CONNECTICUT REPORTS.

BEING REPORTS OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ERRORS

OF THE

STATE OF CONNECTICUT.

JANUARY—AUGUST, 1894.

VOL. LXIV.

By JAMES P. ANDREWS.

THE BANKS LAW PUBLISHING COMPANY,
21 MURRAY STREET,
NEW YORK.
1899.

JUDGES

OF THE

SUPREME COURT OF ERRORS

DURING THE TIME OF THE WITHIN DECISIONS.

HON. CHARLES B. ANDREWS, CHIEF JUSTICE.
HON. ELISHA CARPENTER.[1]
HON. DAVID TORRANCE.
HON. AUGUSTUS H. FENN.
HON. SIMEON E. BALDWIN.
HON. WILLIAM HAMERSLEY.[2]

JUDGES OF THE SUPERIOR COURT.

HON. FREDERICK B. HALL.
HON. SAMUEL O. PRENTICE.
HON. JOHN M. THAYER.
HON. SILAS A. ROBINSON.
HON. WILLIAM HAMERSLEY.[2]
HON. GEORGE W. WHEELER.
HON. RALPH WHEELER.
HON. MILTON A. SHUMWAY.[3]

---

[1] Retired January 14th, 1894, under constitutional limitation as to age.
[2] Appointed to the Supreme Court January 14th, 1894.
[3] Appointed January 14th, 1894.

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.

DANIEL DOWNING *vs.* JEREMIAH SULLIVAN.

First Judicial District, Hartford, January Term, 1894. ANDREWS, C. J., CARPENTER, TORRANCE, FENN and BALDWIN, Js.

A creditor having an unsatisfied judgment against the defendant, amounting to $397, caused the same to be levied on the debtor's equity of redemption in a farm, his interest in which was valued by the appraisers at $220. The officer's return on the execution recited that he set off to the plaintiff "such part or proportion of the said equity of redemption" in the premises "as 397 bears to 220." *Held*, that the levy of execution was sufficient to vest the equity of redemption in the plaintiff, and that the officer's return, while irregular in form, was good in substance, and admissible to prove the plaintiff's title in an action of ejectment against the defendant.

In this State the mortgagor is for all purposes, except that of security to the mortgagee, regarded as the owner of the land; and one who has acquired the mortgagor's title can maintain ejectment against him. Under such circumstances the mortgagor cannot interpose the mortgagee's outstanding, naked, legal title as a defense.

Upon the trial the defendant offered to show an oral agreement between himself and the mortgagee, at the time the mortgage was given, that he, the defendant, should have the possession of the mortgaged premises until the mortgagee should demand possession. *Held*, that whatever force such agreement might have as between the immediate parties to it, the plaintiff, a stranger, could not be affected by it.

The plaintiff was under no obligation to notify the defendant prior to this action. The set-off of the land on execution was a sufficient notice to the debtor that his title had ceased.

[Argued January 3d—decided February 8th, 1894.]

Downing v. Sullivan.

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

The case is sufficiently stated in the opinion.

William H. Shields, for the appellant (defendant).

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

CARPENTER, J. Action of ejectment by the assignee of a mortgage, who had also become the owner of the equity of redemption, against the mortgagor.

The case was tried to the court. On the trial, the plaintiff, to prove his title, introduced an execution issued on a judgment in his favor against the defendant, and the officer's return thereon, which execution was levied on the equity of redemption, and the equity set off to the plaintiff, in part satisfaction of his judgment. He also introduced an assignment by the mortgagee to himself of the mortgage note and the mortgage, he having paid the mortgage debt. The levy of the execution was admitted against the defendant's objection. Judgment was rendered for the plaintiff and the defendant appealed.

The first error assigned is that the court erred "in admitting in evidence, against the defendant's objection, the execution and the officer's return thereon." The judgment debt, costs and charges amounted to $397.88, and the equity of redemption was appraised at $220.

The officer says in his return: "Whereupon I set off to said creditor such part or proportion of the said equity of redemption of said debtor's right and interest in said described premises as three hundred and ninety-seven dollars and eighty-eight cents bears to two hundred and twenty dollars, the amount of his whole interest therein as valued by the appraisers in part satisfaction of this execution and of

all charges and costs thereon." The defendant now contends that the levy was inoperative to vest the equity of redemption in the plaintiff, inasmuch as the officer in terms set off a proportional part of the equity instead of setting off the whole, as he might have done, stating the balance remaining due on the execution.

We agree that that would have been a simpler, and perhaps a better way to have stated it; but the course taken amounts to the same thing. The greater includes the less. Such a proportion as $397.88 bears to $220 includes the whole equity of redemption, and leaves a balance due of $177.88, on the execution. There is no difficulty in understanding just what the officer did, and just what he intended to do. While it is irregular in form it is good in substance

The second reason of appeal is that the court erred "in holding that said execution and the officer's doings thereunder vested a title to said real estate in the plaintiff, and in not holding said levy of execution to be invalid." For all purposes except for security of the mortgagee, the mortgagor is regarded as the owner of the land, and may maintain ejectment against persons other than the mortgagee. 2 Swift's Digest, top pages 188, 189, and cases cited. That being so, the plaintiff, having acquired the title of the mortgagor, may maintain ejectment against the mortgagor. The defendant in his brief, and also in his oral argument, claimed that the plaintiff did not secure the legal title to the land by the assignment of the note and mortgage to him. But that is not the question we have to decide. The question is whether the plaintiff, having possessed himself of the legal title may maintain ejectment against the mortgagor? Or may the mortgagor interpose the mortgagee's naked legal title as a defense? We think he cannot.

The fourth reason of appeal is that the court erred "in excluding the evidence offered by the defendant to show an agreement made by the officers of the Jewett City Savings Bank"—the mortgagee—"with the defendant at the time said mortgage was given * * * that the defendant shou'd have the possession of the mortgaged property until the bank

should demand of him the possession of the same." Whatever force a parol agreement of that kind may have as between the immediate parties to it, it is quite clear, in this case, that it cannot affect the plaintiff, who is a stranger to it. Besides, the plaintiff brings his action as the owner of the mortgagor's title. This last suggestion is a sufficient answer to the claim that the defendant was entitled to notice before bringing this suit. The set-off of land on an execution to the creditor is a sufficient notice to the debtor that his title has ceased.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

HIRAM R. MILLS, ADMINISTRATOR, *vs.* CHARLES P. BRITTON.

First Judicial District, Hartford, January Term, 1894. ANDREWS, C. J., CARPENTER, TORRANCE, FENN and BALDWIN, Js.

P, the plaintiff's testator, who died in 1849, bequeathed to his wife "all dividends or interest that may accrue or arise" from twenty shares of the preferred, eight per cent cumulative and guaranteed stock of the Housatonic Railroad Company, and from six shares of the common stock of said company, "so long as she shall remain my widow," with remainder to two grandchildren named. The company neither declared nor paid dividends on the preferred or common stock for a number of years (with the exception of an occasional dividend on the preferred stock), and in 1887 the amount of eight per cent guaranteed dividends remaining unpaid on the preferred stock was, together with interest, $320.11 per share. Under these circumstances, the railroad company, in October, 1887, at a stockholders' meeting, duly warned and held, claiming to act under legislative authority given the company in 1879, to settle or compromise with its preferred stockholders for unpaid dividends, by funding said claims or by the issue of additional preferred stock, and to take up and cancel any shares of the common stock, either by purchase or exchange for additional stock or bonds authorized to be issued by the company, voted to increase its stock from 11,800 shares to an amount not exceeding 30,000 shares, and to give each preferred stockholder two of the new four per cent non-cumulative preferred shares, and one hundred dollars in cash or bonds at par at

the option of the directors, in exchange for each share of the eight per cent preferred and guaranteed stock; and to give each common stockholder one share of the new four per cent non-cumulative preferred stock in exchange for each three shares of the common stock. The testator's widow, who was also the executrix of his will, surrendered said twenty-six shares and received from the company two certificates in her name as executrix, one for forty shares and one for two shares of the new stock and $2,000 in cash. Shortly thereafter she transferred twenty of the forty shares to her individual account, and took a new certificate therefor in her own name. This last mentioned stock was subsequently transferred to the account of a firm in New York of which the defendant was a partner, and was received and credited by him on an account he had against the widow. The other twenty-two shares were, at the time this suit was brought, outstanding in the name of the widow as executrix, though the defendant had the custody of the certificates and claimed that the stock belonged to the estate of the widow, recently deceased, and that he had no interest therein except as a creditor of her estate. The plaintiff, who is the administrator with the will annexed on the estate of *P*, made due demand upon the defendant for the entire forty-two shares of stock, and upon the refusal of the defendant brought this action. The defendant had seen a copy of *P's* will, and had read the provisions therein contained respecting the widow's interest in the stock bequeathed by *P*. The plaintiff presented to the commissioners on the insolvent estate of the widow the same claim upon which this suit is based and such claim was allowed; but an appeal was taken which is still pending. *Held:*—

1. The rule is very generally accepted and applied that cash dividends declared by a corporation go to the life tenant, while stock dividends go to the capital of the fund.
2. That in the exchange of stock the railroad company gave no consideration to the respective rights and interests of the life tenant and remaindermen, and did not attempt or intend to define or adjust the rights of either.
3. That the new stock was properly issued and the money properly paid to the widow as executrix.
4. That even if it were true, as claimed by the defendant, that the railroad company, in issuing the additional or new stock, treated and intended to treat the widow as a creditor rather than as a stockholder, yet the transaction, however called, was in legal effect a mere declaration of a stock, as distinguished from a cash, dividend.
5. That if the railroad company was indebted to the widow for unpaid dividends guaranteed, it could not pay such debt by depriving the remaindermen of a part of their principal fund in order to add to the interest fund to which the life tenant, the widow, was entitled.
6. That as between a corporation and creditors not stockholders, the issue of new stock in payment of indebtedness from the corporation to such creditors cannot be called in any sense a dividend, since the removal

or discharge of such indebtedness would add proportionately to the corporation's assets.

7. That a mere increase in the number of shares of capital stock, without any increase in its assets from payments or accumulated earnings, is not a division of anything, either as profits, dividends, income, or interest.

8. That it was unnecessary to determine whether the Act of 1870 was operative in 1887, when the railroad company made this exchange, or whether, if so, the company complied with its terms; since the Act in nowise authorized any interference with, or change of, the terms of the eight per cent guaranteed stock.

9. That the defendant could not be regarded as a *bonâ fide* purchaser for value, but was affected by such equities as existed between the widow, as life tenant, and the remaindermen.

10. That the plaintiff had the right to consider the twenty shares transferred by the widow to the defendant as unadministered property belonging to the estate he represented; and that the defendant's refusal to surrender it on demand, together with his own claim of title, constituted a conversion.

11. That the defendant's refusal to surrender the twenty-two shares of stock upon the ground and for the reasons stated by him, was not such an absolute and unqualified refusal as to make him liable for a conversion of such stock; and that to this extent the judgment of the trial court was erroneous.

[Argued January 3d—decided February 8th, 1894.]

ACTION to recover the value of forty-two shares of the capital stock of the Housatonic Railroad Company, alleged to have been converted by the defendant; brought to the Superior Court in Hartford County, and tried to the court, *Robinson, J.*, upon an agreed statement of facts; judgment for the plaintiff and appeal by the defendant for alleged errors of the court. *Judgment sustained in part and reversed in part.*

The case is sufficiently stated in the opinion.

Adolph L. Pincoffs of New York, for the appellant (defendant).

I. The twenty additional shares of four per cent stock, for the conversion of which Mr. Britton, the defendant, is sought to be held liable in this action, were issued by the Housatonic Railroad Company in payment of claims based on the non-payment of dividends on the old stock, which claims be-

longed to Mrs. Almira L. Perry, and the title in this stock therefore vested in Mrs. Perry individually.

The reading of the resolutions adopted, especially taken in connection with the Act under which the increase of capital stock was made, will show that this view is the only possible one to take. The resolutions recite "that claims to the total amount of $3,777,356.24 are pressed against this company, for back or unpaid dividends, which claims it is for the interest of this company to compromise and settle." They also expressly admit, in the fifth resolution, "that such claims are a valid, local and subsisting liability and indebtedness of the company, to an amount equal at least to the par value of the bonds to be issued ($100 for each share of $100) and additional preferred stock in these resolutions authorized to be issued (namely, "one additional share for each share of the old stock)." It is therefore apparent that, as far as the intention of the corporation goes, Mrs. Perry, who was entitled to the outstanding claims against the corporation, was entitled to the stock.

II. In considering the rights between life tenant and remainderman, the intention of the corporation in making the settlement is to be controlling in the absence of fraud or collusion. *Gibbons* v. *Mahon*, 136 U. S., 549, 558; *Daland* v. *Williams*, 101 Mass., 571; *Rand* v. *Hubbell*, 115 id., 461; *Ellis* v. *Barfield*, 64 Law Times, 625.

III. The company had a perfect right to pay the additional preferred stock to Mrs. Perry. Our adversary claims that, while it is left to the discretion of the company to distribute its earnings either in cash to the life tenant or to the remainderman, as a stock dividend, as it deems fit, because the life tenant has no vested right in such earnings before a dividend is actually declared, every stock dividend, irrespective of the purpose for which it is declared must belong to the remainderman. This contention cannot be sustained. *Gibbons* v. *Mahon*, 136 U. S., 557.

IV. The issue of the additional preferred stock to any one but Mrs. Perry would have been invalid, and in violation of the law. Not only, however, had the company the right

to issue this stock, so as to give a good title to Mrs. Perry, but any stock issued for a different purpose would have been invalid. The Act of 1870 is not only of importance as showing the intention of the corporation, but it is important because it shows the only source from which the company had a right to issue this stock.

V. Even if the company could not, against the objection of the remainderman, have issued the stock to Mrs. Perry, the plaintiff cannot succeed in the recovery of the twenty shares of stock. The remedy of the plaintiff would have been to prevent the consummation of the settlement by which the additional stock was issued. Not having done so he cannot now ratify one part of the agreement and disaffirm the other. If he claims that the stock is valid stock, he is bound by the way in which it was issued, and, as issued, it belonged to Mrs. Perry. At all events no injury has been done to the plaintiff by the transactions considered in this suit.

VI. The defendant cannot be affected by any equities existing between Mrs. Perry and the plaintiff. *Peck* v. *Providence Gas Co.*, 17 R. I. 275.

VII. By making the claim for the value of the stock delivered by Mrs. Perry as executrix against her estate, the plaintiff has lost the right to hold this defendant liable for a conversion of such stock. This defendant was a party to the proceedings in the Probate Court in which the claim was made against Mrs. Perry's estate for the conversion of the 22 shares of stock. As against him, therefore, the plaintiff has elected to consider the shares as part of Mrs. Perry's estate, and, while this defendant does not claim any right or title in his own right in such shares, it would be unjust to compel him to pay for their value or deliver the shares in a proceeding to which the executor of Mrs. Perry is not a party.

Hiram R. Mills, with whom was *Franklin Chamberlin*, for the appellee (plaintiff).

I. In making the exchange of its stock there was no distinction made by the railroad company between life tenant

and remainderman, nor any attempt to define the rights of either in the new stock. There is no provision for sale of any of this new stock nor for putting in any new money to make an increased capital; but it is plain that this action, so far as the stock was concerned, was a readjustment of assets of the company, which had already been capitalized, rather than a division of anything as profits or dividends.

The railroad company had neither right, power, nor authority to make an adjustment between life tenant and remainderman such as is claimed.

In the present case the corporation had *no earnings* to distribute. The claimant of dividends is bound in this case, and always, to show actual earnings to the amount claimed; and further that the directors had acted fraudulently in expending such earnings in additions to the plant. In the emergencies of the business of the company its accumulations, above dividends paid, had been expended and invested. At the time of this exchange no new money was put into its capital by the sale of its shares or otherwise; *its capital* was not increased, but the *number of shares* by which its capital was represented were nearly doubled; it was reduced from an 8 per cent to a 4 per cent stock, and from a cumulative to a non-cumulative stock; and holders of each share of old 8 per cent cumulative stock were asked to exchange for two shares of new 4 per cent non-cumulative stock and were offered also $100 in bonds of the company, or the same amount, in cash, if preferred. The old stock of the testator cannot be diluted to make new stock to distribute to the life tenant. The life tenant and the remainderman are bound, in the absence of fraud, by the action of the corporation *as to earnings*, but not as to the capital.

