* negotiability. Our court held in *Bridgeport Bank* v. *New York & New Haven Railroad Company*, 30 Conn., 231, that certificates of stock have a "species of negotiability, although of a peculiar character, but one necessary to the public convenience." Cook, in his recent work on "Trusts" of this modern character, says (page 9):—"In all these (trusts) also trust certificates are issued by the trustee to the parties to represent their interest in the trust. These certificates are bought and sold on the market like shares of stock;" and (page 14:—) "Certificates representing a proportional interest are issued. These certificates are transferable; the persons interested in the trust change and fluctuate." I must hold that these trust certificates, subjected to such use by the consent of the syndicate as that they eventually were put afloat and came into the hands of these plaintiffs, who purchased them for value and without notice, have quite as much negotiability when endorsed with an irrevocable power of attorney to transfer, in blank, and signed by the owner, as certificates of stock under like circumstances. I think this is a fit case for the application of the doctrine of estoppel. Each trust certificate is a declaration put afloat through the instrumentality of this syndicate that the signer thereof holds in trust a definite number of shares of stock for the holder of the certificate. It is in effect a declaration that the holder owns the equitable title to a precise number of shares, and at the termination of the trust, on surrender of the certificate, will be entitled to have that number of shares transferred to him by the signer. This trust certificate or declaration is made assignable by agreement of the syndicate and by the terms of the certificate, and was sent out into the market through the instrumentality of this syndicate; and now certain members of it attempt to impeach or burden the holders' title. This the court cannot permit.

But the defendants say that, even if the trust certificates

have a *quasi* negotiability, the defendants were bound to make inquiry. But not unless there was something about the *quasi*-negotiable collateral that ought to put a prudent person upon inquiry. The trust certificates and the trust agreement, and the other facts found, show nothing of this latter sort; and had these plaintiffs made inquiry, that inquiry would have revealed, if frankly answered, simply the facts found by this court.

It is suggested by the defendants that "he who comes into equity must come with clean hands." This is true; but the court fails to find any act or conduct upon the part of any of the plaintiffs that will entitle the defendants to the benefit of this rule. It is suggested that the plaintiffs bought into the Shepaug Company for improper purposes, and to interfere with a policy agreeable to all the stockholders, and to obtain a control, and to use this control for the benefit of rival railroad companies; and it is said that these suits are to that end. But it has not been established that the real object of these suits is to serve the interests of rival companies, or that they have been brought for any improper or meddlesome purpose. That the plaintiffs intended to revoke the voting trust when they purchased the trust certificates is quite likely true; but there is no direct proof of it; and if there were, they had the right to do this; and so had any trust certificate holder the right at any time to revoke this voting trust. They had the right to purchase these trust certificates and these shares of stock which were offered for sale, and even if these acts of purchase give them the control of the Shepaug Company, and they purchased with that intent, these things can furnish no reason for a court of equity to refuse its assistance to protect their rights and procure a recognition of them by this trust company. Even if this is to result to the plaintiffs in the control of the Shepaug Company, this court cannot refuse its aid so far as sought in this case. It is not unlawful for persons to purchase or to own the majority of the stock of a corporation, and if these plaintiffs have bought and are entitled to the control, why should this court refuse to compel those in

control, and not entitled to it, to surrender it to those who are? If the plaintiffs have bought these trust certificates and this stock unhampered by any burdens, liens or rights of the defendants, it would seem intolerable that parties who own eighty-five per cent of the capital stock should be kept out of any voice in its policy or management, because it is feared that they may use, or intend to use, this control for the benefit of rival companies.

The court in the case of *Griffith* v. *Jewett*, heretofore referred to, very properly says:—"Moreover we are dealing with the rights of property, and it is no answer to one's demand for the possession and control of his own property to say that he intends to use it for an illegal purpose. * * * If the illegal proceedings feared by the defendants should be undertaken by any of the parties, the law will doubtless afford remedies and the court be ready to apply them."

Upon the facts the court cannot grant the prayer and claims of the intervenors. They have not brought all their parties before the court, and they are not in a position to ask it if they had; and it would involve the settlement of partnership accounts, which is in no wise necessary in ascertaining or determining the plaintiffs' rights to the relief they seek. The present condition of their partnership affairs is a matter of entire indifference to the plaintiffs' proceedings and rights.

I must sustain the demurrer to the prayer and claims of the intervenors; and on the merits of their complaint it has been found that they have neither any several nor any partnership interest or ownership in the trust certificates of stock claimed by the plaintiffs. The plaintiffs' demurrer to paragraph four of the defendants' fourth defense and counterclaim is sustained.

In the Starbuck case the court orders a permanent injunction to issue against the Mercantile Trust Company to restrain it from voting on the stock of the Shepaug Company, in its name, at any future meeting of said company, according to the direction of the committee named in the

trust agreement, or in any way except as authorized by the true owners of the stock respectively.

The court further orders a permanent injunction to issue against the Shepaug Company to restrain it from receiving any such vote.

The court orders that the trust company transfer to the plaintiffs respectively the stock now standing in its name, of said railroad company, which is equitably owned by the plaintiffs respectively and is represented by the trust certificates which the plaintiffs hold; but upon what terms, if any, such transfer shall be made, the court will determine after hearing the claims of the Mercantile Trust Company with reference to such matters.

The court also orders a permanent injunction to issue to restrain Harold Clemens, Marcus W. Robinson, and Lucian T. Chapman, the committee named in the trust agreement, from attempting to perform any further acts under said trust agreement and power of attorney.

APPENDIX.

OBITUARY SKETCH OF JOHN P. C. MATHER.*

JOHN PERKINS CUSHING MATHER, a prominent member of the New London County bar, died at his residence in New London on the 12th day of February, 1891.

He was the son of Capt. Andrew Mather, a native of Lyme in this state, who for many years, and until his death, was a commander in the United States revenue marine, and for a long period in the latter years of his connection with the service was in command of the cutter stationed at New London. His family residence was at New London. There his son John was born on September 23d, 1816, in the homestead that continued to be his home through all his long life. The son entered Yale College at the age of seventeen, and graduated in the class of 1837.

Choosing the law to be his profession, after he left college he entered upon its practical study in the office of the late Lyman Law of New London. He was admitted to the bar in the year 1839, and commenced a practice at New London, which was actively continued (except as it was interrupted or encroached upon by the duties of judicial or political positions to which he was called), until his retirement from professional and public business in the year 1886.

He was chosen mayor of the city of New London in 1845, and held that office by re-election until he resigned it in 1850 to become the secretary of the state.

In 1849 he was elected one of the representatives of the town of New London in the General Assembly, and served on its judiciary committee In 1850 he was elected by the General Assembly secretary of the state, to fill out the unexpired term of Hon. Hiram Weed, who died during his term, and was continued in the office for the three annual terms next following. In the elections of 1851, 1852 and 1853 he was the nominee for that office on the democratic state ticket, which was headed, in each of those elections, with the name of the Hon. Thomas H. Seymour. In 1851 there was no choice of state officers by the people, but the General Assembly by its vote chose the democratic candidates. In 1852 and 1853 Mr. Mather, with the others of the democratic nominees, was elected by the popular vote.

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* Prepared at the request of the Reporter by Charles W. Butler, Esq., of the New London County bar.

In 1858 Mr. Mather was appointed, by President Buchanan, the collector of customs at New London. That office he held until the early part of President Lincoln's term in 1861, when he gave place to a republican successor appointed by the new president.

In 1866, 1867, 1868, 1870 and 1873, he was the judge of the police and city court of New London. In 1871 he was judge of the probate court for the New London district. He was a little later one of the five revisers of the statutes of the state by whom the revision of 1875 was prepared. In 1878 and 1879 he sat in the state senate, from the New London district.

In 1879 he was appointed judge of the Court of Common Pleas in New London County, and remained in that office, by reappointment when his first term closed, until in 1886 he relinquished it because he had reached the limit of age fixed by the constitution of the state.

This enumeration of the various offices filled by Judge Mather during his extended career, may well serve to indicate the extent and variety of his qualifications for rendering useful service to his fellow citizens in public stations of trust and responsibility. It exhibits the subject of our sketch, however, as devoting much of his time through a course of many years to public affairs more or less connected with or related to politics or political influences. But he was not a politician, and he was not an office seeker. The duties of these places were cast upon him by the common voice of fellow-citizens who recognized his fitness to serve them and who called him to that service because he was the man capable and trustworthy for the duty. The attractions of politics or of office were never, to his view, sufficient to draw away his mind from its attachment to his chosen profession of the law. From first to last,—at all times,—he was faithful and earnest in his devotion to the duties of that profession. He was, above all things else, the lawyer always.