II. The new shares of 4 per cent preferred new stock were all part of the principal of the fund, and belonged to the remainderman and not to the tenant for life. It is a general and practically uniform rule that *cash* dividends go to the life tenant, and *stock* dividends to the capital of the fund. *Spooner* v. *Phillips*, 62 Conn., 62; *Hotchkiss* v. *Brainerd Quarry Co.*, 58 Conn., 120; *Brinley* v. *Grou*, 50 Conn.,

66; *Minot* v. *Paine*, 99 Mass., 101; *Daland* v. *Williams*, 101 Mass., 571; *Gibbons* v. *Mahon*, 136 U. S., 549; *Barton's Trust*, L. R., 5 Eq., 238–243. "A stock dividend does not distribute property, but simply *dilutes* the shares as they existed before." 93 N. Y., 162, 189. Quoted by Judge GRAY, 136 U. S., 566. *Sproul* v. *Bouch*, 29 Ch. Div., 632; *Bouch* v. *Sproul*, 12 App. Cases, 385.

III. The 22 shares standing in the name of Almira L. Perry, executrix of the will of Nathaniel P. Perry, are not claimed to be income, and defendant cannot justify his refusal to deliver the certificate to the plaintiff.

IV. This is an action in tort; and the liability of the tort-feasors for the conversion alleged is several as well as joint. "A judgment against one of two trespassers without satisfaction is not a bar to an action against his co-trespassers." *Sheldon* v. *Kibbe*, 3 Conn., 214. "A judgment in trover without satisfaction does not pass the title of the property to the defendant." *Atwater* v. *Tupper*, 45 Conn., 144. The allowance of this claim by commissioners of an insolvent estate can certainly have no higher effect in this respect than a judgment. The defendant ought not to be heard to complain because we sought to reduce his obligations by an amount sought to be secured from the other tort-feasor.

FENN, J. Nathaniel P. Perry, of Kent, in this state, died in 1849, then being the owner of twenty shares of the preferred stock of the Housatonic Railroad Co., which was known as eight per cent cumulative stock; so called because the company guaranteed to its holders dividends from profits earned, at the rate of eight per cent per annum, before the common stock could participate in any division of earnings; he also was the owner of six shares of the common stock of said company. By his will he gave to his wife, Almira L. Perry, so long as she should remain his widow, all dividends or interest that might accrue or arise from said shares of stock, with remainder to two grandchildren named. He also appointed his wife executrix of his will. She accepted the trust and remained such executrix, and also the widow of the

testator, until her death, February 1st, 1890. On February 6th, 1888, she surrendered the said twenty shares of preferred stock, and on February 16th, 1888, a new certificate for forty shares of new four per cent non-cumulative preferred stock, in the name of Almira L. Perry executrix, was issued by said railroad company. For the six shares of the common stock, likewise surrendered, there was also issued a certificate for two shares of the new four per cent non-cumulative stock, in the name of Almira L. Perry executrix of N. P. Perry.

On March 3d, 1888, there was transferred from Almira L. Perry executrix, to the individual account of Almira L. Perry, twenty shares of said new preferred stock, and a new certificate for twenty shares of said new preferred stock was issued in the individual name of said Almira L. Perry. On January 29th, 1890, said twenty shares of new preferred stock were transferred to the account of a firm of which defendant was a partner, and were received by the defendant, and there was credited by him, upon an account which he had against said Almira L. Perry, the sum of $980, as the proceeds thereof. The other twenty-two shares of said new four per cent non-cumulative stock are now outstanding in the name of Almira L. Perry, executrix. Said stock is in the custody of the defendant, and is claimed by him to form a portion of the estate of Almira L. Perry, in which he, the defendant, has not and does not claim any interest, except as a creditor of said estate.

On February 25th, 1891, the plaintiff, who is the administrator *de bonis non* on the estate of Nathaniel P. Perry, made due demand upon the defendant for the entire forty-two shares of stock. The defendant has not complied with said demand, or any part thereof.

Upon these, and the other facts which will be stated hereafter in their proper connection, the plaintiff having in the Superior Court recovered judgment for the value of all the shares, the defendant, by his appeal, in effect contests the correctness of that judgment; *first*, as to the twenty shares transferred to the individual name of Almira L. Perry, claim-

ing that they represent "dividends or interest," and belonged to the life tenant, and are not a part of the principal of the trust fund, which belongs to the remainder interest; and *second*, as to the twenty-two shares which are admitted to be principal, claiming that the certificates for these shares are, as against the plaintiff, lawfully held by the defendant, and that said shares have never been converted by him.

We will consider these claims in the above order. As to the twenty shares, there is no dispute concerning the existence of a general and practically uniform rule that cash dividends declared by a corporation go to the life tenant, and stock dividends to the capital of the fund. The law upon this subject has been so clearly and fully stated in recent cases in our own jurisdiction that neither discussion, nor the citation of authorities elsewhere is required. *Terry* v. *Eagle Lock Co.*, 47 Conn., 141; *Brinley* v. *Grou*, 50 Conn., 66; *Hotchkiss v. Brainerd Quarry Co.*, 58 Conn., 120; *Spooner* v. *Phillips*, 62 Conn., 62.

But it is the contention of the defendant that these shares of stock were issued, not as dividends, but in payment of claims based on the nonpayment of dividends on the old guaranteed stock, which claims belonged to the life tenant, and that therefore the title to the stock in question vested in such life tenant; that in deciding whether this be so, and in considering the respective rights of life tenant and remainderman, the intention of the corporation in making the settlement is, in the absence of fraud or collusion, of controlling weight; that such company had a perfect right to pay the additional preferred stock to Mrs. Perry, and that the issue to any one else would have been invalid, and in violation of law.

In order to understand this position it will be necessary to look further into the record. It has already been stated that the Housatonic Railroad Co. guaranteed to the holders of its cumulative preferred stock, dividends from profits earned, at the rate of eight per cent per annum, before the common stock could participate in any division of earnings. No dividends or interest were declared or paid on the com-

mon stock since 1850. Dividends on the preferred stock were irregular, so that the dividends guaranteed as aforesaid, of eight per cent remaining unpaid on the original twenty shares of preferred stock, amounted in November, 1887, without interest, to the sum of $2,380; and upon the whole outstanding preferred stock of the company, at this date, November, 1887, the aggregate claims for such dividends of eight per cent, with interest, unpaid by the company and undivided prior to the stockholders' meeting hereafter referred to, amounted to the sum of $3,777,366.24; being $320.11 on each share.

The General Assembly of this State, at its May session, 1870, passed a resolution which authorized and empowered the directors of the Housatonic Railroad Company "to settle or compromise with the holders of the preferred or guaranteed capital stock of said company, for any and all claims which they may have for or on account of the back and unpaid dividends upon said stock, either by funding said claims, or by the issue of additional preferred stock therefor, and upon such terms and conditions as may be agreed upon by the holders of both the original and preferred stock, at a special meeting of such stockholders called for that purpose." Other provisions are contained in said resolution which are unnecessary to quote. This resolution was accepted by the company as an amendment to, and part of its charter, in November, 1870. No further action appears to have been taken by said company in regard to such resolution, or the matters contained therein, until September 6th, 1887. On that day notice was given of a special meeting of the original and preferred stockholders, to be held October 5th, 1887, "for the purpose of making a settlement and exchange with the stockholders as, and in any manner, authorized and contemplated by the Act or Resolution of the General Assembly of the State of Connecticut, passed at its May session, 1870;" also for the transaction of certain other specified business.

From the minutes of said meeting, duly held, pursuant to such notice, October 5th, 1887, it appears that:—"The chairman stated, generally, the purposes of the meeting, explained

the long pending claims of the preferred stockholders for back or unpaid dividends, which amounted by a statement he exhibited to $3,777,366.24, and enlarged on the advantage and desirability of adjusting the same, to remove the cloud over the company, avoid litigation, settle a just debt, and place the company's affairs in a definite shape." Thereupon a preamble and resolution were offered. The preamble stated, among other things, that it was necessary to make provision for the payment of a portion of the funded debt of the corporation soon falling due; that the holders of the preferred or guaranteed stock, had, and were pressing claims against the company for back or unpaid dividends on such stock, which claims it was for the interest of the company to compromise and settle; that it was also to the interest of the corporation to secure a reduction of the preferred or guaranteed dividends on such stock, henceforth, from eight per centum per annum, to four per centum per annum and a relinquishment of the cumulative provisions thereof; that the growth of the business of the company, and its enlarged connections, required an increase of the plant, equipments, and transportation facilities, and that it was also desirable for the company to raise funds for its general business and purposes, and to discharge other obligations. And the resolutions provided *first*, for the borrowing of money and the issuance of consolidated mortgage bonds therefor, to an amount not exceeding three million dollars, to be used and sold for the purpose of funding or retiring existing obligations, "paying, settling or compromising the aforesaid claims of preferred stockholders, as hereinafter agreed, and of carrying out such settlement or compromise," and also for other purposes specified. The resolutions then proceeded as follows: "*Resolved*, Second, That for the purpose of effecting and consummating the settlement or compromise hereinafter agreed upon of the claims of the preferred or guaranteed stockholders for back or unpaid dividends, and of effecting or consummating the exchange hereinafter agreed upon with the common stockholders, and pursuant to powers conferred by the act or resolution aforesaid, of July 6th, 1870, the pre-

ferred capital stock of this company be and the same hereby is increased from 11,800 shares to such amount as may be necessary to carry out these resolutions and agreements, but not exceeding thirty thousand shares, but that the rate of dividends preferred thereby shall be four dollars per share per annum, instead of eight dollars per share as heretofore, and such dividends shall not be cumulative, as heretofore; that the holders of said preferred stock shall be entitled to receive, as aforesaid, dividends of four dollars per share in each calendar year before any dividends for such year shall be paid to the holders of common stock; but when the holders of such preferred stock shall receive four dollars per share of such stock during any one calendar year, then the holders of the common stock shall be entitled to receive four dollars per share before any further dividends shall be paid in said calendar year on such preferred stock; and when both classes shall each have received four dollars per share during any one calendar year, any further dividends declared during such year shall be divided *pro rata* between both such classes of stockholders, and, as above declared such dividends shall not be cumulative, and there shall be no accumulation of arrears of such dividends, and such preferred stock may be called four per cent non-cumulative preferred stock."

"*Resolved*, Third, That any and all claims, demands, suits, accountings and liabilities of every kind which the holders of the preferred or guaranteed stock of the Housatonic Railroad Company have or may have against the company to this date for or on account of back or unpaid dividends upon such preferred or guaranteed stock be and the same are hereby settled or compromised, adjusted, released and canceled on the following terms and conditions."

"First: The holders of the existing preferred stock shall surrender their certificates of such stock, and shall receive one share of such new four per cent non-cumulative preferred stock in exchange for each share of such eight per cent cumulative stock so surrendered, and shall also receive first, one hundred dollars par value of such bonds authorized by said Act and by this meeting, with interest thereon from the

date of such surrender, and second, one additional share of such new four per cent non-cumulative stock on the settlement herein made; and all of the same, namely, two shares of such new four per cent non-cumulative preferred stock and one hundred dollars par value of such bonds, with such interest, shall be in full release and settlement of each share of existing eight per cent cumulative preferred stock and of all claims, aforesaid, for back or unpaid dividends thereon, and of the larger dividends and cumulative provisions of the existing preferred stock."

"Second: That the company, through its board of directors, shall have the right to pay one hundred dollars in cash on each share of such preferred stock so surrendered in lieu and instead of said bonds as above stipulated and provided, if in the judgment of the board it shall be judicious so to do."

"Third: That all further rights to dividends on the existing preferred stock ceases after this day, and the rights and interests of the holders thereof shall be thenceforth such as are conferred or created by such new four per cent non-cumulative preferred stock and no other; that the board of directors are hereby fully authorized and empowered to add (and at will to alter or annul the same) such penalties and conditions to the foregoing provisions as they may deem best, in respect of all such stockholders as shall not make such actual surrender within ninety days after notice thereof shall be sent by the secretary by mail to their last post office address known to him."

"Fourth: That the common stockholders of the company, in consideration of assenting to this settlement, shall have the right and privilege contained in resolution fourth upon the conditions therein expressed or referred to."

"Fifth: That it is hereby admitted and agreed that such claims are a valid, legal, and subsisting liability and indebtedness of the company to an amount equal at least to the par value of such bonds and additional preferred stock in these resolutions authorized to be issued in consummating any settlement or exchange therein authorized, and that the right of the holders of such preferred stock to vote as here-

tofore, equally with the holders of common stock at all elections and meetings of stockholders is hereby expressly recognized and agreed to."

"*Resolved*, Fourth: That the holders of the original or common stock of this company shall have the right, and they are hereby declared to be entitled to exchange and surrender their shares of common stock for the said new four per cent non-cumulative preferred stock, upon the basis of one share of said new preferred stock for each three shares of such common or original stock so surrendered and exchanged, and to receive such one share of new four per cent non-cumulative preferred stock for each three shares of common stock so surrendered and exchanged. *Provided*, that such exchange and surrender be made within ninety days from this date; and *provided, further*, that after the expiration of said ninety days the board of directors shall take up and cancel any of such stock, either by purchase or by exchanging the same for bonds or stock authorized by said act of 1870, and by these resolutions to be issued, only upon such terms and conditions as they may deem best, and as may be agreed to by the owner or owners of such common stock.

"*Resolved*, Fifth: That the board of directors be and they are hereby fully authorized and empowered to issue such four per cent non-cumulative preferred stock for the purpose aforesaid, and to make such exchange, and to cause the certificates of such stock to be prepared and executed in such form and manner as they may deem best, and generally to execute all instruments, and do all acts and things, and make all agreements, which, in their absolute judgment and discretion may be necessary or proper to effectuate the purposes aforesaid, and to carry out the foregoing resolutions, agreements and acts."

The foregoing resolutions were adopted by a practically unanimous vote of stockholders representing both preferred and common stock. And in accordance with the scheme therein provided, Mrs. Perry received the forty-two shares of stock hereinbefore referred to, and in lieu of bonds to that

amount in par value, she also received $2,000, by check of said railroad company, to her order, as executrix, which she appropriated to her own use. No claim to recover this latter amount of the defendant was pressed in the court below, and no evidence was offered to show that it ever came into his possession. It also appears in the agreed statement of facts in the record, that at the time of the above settlement and exchange with the Housatonic Railroad Company, the market value of said preferred stock, together with all accumulated dividends claimed thereon, was $145 per share, and that in 1891 the new four per cent preferred stock had a market value of $56.00 per share.

Upon these facts it is the general claim of the defendant, as we have already seen, that it was the clear intention of the railroad company to issue the twenty shares of additional preferred stock, not as a dividend, but in the payment of an admitted debt; that such intention should govern, and that these shares should be held to belong to Mrs. Perry, the life tenant, as the person entitled to the claim which was intended to be paid by them.

With the facts recited before us, let us examine the claim. In the exchange of the old stock, it is apparent that no consideration was given by the railroad company to the respective rights and interests of life tenants and reversioners or remaindermen, of such stock. Nor was any attempt to define the rights of either in the new stock made or thought of. It is unnecessary to determine whether such company, either by virtue of the resolution or otherwise, had any power or authority to make any such adjustment of such interests, since it is manifest that none was intended. All the new stock issued in lieu of or in addition to the stock, both preferred and common, which had belonged to Nathaniel P. Perry was properly issued, and the money paid to his executrix, leaving the rights of respective claimants to be elsewhere determined.

But if it were to be conceded that such determination should be governed by the intention of the company, if it could be ascertained; that the additional stock, with the

bonds or money, should be in payment, settlement or compromise of the admitted debt of the company for unpaid dividends to its preferred stockholders, how can such intention be made to appear? That this was indeed one of the purposes of the increase, is manifest from the preamble and resolutions recited. But that it was not the only one is also manifest from such preamble and resolutions. It was also "to the interest of this corporation to secure a reduction of the preferred or guaranteed dividends on such stock henceforth, from eight per centum per annum to four per centum per annum, and a relinquishment of the cumulative provisions thereof." And it was also for the interest of holders of common or original stock, which had never paid any dividends, to exchange it for preferred or guaranteed stock, which would pay dividends. Who shall declare,—who can know the extent to which each of these and other purposes, some of which are expressed in the preamble and resolutions, and some though not expressed it is impossible not to comprehend, might have been regarded as valuable, and considerations which actuated the exchange and increase of stock? The meeting had no occasion to specifically pass upon these matters, since it treated with the owners of stock only in bulk.