To the more showy branches of legal practice, that so much fill the eye of the general public outside the bar, he seemed not so much adapted or inclined. He made no effort to attain distinction as an orator, or as a brilliant contestant in the struggles of the court room. His habit was quiet, unobtrusive, devoid of all the pretensions that might challenge the admiring notice of the populace. His sphere was that of the counsellor, and in that field of service he was in a rare degree wise and prudent. His knowledge of the law was full and profound. He was patient to hear, keen to observe and to scan, close and sound in reasoning, careful in considering, firm in his conclusions and faithful to them, and his speech was the plain and direct and clear expression of the wisdom that was in him.

On the bench he exhibited admirably these qualities so much to be desired and so highly to be prized in those of our profession who are called to judicial positions. Alike by his brethren of the profession

and by the laity outside the bar, he was recognized by the observant ones as the right man for the place, the upright and learned magistrate, the model judge. Many there are of the members of the bar—of the juniors, perhaps, especially—who cherish grateful memories of his kindly disposition and demeanor.

After he left the bench in 1886 Judge Mather lived in quiet retirement at his ancestral home in New London. He was never a man of robust physique, and in his last years, as bodily strength declined and infirmities grew and multiplied, he remained more and more in the seclusion of his home, among his books. He had always been an enthusiastic book-lover, and in his last years his library was, more than ever before, the place where he loved to be.

He died of an attack of bronchitis, at about three o'clock on the morning of the 12th of February, 1891. Late in the evening of that night his physician saw indications that the end was nigh at hand. The patient received with undisturbed composure the announcement that before the rising of the morning's sun his eyes would have closed forever upon all the things of earth, and he calmly awaited the end.

With serene soul, and brave heart, and unfaltering step, this honored brother in our honorable profession, who had finished his work here, calmly and quietly passed out through the invisible portal into the eternal mysteries of the world beyond.

OBITUARY SKETCH OF ABIJAH CATLIN.*

ABIJAH CATLIN, then the oldest member of the Litchfield County bar, died at the family homestead in Harwinton on April 14th, 1891. He was born at the same place on April 1st, 1805, being the fourth in lineal descent, and of the same name, who were born successively on the ancestral farm, who inherited it, and who lived and died there, since Major Abijah Catlin, the first of the line, emigrated from Hartford to Harwinton in 1739, as one of the original settlers of that town.

The subject of this notice was graduated from Yale College in 1825, where he was a classmate with the late George C. Woodruff of Litchfield. He studied law with William S. Holabird, Esq., at Winchester, and began practice in Georgia; but, on the death of his father in 1837, he returned to Harwinton and took possession of the old homestead. There he lived during the remainder of his life, practising law, representing his town and senatorial district in the General Assembly, serving as judge of the County Court, holding various state offices, and

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*Prepared, at the request of the Reporter, by George A. Hickox, Esq., of the Litchfield County bar.

other positions of public trust, and acting as judge of probate and justice of the peace until disqualified by age.

The following list of state offices held by Judge Catlin shows only a part of the public duties he performed during his long public career. He represented Harwinton ten times in the House of Representatives, namely, in 1837, '8, '9, 1840, 1851, 1861, '2, '5, 1874, '9. He served in the Senate in 1844; was Judge of the County Court in 1844, '5; Comptroller in 1847, '8, '9; School Fund Commissioner in 1852; and Presidential Elector in 1880.

Generous by nature, somewhat irascible, though placable, Judge Catlin early developed the best characteristics of the great yeoman class from which he sprang. He was always the honest, intelligent lawyer-farmer, reliable in places of trust, fearless in the exposure of meanness and injustice, always at the front in times of danger, truckling neither to man nor to money. On the breaking out of the war he was one of the prominent leaders of the Union party organized in this state by members of both the old parties for the sole purpose of preventing the dismemberment of the republic.

Indeed Judge Catlin always loved republicanism and the republic. He feared the growth of the money power and greatly regretted the decline of agriculture in his county and state. The writer well remembers his telling him, not many years since, of the feeling of discouragement aroused within him by a recent perusal of Sallust's terrible picture, in his Cataline, of the demoralization and decay of the Roman commonwealth, and he clearly recognized the similarity of the conditions of the great republic of the ancient world to those which are so rapidly developing in our own. Nevertheless, the prevailing tone of his mind was the hopefulness natural to a sound and courageous manhood.

One could not reasonably expect the development of a great lawyer in a small agricultural community in one of the oldest states of the union. But such a community seldom mourns the loss of a more honest, honorable or useful citizen.

OBITUARY SKETCH OF CHARLES J. McCURDY.

Charles Johnson McCurdy, who had been for many years one of the foremost men in the state in professional and public life, died at Lyme in this state, where he was born and had always lived, on the 8th of June, 1891, in the ninety-fourth year of his age. Twenty-four years before his death he had left, under the constitutional limit as to age, the bench of the Supreme Court of the state, and had since lived in dignified retirement at the ancestral mansion, occupying himself with agri-

cultural pursuits, the gratification of his taste for literature and art, an interested and intelligent observation of the progress of the world, the society of his friends, and a generous hospitality. His physical vigor and activity continued in a remarkable degree till near the close of his life, and his mental faculties remained for the same time unimpaired.

At a meeting of the bar of New London County, called upon the occasion of his death, the following resolutions were presented by a committee of the bar and passed:—

"In the death of the Hon. Charles Johnson McCurdy of Lyme, the New London County bar has lost its oldest and one of its ablest members. He was a man of character, an able lawyer, a safe counsellor, an upright and patriotic citizen, energetic, of strong will but always open and manly. He scorned mean deeds and mean men. He died in the ripeness of age, after a lifetime of success in his chosen profession, in the plenitude of his powers, with his eye undimmed and his natural force unabated. His death was not an unexpected and sudden blow, but the natural and expected translation of a completed earthly life to the higher and better life beyond.

"The members of the New London County bar take pleasure in placing on record their high appreciation of Judge McCurdy's strength of character, of his winning geniality of temper and manner, of his unswerving integrity, of his self-sacrificing devotion to principle in public and private life, of his industry and zeal as a lawyer, of his fidelity as a legislator, of his talent as a diplomat, and of his patience, acumen and wisdom as a judge of the Supreme Court and expounder of the constitution and the laws. His private life was blameless and he graced and honored every function of public life in which he was called to engage.

"He lived for many years at his pleasant home in Lyme, amid rural surroundings, and passed quietly away full of years and honors, calmly prepared to meet the fate which the next world had in store for him. His life may well be studied and his manly virtues emulated by the young men of to-day.

"*Resolved*, That in further appreciation of our friend and brother, and to perpetuate the remembrance of his many virtues, these resolutions be entered upon the records of the bar, and that the court be requested to cause the same to be spread upon the records of the Superior Court."

Jeremiah Halsey, Esq., in presenting the resolutions to the court, made the following address:—

MR. HALSEY'S ADDRESS.

May it please the court:—Before making the motion suggested by the resolutions, I desire to make some allusions to the life, character and public service of our departed friend and brother.

Judge McCurdy was born at Lyme, December 7th, 1797. His grandfather was a Scotch-Irish Presbyterian, who was a successful and wor-

thy merchant, an ardent patriot, and one of the earliest and boldest in urging on the American revolution. His father, Richard McCurdy, was a graduate of Yale and a lawyer by profession, but devoted himself to agricultural pursuits and the care of his estate.

His mother was Ursula Wolcott Griswold, granddaughter on her father's side of the first Governor Griswold, and of that Ursula Wolcott whose husband, father, brother, uncle, nephew, and still greater son, Roger Griswold, were all governors of Connecticut. On her mother's side she was a granddaughter of the Rev. Stephen Johnson of Lyme, who is noted in history for his eloquent papers in favor of colonial rights, which roused into existence the "Sons of Liberty" and were among the most efficient causes of the revolution. The maternal grandmother of Judge McCurdy's mother was Elizabeth Diotate, descended from Dr. Theodore Diotate, a distinguished court physician of London in the time of James I., and brother of the Rev. John Diotate, an eminent theologian of Geneva.

Having had his early educational training at the Bacon Academy in Colchester, he entered Yale College in 1813, and was graduated with high honors in 1817. He studied law in the office of Chief Justice Swift of Windham, and was admitted to the bar in 1819. In May, 1822, he married Sarah Ann, daughter of Richard Lord of Lyme, a woman of great refinement and sensitive nature, a devoted wife and mother, who died in 1835, at the age of thirty-six, leaving an only child, now the wife of Prof. Edward E. Salisbury of New Haven. During the remainder of his life, more than half a century, he remained a widower.

Mr. McCurdy soon attained eminence in his profession and early became interested in political affairs. He was elected to the legislature as a representative from his native town, and served as a member of that body for ten years between 1827 and 1844, being speaker of the house three of those years. In 1832 he was state senator, and in 1847 and 1848 he was lieutenant governor and president of the senate.

He originated, and with the assistance of Hon. Charles Chapman, was chiefly influential in carrying through, in 1848, that great change in the common law by which parties and others interested in the event of suits are allowed to be witnesses—a change which has since been adopted in this country and in England.

He held the office of judge of the County Court for New London County for several years. This court had an important jurisdiction, civil and criminal, the judges of which were appointed annually by the General Assembly.

In 1851 he represented this country at the court of Austria. The situation then was one of great delicacy, as the Austrians were much irritated against our nation on account of the reception of Kossuth, and the American legation at Vienna was supposed to be a place of refuge

and protection, not only for our citizens, but also for the subjects of other countries, including Great Britain, when endangered or annoyed by the Austrian authorities, who were exasperated by the recent Hungarian revolution. His course in liberating from imprisonment the Rev. Charles L. Brace will be remembered, and his assistance to the Scotch missionaries who were driven out of Hungary was the subject of commendation in the British Parliament.

He returned to the United States at the close of 1852 and resumed the practice of his profession. From this time until his appointment to the bench of the Superior Court he was actively engaged as leading counsel in litigated cases of importance.

In 1856 he was appointed a judge of the Superior Court and in 1863 a judge of the Supreme Court of Errors, which position he held until his retirement by constitutional limitation of age in 1867.

In 1861 he was an active member of the peace convention, where he was one of the first to discover the irreconcilability of the opposing views of the north and south; but after the civil war commenced, and even during its darkest days, he never doubted the final success of the union cause.

Subsequent to his retirement from the bench he for several years delivered courses of lectures before the law school of Yale College, from which institution he received the degree of doctor of laws in 1868.

My acquaintance commenced with Judge McCurdy in 1846. He was then judge of the County Court. I appeared before him to argue my first case; it was naturally to me a momentous event. The courtesy, kindness and attention with which Judge McCurdy listened to my argument made a lasting impression upon my memory. Since that time, while he was engaged in practice, I have been associated with him in the conduct of many important causes.

As a lawyer he was learned in the law, wise and judicious in counsel, honorable and courteous to his opponents; as an advocate he was clear, concise, forcible and polished. The duties of the judicial office were more congenial to him than practice at the bar. He entered upon the discharge of those duties with a deep sense of the responsibility which they imposed. His knowledge of the law, combined with sound sense in its application to the circumstances of affairs which came before him for judgment, and a strong love of justice, eminently qualified him for the judicial office. He gave an attentive hearing to every member of the bar who had occasion to present anything for his consideration. He was a gentleman of polished manners and was always courteous and dignified.

Judge McCurdy always resided in his native town. In 1860, after the death of his father, leaving the home where he had lived since his marriage, he took possession of the ancestral homestead, a large farm which had then been in the family for more than one hundred

years. Washington lodged there in April, 1776, and it was the headquarters of Gen. Lafayette in July, 1776, when he rested his detachment of troops at Lyme on their march between Boston and New York, and it again gave him a welcome on his visit to this country in 1824.

He became deeply interested in agriculture. He was always a constant and discriminating observer of public events. Inheriting a constitution of remarkable vigor and elasticity, always regular and temperate in his habits, he never had a serious illness, and his physicians say that he had no disease even at the last. Until about two years ago, though then over ninety-one years old, he showed none of the infirmities of that age, but was erect in figure, active in movement, with a delicate blush upon his cheeks and eyes not dim. His voice was still rich and melodious, his conversation was still full of point and wit, his interest in life as keen and his society as attractive as ever, and he retained his early fondness for poetry, literature and art.

Thus crowned with length of days, wisdom and honor, sustained and soothed by an unfaltering faith and trust, he met the approach of death,

> "Like one that draws the drapery of his couch
> About him and lies down to pleasant dreams."

An illustrated article of considerable length and of great interest, with regard to Judge McCurdy and his ancestry, by Martha J. Lamb, appeared in the November number of the Magazine of American History, and the remainder of the present article is made up of extracts from it.

Among the jurists of the country who have figured in the field of public affairs since the beginning of the present century it would be difficult to find a longer or more perfectly rounded and beautiful life than that of Judge Charles Johnson McCurdy of Lyme, Connecticut. Born in December of the eventful year 1797, when John Adams was in the early part of his presidency of the United States and George Washington still living, his career has been identified with nine of the most important decades of the world's history. He could remember the excitement which followed the death of Hamilton in the fatal duel with Aaron Burr, and was a boy of ten years when the steamboat of Robert Fulton made her first successful passage from New York to Albany. He was prepared for college during the excitements which culminated in the war of 1812, and was graduated from Yale with honors in 1817, the same year that Madison retired from his second administration and Monroe took the presidential chair. He was admitted to the bar in 1819, and with a successful practice from the first had become one of the leading lawyers in the state before there was a railroad projected on this continent. . . . .

Personally he was a gentleman of the old school, with rich, fair complexion, dark hair, expressive eyes, finely cut features, of medium

height, erect and well-proportioned figure and courtly bearing, with exceptional polish of manners. In temperament he was happy, cheerful, elastic; and his liberal culture, practical wisdom, sparkling wit and humor, and inexhaustible fund of reminiscences, together with his apt poetical quotations, made him a charming social companion. He was literary in his tastes, with a quick eye for whatever of merit was discernible in the whole range of poetry, art and literature, was intelligently interested in scientific investigations, active in promoting agricultural improvements, and always a discriminating observer of political events. His reading was varied; he was fond of the classics, but always had the time and inclination to keep abreast with new publications and the current news and periodicals of the day, even to his ninety-first year.

His knowledge of human nature seemed intuitive, and his acute perceptions and sound judgment made him at all times a safe counselor. During his many years of law practice in the Connecticut courts he invariably advised the townspeople about him who came with grievances against their neighbors, "Never go to law if you can by any possibility settle your differences among yourselves." To the poor he was always a conscientious friend; no one listened more patiently than he to tales of genuine distress, or was more sympathetic and unostentatious in providing speedy relief. At the same time his public-spirited regard for the welfare and improvement of the community about him, led him whenever practicable to exercise that element of true charity which helps others to help themselves. He had literally a clear head, a kind heart, and an open hand.

He was married in 1822 to his second cousin, Sarah Ann Lord, the daughter of Richard and Anne (Mitchell) Lord, her mother being the daughter of William Mitchell, a wealthy Scotchman, who was the first cousin to Chief Justice Stephen Mix Mitchell. Mrs. McCurdy was a lady of great loveliness of mind and character, but her domestic happiness was of brief duration. She died in 1834, leaving only one child, a daughter. Judge McCURDY did not marry again. The education of this daughter became one of his greatest pleasures, and as she developed and matured into womanhood it was his delight to make her his confidential friend and familiarize her mind with his legal and business affairs, and share with her his political, intellectual, and social interests. He was extensively acquainted with the prominent men of the country, and his house was always open to the most generous hospitalities, his daughter presiding over his household.