But if the only object had been what the defendant assumes, what occasion was there to retire the old stock? If we use, for illustration, the example of interest largely in arrears upon a note secured by mortgage upon real estate, the maker of which is irresponsible beyond the security, the surrender of the old note and the substitution of a new one signed by the same maker and secured upon the same property, for twice the amount of the old, but bearing half the former rate of interest, would seem a peculiar transaction, if regarded solely as a mode of payment of such accrued interest. It is equally hard to see how in the case before us, increasing the old preferred stock of the corporation, while at the same time proportionately decreasing its guaranteed earning capacity, adding also to its shares in exchange for common stock, admitted on the same plane of earning capac-

ity, could tend in any measure to the benefit of a life tenant of such stock having a claim for unpaid and undeclared dividends, beyond the extent to which the transaction detracted from the just interest of the remainderman in such corporate stock. The doubling of the shares under such circumstances, and then giving the additional shares to the life tenant, would, in effect, take from the remainderman half his proportionate interest in the capital of the company. If there had been only an increase, and such increase had been based upon earnings which ought to have been declared and paid during the term of the life tenant, it might seem legitimate to do this; but in the present case it nowhere appears that the corporation had any earnings to contribute. On the contrary it does appear that at the time of this exchange the company was obliged to borrow the money required for the compromise, by issuing bonds of the company therefor. There was no increase in capital, either by the paying in of money, or from accumulated earnings, but only an increase of the number of shares by which the capital was represented. No new property was put in. No new stock was to be sold. The issue of new stock was a readjustment of the capitalized assets of the company, adding nothing thereto, and taking nothing therefrom, and was not a division of anything, as profits or dividends, as interest or income.

But suppose there had been profits or net earnings, for which cash dividends should have been declared to the owners of preferred stock in excess of those actually declared and paid; it follows, since even the cash given to the stockholders as part of the exchange had to be borrowed, that these earnings had already been invested. They had been added to the capital, and the effect of the action of the stockholders was to confirm the previous action of the directors and to retain them as such.

But we return to the real argument of the defendant. And granting, for its sake, the first assumption, that the railroad company admitted that the claims of its preferred stockholders against it for undeclared dividends, to the extent of eight per centum per annum, constituted a "valid,

legal, and subsisting liability and indebtedness of the company to an amount equal at least to the par value of such bonds and additional preferred stock;" and that it was the intention of the company that the additional stock, as well as bonds, should be issued only for the payment of such claims; and thus to distinguish between the rights of the holder of the original preferred stock, as stockholder and as creditor:—it seems to us that granting this, though for argument's sake merely, the conclusion is in no wise altered. Calling these claims debts, the fact remains that they are due to stockholders, and not to outside parties, and are for undeclared as well as unpaid dividends. If calling them debts implies that the earnings of the company warranted their declaration and payment in cash, and that not having been paid in cash it was the purpose of the action taken to pay them partly in bonds, or their avails, and partly by the issue of stock, then, so far forth as such issue of stock is concerned, by whatever name the transaction may be christened, it is in effect the declaration of a stock dividend, in place of a cash one. It takes nothing out of the corporation, as a cash dividend does, but leaves everything in it capitalized, as a stock dividend does. As between a corporation and its stockholders, it matters little what name may be given to such a transaction, or how it may be considered; whether a payment of indebtedness or declaration of a dividend. As between the corporation and persons not stockholders, to whom it was indebted, and whose claims are thus to be liquidated, the issue of new stock is in no sense a dividend. It does more than dilute the shares as they existed before. By taking away indebtedness, the transaction adds proportionately to the assets of the corporation. Such an adjustment, if fair, detracts nothing from the value of the original shares, because it returns a just equivalent for the increase. But, when a question with which the corporation, as such, is not concerned, arises between the owner of income and that of capital, the case is altered. If the corporation is indebted to the shareholder, plainly the remainderman is not indebted to the life tenant; and if the corporation may pay its debts

to such shareholder, as plainly it may not take away from the principal of the fund, which belongs to one, in order that it may be added to the interest of the fund to which another is entitled. Whether it was the intention therefore of the railroad company that these additional shares should be issued to the original stockholders as payment for indebtedness or not, it was not and could not legally have been the intention that such issue should waste the principal in order to increase, or even to preserve the income. Such, however, as we have seen, would be the necessary effect if these new shares were held to be the property of the life tenant.

The defendant says in his brief:—"It was for the interest of the stockholders to consent to a change which would give them, in place of an eight per cent cumulative stock, on which the interest had been paid only at very irregular intervals, a four per cent stock on which it was evidently expected that interest would be paid with regularity." But the defendant in that connection, does not quite go to the extent of asserting that such speculative interest in an increase would have constituted a controlling consideration in inducing a remainderman to accept one share of four per cent, which could only be paid provided the net earnings of the road were eight per cent upon its previous stock, in place of one share of such eight per cent which must be paid, if all the earnings would permit, and if not would constitute, at least in the eyes of the stockholders passing in their meeting upon their own claims, an indebtedness.

It appears to us, however this question may be looked at, the plain principles declared in repeated decisions in reference to the respective rights of remaindermen and life tenants, in case of increase of capital shares of corporate stock, underlie and control the decision which should be reached. Thus, referring to cases in our own jurisdiction, in *Brinley* v. *Grou*, *supra*, the words used in creating the life interest were "rents, dividends, increase and income," being somewhat broader terms than in Mr. Perry's will. But this court held that an increase of capital from three to four millions, with an apportionment of new shares *pro rata* among the

stockholders of a corporation, at $100 per share, bringing the new stock at once to such a large premium that the trustees, who had been entitled to subscribe for eighty-one shares sold the right to subscribe for thirty-four shares for a sum which enabled them to subscribe and pay for forty-seven shares, gave nothing to the life tenants; but that the right to subscribe for the new shares, the profit on the sale of the right, and the new shares taken, all went to the trustees as a part of the principal of the fund. This court, in answering the questions asked by the trustees, said:—"A shareholder has no proprietary interest in the accumulated profits properly retained by a corporation for the protection of its capital; he cannot acquire one by summoning it to make a rest in its business and take an account of them; he first obtains one when it has either in fact, form, or intent, set his proportion thereof to his individual credit. This, of course, is the measure of the right of a life tenant; there is to him only a possibility that the profits may be divided, or that the use of them by the corporation may increase its dividend during his term." So also, in *Hotchkiss* v. *Brainerd Quarry Co.*, *supra*, this court quotes with approval the language of WOOD, V. C., *In re Barton's Trust*, 5 L. R. Eq. Cases, 238:—"The dividend to which a tenant for life is entitled is the dividend which the company chooses to declare. And when the company meet and say they will not declare a dividend, but will carry over some portion of the half year's earnings to the capital account, and turn it into capital, it is competent for them, I apprehend, to do so; and when this is done everybody is bound by it, and the tenant for life of those shares cannot complain." Again, in the very recent case of *Spooner* v. *Phillips*, *supra*, the subject is exhaustively discussed, with abundant citation of authority, and it is declared as settled: First, that the word "dividends," if unqualified, signifies dividends payable in money; that the word "income" has a broader meaning, but not broad enough to include anything not separated in some way from the principal; that accumulated surplus, so long as it is retained by the corporation, either as surplus or increased stock, can in no proper sense be called

income; second, that a corporation owns the undivided earnings of the business, rather than the stockholders, and the latter cannot become the separate owners of any part of the common property until set apart by the management for that purpose, by declaring a dividend or otherwise.

Among the many cases cited in the opinion is that of *Gibbons* v. *Mahon*, 136 U. S., 549, the original case being reported with extended note in 54 Am. Rep., 262, a most instructive and exceedingly pertinent case, in which the conclusion stated is this:—"Reserved and accumulated earnings, so long as they are held and invested by the corporation, being part of its corporate property, it follows that the interest therein, represented by each share, is capital, and not income, of that share, as between tenant for life and the remainderman, legal or equitable, thereof." And again it was said:—"A dividend is something with which a corporation parts, but it parted with nothing in issuing this new stock." See also, *Minot* v. *Paine*, 99 Mass., 101; 96 Am. Dec. 705, with note; *Rand* v. *Hubbell*, 115 Mass., 461.

The defendant, however, further contends that the issue of the additional preferred stock to any one but the life tenant would have been invalid and in violation of law. It is said that the Resolution of 1870 is the sole authority for this issue; that by virtue of that enactment stock could only be issued for the purposes of payment of existing claims, and the conversion of the common stock into preferred stock; that, therefore, this action is an attempt to claim for the remainderman stock which was not intended to be issued to him by the company, and which, if issued to him by the company, would have been absolutely void in his hands. In answer to this it is unnecessary to consider whether the Act of 1870 was in existence at all in 1887, or whether, as contended by the plaintiff, it had been repealed by subsequent legislation in 1878. Nor is it necessary to determine whether, if such Act was in existence when it provided for the issue of bonds or stock in settlement of claims, it was followed when both bonds and stock were issued in such settlement. It is unnecessary, we say, to decide these matters, since, if

the defendant's contention as to both were conceded, the Act in no wise authorized any interference with, or change of, the terms of the eight per cent guaranteed stock. Nor have those who are entitled to the remainder in this stock in any way assented to its surrender. If, therefore, such issue of new stock is only valid because authorized by the Act of 1870, and only to the extent and for the purposes therein prescribed, it follows that the rights of the holders of the old preferred stock to their capital cannot be affected by such issue. And it is only upon the theory that two new shares, yielding four per cent each, represent one share of the old, yielding eight per cent, that it can be held that such capital would not be affected thereby.

It is further said by the defendant that he stands in the position of a *bonâ fide* holder for value, and that he cannot be affected by any equities existing between Mrs. Perry and the plaintiff. The record, however, states that the defendant had seen a copy of the will of said Nathaniel P. Perry, and had read the provisions therein contained with respect to the interest of Mrs. Perry in the Housatonic Railroad stock. It also appears that the stock was transferred to him to be applied in part payment of a debt by Mrs. Perry, who was his grandmother, three days before her death. There is nothing whatever in the record to justify the assertion of the defendant that this debt was for the advances made Mrs. Perry upon the faith of her ownership of this stock. It is true that the stock had been transferred from Mrs. Perry's name, as executrix, to her individual name. But the record leaves no room to question the defendant's full knowledge of the source from which this stock was derived, and the trust under which it was held. The defendant therefore stands in the same position, in respect to these shares, as Mrs. Perry stood, and the right of the plaintiff, as administrator *de bonis non*, to maintain this suit against him rests upon the same foundation as that which supported the recovery by the plaintiff in *Mansfield* v. *Lynch*, 59 Conn., 320. In each case, the party exercising the original administration parted with assets of the estate, in a manner which gave the

party receiving them no right to retain them against such administrator. They therefore still remained assets of the estate, which it was the duty of the administrator *de bonis non* to administer. The act of Mrs. Perry in causing a transfer of these shares to her individual name, and the subsequent act of transfer to the defendant's firm, for whatever purpose, and with whatever intent said acts were done, did not divest the estate of Nathaniel P. Perry of its interest in the stock. Pomeroy's Eq. Jur. (2d ed.), §§ 1048, 1052. As against this defendant who asserts his ownership of such stock, although occupying no better position in regard to it than Mrs. Perry did, the plaintiff has the right to consider it unadministered property belonging to the estate which he represents; and when demand was made by the plaintiff upon the defendant for it and he refused to surrender it, claiming title, with the ability which the transfer of the certificates to his firm gave, to assert such title and to use the stock as his own, such refusal constituted conversion. *Hartford Ice Co.* v. *Greenwoods Co.*, 61 Conn., 166. For these reasons there is no error in the judgment of the court below in awarding damages to the plaintiff for the twenty shares of stock in question.

But to the extent that such judgment also includes damages for the conversion of the remaining twenty-two shares of stock, we think that it is erroneous. It appears from the record that at the time of her death, Mrs. Perry was largely indebted to the defendant, and that her estate was insolvent. Commissioners were appointed upon her estate to whom the defendant presented his claim. The plaintiff also presented to such commissioners the same claim set forth in this present action against the defendant for the conversion of the stock. This claim was allowed, but an appeal was taken from the doings of the commissioners, which is still pending, and no payment or dividend has yet been made upon said claim. At the time of the demand by the plaintiff upon the defendant, the defendant understood that his custody of the twenty-two shares of stock was for and in the behalf of the executor of Mrs. Perry, and he did not claim and has not claimed any interest therein, except as creditor of her estate.

This stock stands in the name of Almira L. Perry, executrix. It does not appear that the certificates have ever been indorsed, so that the defendant could, if he so desired, make any use of the stock for his own benefit. He has never desired to do so, and there is no ground to hold that he has ever converted this stock to his own use, unless, under the circumstances, the demand for, and the refusal to deliver the certificates, constituted such conversion.

It is the further claim of the defendant that he was a party to the proceedings before the commissioners, in which the claim was made against the estate of Mrs. Perry for the conversion of these shares, and that as against him the plaintiff elected to consider these shares as a part of her estate; that this being so, it would be unjust to him to compel him to pay for their value, or to deliver them, in a proceeding in which the executor of Mrs. Perry is not a party. It is the claim of the plaintiff that he has not elected, and that this is not a case in which he is put to any election; that it is an action of tort, in which the liability for the conversion alleged is several as well as joint; that "a judgment against one of two joint trespassers, without satisfaction, is not a bar to an action against his co-trespasser, for the same trespass, and does not pass the title of the property to the defendant." *Sheldon* v. *Kibbe*, 3 Conn., 214; *Atwater* v. *Tupper*, 45 Conn., 144; and that the allowance of this claim by commissioners ought to have no higher effect than a judgment.

It seems to us that this contention does not meet the precise point of the true issue. The question is not whether the defendant would be severally liable for conversion; but whether he has in fact converted this stock by his refusal to deliver it to the plaintiff on demand, as we have herein previously held that he might be considered to have done with the twenty shares of stock. As bearing upon the question, the further inquiry as to the reason or ground of such refusal, is relevant. *Hartford Ice Co.* v. *Greenwoods Co.*, *supra*. The plaintiff's claim for conversion presented to the commissioners on Mrs. Perry's estate was allowed. And though an appeal was taken, he is still pursuing it. If finally allowed,

and a dividend paid upon it, the estate available for the payment of other claims, among them the large one of the defendant, will be thereby so much lessened. And certainly the executor on Mrs. Perry's estate would thereby acquire an interest in this stock for the benefit of the creditors. Upon these circumstances, the refusal of the defendant to deliver the certificates of stock to the plaintiff, while at the same time disclaiming title or interest in the stock himself, except to the extent of his interest as creditor, upon the contingency of such stock becoming assets of the estate of Mrs. Perry, was not such an absolute and unqualified refusal to deliver property to the owner or party entitled to the possession, on demand made, as constituted a conversion of the property. *Hartford Ice Co.* v. *Greenwoods Co.*, *supra.*

There is error in the amount of the judgment rendered, to the extent of the damage awarded for the value of the twenty-two shares, and to that extent it is reversed. And it is affirmed to the extent of the damages for the conversion of the twenty shares.

In this opinion the other judges concurred; except CARPENTER, J., who dissented as to that part of the opinion holding there was error in the judgment below respecting the conversion of the twenty-two shares.

PARK BROTHERS & CO., LIMITED, *vs.* THE BLODGETT & CLAPP CO.

First Judicial District, Hartford, January Term, 1894. ANDREWS, C. J., CARPENTER, TORRANCE, FENN and BALDWIN, Js.

The distinction between mistakes of law and fact, while recognized to a certain extent, is not, practically, so important as it is often represented to be in the matter of reforming written instruments. It is no longer true, if it ever was, that a mistake of law is no ground for reformation in any case. The more important question is whether the particular

mistake is such as a court of equity will correct; and this depends upon whether the case falls within the fundamental principle of equity, that in legal transactions no one shall be allowed to enrich himself unjustly at the expense of another, through, or by reason of, an innocent mistake of law or fact, entertained without negligence by the loser, or by both parties.

But in reforming written business contracts courts of equity ought to move with great caution; the proof of the mistake and that it really gives an unjust advantage to one party over the other ought to be of the most convincing character.

The plaintiff, by a written proposal accepted in writing by the defendant, agreed with the latter to supply the defendant with fifteen net tons of tool steel, to be furnished prior to January 1st, 1890, at stated prices, and "to be specified for * * * as your wants may require." The defendant having failed to order the full number of tons within the time stipulated, the plaintiff sued for a breach of the contract. The defendant answered, alleging that the parties, prior to the execution of such written contract, had orally agreed that the plaintiff should supply the defendant within the stated time with such steel to an amount not exceeding fifteen tons, "as the defendant's wants during that time might require," and that by the mistake of the parties the written contract did not embody the actual agreement so made by them; and prayed that the contract might be reformed. *Held*, that oral testimony was admissible to prove the alleged mistake and that the court below had power to reform the contract if clearly satisfied as to the facts alleged by the defendant.

[Argued January 4th—decided February 8th, 1894.]

ACTION to recover damages for breach of written contract to purchase a certain quantity of steel; brought to the Court of Common Pleas in Hartford County and tried to the court, *Taintor, J.*; facts found and judgment rendered for the defendant, and appeal by the plaintiff for alleged errors of the court in the admission of testimony. *No error.*

The case is sufficiently stated in the opinion.

Albert H. Walker, for the appellant (plaintiff).

In the following cases, each of which is identical in every material point with the case at bar, a reformation of the written contract was refused. *Wheaton* v. *Wheaton*, 9 Conn., 96 (1831); *Broadwell* v. *Broadwell*, 1 Gilman, 604 (1844); *Sibert* v. *McAvoy*, 15 Ill., 106 (1853); *Gordere* v. *Downing*, 18 Ill., 492 (1857); *Wood* v. *Price*, 46 Ill., 439 (1868); *Allen* v. *Anderson*, 44 Ind., 400 (1873); *Heavenridge* v. *Mondy*, 49

Ind., 439 (1875); *Rector* v. *Collins*, 46 Ark. 174 (1885); *Fowler* v. *Black*, 136 Ill., 376 (1891).

Edward S. White, for the appellee (defendant).

I. Parol testimony was the only kind of proof possible, and in its admission that was no error. "It is very certain that courts of equity will grant relief upon clear proof of a mistake, notwithstanding that the mistake is to be made out by parol evidence." 1 Story's Eq. Juris., § 153; *Woodbury Savings Bank* v. *Charter Oak Life Ins. Co.*, 31 Conn., 529.

II. Courts of equity relieve against mistakes of law as well as mistakes of fact. *Stedwell* v. *Anderson*, 21 Conn., 139; *Woodbury Savings Bank* v. *Charter Oak Life Ins. Co.*, *supra*; *Evans's Appeal*, 51 Conn., 435. "Equity will generally relieve either party against a mutual mistake of law affecting the written expression of the agreement." Brown on Parol Evidence, p. 79.

TORRANCE, J. This is an action brought to recover damages for the breach of a written contract, dated December 14th, 1888. The contract is set out in full in the amended complaint. It is in the form of a written proposal addressed by the plaintiff to the defendant, and is accepted by the defendant in writing upon the face of the contract. Such parts of the contract as appear to be material are here given: —"We propose to supply you with fifteen net tons of tool steel, of good and suitable quality, to be furnished prior to January 1st, 1890, at" prices set forth in the contract for the qualities of steel named therein. "Deliveries to be made f. o. b. Pittsburgh, and New York freight allowed to Hartford. To be specified for as your wants may require." The contract was made at Hartford, by the plaintiff through its agent A. H. Church, and by the defendant through its agent J. B. Clapp.

After filing a demurrer and an answer which may now be laid out of the case, the defendant filed an "answer with demand for reformation of contract," in the first paragraph of which it admitted the execution of said written contract.

The second, third and fourth paragraphs of the answer are as follows:—

"The defendant avers that on or about December —, 1888, it was agreed by and between the plaintiff and defendant, the plaintiff acting by its said agent, A. H. Church, that the plaintiff should supply the defendant prior to January 1st, 1890, with such an amount of tool steel, not exceeding fifteen tons, as the defendant's wants during that time might require, and of the kinds and upon the terms stated in said contract, and that the defendant would purchase the same of the plaintiff on said terms.

"3. That by the mistake of the plaintiff and defendant, or the fraud of the plaintiff, said written contract did not embody the actual agreement made as aforesaid by the parties.

"4. That the defendant accepted the proposal made to it by the plaintiff, and contained in said written contract, relying upon the representations of the plaintiff's said agent then made to it, that by accepting the same the defendant would only be bound for the purchase of such an amount of tool steel of the kinds named therein as its wants prior to January 1st, 1890, might require, and the defendant then believed that such proposal embodied the terms of the actual agreement made as aforesaid by and between the plaintiff and defendant." The fifth and last paragraph of the answer is not now material. The answer claimed, by way of equitable relief, a reformation of the written contract.

In reply the plaintiff denied the three paragraphs above quoted; denied specifically that the written contract did not embody the actual agreement made by the parties; and denied the existence of any joint mistake or fraud.

Thereupon the court below, sitting as a court of equity, heard the parties upon the issues thus formed, found them in favor of the defendant, and adjudged that the written contract be reformed to correspond with the contract as set out in paragraph 2 of the answer. At a subsequent term of the court final judgment in the suit was rendered in favor of the defendant.

The present appeal is based upon what occurred during the trial with reference to the reformation of the contract. Upon that hearing the agent of the defendant was a witness, on behalf of the defendant, and was asked to state "what conversation occurred between him and A. H. Church in making the contract of December 14th, 1888, at and before the execution thereof and relevant thereto." The plaintiff "objected to the reception of any parol testimony on the ground that the same was inadmissible to vary or contradict the terms of a written instrument, or to show any other or different contract than that specified in the instrument, or to show anything relevant to the defendant's prayer for its reformation." The court overruled the objection and admitted the testimony, and upon such testimony found and adjudged as hereinbefore stated.

The case thus presents a single question—whether the evidence objected to was admissible under the circumstances; and this depends upon the further question, which will be first considered, whether the mistake was one which, under the circumstances disclosed by the record, a court of equity will correct. The finding of the court below is as follows: —"The actual agreement between the defendant and the plaintiff was that the plaintiff should supply the defendant, prior to January 1st, 1890, with such an amount of tool steel, not exceeding fifteen tons, as the defendant's wants during that time might require, and of the kinds and upon the terms stated in said contract, and that the defendant would purchase the same of the plaintiff on said terms. But by the mutual mistake of said Church and said Clapp, acting for the plaintiff and defendant respectively, concerning the legal construction of the written contract of December 14th, 1888, that contract failed to express the actual agreement of the parties; and that said Church and said Clapp both intended to have the said written contract express the actual agreement made by them, and at the time of its execution believed that it did." No fraud is properly charged, and certainly none is found, and whatever claim to relief the defendant may have must rest wholly on the

ground of mistake. The plaintiff claims that the mistake in question is one of law and is of such a nature that it cannot be corrected in a court of equity.

That a court of equity under certain circumstances may reform a written instrument founded on a mistake of fact is not disputed; but the plaintiff strenuously insists that it cannot, or will not, reform an instrument founded upon a mistake like the one here in question which is alleged to be a mistake of law. The distinction between mistakes of law and mistakes of fact is certainly recognized in the text books and decisions, and to a certain extent is a valid distinction; but it is not practically so important as it is often represented to be. Upon this point Mr. Markby, in his "Elements of Law," sections 268 and 269, well says:—"There is also a peculiar class of cases in which courts of equity have endeavored to undo what has been done under the influence of error and to restore parties to their former position. The courts deal with such cases in a very free manner, and I doubt whether it is possible to bring their action under any fixed rules. But here again, as far as I can judge by what I find in the text books, and in the cases referred to, the distinction between errors of law and errors of fact, though very emphatically announced, has had very little practical effect upon the decisions of the courts. The distinction is not ignored, and it may have had some influence, but it is always mixed up with other considerations which not unfrequently outweigh it. The distinction between errors of law and errors of fact is therefore probably of much less importance than is commonly supposed. There is some satisfaction in this because the grounds upon which the distinction is made have never been clearly stated."

The distinction in question can therefore afford little or no aid in determining the question under consideration. Under certain circumstances a court of equity will, and under others, it will not reform a writing founded on a mistake of fact; under certain circumstances it will, and under others it will not, reform an instrument founded upon a mistake of law. It is no longer true, if it ever was, that a mistake of law is

no ground for relief in any case, as will be seen by the cases hereinafter cited. Whether, then, the mistake now in question be regarded as one of law or one of fact is not of much consequence; the more important question is whether it is such a mistake as a court of equity will correct; and this perhaps can only or at least can best be determined by seeing whether it falls within any of the well recognized classes of cases in which such relief is furnished. At the same time the fundamental equitable principle which was specially applied in the case of *Northrop* v. *Graves*, 19 Conn., 548, may also, perhaps, afford some aid in coming to a right conclusion. Stated briefly and generally, and without any attempt at strict accuracy, that principle is, that in legal transactions no one shall be allowed to enrich himself unjustly at the expense of another, through or by reason of an innocent mistake of law or fact entertained without negligence by the loser, or by both. If we apply this principle to the present case, we see that by means of a mutual mistake in reducing the oral agreement to writing the plaintiff, without either party intending it, gained a decided advantage over the defendant to which it is in no way justly entitled or at least ought not to be entitled in a court of equity.

The written agreement certainly fails to express the real agreement of the parties in a material point; it fails to do so by reason of a mutual mistake, made, as we must assume, innocently and without any such negligence on the part of the defendant as would debar him from the aid of a court of equity; the rights of no third parties have intervened; the instrument if corrected will place both parties just where they intended to place themselves in their relations to each other; and if not corrected it gives the plaintiff an inequitable advantage over the defendant. It is said that if by mistake words are inserted in a written contract which the parties did not intend to insert, or omitted which they did not intend to omit, this is a mistake of fact which a court of equity will correct in a proper case. *Sibert* v. *McAvoy*, 15 Ill., 106. If then the oral agreement in the case at bar had been for the sale and purchase of five tons of steel, and in reducing

the contract to writing, the parties had by an unnoticed mistake inserted "fifteen tons" instead of "five tons," this would have been mistake of fact entitling the defendant to the aid of a court of equity. In the case at bar the parties actually agreed upon what may, for brevity, be called a conditional purchase and sale, and upon that only. In reducing the contract to writing they, by an innocent mistake, omitted words which would have expressed the true agreement and used words which express an agreement differing materially from the only one they made. There is perhaps a distinction between the supposed case and the actual case, but it is quite shadowy. They differ not at all in their unjust consequences. In both, by an innocent mistake mutually entertained, the vendor obtains an unconscionable advantage over the vendee, a result which was not intended by either. There exists no good substantial reason as it seems to us why relief should be given in the one case and refused in the other, other things being equal. It is hardly necessary to say that in cases like the one at bar, courts of equity ought to move with great caution. Before an instrument is reformed under such circumstances, the proof of the mistake and that it really gives an unjust advantage to one party over the other, ought to be of the most convincing character. "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 (for relief of this kind) must be supported by overwhelming evidence, or be denied." *Palmer* v. *Hartford Ins. Co.*, 54 Conn., 501.

We are not concerned here, however, with the amount or sufficiency of the proofs upon which the court below acted; nor with the sufficiency of the pleadings; we must upon this record assume that the pleadings are sufficient and that the proofs came fully up to the highest standard requirements in such cases. Upon principle then we think a court of equity may correct a mistake of law in a case like the one at bar, and we also think the very great weight of modern authority is in favor of that conclusion. The case clearly falls within that class of cases where there is an antecedent

agreement, and in reducing it to writing, the instrument executed, by reason of the common mistake of the parties as to the legal effect of the words used, fails as to one or more material points, to express their actual agreement. It is perhaps not essential in all cases that there should be an antecedent agreement, as appears to be held in *Benson* v. *Markoe*, 37 Minn., 30; but we have no occasion to consider that question in the case at bar. The authorities in favor of the conclusion that a court of equity in such cases will correct a mistake even if it be one of law are very numerous, and the citation of a few of the more important must suffice.

In *Hunt* v. *Rousmaniere's Administrators*, 1 Pet., 1, decided in 1828, it is said: "Where an instrument is drawn and executed which professes, or is intended to carry into execution an agreement, whether in writing or by parol, previously entered into, but which by mistake of the draftsman, either as to fact or law, does not fulfill, or which violates the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement." It was said in the argument before us that this was a mere *obiter dictum*, but that is hardly correct. It is true the case was held not to fall within the principle, but the principle was said to be "incontrovertible" (p. 13), and was applied to the extent at least of determining that the case then before the court did not come within it. In *Snell* v. *Ins. Co.*, 98 U. S. 85, the court applied the principle so clearly stated in the case last cited, and reformed a policy of insurance though the mistake was clearly one as to the legal effect of the language of the policy.

In numerous other decisions of that court the same principle has been cautiously but repeatedly applied, but it is not necessary to cite them. On the general question, whether a court of equity will relieve against a mistake as to the legal effect of the language of a writing, the case of *Griswold* v. *Hazard*, 141 U. S., 260, is a strong case, though perhaps hardly an authority upon the precise question in this case. *Canedy* v. *Marcy*, 13 Gray, 373, was a case where the oral contract was for the sale of two-thirds of certain premises,

but the deed by mistake of the scrivener conveyed the entire premises. The words used were ones intended to be used in one sense, the error being that all concerned supposed those words would carry out the oral agreement. This was clearly a mistake "concerning the legal construction of the written contract," but the court by Chief Justice SHAW said:—"We are of the opinion that courts of equity in such cases are not limited to affording relief only in cases of mistake of fact, and that a mistake in the legal effect of a description in a deed, or in the use of technical language may be relieved against upon proper proof." In *Goode* v. *Riley*, 153 Mass., 585, decided in 1891, the court says:—"The only question argued is raised by the defendant's exception to the refusal of a ruling, that, if both parties intended that the description should be written as it was written, the plaintiff was not entitled to a reformation. It would be a sufficient answer that the contrary is settled in this Commonwealth," —citing a number of cases.

In *Kernnard* v. *George*, 44 N. H., 440, the parties, by mistake as to its legal effect, supposed a mortgage deed to be valid when it was not. The court relieved against the mistake and said:—"It seems to us to be a clear case of mutual mistake, where the instrument given and received was not in fact what all the parties to it supposed it was and intended it should be; and in such a case equity will interfere and reform the deed and make it what the parties at the time of its execution intended to make it; and in this respect it makes no difference whether the defect in the instrument be in a statutory or common law requisite, or whether the parties failed to make the instrument in the form they intended, or misapprehended its legal effect."

In *Eastman* v. *Provident Mut. Relief Association*, 65 N. H., 176, decided in 1889, the mistake was as to the legal effect of an insurance certificate, but the court granted relief by way of reformation. The court says: "Both parties intended to make the benefit payable to Gigar's administrator. That it was not made payable to him was due to their mutual misapprehension of the legal effect of the language used in

the certificate. * * * Equity requires an amendment of the writing that will make the contract what the parties supposed it was, and intended it should be, although their mistake is one of law, and not of fact."

In *Truesdell* v. *Lehman et al.*, 47 New Jer. Eq., 218, the marginal note is as follows :—" Where it clearly appears that a deed drawn professedly to carry out the agreement of the parties previously entered into, is executed under the misapprehension that it really embodies the agreement, whereas, by mistake of the draughtsman either as to fact or law, it fails to fulfill that purpose, equity will correct the mistake by reforming the instrument in accordance with the contract."

In a general way the same rule is recognized and applied with more or less strictness in the following cases: *Clayton* v. *Freet*, 10 Ohio St., 544; *Bush* v. *Hicks*, 60 N. Y., 298; *Andrews* v. *Andrews*, 81 Me., 337; *May* v. *Adams*, 58 Vt., 74; *Griffith* v. *Townley*, 69 Mo., 13; *Benson* v. *Markoe*, 37 Minn., 30; *Gump's Appeal*, 65 Pa. St., 476; *Cooper* v. *Phibbs*, 2 H. L. Cases, 170. See also Pomeroy's Eq. Jur., vol. 2, § 845, and Bispham's Principles of Equity, §§ 184 to 191.

And whatever the law may be elsewhere this is certainly the law of our own State. *Chamberlain* v. *Thompson*, 10 Conn., 243; *Stedwell* v. *Anderson*, 21 id., 144; *Woodbury Savings Bank* v. *Ins. Co.*, 31 id., 518; *Palmer* v. *Ins. Co.*, 54 id., 488, and *Haussman* v. *Burnham*, 59 id., 117. Indeed, since the time of *Northrop* v. *Graves*, *supra*, it is difficult to see how our law could have been otherwise. We conclude then that by our own law, and by the decided weight of authority elsewhere, the defendant was entitled to the relief sought. If this is so, then clearly he was entitled to the parol evidence which the plaintiff objected to; for in no other way ordinarily can the mistake be shown. " In such cases parol evidence is admissible to show that the party is entitled to the relief sought." *Wheaton* v. *Wheaton*, 9 Conn., p. 96. " It is settled, at least in equity, that this particular kind of evidence, that is to say, of mutual mistake as to the meaning of words used, is admissible for the negative purpose we have mentioned. And this principle is entirely consistent

with the rule that you cannot set up prior or contemporaneous oral dealings to modify or override what you knew was the effect of your writing." *Goode* v. *Riley*, 153 Mass., 585; Reynolds' Evidence, § 69; 1 Greenleaf's Evidence (15th ed.), § 269*a*; Stephens' Digest (Evidence), § 90.