The historic dwelling in Lyme where Judge McCurdy was born, and in which he resided continuously during the last thirty-four years of his life, is one of the oldest houses in Connecticut. Four generations of the McCurdys have lived in it and three later ones have been entertained under its roof or trace their lineage from it. It has been

enlarged until it measures over ninety feet in length, and its sound timbers give abundant evidence of the solidity of the colonial architecture which it represents. The precise age of the original building is not known, but it is believed to have been built about 1725. It was purchased by John McCurdy, the grandfather of Judge McCurdy, in 1754. Its antique features have a special charm for the curious. The interior work is believed to have been done by English carpenters, especially the paneled oak wainscots, fluted pilasters in the corners of the rooms, graceful arches about the fireplaces, and the wood carving of the elegant "corner cupboard" or *buffet* in the south parlor, with shell-shaped top, built with the house, which is appropriately devoted to an exceedingly choice collection of specimens of the porcelain used by the American ancestors of Judge McCurdy. A volume might be written from its shelves. The whole house is a museum of souvenirs of former generations of ancestral families. The articles of furniture are in most instances over a hundred years old, and each with an interesting history. Many of them are associated with the visit of Washington on the 9th of April, 1876, when he spent a night under this roof on his journey from Cambridge to New York. Lafayette, in command of a detachment of troops, was the guest of John McCurdy on the night of July 27th, 1778, occupying the north chamber over the north parlor of the house. He was here again forty-six years afterward, in 1824, on his memorable journey to Boston as the guest of the nation, and was entertained by Richard McCurdy, the youngest son of John McCurdy, and his family, which included Charles Johnson McCurdy, who had then been married some two years.

The distinguishing acts of Judge McCurdy's public life are of interest to all Americans. While he was lieutenant-governor of Connecticut he originated and carried into effect, through the legislature, that great change in the common law by which parties and others interested in the event of suits are allowed to be witnesses, a change which has since been generally adopted throughout this country and in England. Our readers will remember the publication of some very interesting correspondence in the early part of 1888, between Judge McCurdy and Hon. David Dudley Field, in relation to the true genesis of the great improvement in one of the most important of all human transactions—the administration of justice. Mr. Field published the law in his code in 1849, and was emphatic in his statement that the English were indebted to the efforts of Judge McCurdy for the idea which resulted in the same improvement in their courts.

At the time Judge McCurdy was sent to Austria, the post of *chargé d'affaires* was one of great delicacy and importance. * * * Vienna was still the famous old walled city of feudal times, not leveled as now into the magnificent streets of a modern capital, and the government of tyranny and fear had not given place to liberal and peaceful rule. . . .

Rev. Charles L. Brace was one of those arrested and thrown into a dungeon, while traveling in Hungary. He was accused of bearing papers of treasonable character from Hungarian fugitives, and although he really had but one letter in his possession, and that only a note of introduction containing not more than three lines, and one pamphlet, an essay on the Hungarian question, which he kept for his own private use as a matter of historic importance, he was treated as a convict. Through the prompt and energetic intercession of Mr. McCurdy, which involved a spirited correspondence with Prince Schwarzenburg, long since made public, Mr. Brace was finally rescued and his life saved. Hardly less notable was the philanthropy exercised by Mr. McCurdy in relation to the Scotch missionaries who were expelled by the government from Austria, where they had labored for ten years or more. It was midwinter, some of the clergymen had sick wives and young children, and they all keenly felt the hardship of breaking up their homes at a few days' notice and removing their families to Scotland. They came to Vienna seeking assistance from the English embassy, and not receiving it proceeded to the American legation. Mr. McCurdy could do nothing officially, but his intelligent interference procured them some favors, and his ready sympathy and offer of his private purse were never forgotten. He afterward received the thanks of the Free Church of Scotland, and his course was commended by the English Parliament.

On his return from Austria Judge McCurdy resumed his practice at the bar. He was learned in every branch of the law, was a forcible speaker, strong in argument, acute, witty, convincing, but always honorable and courteous to his opponents. He was constantly engaged as leading counsel in important cases until his appointment as judge. The older lawyers held his opinions in highest respect, while the younger men speak with enthusiastic gratitude of his kindness and helpful consideration, especially in the days of their timid inexperience. He was eminently qualified for the bench, always giving attentive hearing to every member of the bar who had occasion to present anything for his consideration, and discharging all the duties of his judicial office with ability and wisdom. He was a ready writer as well as public speaker and singularly happy in the choice of words, his language being remarkable for its terseness, point, and symmetry.

After the death of his father in 1860 Judge McCurdy sold his large, handsome house, where he had lived since his marriage, and took possession of the ancestral homestead, in which he spent the peaceful evening of his days. From early life he had limited his ambitions; a hereditary moderation seems to have calmed his pulses and saved him from the feverish restlessness which wears out prematurely so many public men. He repeatedly declined nominations for political office, including that of governor of the state, preferring the quiet sphere of

legal practice or the serener position of judge. After he left the bench he indulged his studious inclinations, kept fresh his familiarity with history, the classics, poetry, and art, entertained his friends, and took active interest in the care of his estate. His daughter and only child, his intimate companion through her life, became the wife of Professor Edward E. Salisbury of New Haven, a gentleman of elegant scholarship and literary accomplishments, lately professor at Yale, a pioneer in oriental studies in this country; and Mr. and Mrs. Salisbury have since divided their residence between New Haven and the ancestral homestead in Lyme, Mrs. Salisbury presiding over both.

Judge McCurdy descended not only from the ancient MacKirdy race of Scotland and Ireland, but from the Willoughbys, Gilberts, Drakes, Wolcotts, and Griswolds of England, the Vander Lindens of Belgium, the De Gallegos of Spain and the Diodatis of Italy. Among the strong men, his more immediate ancestors, who led in the formation of our early colonies and their later independence, were Deputy-Governor Francis Willoughby, Henry Wolcott, Hon. Daniel Clarke, John Ogden, Governor Roger Wolcott, Governor Matthew Griswold, and Rev. Stephen Johnson. One might expect to find him the man he was, enlightened, high minded, public spirited. His religious training and tendencies found expression in his familiarity with the Scriptures, and in his never-failing practical efforts for the support of public worship. A characteristic incident is related of him. He had built a house for his farmer, and the man and his family were comfortably quartered in it, when suddenly it was found to be on fire and was completely destroyed. The judge was standing among his neighbors watching the progress of the flames, when in reply to some words of condolence he said: "Shall a man receive good at the hand of the Lord and shall he not receive evil?" He was reticent in regard to his religious experiences and feelings, but his habit of daily prayer and his firm faith in the doctrines of Christ are well known, and precious legacies for those near and dear to him. Inheriting a constitution of remarkable vigor and elasticity, and always temperate and regular in his habits, he never had a serious illness, but grew feeble, and passed away in June, 1891, simply from length of years. His handsomely cut features had lost none of their beauty even at his advanced age, and were even more marked after death. Having survived all his own generation of relatives and friends, the sons of his cotemporaries bore him tenderly to his burial. Until a short time before he died his conversation had been as attractive, his voice as rich and melodious, his interest in life as keen as ever. His sympathies had been so warm and tender and his love for his friends so true and active, especially for young people and little children, that great sorrow followed his departure. For him may be repeated the words he inscribed on his father's monument in describing his life. "Active and beneficent in manhood, serene in age, and

tranquil and hopeful at its close." Judge McCurdy will be remembered as one of the most conscientious and upright of citizens, who combined all the charms of good breeding and a sound heart with the unassuming excellencies of a Christian gentleman.

OBITUARY SKETCH OF HENRY B. GRAVES.

HENRY BENNETT GRAVES, of the Litchfield County bar, died at his home in Litchfield on the 10th of August, 1891, in the sixty-ninth year of his age. He came of ancestors who were prominent in public affairs, his grandfather, Ezra Graves, representing New Fairfield several sessions in the General Assembly, and his father, Jedediah Graves, being for many years a representative from the town of Sherman, besides which he was a judge of the County Court and a member of the constitutional convention of 1818. His mother was a daughter of David Northrop, a leading citizen of the same town. The following obituary notice of Mr. Graves appeared in the Litchfield Enquirer:—

"Mr. Graves had the advantages of an academic education, but never graduated from college. He studied law with the Hon. James C. Loomis of Bridgeport, and was admitted to the bar at Litchfield in April, 1845. He began practice the same year at Plymouth. In 1849 he removed to Litchfield, where he has ever since resided. All that time he has been engaged in a wide and successful professional experience. No man during the time has been engaged in more trials, few have ever had a better general success. He was the executive secretary to Gov. Henry Dutton during his incumbency of the governorship, and was clerk of the County Court one year. He has represented the town of Litchfield in the Lower House of the General Assembly seven times, viz.: 1858, 1867, 1868, 1876, 1877, 1879 and 1889. He always took a leading part in the legislation of the state, and drafted many of the laws now found in the public statutes.