The view we have taken of this case renders it unnecessary to notice at any length the cases cited by counsel for the plaintiff in his able argument before us. Upon his brief he cites five from Illinois, two from Indiana and one from Arkansas. After an examination of them, we can only say that most of them seem to support the claims of the plaintiff. If so, we think they are opposed to the very decided weight of authority, and do not state the law as it is held in this State.

Before closing, however, we ought to notice the case of *Wheaton* v. *Wheaton*, *supra*, upon which the plaintiff's counsel seems to place great reliance. The case is a somewhat peculiar one. Even in that case, however, the court seems to recognize the principle governing the class of cases within which we decide the case at bar falls, for it says :—" It is not alleged that the writings were not so drawn as to effectuate the intention of the parties, through the mistake of the scrivener. On the contrary it is alleged that the scrivener was not even informed what the agreement between the parties was." From the statement of the case in the record and in the opinion, it clearly appears that the mistake was not mutual; indeed it does not even appear that at the time when the note was executed the other party even knew that there was any mistake at all on the part of anybody. Upon the facts stated the plaintiff in this case did not bring it within the class of cases we have been considering. The case was correctly decided, not on the ground that the mistake was one of law, but on the ground that the mistake of law was one which under the circumstances alleged a court of equity would not correct. The court, however, in the opinion, seems to base its decision upon the distinction between mistakes of law and mistakes of fact; holding in general and unqualified terms, as was once quite customary, that the lat-

ter could be corrected and the former could not. The court probably did not mean to lay the law down in this broad and unqualified way, but if it did, it is sufficient to say that it is not a correct statement of our law, at least since the decision of *Northrop* v. *Graves*, *supra*. On the whole, this case of *Wheaton* v. *Wheaton* can hardly be regarded as supporting the plaintiff's contention.

There is no error apparent upon the record.

In this opinion the other judges concurred.

Fannie L. Wordin et al. Appeal from Probate.

Third Judicial District, New Haven, January Term, 1894. Andrews, C. J., Torrance, Fenn, Baldwin and Hamersley, Js.

A testator devised his homestead to his executors in trust for the use of his daughters jointly, during their lives and the life of the survivor, and directed the executors to pay, during said term, the taxes and assessments thereon and to keep the homestead in repair, out of any funds of his estate. The residue and remainder of his property he gave to said executors and their successors in trust for said daughters and two sons, during their respective lives, directing that the same be divided into four equal shares, one share to be held for each of said children. The executors declined to act and an administrator with the will annexed was duly appointed. Upon the settlement of the estate distributors were appointed by the probate court to divide said residue according to law and subject to the terms of the will. The division made was in itself equal and just, but no fund or estate was reserved for the payment of future taxes, assessments and repairs upon the homestead, nor was said distribution in terms made subject to the burden in favor of the homestead and by the testator imposed upon the residue so distributed. The daughters appealed from the order and decree of the probate court accepting the distribution. *Held*:—

1. That it was evidently the intention of the testator that his executors should pay the taxes and assessments upon the homestead and keep the same in repair during the aforesaid term, out of any funds belonging to his estate.
2. That the only way in which the executors could comply with such requirements would be by reserving in their hands sufficient funds of the estate for these purposes.

3. That such provision of the will was not void for uncertainty in the quantity of the estate to which the trust should attach; especially in the absence of any finding that the amount required to be reserved for these purposes could not, approximately and with reasonable certainty, be determined by the probate court upon a hearing.
4. That although neither the probate court, nor distributors whose duties are purely ministerial, could affix conditions or burdens to the division, yet they were legally bound to recognize those which the testator had imposed. If they fail to do this and the distributees or any of them are prejudiced by such omission, they are "aggrieved" within the meaning of the statute (General Statutes, § 640), and have the right to appeal from the decree accepting such distribution; and this right is not affected by the fact that in some other way a court of equity might enforce the charge.
5. That it was unnecessary that the appellants should have appealed from the order appointing distributors, since they were not in any respect injured thereby.
6. That division of the residue of the estate be made, subject to the right and duty of the administrator with the will annexed, to retain in his hands such items and amount of the property, reserved equally from each share, as the probate court should find necessary to produce an income sufficient to meet said charges. And that if the probate court should at any time hereafter find that the amount so reserved was unnecessarily large, it might then direct the payment of the excess, either principal or income, to the persons entitled thereto under the distribution; and at the close of the term might correct any inequalities which had arisen in the shares of the beneficiaries in such reserved fund during said term.
7. A bequest so indefinite in amount or subject-matter as to be incapable of determination and execution by a court, is undoubtedly void. But such indefiniteness must clearly appear; it cannot be presumed.

[Submitted on briefs, January 16th,—decided February 8th, 1894.]

APPEAL from an order and decree of the Probate Court for the District of Bridgeport, accepting the report of distributors on the estate of Nathaniel S. Wordin deceased; brought to the Superior Court in Fairfield County, and tried to the court, *John M. Hall, J.*; facts found and case reserved for the advice of this court.*

The case is sufficiently stated in the opinion.

Samuel Fessenden and *Homer S. Cummings*, for the appellants.

* This case was argued at the October Term, 1893, in Bridgeport, but was continued in order that a new party might be summoned in and that the record might be amplified.

I. It was the clear purpose of the testator, that the taxes assessments and repairs, described in section six, should fall as a burden upon the estate (either before or after distribution), and that no distribution and no construction should be permitted to defeat that purpose or conflict with it. The result of the distribution as made would be the utter destruction of one of the leading provisions of the will. This is contrary to the spirit of the law, for, "If possible, some effect shall be given to each distinct provision, rather than that it should be annihilated." *Chrystie* v. *Phyfe*, 19 N. Y., 348.

II. Such a distribution cannot be properly made, for a *legal* distribution must be consistent with the reservation of the power or means for paying or providing for the payment of the taxes, assessments and repairs, as required in section six of the will.

III. It is urged by the appellees, that such a reservation is impossible practically, owing to the inherent difficulties of the case. It is said that the correct sum or amount to be reserved "cannot be judicially determined." The finding discloses no such condition. There is certainly nothing in the language of the will itself, in connection with the facts found, which shows that it is impossible for the court to determine with perfect accuracy the sum to be reserved. Whether such sum may be judicially fixed by the court in this case, is a question of fact and not one of law. We submit that there is no fixed rule of law preventing the definite determination of taxes, assessments or repairs, and that, as a matter of fact, the accurate or approximate determination of such questions is a matter of everyday business life by individuals, banking institutions, and insurance companies, and that by the application of well-established rules, such seeming uncertainties are rendered definite, fixed and certain. Jarman on Wills, Rule XIII; *Thorpe* v. *Owen*, 2 Hare, 610; *Broad* v. *Bevan*, 1 Russ., 511.

IV. The duties of the executor did not cease upon the death of the widow; nor until they are in fact discharged as the will directs. Distribution itself does not necessarily exhaust the executor's or administrator's powers. *Davis* v.

Weed, 44 Conn., 577. Clearly, then, when the estate is improperly settled or distributed, or where one of the commands of the testator remains unexecuted, the power of the administrator survives if that power is necessary to the performance of the testator's wish. *Booth* v. *Starr*, 5 Day, 286; *Seymour* v. *Seymour*, 22 Conn., 272, 278; *Re Howard*, 9 Wall., 184.

V. It is also claimed by the appellees that it is impossible to charge the shares of the distributees—their burdens being indicated by the will and not by distributors, whose duty is to divide the residue into four equal parts, in favor of the trustees of said beneficiaries. Distributors cannot affix conditions, for burdens "attach, if at all, after such distribution is made." This is little more than a subtle "begging of the question." What is said is true enough, perhaps, but it does not meet the case. It assumes as settled the very point in controversy. We do not ask that the distributors shall impose burdens, but we insist that they should recognize burdens already imposed.

VI. Finally, it is claimed by the appellees that the provision in section six, relating to the payment of taxes, assessments and repairs, is void for uncertainty, because a proper reserve cannot be judicially determined, and because no means are provided in the will for apportioning the charges and expenditures between the trustees of the beneficiaries.

The extreme reluctance of the courts to destroy the efficacy of a will or any of its provisions, on the ground of uncertainty, has passed into a familiar principle. Wigram on Wills, p. 369; 1 Jarman on Wills, 472; Schouler on Wills, § 594; *Mason* v. *Robinson*, 2 Sim. & S., 295. "It must be an extreme case before we can relieve ourselves of the duty of giving a construction to the instrument by declaring it void for uncertainty." *Den* v. *McMurtrie*, 8 Green. (N. J.), 276; *Doe d. Winter* v. *Perratt*, 6 Mann. & Gr., 359; *Wooton* v. *Redd*, 11 Gratt., 196; Redfield on Wills (1884), p. 670; *Townshend* v. *Downer*, 23 Vt., 225; *Bull* v. *Bull*, 8 Conn., 51; *Treat's Appeal*, 30 Conn., 116.

Stiles Judson, Jr., for the appellees.

I. The distribution was a ministerial duty over which the probate court could exercise no discretion in respect to the reservation of a fund for the payment of the claims that are urged by the appellants. *Strong* v. *Strong*, 8 Conn., 411. The distribution is admittedly fair and equitable in itself; but the appellants claim that it should have been made subject to the provisions in the sixth clause of the will. But the interests of the appellants under that clause are not in the slightest degree affected by the judgment of distributors on the subject of values. If this is so then they are not *interested* persons and cannot be *aggrieved* within the meaning of General Statutes, § 640, concerning probate appeals. *Nash* v. *Taylor*, 83 Ind., 343. But if interested, then under § 558 of the General Statutes, the order of the probate court is binding on them.

II. The claim of the appellants that a certain sum must be set aside sufficient in amount to yield an income competent to pay future taxes and assessments, cannot be sustained, owing to the uncertainty in the *quantity* of the estate to which the trust is to attach. Jarman on Wills, pp. 388, 389. How shall this amount be determined, and by whom? It is incapable of being ascertained from the nature of the case, and for that reason must be declared void. In some of the early English cases, the difficulties here presented were discussed, and the utter futility of attempting judicially to determine the amount required to pay uncertain future charges was fully recognized, even when worthy and charitable purposes were defeated in consequence. *Chapman* v. *Brown*, 6 Ves., 404; *Limbrey* v. *Gun*, 6 Mad., 151; *Fowler* v. *Fowler*, 33 Beav., 618; *In re Bickett*, 9 Ch. Div., 580; *Milford* v. *Reynolds*, 16 Sim., 105; *Atty. Gen.* v. *Hinxman*, 2 J. & W., 269; Redfield on Wills, Vol. 1, pp. 676, 683, 684; *Adams* v. *Spaulding*, 12 Conn., 259; Perry on Trusts, Vol. 1, § 308.

III. It is next contended by the appellants, that if such fund is not to be set aside and reserved to the administrator for the execution of the alleged trust, that at least, the residuary shares, in the division made under the will, should be, in terms, expressly charged with the payment of the contin-

gent obligations embraced in paragraph six. Such direction constitutes a valid charge upon the residuary shares. It is not essential to the creation of a charge that the burden should be attached in express terms to the estate devised. *Mathewson* v. *Saunders*, 11 Conn., 144. And even were such charge not intended to be an incumbrance upon the estate devised, it would create an obligation on the part of the trustees of these beneficiaries to pay such sums as were reasonably required for the purposes indicated in the will. *Olmstead* v. *Brush*, 29 Conn., 535. If such charge exists, it is solely the creation of the will, and not of the court or the distributors. The trustees may enforce from their residuary shares the payment of such as accrue in the future, with respect to the taxes, assessments and repairs; and all persons dealing with the property constituting the residue of the estate are bound to take notice of such charge. Perry on Trusts, Vol. 2, p. 529; *Scott* v. *Patchen*, 54 Vt., 253; *Mathewson* v. *Saunders*, 11 Conn., 144; *Gardner* v. *Gardner*, 3 Mason, 178; Perry on Trusts, Vol. 2, §§ 560, 805; Lewin on Trusts, Vol. 2, p. 611; Story's Eq. Juris., Vol. 2, § 1251.

If the administrator *in his capacity as such*, is to discharge these obligations, and not in the exercise of a *trust power*, then these appellants are to be treated merely as creditors of the estate who have contingent claims against it, and they would have no interest as such, in the distribution made. They must look to the administrator for satisfaction of their claims when they mature, and the administrator, in turn, may secure ample protection under the statute governing such case. General Statutes, § 633. It would therefore seem, in the case at bar, that the residuary legatees or devisees are legally entitled to the whole beneficial interest in this residue, and the distribution thereof was in strict accord with the intent of the testator. To the estate that is made the subject of the distribution, the law attaches such burdens as are to be deduced from a proper construction of the will, and with this the distributors are not concerned.

FENN, J. This is a reservation by the Superior Court of

questions arising upon an appeal to that court, from the order and decree of the court of probate for the district of Bridgeport, made on the 30th day of December, 1892, accepting a division of the testate estate of Nathaniel S. Wordin, by persons appointed by said court to make such division, pursuant to General Statutes, § 558.

It appears by the record that said Wordin died June 10th, 1889, leaving a last will which was duly admitted to probate, by which will, after giving sundry legacies, he disposed of his property as follows:—

"Paragraph Fifth. I will, order and direct, that all the rest of my estate and property remain in the care and keeping of my executors during the lifetime of my said wife, Fanny Augusta, and that my executors shall collect the rents, dividends and interest which may accrue thereon as it becomes due, and pay the legal taxes, insurance and necessary repairs on the buildings, and other legitimate expenses, and pay over the balance to my said wife semi-annually, or from time to time, as may be needful, to be used or invested as her own absolutely.

"Paragraph Sixth. At the decease of my wife, Fanny Augusta, aforesaid, I give, devise and bequeath to my executors in trust, so much of the homestead, No. 334 State street, as lies south of a line parallel with State street, and distant therefrom one hundred and fifty feet, for the free and unmolested use of my daughters, Helen C. and Fanny L., aforesaid, jointly, during their natural lives, or the lifetime of the survivor of them. My said executors to pay legal taxes and assessments thereon, and keep the same in repair, out of any funds belonging to my estate, during said term. At the decease of both daughters, aforesaid, the property shall become and be a part of the residue of my estate, and treated as such.

"Paragraph Seventh. At the decease of my wife, Fanny Augusta, aforesaid, subject to the foregoing, I will and direct, that the residue and remainder of my estate be divided into four equal shares, and I give, devise and bequeath to my executors and their successors in trust, one of said shares

for each of my children, to wit: Helen C., Nathaniel Eugene, Fanny L. and Thomas C., aforesaid, in the manner and for the purposes hereinafter provided and stipulated: First. One shall be held and managed for my son, Nathaniel Eugene Wordin, M. D., aforesaid, and the net income, rents and profits paid over to him semi-annually during his natural life. If, at his death, he shall leave a son or sons, his own issue, then I will that said share become and be vested in said son or sons, share and share alike, absolutely, and to his or their heirs. Second. Two shares shall be held and managed for Helen C. and Fanny L., aforesaid, and the net income paid over, one half to each respectively, semi-annually. Upon the death of either, the survivor shall take the net income of both shares, during her natural life. Third. The remaining one share shall be held and managed for my son, Thomas Cook Wordin, aforesaid, and the net income paid over to him semi-annually, during his natural life. If, at his death he shall leave a son or sons, his own issue, then I will that said share become and be vested in said son or sons, share and share alike, absolutely, to his or their heirs."

The executors named in the will declined to act, and thereupon an administrator with the will annexed was duly appointed and qualified. The widow died August 25th, 1892. In October following, the administrator filed his account with the court of probate, showing property real and personal, amounting in the aggregate to $288,538.99, on hand, after all the charges and claims against said estate had been satisfied, except such burden as may be imposed upon said estate by virtue of the provisions of paragraph sixth of the will, relative to the payment of taxes, assessments, and repairs, which might accrue in the future, concerning the property therein described. Thereupon, on October 20th, 1892, the court of probate passed an order as follows:—"That said real and personal estate be divided into four equal shares and distributed among the residuary devisees and legatees under said will, to wit, to the trustee of said shares respectively for said Helen C. Wordin, Nathaniel Eugene Wordin, Fannie L. Wordin and Thomas C.

Wordin, for the purposes specified in said will, said division of said residue and remainder of said estate to be made according to and subject to the terms of said will, and according to law, and this court appoints Joseph W. Johnson, Philo H. Prindle and Chas. E. Wilmot, disinterested persons, who being duly sworn, shall make said division among and distribution to said trustees for said beneficiaries as required by said will, and according to and subject to the terms and conditions of said will and according to law, and make return to this court."

The persons appointed made return of their doings, dividing the estate into four equal parts, one for each of the four children, all being set to William B. Hincks, the administrator with the will annexed, in trust for said children respectively. No provision was made for the payment of the taxes, assessments and repairs provided for in paragraph sixth of the will. Nor was the matter in any wise referred to in said division. The court accepted such division and ordered it to be recorded and lodged on file. Pending the appeal, the record discloses that said William B. Hincks represented to the court of probate that a question had arisen whether he, as the administrator with the will annexed of the estate of Nathaniel S. Wordin, deceased, was, as such administrator, the successor of the executors appointed in said will, in trust, and entitled to act as trustee under the provisions of paragraph seventh of the will; that he desired to remove all doubt, and therefore declined to act as trustee. The declination was accepted by the court, and said court appointed Joseph W. Johnson trustee for Nathaniel E. Wordin; David Pendleton trustee for Helen C. Wordin and Fannie L. Wordin; and Herbert M. Knapp trustee for Thomas C. Wordin; all of whom have duly become parties to this reservation.

The appeal was taken by said Fannie L. Wordin and Helen C. Wordin, who claimed to be aggrieved because there was not set aside in the division, a sufficient sum to provide for the payment of the legal taxes, assessments and repairs referred to in paragraph sixth of the will; because in no way

was there reserved or set aside any fund or estate for such payment, and because said division is not in terms expressed to be charged with, or subject to, the burden of such payment.

In considering the interesting question thus presented to us by the reservation, let us first look carefully into the provisions of the will which we have quoted, in order to discover therefrom, as clearly as possible, the intention of the testator. It was his manifest design, as expressed in paragraph fifth, that during the lifetime of his wife, the entire property in bulk should remain undivided and unapportioned in the hands of the executors, who, out of the income, were to pay all legitimate expenses, including taxes and repairs, and the balance to his wife to be used and invested as her own, absolutely. It was also his intent as expressed in paragraph sixth, that after the decease of his wife his daughters should have the use of the homestead, or a certain defined portion thereof, for their lives and the life of the survivor, and that during this term his said executors should, out of any funds belonging to his estate, pay the legal taxes and assessments thereon, and keep the premises in repair. Coming now to paragraph seventh, three things are to be noticed. *First*, while at the decease of his wife the residue and the remainder of the testator's estate was to be divided into four equal shares, one to be held in trust for each of his four children respectively, yet the direction for division was made expressly "subject to the foregoing," viz., the provisions of the sixth paragraph. *Second*, although the executors were named as trustees, "successors in trust" were also provided for, which had not been done in the preceding paragraphs. *Third*, the trust as to the share of each of the sons might terminate, and such shares vest absolutely in issue, during the continuance of the life estate provided for in paragraph sixth. It would seem to follow therefore that the only way in which the executors could comply with the requirements of the express terms of paragraph sixth, to pay legal taxes, assessments, and repairs (which, it may be noticed, they were themselves instructed to make,) "out of any funds belonging to my es-

tate, during said term," would be by reserving in their hands sufficient funds to provide therefor. We also think that when, immediately following the creation in paragraph sixth of a life estate in the homestead, in the daughters, together with the provision for the payment of taxes, assessments and repairs thereon, the testator began paragraph seventh by saying: "At the decease of my wife Fanny Augusta, aforesaid, subject to the foregoing, I will and direct that the residue and remainder of my estate be divided," etc.—his intention was that such division should be subject to the life estate of the homestead; and further, subject to such reservation of the other property or funds of his estate, as would enable the executors to carry out the positive requirements of his will, imposed upon them, in reference thereto.

Such being, in our opinion, the intention of the testator, the next inquiry is whether such a provision is valid, or whether as the appellees claim, it should be void for uncertainty. In support of the claim that it is void, the appellees say that the setting aside by the court of probate, or the reservation by the administrator of a certain sum of money, as a fund, to yield an income equal to future taxes, assessments and repairs, would create, in that respect, an active trust, with legal title of an integral part of the estate vested in a trustee for its proper execution, as distinguished from a mere *power in trust;* and that such trust cannot be maintained when tested by the rules of equity applicable to the subject, because certainty in the *quantity* of the estate to which the trust is to attach, is essential to its validity. In support of this proposition they cite as authority, Jarman on Wills, pp. 388, 389; *Chapman* v. *Brown*, 6 Vesey, 404; *Limbrey* v. *Gurr*, 6 Madd., 151; *Fowler* v. *Fowler*, 6 Beavan, 618; *In re Bickett*, 9 Ch. Div., 580; *Mitford* v. *Reynolds*, 16 Sim., 105; *Atty. Gen.* v. *Hinxman*, 2 J. & W., 269; Redfield on Wills, Vol. 1, pp. 676, 683, 684; all of which on examination appear to be in point to the extent only that they are authority for the proposition that a bequest so indefinite as to amount, or subject-matter, as to be incapable of determination and execution by the court, is void. This principle is so unques-

tionable as hardly to justify the citation of authority at all in its support. If it did, such authority might be found in our own state, in *Coit* v. *Comstock*, 51 Conn., 352, 386, as explained in *Bristol* v. *Bristol*, 53 Conn., 242, 257–260.

The very authorities cited by the appellees all show that if the object of the testator is so defined "as to furnish fair and reasonable data, the court will determine the amount which ought to have been expended on it;" and that a bequest of a residue or surplus of a specific fund remaining after providing for an object illegal or unattainable, the exact amount to be laid out on which is not specified, is not void for uncertainty, if the court can determine what would have been the probable amount to be expended. In short the authorities do not require more than approximate or reasonable certainty, and none, in applying the rule, go to the extent which we should be obliged to go were we to declare the testator's purpose void for the want of such certainty. On the other hand it may fairly be held on principle, that a less degree of certainty as to the amount required to be reserved or set aside, should serve to support the provision before us, than would be requisite in the cases cited by the appellees. In those cases the question arose concerning the validity of bequests of residue remaining after indefinite provisions for objects illegal or unattainable; the amount required for which, once ascertained with whatever degree of probability, could never be made more certain, or any inequality finally obviated, since the purpose of the testator would never be actually executed. In this case it is otherwise. If an amount be set aside which proves too large for the purposes to be provided for, very little, if any, harm can come to the beneficiaries from the retention of such excess in the hands of the administrator, since the whole beneficial interest in both principal and income of the entire sum, subject to the charge, belongs at all times to them respectively; and so far as the children of the testator are themselves concerned, the only difference is that this amount remains in the hands of the administrator in trust, instead of passing into the hands of the trustees to hold in trust.

It is true that it would be impossible for a court to determine the exact amount which in the uncertain future will be required for the purpose contemplated by the testator. The valuation of the homestead from time to time for the purposes of taxation, the rate of such taxation, and of municipal assessments, and the cost of repairs, are doubtless incapable of precise determination in advance. So also, the amount which may be derived as income from any sum or property set aside must be measurably uncertain. But there are no facts before us to show, nor are we able to take judicial notice, that all these things may not be fairly and reasonably approximated. Indeed we believe they may be, and with no more difficulty than is experienced in matters occurring in the almost daily practice of the courts of probate in this state, where partial distribution is had, and the sums retained in the hands of executors, or administrators, for ultimate disposition after the discharge of the trusts or duties imposed. It was early declared by this court in *Brewster* v. *McCall's Devisees*, 15 Conn., 274, 292, that: "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." This principle is one which has received frequent application since, and we do not hesitate to apply it now and to hold that no such necessity has been shown, or is to be presumed to exist.

Finally, the appellees say that persons having been duly appointed under § 558 of the General Statutes to make the division required by the seventh paragraph of the will of the testator, and such appointment being by an order from which no appeal has been taken, the division was a ministerial duty directed by the testator, and over which the court could exercise no jurisdiction in respect to the reservation of a fund for the payment of the claims urged by the appellants. They say that the appellants' interests, under paragraph sixth of the will, are not affected by the act of division; that therefore, within the meaning of General Statutes, § 640, they are not interested persons, and cannot be *aggrieved;* and that if they can be said to have an interest in the division ordered

by the testator, by virtue of their rights under paragraph sixth, then the order of the court of probate, under the terms of the Statutes, § 558, is binding on them and that the appeal should be dismissed.

In reference to this contention we will say that there are two orders of the court of probate. The order for division, which is unappealed from, and is binding; the order accepting the division which has been appealed from and is before us. The former order directed the division of the estate on hand to be made "according to and subject to the terms and conditions of said will." The latter order accepted a division in which no consideration was given to such "terms and conditions." It is true that the powers of both the court of probate and of the persons appointed by it to make division, are strictly statutory, and of the latter purely ministerial. They cannot affix conditions or attach burdens to the division. But they ought to recognize those which the testator has attached. Failure to do so is equivalent to an attempt to nullify such provisions. We need not inquire whether such an attempt could be successful. It may well be true, as the appellees say, that a court of equity could enforce the charge; or the appellants might, in the capacity of creditors of the estate, require the administrator to discharge the obligation without reference to the division made; that he would be liable on his bond. *Sanford* v. *Gilman*, 44 Conn., 461, 464. But because in some less convenient and more litigious way, involving family quarrels and dissensions, the same end could ultimately be accomplished, no reason is afforded why the appellants should be deprived of the very security and means which it was the intention of the testator they should have, through an omission of the persons appointed to make division under his will to recognize such means, coupled with the approval of the court of probate of such omission. It cannot be correctly said that because as *cestui que trusts* of two of the trust shares in the residue of the estate, the appellants do not claim to be aggrieved by the division, it being conceded that the division of such residue was fairly and equitably made, they cannot be aggrieved at

all. They are bound by the division, when accepted by the court, as a whole; and if, taken as a whole, they are in any way prejudiced by it, in respect either to right or remedy, under any provisions of the will, they are thereby aggrieved.

It would have been a simpler and more customary way had the court of probate made an order for only partial division, reserving a sufficient sum to meet the requirements of paragraph sixth of the will. *Clement* v. *Brainard*, 46 Conn., 174, 181, 182. But the same result can now be accomplished by a division, as directed, "subject to the terms and conditions of the will;" that is to say, subject to such a reservation of estate distributed, in the hands of the administrator, as may be found and ascertained by the court of probate will be sufficient to yield an income ample to defray the outlay charged upon the estate for taxes, assessments and repairs. *Bristol* v. *Bristol*, *supra*, p. 260. This will be similar to the distribution of property subject to dower, or other life estate, before the termination of such particular estate, which may, nevertheless, if personal property, remain in the hands of the executor until the determination of such particular estate. *Sanford* v. *Gilman*, *supra;* General Statutes, § 632; *Webster* v. *Merriam*, 9 Conn., 225. "If the substantial requirements of the will are complied with, the manner of doing it is not very material." *Platt* v. *Platt*, 42 Conn., 346.

For the reasons stated, we think there is error in the order and decree of the court of probate appealed from. And the Superior Court is advised that such order should be reversed, and that division should be made of the estate of the testator, subject to the right and duty of the administrator with the will annexed to retain in his hands such items and amount of the property divided, reserved equally from each share, as in the opinion of the court of probate, upon due hearing had and finding made, may be sufficient to enable such administrator, from the net income thereof, to defray the charges for taxes, assessments and repairs specified in paragraph sixth of the will, during the term therein created. Said court is also further advised, that should the amount reserved be found too large, it will be in the power of the court

of probate, at any time, by proper proceedings and order to direct further payment of principal or income to the persons entitled to the same under the division; and also, at the close of the term, by proper order, to correct any inequalities which may have arisen in the shares of the beneficiaries in the reserved fund during the term. *Platt* v. *Platt*, *supra*.

In this opinion the other judges concurred.

ALVAN TALCOTT, TRUSTEE, *vs.* GEORGE E. MEIGS.

Third Judicial District, New Haven, January Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

Section 3016 of the General Statutes provides that the retention of possession by the mortgagor of any machinery, engines, or "implements" situated and used in any manufacturing or mechanical establishment, shall not impair the title of the mortgagee of such personal property. *Held*, that a portable safe situated in the office of a manufacturing establishment and used for the sole purpose of keeping the books, papers and cash of the mortgagor, appertaining to the business, was an "implement" within the meaning of the statute and therefore the subject of mortgage; and that the trial court erred in refusing to so charge the jury.

It is not essential that implements mortgaged by a manufacturer should be peculiarly adapted to his particular business, or necessary for its prosecution. It is enough if they are in fact situated and used in his establishment for the benefit of the business there carried on, and are suitable and proper for such use.

In the present case the mortgage deed to the plaintiff described the property mortgaged as subject to a prior mortgage to a third party; and the defendant, a vendee of the mortgagor, claimed that if he was liable to any one, he was liable to the first mortgagee and not to the plaintiff. *Held*, that in this State there is no difference, in this respect, between mortgages of real and of personal property; that a second mortgage of chattels, executed and recorded in conformity with the statute, conveys to the second mortgagee a legal interest in the property, with a right of immediate possession against any one not claiming under the first mortgage; and therefore the defendant could not avail himself of the outstanding first mortgage to defeat the plaintiff's recovery.

[Argued January 24th—decided February 8th, 1894.]

ACTION to recover damages for the conversion of a safe;

brought to the Court of Common Pleas in New Haven County and tried to the jury before *Deming, J.* Verdict and judgment for the defendant and appeal by the plaintiff for alleged errors in the rulings and charge of the court. *Error and new trial granted.*

The case is sufficiently stated in the opinion.

Henry G. Newton and *Livingston W. Cleaveland* for the appellant (plaintiff).

Edmund Zacher and *A. N. Wheeler* for the appellee (defendant).

BALDWIN, J. General Statutes, § 3016, secures the title of a mortgagee, notwithstanding the retention of possession by the mortgagor, under a mortgage, duly recorded, of "any manufacturing or mechanical establishment, together with the machinery, engines, or implements situated and used therein." The plaintiff holds a second mortgage on a silk mill, together with machinery, engines and sundry other articles of personal property particularly described in the mortgage as situated and used therein. Among these articles is an iron safe of moderate size and value. This the mortgagor, while remaining in possession, sold to the defendant, who took it for a valuable consideration and without actual notice of the mortgage.

The main question in controversy between the parties is whether the safe can be considered as an "implement" within the meaning of § 3016.

The first statute respecting mortgages of manufacturing establishments was passed in 1832, and was restricted in its operation to the factory and its machinery. In 1837 (Stat., Ed. 1838, p. 74) its provisions were "extended and applied to the machinery, engines and implements in and used by" the establishment. At this date, the word "implement" also occurred in our statutes, in the provision exempting from execution "implements of the debtor's trade," (Ed. 1838, p. 63, § 74,) and in that forbidding taverners from keeping in

or about their houses "any cards, dice, tables or billiards, or any other implement used in gaming." (Ed. 1838, p. 166, § 101.) The first use of this term in the legislation of the State was in an "Act concerning Executions." As given in the Revision of 1702, (p. 32,) the goods of a judgment debtor exempt from levy were "necessary apparel, bedding, tools and arms, or implements of the household which are for the necessary upholding of his life." Substantially the same words of description were retained until 1821, in the revision of which year (p. 56, § 74) they are replaced by these: "necessary apparel, bedding and household furniture necessary for supporting life; arms, military equipments, implements of the debtor's trade," etc. It would seem from this change of phraseology that household "furniture" was deemed in 1821 to mean the same thing, in the language of the day, which household "implements" did at the beginning of the preceding century. The word "tools," for which in this revision was substituted the phrase "implements of the debtor's trade," was held by this court not applicable to "such implements only as are used by the hand of one man," but to cover, as respected printers, the printing press, cases and types. *Patten* v. *Smith*, 4 Conn., 450, 454. In 1858, a statute was enacted, which declares that the provisions as to "mortgages of the machinery, engines, or implements, situated and used in any manufacturing or mechanical establishment," * * * "shall be and the same are hereby made applicable to the presses, types, cases, stereotype plates, and copper plates of and pertaining to any printing or publishing establishment." Public Acts of 1858, p. 41, chap. LV. Apparently the legislature were in doubt whether the former statute as to chattel mortgages embraced printing or publishing establishments, and desired to bring them clearly within its operation, as regards the kinds of property which had been the subject of discussion in *Patten* v. *Smith*; thus declaring in effect that a printing or publishing establishment was to be regarded as a manufacturing or mechanical establishment, and that the presses, types, cases and plates were machinery or implements of the business.

In the Revisions of 1875 and 1888, the Act of 1858 is incorporated into the main statute, and, in so doing, the reference to presses, types, etc., follows the words "machinery, engines, implements;" but, in view of the history of the law, we do not think it is to be inferred that they would not otherwise have been included under the preceding terms of general description.

The import of the term "implements," so far as trade or manufacturing is concerned, does not seem to have changed since the first settlement in Connecticut. In *Cowell's Interpreter*, which was published in 1637, it is defined as signifying "things tending to the necessary use of any trade, or furniture of household," and Bouvier's Law Dictionary gives it as meaning "such things as are used or *employed* for a trade or furniture of a house."