"As a lawyer he possessed high professional skill, and had great fluency of speech, energy, industry, good judgment, courage and tact. He was always enthusiastic, hopeful and full of resources. These faculties could hardly fail to bring to him a large measure of favorable results. He was a man of the most kindly feelings—warm and ardent in his friendships, generous and helpful to all, and never vindictive even to his opponents. His failings seemed hardly more than the overflow of his good qualities.

"He was twice married—once to the daughter of Gov. Henry Dutton; the second time to Sarah, daughter of the late Simeon Smith of Morris. She survives him. There are three children, daughters—two of the first and one of the second marriage."

Obituary Sketch of Chauncey Howard.

A felicitous sketch of Mr. Graves, from the pen of Greene Kendrick, Esq., of the Waterbury bar, appeared in one of the papers, from which the following paragraph is taken:—

"Mr. Graves was a typical lawyer of the old school. He had great keenness of perception, an instinctive power to grapple with a legal complication and unravel it, splendid capacities for analysis, and he was a compact and logical thinker. That attorney must indeed have his legal armor strong and bright if Mr. Graves could not somewhere puncture it. Shrewd, quick, sarcastic and logical, he has for many years occupied a commanding position at the bar of this state. Little given to rhetorical flourish, seldom attempting masterly speeches, he was a thoroughly argumentative lawyer. Before a jury, he won their confidence by his clear, concise and fair manner of putting his case, while for his deep research in matters of pleading and evidence, he possessed the respect and commanded the attention of the bench. In figure, Mr. Graves was tall, handsome and striking. In heart, he was generous, fair and without shams. He was the same "Henry Graves" always and to every one. He had no Sunday face and another for Monday. If he possessed faults, (which is only another way of saying that he was human,) he had the honesty of character not to conceal them. Every one knew him exactly as he was. He occupied a place in the profession which few men could fill.

OBITUARY SKETCH OF CHAUNCEY HOWARD.

CHAUNCEY HOWARD, a member of the Hartford County bar, and for many years clerk of the Superior Court in that county, died at Hartford on the 12th of August, 1891, in the eightieth year of his age.

Mr. Howard was born in 1812, in Coventry in this state, where the family had resided for several generations and where he kept up a country home through life. He never married, and had but one brother, John Ripley Howard, who lived at the old home, a man of remarkable literary ability and strong mental powers, who was a great sufferer from heart disease and who died many years ago. To the care and comfort of this brother, while he lived, Mr. Howard gave constant thought, and devoted much of his time and means. No mother could ever watch over a child with more affection and constancy. At one time, though it had been the dream of his life to go abroad, he declined an offer made by a gentleman to send him to England on important business from unwillingness to leave his brother.

Mr. Howard graduated at Amherst College in 1835, and soon after came to Hartford and began the study of law in the office of Hon. William W. Ellsworth, afterwards governor of the state and a judge of the Supreme Court. He was admitted to the bar in 1839. In 1844 he

was appointed clerk of the Superior Court, which office he held, with some interruptions prior to 1857, until 1873, when, against the wishes of the judges and the bar, he resigned the office, having held it during his last occupancy sixteen years and in all twenty-two years. With his resignation of this office his professional life ended, and he soon after retired to his country home, where he spent most of the remainder of his life. He was however elected to the lower branch of the General Assembly as a representative from Hartford in 1874, and from Coventry in 1877, and was a member of the state senate in 1875. From 1879 to 1881 he was state comptroller.

While clerk of the Superior Court he discharged the duties of the office to the greatest satisfaction of the profession and the public. His handwriting gave to his entries and records an almost artistic elegance, he was faithful and accurate in all his clerical work, and, in an office full of petty and perplexing details, was always patient, obliging and courteous.

But he was much more than a pains-taking, faithful, accurate and courteous official. He had sterling qualities of character. He was not merely a man of absolute integrity, but was of the highest moral tone, and held in abhorrence every professional or business act that fell below a high moral level. He was a perfect gentleman in appearance and in reality, tall and erect, with an elegant figure and a face of striking manly beauty, and much of that deferential courtesy which makes so large a part of the best manners. There was no assumption about him, no inclination to self-assertion, though he was quite positive in his opinions and in his views of men and measures. There was none of the proverbial American push and hurry about him, rather a disposition to be quiet and inactive, and this not from a tendency to indolence, but from a love of enjoying at his ease and in a leisurely way those things that he was specially fond of, mainly his books. He loved the society of his old friends, but was not fond of making new acquaintances; and in conversation, while brightly and intelligently and often very wittily responsive to what was said by others, especially in matters of anecdote and humor, he rarely led the conversation by contributions from his own accumulated treasures. He was very fond of old English literature, and his memory was filled with the quaint and pithy sayings of the real or imaginary persons who figure in the English classics. Charles Lamb, whom he often quoted, never loitered with more affection among the old streets and inns of London than he would have done. This love of old things made him rather inhospitable towards new ideas. He was distrustful of the spirit of progress, conservative in his feelings, and averse to change. Still he did not live wholly in the past, but enjoyed the best literature of our own time and watched with great interest the course of public affairs. In the latter he took little part, seeming to prefer that the world should pass him by

and leave him outside of its whirl and sweep to enjoy his books and his quiet; and to the literature of his time he made no contribution of his own. He was indisposed to the effort which it would have required, fastidious, without ambition, somewhat self-distrustful, and greatly disinclined to submit himself to public criticism.. But he has left behind him what is beyond price, the example of an exceptionally pure, upright, godly life, while with the rapidly lessening number of us who knew him well, there will abide the delightful memory of a most charming and lovable man.

Mr. Howard was, from his early residence in Hartford, a member of one of its Congregational churches. His religious convictions were decided, and dominant in his life.

At a meeting of the Hartford County bar, on the occasion of Mr. Howard's death, the following resolution, prepared by Hon. Nathaniel Shipman, Judge of the U. S. District Court, was presented by Mr. William Hamersley:—

"In following the praiseworthy custom of the bar of this county to publicly testify its appreciation of its honored dead, all can truthfully say that no one of our members received during his long life a larger share of our love and respect than did Chauncey Howard.

"He inherited the best traits of his typical New England ancestry, and was careful that in his life they received no detriment. Integrity was not merely a part, but it was the whole of his nature. It showed itself in an inability to entertain wrongness of motives or impurity of thought and speech, in tender faithfulness, in courtesy and dignity.

"Conservative by nature, he reluctantly welcomed novelties in creeds or platforms; he loved old friends and the ideas and principles of his youth. Critical in his literary tastes, he rejoiced in the books and poetry which ennoble English literature. He adorned the office which he long occupied, in the Superior Court of the county; he made the members of the bar and the bench his personal friends, and he filled with ability the positions of trust to which he was summoned by the state. He lived and he died in the comfort of a reasonable, religious and holy hope, and he has left behind him the memory of an unstained life.

"*Resolved*, That the state's attorney be requested to present to the Superior Court now in session the above minute and ask the court that the same may be entered on its records, and that the clerk of the bar be requested to cause a copy of the foregoing to be sent to Mr. Howard's family."

After reading the resolution Mr. Hamersley said:—

"It is difficult to add anything to the most attractive and just portrait which Judge Shipman has sketched in these few words, and I will attempt but a single suggestion. Mr. Howard possessed that highest and purest of all ambitions—the desire to do well whatever came to his hand to do; in his official duties and public trusts, in his occasional

indulgences in literature, in the interchanges of friendship, in all matters private or public, trivial or weighty, he anxiously sought to act well. The more common ambition for accomplishing special results seemed to have little hold upon him.

"It is, after all, such lives that exert the most lasting and best influence—the influence of pure purpose and fair example that speaks with the tick of every passing second. In our own profession we specially cherish such a character; the outside world too often mistakes notoriety for ability, surprising results for permanent influence, but we know that the strength, the usefulness and the lasting power of the profession of the law depends upon the pure integrity, the daily and hourly faithfulness, of its members; and so it is, that the character we love to honor and keep fresh in memory as a standard gauge for our daily work was well illustrated by the life of Chauncey Howard."

Mr. Henry C. Robinson then spoke upon the resolution as follows:—

"The younger members of the bar, who never saw Mr. Howard qualify a jury, will never know what a picturesque and impressive incident of our procedure they have missed. His athletic figure, his massive, well balanced head, his open breadth of brow, his piercing eyes, beaming with the lightning of perception and the twinkling of humor and the glistening of tenderness, his voice as full of elocution as it was empty of bombast, and, in all his motions and gestures, a certain modest courtliness, a sense of the dignities and proprieties of his office which needed no symbol of uniform or insignia, return to the thoughts of some of us to-day like the memory of a lost sunset.

"Nor was it there alone that Mr. Howard fulfilled the measure of an ideal clerk of a highest court. His records and dockets were as clear and clean as a publisher's 'edition of luxury.' His office manners were genial and courteous. And what a treasury of useful and delightful information he always opened to inquiry and to companionship! It was not deficient in the facts of history and the figures of statistics, but it contained much more. His mind seemed to be a chamber of reminiscence of the great and good, and of the witty and brilliant things of bench and bar, whose walls were hung with portraits of judges and advocates and counsellors whom he had known, and which echoed the fine thoughts and notable sayings which he had collected, and which he called out, as from a phonograph, in the key and cadence of the voices of oratory, which first winged them to his ear and soul. So much for our loved friend as an officer of this venerable and honorable court.

But what an atmosphere of purity, integrity and sincerity his personal character brought to all who knew him! We have had, we have, other men who are pure, sincere and honest to the last degree. We have honored them, we will honor them. But Mr. Howard in these supreme virtues was unique. His soul held them in solution with such

delicacy and modesty and refinement as seldom are found in human character. And how gentle and gracious and kind and considerate he was! I often recall the words of one who is very dear to me, now ninety years of age, with unabated intellect, whose attachment to Mr. Howard was active until his death, 'I feel sorry for the woman whom Chauncey Howard did not marry.' What more complete eulogy upon a man's character could discriminating womanhood make.

"His life was a story of unselfishness, and, in many of its chapters, of saintly ministrations. But under all his gentleness and modesty Mr. Howard always carried a heart full of bravery and courage and even stored with aggressiveness and combativeness for proper subjects. The blood of old England and New England heroes ran in his veins. Mr. Howard was a reverent man. He honored, without servility or obsequiousness, authority and reasonable tradition and the wisdom of the great and good of the ages. He took delight in clearing gathered mosses from old headstones. His philosophy, in jurisprudence, in statesmanship and in religion, was conservative. He was apprehensive and even timid in presence of new discoveries and new departures, but he was full of broad sympathy, and had no harbor in his mind for dogmatism nor in his heart for persecution. He was called to important offices in the service of the state, but he offered no such service until he was called.

"His culture was thorough and elegant. His studies in literature and eloquence and philosophy were with authors who are already and certainly enrolled as classic. His letters and notes were models, glowing with fine sentiment and phrased in choice words. He was a fine type of New England manhood and New England culture.

"As we are gathered here at a double memorial meeting and think of Howard and Barbour and Jones, whom we have so lately carried in quick succession to the grave, I am reminded of one of Mr. Howard's favorite quotations, and I can almost hear him repeat it now in clear and impressive voice. It is a part of the opinion familiar to you of Lord Chief Justice Crew, in the DeVere case, tried in the time of the first Charles and involving the fortunes of the house of DeVere: 'And yet time hath his revolutions, there must be a period and an end of all temporal things, *finis rerum*, an end of names, and whatsoever is terrene. And why not of DeVere? For where is Bohun? Where is Mowbray? Nay, which is more and most of all, where is Plantagenet? They are entombed in the urns and sepulchres of mortality. And yet let the name and dignity of DeVere stand so long as it please God!'"

The resolution was remarked upon by some other members of the bar and was unanimously passed. R.

OBITUARY SKETCH OF RICHARD C. AMBLER.*

RICHARD CHARLES AMBLER, a member of the Fairfield County bar, died at his residence in the town of Trumbull, on the 12th of September, 1891, in the thirty-ninth year of his age, he having been born in that town on the 31st day of August, 1853.

His death was a great shock to his professional brethren, for although they knew he was suffering from ill health—ill health brought about almost, if not entirely, by his devotion to his profession—he had been in his office all day attending to business.

The respect in which he was held by the community, the public, through the press and the resolutions of the various societies and organizations to which he belonged and the large concourse of people at his funeral, abundantly and truthfully testified.

It is to his character as a lawyer that this short notice appropriately finds its place in the Connecticut Reports.

His ancestors for years had been among the most prominent business men in this community; but as their business was almost exclusively with the Southern States, it was destroyed by the war. This necessarily interfered with his cherished educational plans. Determined not to be deprived wholly of these advantages, he set himself to work, as soon as he had acquired a thorough common school education, in a book store, where he devoted all his spare time to reading and storing his mind with useful information. The money he earned was saved that he might take a course of legal training at the Yale Law School. This he subsequently did, graduating from that institution in 1878.

While at Yale he earned, by his industry and courtesy, the high opinion of his instructors and the sincere respect of his classmates.

After graduating, he continued his studies in the law office of Seymour & Seymour, in Bridgeport, for two years, devoting his time to acquiring the details of practice. He then opened an office there for himself, in which he was gradually, but certainly, building up a good business, and acquiring a reputation for integrity, ability and learning.

The pervading characteristic of Mr. Ambler's professional, political, social and religious life was *faithfulness*. No client's interest was ever neglected. Indeed, so far did he carry the idea that he must accomplish all his client desired, that he was almost morbid in regard to it. His client's case was his case so fully that every failure, short of complete success, seemed a personal failure.

His professional life was not long enough to gain its first rank or reap its highest rewards; but what faithfulness, diligence, uprightness,

* Prepared at the request of the Reporter, by Morris W. Seymour, Esq., of the Fairfield County bar.

and intelligence could do to carry him towards that end, was done. When that can truthfully be said of a lawyer, what matter when or where he falls. His eulogy is pronounced; his monument raised.

Mr. Ambler was a representative in the General Assembly from the town of Trumbull, in 1889, and as the only lawyer on the railroad committee, he exercised a dominating influence in its action through the memorable railroad fight of that year; and though stories of improper conduct were rife, no man dared to try improperly to influence his judgment or to impugn his integrity.

Fond of historical research, he was both an officer in and contributor to the Fairfield County Historical Society.

A devout member of the Episcopal Church, he not only represented his parish in the annual conventions of that body in this diocese, but maintained personally, as a lay reader, services in the parish church of which he was a member and vestryman.

He was married in 1879 to Miss Jennie Beardsley of Huntington, who, with a daughter, survives him.

His life left, as such a life could not fail to leave, among his professional brethren, a fragrant memory of kindly courtesy, that will not soon be forgotten.

OBITUARY SKETCH OF HENRY S. BARBOUR.

Henry Stiles Barbour, a greatly respected member of the Hartford County bar, died at Hartford, where he had lived for the last twenty years, on the 21st of September, 1891. He was born in Canton in this state August 2d, 1822, and his childhood and youth were spent there upon his father's farm. His mother was the sister of Rev. Dr. Heman Humphrey, an early president of Amherst College in Massachusetts, and was first cousin of the famous John Brown. The atmosphere in which he grew up was one of more than usual intelligence, while the best religious influences, operating on a responsive nature, made him from early life conscientious and dutiful and prepared him for a manhood characterized by high moral purpose. He took a course of study, helping himself by teaching at Amherst Academy and at Williston Seminary in Easthampton, Mass., and afterwards studied law in the Yale Law School and with the late Roger H. Mills, Esq., then a member of the Litchfield County bar and residing at New Hartford. He was admitted to the bar in 1849, and immediately commenced practice in Torrington in Litchfield County, where he remained for twenty-one years, holding, during fifteen years of that time, the office of judge of probate, and for twenty years those of town clerk and town treasurer. In 1850 he represented the town in the lower house of the

General Assembly and in 1870 the Fifteenth District in the upper house. While in the senate he was chairman of the judiciary committee of the two houses. In 1879 he was appointed by the General Assembly upon a committee for the revision of our joint stock law, and in 1885 upon another for the revision of our probate laws, and in each case took a prominent part in the work undertaken.

In 1870 Mr. Barbour removed to Hartford and entered into partnership with his older brother, the late Heman H. Barbour, who had for several years been in the practice of law there. On the death of the latter in 1875 he formed a partnership with another brother, Sylvester Barbour, who had just removed to Hartford. This partnership was dissolved a few years later, and he entered into no other. On coming to Hartford he soon received the public confidence as a lawyer of great fidelity to business intrusted to him and of sterling integrity. His appointment upon the two commissions named was made after he went there. His mind was quite judicial in its character; with none of the brilliancy that might have enabled him to succeed as an advocate, and with no rhetorical faculty or ambition, he had excellent judgment, a habit of patient investigation, and a strong sense of justice, and discharged most creditably those minor judicial duties to which he was often called. His familiarity with the administration of town business, acquired in his long occupancy of town offices in Torrington, made his services valuable as the adviser for several years of the town officers of Hartford. He was also one of the best probate lawyers in the state.