The finding upon which this appeal is based shows, that upon the trial in the Court of Common Pleas it was admitted, or proved and not denied, that at the date of the mortgage the safe in question was a portable one, situated in the office of the factory, and used for the sole purpose of keeping the books, papers and cash of the mortgagor, appertaining to the business; and that its situation and use continued the same, until a year or two after its sale to the defendant. The plaintiff asked the court to instruct the jury that under the admitted facts, their verdict should be in his favor. The court declined to do so, and charged that while a safe might, under certain conditions, be an implement of a manufacturing establishment, it could be such only if it was necessary in the business carried on therein.

There is nothing in the statute as to chattel mortgages which requires that implements mortgaged by a manufacturer shall be peculiarly adapted to his particular business, or that they shall be necessary for its prosecution. It is enough if they are in fact situated and used in his establishment, for the benefit of the business there carried on, and are suitable and proper for such use. It having been admitted on the trial that the safe, for a conversion of which the suit was brought, was moderate size, and when mortgaged, and until long after

the sale to the defendant, was situated in the silk mill, and used solely for keeping the books, papers and money of the establishment, it was a necessary conclusion of law that it was such an implement of the business as to be protected by the mortgage. So far as this point is concerned, the jury should therefore have been directed to return a verdict for the plaintiff. *Whitney* v. *Brooklyn*, 5 Conn., 405, 416; *Peoples Savings Bank* v. *Norwalk*, 56 Conn., 547, 556.

The defendant, however, contends that, as the finding of the court below shows that the plaintiff's title rests on a deed which described the property mortgaged as subject to a prior mortgage, duly recorded, for $10,000, to a third party, and as the plaintiff has never been in possession, he is in no position to recover for a conversion. In support of this contention it is argued that the whole legal title was conveyed by the first mortgage; that if the defendant is liable to any one, he certainly is to the first mortgagee; and that it cannot be that each mortgagee has a separate action against him for the same tort. This is understood to be the doctrine of the Massachusetts courts: *Ring* v. *Neale*, 114 Mass., 111, 112; but it is there rested on the position that, in the case of chattel mortgages, the whole legal title and right of possession passes out of the mortgagor by the first mortgage, so that he can thereafter give only an equitable estate to a junior mortgagee, even as against a stranger. Such is not the law of Connecticut. We have recognized no difference in this respect between mortgages of real and those of personal property. As to the former, it is well settled that a junior mortgagee has a legal title on which he can maintain ejectment against the mortgagor, notwithstanding his deed was expressly made subject to a prior mortgage, which is outstanding and unsatisfied. *Savage* v. *Dooley*, 28 Conn., 411. The same view has been taken of the rights of the holder of a second mortgage of chattels, executed and recorded in conformity with our statutes. He is regarded as having a legal interest in the property, with a right of immediate possession against any one not claiming under the first mortgage. *White* v. *Webb*, 15 Conn., 302, 305; *Becker* v. *Bailies*, 44 Conn., 167, 174.

It is true that the defendant would also have been liable to an action by the first mortgagee (if the first mortgage is still unsatisfied) for the conversion of the safe; but it does not follow that he would have been liable to pay two judgments for its value. Had the first mortgagee sued and recovered judgment, its satisfaction would have discharged the lien of the second mortgage, by appropriating the security for the benefit of a paramount title, and the second mortgagee could thereafter have recovered only damages for the detention of the property after demand or suit by him, and before demand or suit by the first mortgagee. If, on the other hand, judgment is recovered in this action by the plaintiff, no demand having been made or suit brought by the first mortgagee, he is entitled to recover the full value of the property, applying it for the benefit of the parties to the mortgages according to their respective rights and equities. *White* v. *Webb*, 15 Conn., 302. In view of the equitable interest of the first mortgagee in the fund thus recovered, it would seem that he would be precluded (in the absence of bad faith or under-valuation) from claiming any judgment against the defendant for a conversion of the same property; but this question is not now before us.

The plaintiff contends that he was entitled to judgment on the record, *veredicto non obstante*, but as the admissions as to the character and use of the safe, upon which he relies, appear only from the finding prepared for the purposes of the appeal, it is manifest that this claim is untenable.

There is error in the judgment of the Court of Common Pleas, and a new trial is ordered.

In this opinion the other judges concurred.

THOMAS H. BISSELL *vs.* JOSEPHINE L. DICKERSON.

First Judicial District, Hartford, January Term, 1894. ANDREWS, C. J., CARPENTER, TORRANCE, FENN and BALDWIN, Js.

Under the provisions of the Act of 1762, as to granting new trials by the Superior and County Courts, (which with no substantial change except an extension of the right to District and City Courts, are still in force and constitute § 1125 of the General Statutes,) the words in the statute, "for other reasonable causes," authorized the courts therein named to grant new trials for verdicts against evidence.

This power was withdrawn by a provision enacted in 1821, which constituted § 1127 of the General Statutes.

Chapter LI of the Public Acts of 1893, respecting new trials for verdicts against evidence, in effect repealed § 1127, substituting provisions radically different, and gives either party in any cause tried to a jury the right to have the case reviewed after judgment by the Supreme Court of Errors, notwithstanding the verdict in the opinion of the trial court is in accord with the evidence. The effect of this legislation is to remove the restriction imposed in 1821 upon the power formerly possessed by trial courts, under § 1125 of the General Statutes, to grant new trials after verdict and before judgment, in cases where, in the opinion of such court, the verdict is against the evidence; and to restore the law upon that subject as it existed prior to 1821.

A repeal of a statute by implication is not favored, and will never be presumed where both the new and the old statute may well stand together.

The question whether a verdict should be set aside as against the evidence in the cause, cannot be brought before the Supreme Court of Errors on a reservation for advice. In cases where this court has power to grant a new trial on that ground, it acts directly, by its own mandate, and not by advice to the court below as to what action should be taken there.

The indorsee of a negotiable accommodation note who received the same in good faith before maturity for value and without notice of any infirmity is entitled, in an action thereon against the maker, to recover the face of the note with interest, notwithstanding such note was obtained from the maker by the fraud of the payee and indorser, and the plaintiff paid less than its face value.

[Argued January 4th—decided February 19th, 1894.]

ACTION by the indorsee against the maker of a negotiable note to recover $100, the amount thereof; brought to the City Court of Hartford and tried to the jury before *McManus, J.*; verdict for plaintiff for $25.00, only, and appeal by

the plaintiff for an alleged error in the charge of the court. *Error, and new trial granted.*

The defendant, in her defense, claimed and offered evidence to prove that the note in question was an accommodation note executed by her for the benefit of the payee, and was obtained by the latter by misrepresentation and fraud, of which the plaintiff had knowledge before he purchased the note. The plaintiff claimed and offered evidence to prove that he bought the note in good faith, before maturity without notice of any infirmity and paid not less than $80.00 for it.

The plaintiff requested the court to charge the jury that if they should find that the plaintiff was a *bonâ fide* purchaser of the note without notice of any fraud or infirmity in its inception at the time he took it, he was entitled to recover the face value of the note, with interest from its maturity, whether the note, as between the maker and the payee, was fraudulent or not. The court did not charge as requested, but instructed the jury that if they should find a verdict for the plaintiff it should be for such amount as he paid for the note.

The trial court accepted the verdict and upon oral motion of plaintiff's counsel for a new trial for a verdict against evidence, caused the evidence to be made part of the record and certified that in the opinion of the court the jury were not justified by the evidence in rendering a verdict for the plaintiff for less than eighty dollars. A rule to show cause why a new trial should not be granted for a verdict against evidence was allowed and the questions arising thereon were reserved for the advice of this court.

Cooke Lounsbury, for the appellant (plaintiff).

I. The court erred in instructing the jury as to the amount the plaintiff was entitled to recover in case the verdict should be in his favor. This court has made no distinction in this respect between an accommodation note or note without consideration, and one obtained by fraud; but has treated both as valid for their face value, in the hands of a *bonâ fide* indorsee. And there seems to be no distinction in principle

Lawrence v. *Stonington Bank*, 6 Conn., 521; *Brush* v. *Scribner*, 11 id., 388; *Belden* v. *Lamb*, 17 id., 453; *Roe* v. *Jerome*, 18 id., 155; *Middletown Bank* v. *Jerome*, 18 id., 443; *Van Windisch* v. *Klaus*, 46 id., 433.

Though, in other states, the authorities on this question of the amount to be recovered by a *bonâ fide* holder are somewhat conflicting, we think the weight of authority is decidedly in favor of a full recovery. And even in those states which hold the contrary the authorities are by no means uniform. *Judd* v. *Seaver*, 8 Paige, 548; *Putnam* v. *Sullivan*, 4 Mass., 45–54; *Peacock* v. *Rhodes*, 2 Douglass, 633; *Vinton* v. *Peck*, 14 Mich., 296; *Bailey* v. *Smith*, 14 Ohio State, 396; *Mathews* v. *Rutherford*, 7 La. An., 225; *Lay* v. *Wissman*, 36 Iowa, 305; *Daniels* v. *Wilson*, 21 Minn., 530; *Moore* v. *Baird*, 30 Penn. State, 138; *Gaul* v. *Willis*, 26 id., 259; *Dunn* v. *Ghost*, 5 Colo., 139; *U. S.* v. *Dunn*, 6 Peters, 59; *Cromwell* v. *County of Sac*, 96 U. S. (6 Otto), 60; *R. R. Companies* v. *Schutte*, 103 U. S. (13 Otto), 118–145; Daniels on Negotiable Instruments, §§ 756–769*a* and notes; 3 Parsons on Contracts, 146–148.

II. The testimony of the plaintiff that he paid $90.00 or thereabouts, certainly more than $80.00 for the note, was uncontradicted. This fact therefore must be taken as proved.

The verdict was, therefore, clearly against the evidence, and contrary to the instructions of the court, and a new trial should be granted on that ground.

Sidney E. Clarke, for the appellee (defendant).

The authorities are at variance concerning the rule relating to the amount of recovery upon a note issued without consideration. While some few of the courts maintain the doctrine that a *bonâ fide* holder for value may recover the full amount, the better authority seems to be that when a note is obtained by fraud or without consideration the amount of recovery is measured by the actual amount paid, with interest. The English decisions are uniform in maintaining this rule, and the courts of Massachusetts, following the common law, have always maintained the rule as contended

by the appellee, and as the court below instructed the jury. *Babson* v. *Webber*, 9 Pick., 165; *Parish* v. *Stone*, 14 Pick., 208; *Chicopee Bank* v. *Chapin*, 8 Met., 44; *Stoddard* v. *Kimball*, 4 Cushing, 604; *Stoddard* v. *Kimball*, 6 id., 469; *Hubbard* v. *Chapin*, 2 Allen, 328; *Newton* v. *Baker*, 125 Mass., 30. The courts of New York have established the same doctrine. *Harger* v. *Wilson*, 63 Barbour, 237; *Todd* v. *Shelbourne*, 15 New York (8 Hun), 512; *Williams* v. *Smith*, 2 Hill, 301; *Moore* v. *Ryder*, 65 New York, 439; *Brown* v. *Mott*, 7 Johnson, 361; *Clarke* v. *Sisson*, 22 New York, 312. This rule also prevails in a number of other states.

BALDWIN, J. This case comes before us on a reservation for our advice, as to the granting of a new trial on the ground that the verdict was against the evidence; and also on an appeal by the plaintiff, assigning error in the charge to the jury.

The advice to be given depends on the construction and effect of chapter LI of the Public Acts of 1893, and involves a consideration of the question whether, since its enactment, trial courts have power, as at common law, to set aside verdicts which, in their opinion, are manifestly against the weight of evidence.

Such a power was given as early as 1644 to the "particular court" of the Colony, then the ordinary tribunal for the trial of civil causes. In the first Revision of our Colonial Statutes, the "Code of 1650," it is vested in the particular court in the following terms: "And it is further ordered, that the Courte of Magistrates shall haue libbertye (if they doe not find in their judgments, the Jury to haue attended the euidence giuen in, and true issue of the case, in theire verdict,) to cause them to returne to a second consideration thereof; and if they still persist in theire former opinion, to the dissatisfaction of the Courte, it shall be in the power of the Courte to impannell another jurye, and committ the consideration of the case to them." 1 Colonial Records of Connecticut, 536.

In 1666, the year after the grant of the charter, the Colony was divided into counties, each of which was supplied with a County Court, invested with substantially the same powers,

in ordinary civil causes, as those formerly enjoyed by the "particular Court." A "Court of Assistants" was also created, with jurisdiction, among other things, of appeals from the County Courts.

In 1694 the right of trial courts to set aside verdicts, as contrary to the weight of evidence, was taken away. In lieu of this, two remedies were provided, by appeal and by what was called a "review." Any party against whom a verdict was rendered could, notwithstanding judgment was entered upon it, review it by a new "process" in the same court, where the cause was thereupon tried *de novo*, before another jury. This system, as set out in the Revision of 1702 (p. 3), gave an appeal from any judgment of the County Court to the Court of Assistants, or at the election of the party, a review. If either party was dissatisfied with the judgment on such a review, he could appeal to the next Court of Assistants, where the matter was to be finally disposed of. If on an appeal to the Court of Assistants taken from a judgment of the County Court rendered upon a first trial, either party was dissatisfied with the result, he could review it by a new process in the appellate court. In 1709, by "An Act for Restraining the liberty of Three Tryals, in some Actions and Cases," these provisions were so modified that whenever there were two trials in the same court with the same result, the second judgment should end the case forever; but "in all Actions and Causes wherein the Plaintiff upon the First Trial by the Bench and Jury, shall recover judgment, and the defendant upon the Second Trial, by the Bench and Jury shall recover Judgment, there shall be Liberty of another or Third Trial, by Appeal or Review, as formerly." Session Laws of 1709, p. 150.

The power of the court, if dissatisfied with a verdict, to send the jury back for a further consideration, was stated in the Revision of 1702 (p. 3), in the form which is still retained in General Statutes, § 1104.

In 1762 a statute was passed which worked important changes in our methods of judicial procedure. The General Assembly made over its jurisdiction as to granting new trials,

in ordinary cases, to the Superior and County Courts respectively, and the process of review was abolished. Statutes, Ed. 1769, p. 307. The provisions of this Act, as to new trials, with no substantial change of terms except an extension of the right of granting them to District and City Courts, are still in force, and are thus given in the General Statutes:—"Section 1125. The Superior Court, Court of Common Pleas, District Court, and any City Court, may grant new trials of causes that may come before them respectively, for mispleading; the discovery of new evidence; want of actual notice of the suit to any defendant, or of a reasonable opportunity to appear and defend, when a just defense in whole or part existed; or other reasonable cause, according to the usual rules in such cases."

This statute, when originally passed, had the effect of greatly restricting the remedy of a new trial. Previously it could be demanded as an absolute right by any party, plaintiff or defendant, who was dissatisfied with the verdict. Henceforth a new trial could be had only when the court was dissatisfied with the verdict, and for a cause recognized as sufficient at common law.

The construction of the Act, as respects the particular subject of verdicts against evidence, was first brought under discussion in this court in 1816. The losing party in a case in the Superior Court had filed a motion for a new trial on the ground that the verdict was against the evidence, and that court, thereupon, without stating what the evidence was, had simply reserved for the opinion of this court the question whether it (the trial court) had the legal power to grant the motion. At that time, under the general rules of practice adopted in 1807, (3 Day, 28,) the Superior Court could either dispose finally of motions for a new trial, or, at its discretion, reserve them for the opinion of this court. The opinion in the case was delivered by Chief Justice SWIFT, and affirmed the right of the Superior Court to grant the motion. It states the law on the point under examination in these terms:—"To all courts acting on the principles of the common law the power is incidental to grant new trials for vari

ous causes, among which one is, that the verdict was against evidence. This has ever been done in *England*, as well as in sundry states in the Union. Courts in this state, then, acting according to the common law, have this power, unless prohibited by positive law. The statute respecting this subject authorizes courts to grant new trials, 'for mispleading, discovery of new evidence, or other reasonable cause, according to the common and usual rules and methods in such cases.' This is so far from being a prohibition, it may be considered as conferring a power to grant new trials where the verdict is against evidence; for this comes clearly within the expression, 'for reasonable cause, according to the common rules.' It would seem clear, both by the common and statute law, our courts possess this power.

"It has been supposed from the power of the court to return the jury to a second and third consideration, the necessary implication is, that they shall have no further control of the verdict; and that in those countries where new trials are granted on the ground that the verdict is against evidence, the courts have no such power. But there is no inconsistency or impropriety in the exercise of both these powers; and it may often happen that a new trial is rendered unnecessary by returning the jury to a further consideration where the verdict is wrong." *Bartholomew* v. *Clark*, 1 Conn., 472, 480.