Mr. Barbour was in the highest degree honorable in all his dealings, always fair and courteous in the trying of cases, painstaking and accurate in all his legal work, patient in investigation, kindly sympathetic in his treatment of others, modest and unassuming, and preeminently conscientious and just. He was governed everywhere by the law of kindness.

In the latter part of his life he became seriously involved through obligations assumed for others and his later years were years of professional toil, patiently borne under failing health, in the hope, never fully realized, of meeting and discharging the obligations which overloaded him, and of which he felt the pressure even upon his dying bed.

He had from early life been a man of decided religious convictions and character, and a valued member of the Congregational denomination, and was for several years a deacon in the Asylum Hill Congregational church.

In 1857 he married Pamelia J. Bartholomew, of Sheffield, Mass., who, with a son and daughter, survive him. His son is Rev. John Humphrey Barbour, a most esteemed professor in the Berkeley Divinity School at Middletown in this state.

At a meeting of the Hartford County bar, on the occasion of Mr. Barbour's death, Mr. F. L. Hungerford spoke of him as follows: "I have

known Judge Barbour since my earliest childhood, as I was born in Torrington where he had practised law for many years, and during my minority he was my guardian. He was the man of the town and prominent in church matters. Every one looked up to him and thought when they had his opinion on any matter they had all that could be gotten anywhere. He may not have been a man who could be called great, judged from the point of public greatness, but judged from the good his life has done society he has been a great success. He was not only a very kindly man, but one of great knowledge and excellent judgment."

Judge W. J. McConville spoke as follows: "Judge Barbour's death has been a personal loss to me. In his office I studied law, and with him have been associated for several years. No one outside of his family has in the last twelve years seen him as much. Between us there were no differences and neither appeared to be conscious of an unpleasant thought towards the other. No one could have such thoughts of him; he was so gentle, sympathetic and considerate of others. I have said of him many times, and can say truly now, as I can of no other I have known as well, that he never had an unkind word to say of any one. He loved his fellow men and delighted to help them. He practised law for the good he might do. He affected nothing, he had no arts, he deceived no one, he scorned meanness and indirection. He was just what he seemed to be. If he ever made a friend or won a case he deserved them. In his declining years he had his full share of trials, but he bore them without a murmur. You would never know from anything he said that he ever had them. He died as he had lived, a patient, upright Christian gentleman."

Further eulogistic remarks were made by other members of the bar, and resolutions of respect to his memory were passed. *R.*

OBITUARY SKETCH OF SAMUEL F. JONES.

SAMUEL FINLEY JONES, a member of the Hartford County bar, died in Hartford, where he resided, on the 28th day of September, 1891, in the sixty-fifth year of his age. The following appreciative notice of him appeared in the Hartford Times:—

Mr. Jones came from an old and prominent family of Marlborough, Conn., his grandfather and father being extensive landholders. Here he was born in August, 1826. He had the advantages of a good education, and attended Wesleyan University. He was a special favorite of his grandfather, for whom he was named, and by his will came into possession of considerable property. His grandfather's connection with the old State Bank in the adjacent town of Colchester led to the

young man taking a position there early in life. The bank became involved in difficulties, ending in Mr. Jones's withdrawal. About this time he bought the summer hotel at Orient Point, L. I., as a speculation. While there he met the late Governor Hubbard, who suggested to him that he come to Hartford and study for the bar. He removed to this city in 1849, studied in Governor Hubbard's office, and in 1851 was admitted to the bar of Hartford County. When he entered upon the practice of his profession his abilities were so marked, especially in pleading before a jury, that he acquired a high reputation for a young man and soon built up a large and paying business. His practice for years was of a general character, but later drifted to a large extent to criminal law, in which he was eminently successful.

He represented Hartford in the General Assembly in the years 1873 and 1874. He was chairman of the judiciary committee and made a fine record as a legislator.

For many years past Mr. Jones had devoted his attention almost solely to his law practice, which was large and profitable. He was retained in all the great criminal cases, and with men whose chances were desperate his services came to be regarded as absolutely indispensable. He handled scores of famous causes of this character, and while he preferred, as his intimate friends knew, a wholly different class of work, criminal practice of the most profitable kind so rushed in upon him that for years past he had had little opportunity to exhibit his talents in other lines. Frequently he was called to famous cases out of town. One of the most notable of these was the Jennie Cramer murder case at New Haven, which was on trial for ten weeks, and, previous to that, the four months' trial of Hayden, the Methodist minister, for the murder of Mary Stannard. He was for years the chosen counsel of New York criminals who were captured while operating, or preparing to operate, in Connecticut. Whenever any one of them got into trouble, the first thought of their pals and backers in New York was to rush to Hartford and secure the services of Mr. Jones.

While giving them his best services in a professional way, in accordance with the old legal theory that every man is innocent until he is proven guilty, his friends knew that he had a strong contempt for such people. Personally he had no sort of sympathy with them, but he did his best for them in a professional way. In his own dealings he was strictly honorable and straightforward. His word was his bond, and in all transactions with him his professional brethren held him in the highest esteem. While apparently blunt and gruff, especially in his later years, he had a kindly, sympathetic heart, and hundreds have reason to remember his help and sympathy in their hours of need. He was a rare good judge of human nature; few keener. In this characteristic was his strength with juries. He studied the men before him, and knew how to reach them.

Obituary Sketch of Jared D. Richmond.

For a year past his friends had noticed that he was failing. His age and a busy life were beginning to tell upon him. His nervous system was weakening, and the effects were noticeable in many ways. He sought relief in lightening the burdens of his practice and seeking rest and recreation in a quiet way. Within a few months a spinal difficulty set in, and altogether his system was ill-fitted to withstand the depressing effects of a severe attack of dysentery which set in about eight weeks ago, while at his summer cottage at Twin Lakes. His condition became so serious that a council of physicians was held, and it was his own desire as well as their judgment that he should be removed to his home in Hartford. He was brought in a special car, attended by relatives and a physician. He bore the journey well, but continued to fail, and died a few weeks later.

Mr. Jones leaves a wife, who was Miss Lucy M. Wilcox, of Hartford, a son, Samuel F., jr., and three daughters, Mrs. James M. Plimpton, of this city, Mrs. William R. Crane, of New York, and Mrs. E. F. Meeker, of Bridgeport.

OBITUARY SKETCH OF JARED D. RICHMOND.*

JARED DEWING RICHMOND was born in Ashford, in Windham County, in March, 1804, and resided in his native town nearly seventy-eight years, where he died in December, 1881.

After being instructed in the schools of his own town he prepared for a college course in Springfield, Mass., and afterwards entered Brown University, from which he graduated. He studied law with Lieut. Gov. Stoddard, who was then practising in Ashford, after which he was admitted to the bar and entered upon the practice of law there. He was not an aggressive lawyer, but through life pre-eminently a man of peace, and therefore did not rise to that eminence as an advocate for which his culture helped to fit him. Judge Earl Martin, who studied law with him, says of him that "he had a reputation for fine scholarship;" and that "he was modest and diffident, and these qualities were undoubtedly a hindrance to his success as an advocate; but above all he was thoroughly conscientious and would not knowingly be a party to any wrong, either in public or private life, and he died as he lived without a stain upon his name." He had the entire confidence of his fellow-townsmen and was honored by them with the various offices in their gift. He represented his town in the lower house of the General Assembly in the years 1842, 1845, 1849, 1853 and 1862, and in 1848 he represented the fourteenth district in the senate, acting as chairman of

* Prepared by A. J. Bowen, Esq., of the Windham County bar.

the judiciary committee. He was long known as Judge Richmond, having been judge of the Probate Court of his district for many years. He was also for four years the judge of the County Court.

He was a member of the Congregational Church and led a consistent Christian life. The book of his religious profession was as prominent in his office as were those of his legal profession, and while he found in the latter the law which he delivered to his clients, he found in the former the constant law of his own life.

He had a great love of music and considerable musical talent, and often had charge of the singing in church and religious meetings. In early life he taught singing schools.

Judge Richmond left a widow, who is still living at the age of ninety-three. He was greatly afflicted by the death of a son a few years before his own death, who was a prosperous business man in the city of New York. Two sons and two daughters survive him.

RULE OF PRACTICE.

The Judges of the Superior Court, at a meeting held on the 16th day of November, 1890, amended the 17th section of the rule with regard to "Short-Calendar and Trial Lists," found in Vol. 58, page 574, so that the same reads as follows:—

Sec. 17. During sessions of court for the trial of cases the short-calendar will, in the absence of special order, be taken up at 10 A. M. on Fridays; and at the same hour on other short-calendar days. In counties where the law provides that the Superior Court shall be held in more than one place in such county, separate trial lists will be kept for each of said places. There will be but one short-calendar list in each county, except in New Haven County, when the court is actually in session for the disposal of cases on the Waterbury docket; then the short-calendar shall be heard in said court. When not so in session, cases on said docket may be placed on the short-calendar at New Haven, and the assistant clerk shall transmit the files in such cases to the clerk at New Haven for the purposes of such calendar.

BOOKS IN WHICH CANDIDATES FOR ADMISSION TO THE BAR WILL BE EXAMINED.

A committee appointed to prepare a list of text books to recommend for use by candidates for admission to the bar in this state, have selected the following, which have been adopted for the purpose by the General Bar Committee:— Robinson's Elementary Law; Washburn on Real Property; Parsons on Contracts; Schouler on Domestic Relations; Cooley on Torts; Wharton on Criminal Law; Hawkins on Wills; Morawetz on Corporations; Bispham on Equity; Gould on Pleading; The Practice Act; Greenleaf on Evidence; Cooley on Constitutional Law.

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4. Upon examining the ballots on a recount, three envelopes were found from which the ballots had been removed, and it could not be ascertained what they were; one of the envelopes had not been endorsed, one bore a distinguishing mark, and one the name of the voter. Held that they were clearly illegal, and in the uncertainty as to what the votes were, could not be taken into the recount for any purpose. *Ib.*
5. One of the candidates was Orville S. Mallett, and one ballot was found with the name of Orville Mallett upon it and one with that of O. J. Mallett. The judge below found that there was no other person residing in the town of the name of O. S. Mallett or Orville Mallett or any similar name, and held that the ballots were intended for the candidate mentioned. Held that the evidence was properly admitted. *Ib.*
6. The act of 1889 concerning elections, (Session Laws of 1889, ch. 247,) provides in the first section that all ballots shall be printed and of uniform size, color and quality, to be determined by the secretary of the state, and "shall contain, in addition to the official endorsement, only the names of the candidates, the office voted for, and the name of the political party issuing the same;" the ninth section provides "that if any envelope or ballot shall contain any mark or device so that the same may be identified in such manner as to indicate who might have cast the same, it shall not be counted;" and the eleventh that "all ballots cast in violation of the foregoing provisions, or which do not conform to the foregoing requirements, shall be void and not counted." Held—1. That the word "For," prefixed to the names of the offices, did not necessarily make the ballots void, though the word could be so used as to become a distinguishing mark within the ninth section; and that it did not render the ballots void in this case. 2. That ballots were void which described the office of town clerk in a town election as follows:—"For town clerk and *ex officio* registrar of births, marriages and deaths"—the town clerk being made by statute the registrar of births, marriages and deaths, but there being no office of that name and it being no part of the name given by statute to the office of town clerk. 3. That the following words upon the ballots rendered them void—"For Judge of Probate, Henry H. Stedman"—there being no election at that time of judge of probate. *Fields* v. *Osborne*, 544.
7. A caucus of the republican party was held, pursuant to notice, two days before a town election, for the purpose of nominating candidates for the town offices to be filled at the election. Immediately after it was organized a plan for making up a citizens' ticket from candidates of both political parties was advocated, and after discussion it was voted that the republican caucus adjourn and that a citizens' caucus be organized. Thereupon ten or fifteen members of the democratic party who were present, but had not participated in the proceedings, came forward and acted with the republicans who were present, about fifty in number, in nominating a citizens' ticket, the candidates upon which were taken from both parties. A collection was taken for the expense of printing the tickets. No steps were taken to effect a permanent organization of a citizens' party or to provide for its further existence. The republican party issued no tickets and no ballots were used at the election except those headed "Democratic Ticket" and "Citizens'

of attorney printed upon them which were signed in blank by *S*. Before the connection at tide-water could be effected, *S* failed and went into insolvency. The loans were not paid and the pledged certificates were sold at public sale and most of them were bought by the plaintiffs. The certificates thus bought covered 7000 shares of the capital stock. The plaintiffs also purchased 3300 shares of the stock which had not gone into the trust, making their entire holdings 85 per cent of the whole capital. After the plaintiffs had acquired these trust certificates and this stock they notified the trust company that they revoked the powers given by the trust agreement and demanded that the stock represented by the certificates should be transferred to them upon a surrender of the trust certificates, but the trust company refused to make the transfer. Held:—1. That the trust agreement was void as in violation of the duties of the directors of the railroad company, and against the policy of our law. 2. That the plaintiffs had the right to revoke the powers given to the trust company by the trust agreement, and to have transferred to them, on surrender of the trust certificates, as many shares of the stock as the certificates represented. 3. That the trust certificates were quasi negotiable. 4. That if the plaintiffs bought the trust certificates for the purpose of getting control of the railroad company, that fact alone did not constitute a reason for refusing the relief sought. 5. That although the members of the syndicate became partners in the project which they undertook, yet the trust certificates were individual and not partnership property, and the stock which they represented was not subject to partnership claims, or to an accounting between the plaintiffs and other certificate holders. *Shepaug Voting Trust Cases*, 553.

30. After the syndicate had acquired the control of the Shepaug Company, the directors caused two contracts to be entered into by the company, one with *R* to build an extension of the road to the state line and thence to a point in the state of New York, a railroad corporation of that state becoming a joint party with the Shepaug Company in the contract. The other contract was a ninety-nine years traffic contract with the New York company. Under the first contract a large amount of first mortgage bonds of the Shepaug company, issued for the purpose, was to be used to build the extension. A statute (Acts of 1889, ch. 166) provided that railroad companies might build branch roads provided they were found by a judge of the Superior Court, upon application and a hearing, to be of public convenience and necessity. No such finding had been obtained in this case. Held:—1. That the contract with *R* was on its face illegal, being a contract to aid in building the road of another corporation in another state. 2. That the Shepaug Company had no authority to build the branch to the state line, there having been no finding by a judge of its being of common convenience and necessity. 3. That the contract was also void as being part of a fraudulent scheme. 4. That the traffic contract, being in aid of the fraudulent scheme, was void so far as the Shepaug Company was concerned. 5. That the plaintiffs' application to have these contracts set aside was not an improper interference, on their part as stockholders, with the internal affairs of the company. 6. That the fact that the trust company and the committee of the syndicate voted

STATUTE.

If a statute is rendered unconstitutional by one interpretation and will reasonably bear another which will save its validity, it is ordinarily to receive the latter. *Ferguson* v. *Borough of Stamford*, 433.

STATUTES COMMENTED ON.

STATUTE OF FRAUDS.

1. The clause of the statute of frauds which relates to a special promise of an executor or administrator to answer out of his own estate, has reference to claims against the estate for which the executor or administrator was liable only as the representative of the decedent, and which, but for the promise, he would have been liable to discharge only in due course of administration and to the extent of the property that had come into his hands. *Dillaby* v. *Wilcox*, 71.

TABLE OF THE CASES CITED IN THE OPINIONS.

ERRATA.

Vol. 52, p. 40,—See a correction of the head-note of Gregory *v.* City of Bridgeport, stated in a foot-note, vol. 60, p. 288.

Vol. 53, p. 280, 15th line,—for "all the trustees" read "the widow and children."

Vol. 57, p. 453, 14th line,—for "2 Washb." read "3 Washb."

" p. 470, 12th line,—for "350," read "359."

" p. 490, 5th line from bottom,—insert "be" at the end of the line.

" p. 217, 3d line,—insert "Booth" between *and* and *made*.

" p. 582, 7th line,—for "1876" read "1870"; and in lines 24 and 26 read "1870" for "1875."

Vol. 59, p. 272, 4th line,—for "Seymour" read "F. B. Hall."

" p. 641, 10th line of second column,—for "23 Conn." read "22 Conn."

Vol. 60, p. 170, 11th line,—for "protestas" read "potestas."