In the revision of 1821 a special provision was introduced as to the remedy for verdicts against evidence rendered in the Superior Court, which was designed, as stated by the revisers (Revision of 1821, p. 54, note), to confirm and modify the practice sanctioned in *Bartholomew* v. *Clark*. This statute, while leaving the powers of the County Court unaffected, authorized the Superior Court, if of opinion that a verdict was against evidence, to report a statement of the evidence to this court, which could thereupon, if of the same opinion, grant a new trial. There was an absolute right of appeal in most cases from judgments of the County Court to the Superior Court, so that if a verdict were set aside without due cause by the former, and a contrary verdict afterwards ren-

dered in the cause, the losing party could secure a new trial in the latter tribunal.

No change was made in this law until after the County Courts had been replaced by Courts of Common Pleas, when, in the Revision of 1875, (p. 448,) it was made applicable alike to the Superior Court, Court of Common Pleas, District Court and City Courts, and the power to grant the new trial was given in each case, to such court as would have jurisdiction of a writ of error from a judgment rendered on the verdict. In this form it appeared as § 1127 of the Revision of 1888, which read as follows:—"Sec. 1127. When either of said courts shall be of opinion that the verdict of the jury is against the evidence in the cause, it may, at its discretion, report a statement of such evidence to the next court having jurisdiction of writs of error from its judgments, and if such court shall be of opinion that the verdict is against such evidence, it may, at its discretion, grant a new trial."

The construction placed by the profession on this statute has always been that though permissive in its terms, it was mandatory in effect, and so far modified § 1125 as to withdraw from the trial court any power to set aside a verdict as against evidence. If the court of original jurisdiction was satisfied with the verdict, it accepted it, and ordered it recorded and judgment entered in ordinary course. 2 Swift's System, 260. If dissatisfied, it could order it recorded, render or stay judgment at its discretion, and report the evidence to the appellate court; which could thereupon, if of the same opinion, grant a new trial. No motion for a new trial was addressed to the trial court, for that court had no power to grant one. Ordinarily such a motion was filed in the trial court, but made to the appellate court. There was no reservation of such matter for the advice of this court. It came here for direct action, and the new trial, if obtained, was not advised but ordered. *Zaleski* v. *Clark*, 45 Conn., 405, note.

The Act of 1893, upon which the decision of the question before us depends, is entitled "An Act concerning New Trials of Civil Actions," and reads as follows: "Section 1127 of the General Statutes is hereby amended to read as follows: Upon

the trial of any cause in either of said courts before a jury, either party may, within six days after judgment therein, file a written motion for a new trial upon the ground that the verdict is against the evidence in the cause, and the court shall thereupon report such evidence to the Supreme Court of Errors and make it a part of the record; and, if such court shall be of opinion that the verdict was against such evidence, it shall grant a new trial." Public Acts of 1893, p. 228, Chap. LI.

The effect of this legislation is virtually to repeal § 1127, and substitute a new section in its place containing provisions radically different. A new trial could be obtained under the old law only if the trial court was dissatisfied with the verdict. The new law gives the right to seek it, at the hands of this court, although the verdict was a proper one, in the opinion of the trial court. The old law allowed but did not require the trial court, if it were of opinion that the verdict should be set aside, to report the evidence. The new law requires it to do so, even if it be of a contrary opinion, should such a report be demanded by the losing party. The old law allowed the court, of its own motion, or on an oral motion, to send up the cause to this court, for its decision before entering judgment. *Tomlinson* v. *Town of Derby*, 41 Conn., 268, 269. The new law allows it only upon a written motion, filed by the party after judgment has been rendered against him on the verdict. The old law gave power to this court, even were it of opinion that the verdict was against evidence, to refuse a new trial, at its discretion. The new law, in such a case, requires us to grant the motion.

The City Court, in the present case, without any written motion by the plaintiff, granted a rule to show cause why a new trial should not be granted for a verdict against evidence, and reserved the questions arising thereon for the advice of this court. It has also reported a statement of the evidence, and certified that in its opinion the verdict is against the evidence.

This mode of proceeding was not warranted by General Statutes, § 1127, for that section (as it stood in the Revision of 1888) was, as we have seen, repealed before the trial in

the City Court. It is not warranted by the terms of § 1127 as reconstituted by the Act of 1893, for it is not predicated on a written motion by the losing party. It does not conform to the provisions of either statute, since it is merely a reservation for the advice of this court, as to what action the City Court should take; not a transmission of a record upon which this court is itself to render judgment.

The City Court has, however, the same power as the Superior Court as to reserving questions of law for the advice of this court, (VII Special Laws, p. 867, § 2); and the same question of law arises upon the record now before us, which arose upon that in *Bartholomew* v. *Clark*, 1 Conn., 472. In this case, as in that, the trial court was of opinion that the verdict ought to be set aside, but did not feel assured as to its own power to take such action. The same statutes, in substance, which then existed respecting verdicts against evidence, and which were there held to authorize the trial court, on its own responsibility, to set aside such a verdict, are still in force. (General Statutes, § 1104; Statutes, Revision of 1808, p. 36, § 11; General Statutes, § 1125; Statutes, Revision of 1808, p. 37, § 13.) Unless, then, the Act of 1893 has the same effect in this regard as the statute which it replaced, so as again to withdraw this power, the decision in *Bartholomew* v. *Clark*, which was reached after hearing very full and able arguments on each side from leading counsel, must govern the advice we are to give.

Statutes are to be expounded in view of the mischief to remedy which they were enacted. *French* v. *Gray*, 2 Conn., 119. The principal mischief which the Act of 1893 had in view evidently was that a verdict might be returned which was palpably against the evidence, and yet the trial court take a different view of it and decline to report the evidence for the consideration of this court. There is nothing in the statute which professes to withdraw from the trial court any power to set aside verdicts which it might otherwise possess. Section 1125 of the General Statutes would have given all City Courts power to set aside verdicts against evidence, had it not been restricted, and, by a plain implication, repealed

pro tanto, as respects this class of cases, by § 1127. The latter section is now itself repealed, and the original powers given by § 1125 are no longer restricted, unless it be by the force of the new statute by which § 1127 has been replaced. 1 Swift's Dig., 18.

This statute contains no words of repeal, and if it has such an effect, it must be derived by implication. Repeals by implication are not favored, and will never be presumed, where both the new and the old statute may well stand together. *Windham County Savings Bank* v. *Hines*, 55 Conn., 433, 435; *Kallahan* v. *Osborne*, 37 Conn., 488. If both § 1125 and § 1127 in its new form can have full effect, it is our duty to give them such a construction as will secure that result. *Goodman* v. *Jewett*, 24 Conn., 588, 589; *Middletown* v. *New York, New Haven & Hartford R. R. Co.*, 62 Conn., 492, 498.

Under the Act of 1893, resort can be had to this court only after judgment has been entered on the verdict in the court below; for it is given only upon the written motion of the party, filed "within six days after judgment therein." Such a judgment *primâ facie* indicates that the court approves the verdict. While under our practice, accepting a verdict and ordering that it be recorded do not necessarily imply that it was acceptable to the court, such an inference may naturally be drawn in the absence of any statement in the record to the contrary, from the rendition of a judgment upon it. A judgment upon a verdict is, as fully as any other, the result of judicial action, and it may be entered or not, at the discretion of the court, pending a motion for a new trial. *Collins* v. *Prentice*, 15 Conn., 423, 426; *Tomlinson* v. *Town of Derby*, 41 Conn., 268.

The Act of 1893, therefore, may well be understood as referring only to cases where the trial court is satisfied with the verdict, and as dealing only with motions for a new trial which are made or addressed to the Supreme Court of Errors. This construction leaves to be regulated by § 1125 or by the common law of which it is declaratory, the granting of a new trial where the trial court deems the verdict against evidence, and instead of rendering judgment upon it, sets it

aside. It is also the only mode of construction that is in harmony with the general rule of judicial procedure, that questions of a discretionary nature are always to be acted upon, in the first instance at least, by the trial court. If, in the exercise of its discretion, a verdict is set aside as against evidence, under the provisions of § 1125, the injustice which would otherwise have been done by the action of the jury is fully and promptly remedied. If, on the other hand, both judge and jury concur in erroneous conclusions from the evidence in the cause, the new statute gives a new remedy in this court, but still one which follows and rests upon the exercise of a judicial discretion on the part of the court below.

Many years since, it was said by this court, with reference to setting aside verdicts against evidence, when the trial court was satisfied with the action of the jury: "The practice of allowing, as a matter of course, cases to go up for review on this ground would be attended with much vexation in increasing the amount of litigation, besides the practical difficulty which is always felt in reviewing a question of fact upon a mere statement of the evidence on paper, without an opportunity to judge of the credit due to witnesses from their appearance upon the stand." *Reboul* v. *Chalker*, 27 Conn., 114, 129. The legislature has now determined, by the Act of 1893, that it is better to encounter these inconveniences than to let what this court might consider an unjust verdict stand, although the trial court should think that it ought not to be disturbed. But we cannot think that it was intended to require a party in whose favor the trial court is ready to set aside a verdict, to bring the case here for a further opinion to the same effect, from a court which, as remarked in *Reboul* v. *Chalker*, *supra*, is necessarily less fitted to weigh the testimony, because unacquainted with the bearing and demeanor of the witnesses at the trial, and the manner in which they respond to the questions asked. That the General Assembly by which the statute in question was passed was fully sensible of the force of these considerations is apparent from another enactment of the same session, Public Acts of 1893, p. 319, chapter CLXXIV., § 9, in

which it is provided that, while this court may, upon a statement of the evidence, upon which any finding of fact by a trial court is based, reverse such finding, it can be done only when such finding is adjudged to be "clearly against the weight of evidence." It is hardly to be presumed that a legislature, justly reposing such confidence in the conclusions of the court that saw and heard the witnesses, would in another statute, but a few weeks later in date have taken so different a view as to deny any force to the opinion of the trial court that a verdict was against evidence, particularly when such denial would tend directly to a large increase in the judicial expense of the State, since a long record must be made up and printed, at its cost, in each case within the operation of the statute now in question.

The city court is therefore advised that it has the legal power to grant a new trial in the case at bar.

It was, of course, unnecessary for that court to report to us a statement of the evidence. Whether a verdict should be set aside, as against evidence, is a question addressed to the discretion of the court, and rests on mere considerations of fact. Whether a trial court has the right to set aside a verdict, which it deems to be against evidence, is a question of law, and is the only question properly before us on this reservation.

The plaintiff's appeal is based on the instruction given to the jury, that in the action against the maker of a negotiable accommodation note by an indorsee, who took it in good faith for value before maturity, and without notice of any infirmity, if the defendant proves that it was obtained from him by the payee and indorser by fraud, the rule of damages is the amount paid by the plaintiff. A note given for the accommodation of the payee, which he has thus negotiated to a *bonâ fide* purchaser, stands, as between the holder and maker, on the same footing as if it were business paper. The jury should therefore have been instructed that the rule of damages under the circumstances stated in the charge, was the face of the note, with interest from its maturity. *Belden* v. *Lamb*, 17 Conn., 441, 453; *First Ecclesiastical Society* v.

Loomis, 42 Conn., 570, 574; *Rowland* v. *Fowler*, 47 Conn., 347; *Cromwell* v. *County of Sac*, 96 U. S., 51, 60.

There is error, and a new trial is ordered upon the plaintiff's appeal, in case one should not be granted by the City Court, on the ground that the verdict was against the evidence.

In this opinion the other judges concurred; except CARPENTER, J., who dissented as to so much of the opinion as held that the City Court had power to grant new trials for verdicts against evidence.

FERDINAND WALKO *vs.* NANCY A. WALKO.

Third Judicial District, New Haven, January Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

In an action of replevin brought by the husband against his wife the latter filed a plea in abatement alleging that at the time of bringing the suit she was the lawful wife of the plaintiff. To this plea the plaintiff demurred, "Because upon the matters therein alleged the defendant is not entitled to the relief sought." *Held*:—

1. That the demurrer, being general, was properly overruled.
2. That the plea in abatement was sufficiently precise and certain as respects the date on which the relation alleged existed; and was as definite as the forms given in the Practice Act required.
3. That it was unnecessary for the defendant to allege in such plea that she had not been abandoned by her husband.
4. That the judgment of the trial court for a return of the property with costs was correct. The judgment relating to a return added nothing to the obligation imposed by General Statutes, § 1326, upon a plaintiff in replevin who fails to establish his right to possession. The judgment as to costs rests upon the well settled rule that courts which have no other jurisdiction of the person or cause do possess such jurisdiction and may exercise it in the matter of taxing costs in favor of a party properly pleading to the jurisdiction and obtaining judgment in his favor on such plea.
5. The replevin bond virtually takes the place of the goods replevied, and the plaintiff will not be permitted to say that the bond upon which he invoked and obtained the interference of the law in his behalf is wholly void, or embarrass a recovery against the surety thereon by defeating a judgment which measures the obligation assumed.

[Argued January 17th,—decided February 19th, 1894.]

ACTION of replevin brought before a justice of the peace in the town of Ridgefield, and thence by the plaintiff's appeal to the Court of Common Pleas in Fairfield County, *Curtis, J.*, where judgment was rendered for the defendant, and the plaintiff appealed to this court. *No error.*

In the justice court the defendant filed a plea in abatement alleging that, "at the time of bringing this suit, the defendant was the lawful wife of the plaintiff." To this plea the plaintiff demurred as follows:—"The plaintiff demurs to the defendant's plea in abatement because upon the matters therein alleged the defendant is not entitled to the relief sought." The justice overruled the demurrer, held the plea in abatement sufficient, and the plaintiff appealed. In the Court of Common Pleas the demurrer was again overruled, and the plea in abatement sustained; whereupon the plaintiff filed an answer denying the truth of the allegation of the plea. The court having heard the parties found that issue for the defendant and rendered judgment in her favor for a recovery of the property replevied and her costs.

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

James E. Walsh, for the appellee (defendant).

FENN, J. This is an action of replevin, originally made returnable before a justice of the peace. In the justice court the defendant appeared, and plead in abatement to the writ and complaint, that "at the time of bringing this suit the defendant was the lawful wife of the plaintiff." To this plea the plaintiff demurred, "because upon the matters therein alleged the defendant is not entitled to the relief sought." The court found the issue for the defendant and rendered judgment in her favor for costs. The plaintiff appealed to the Court of Common Pleas, when he was again heard upon demurrer, which that court also overruled. The plaintiff then answered over, denying the truth of the matters contained in the defendant's plea in abatement. Upon that issue the court found for the defendant, and judgment was rendered

in her favor for the return of the property replevied, and costs. The plaintiff appealed to this court.

The reasons of appeal, nine in number, present two questions: Did the court err in overruling the demurrer? Could it render a judgment in the defendant's favor for the return of the property, and costs?

In reference to the first question, the plaintiff contends that the plea in abatement lacks the precision and certainty necessary in such pleas. Two reasons given for this claim; one being that no date is alleged on which the declared relation of husband and wife existed between the parties; that when it is claimed to have existed cannot be ascertained from the plea itself. It need only be said that the plea, in this respect, is as definite as forms given in the Practice Act Book, Nos. 339, 341, 342; and those again, as precise as the forms in Chitty or Saunders. It is rather late to require an accuracy beyond that of which the special pleaders of the past ever conceived. Courts of the present day, in the construction of pleas in abatement, do not "refuse to comprehend the ordinary import of language." *Draper* v. *Moriaty*, 45 Conn., 479.

The other reason given is that the plea did not allege that the defendant had not been abandoned by her husband. The plaintiff insists if she had been so abandoned, that by virtue of General Statutes, § 2794, during the continuance of such abandonment, she might sue and might be sued, as well by her husband, who had abandoned her, as by third parties. Concerning the correctness of this claim we express no opinion. The question is not properly before us, any more than the consideration, not referred to in any wise upon the trial, of the effect of General Statutes, §§ 2796, 2797, 2798; and any statement by us in regard to the matter would be merely *obiter*. But the plaintiff, asserting it, says: This being so, "a plea in abatement must anticipate and exclude what, according to the rules that govern other pleadings, it would be incumbent on the other party to reply." We think the plaintiff is wrong in this claim. *Cady* v. *Gay*, 31 Conn., 395. But, further, his demurrer, so called, raises no such question.

It is in no sense what it purports to be, a demurrer to relief. 58 Conn., 567, § 11. It is in direct contravention to General Statutes, § 873, which provides that "all demurrers shall distinctly specify the reasons why the pleading demurred to is insufficient." Even before the Practice Act, if what the plaintiff now complains of would have constituted a defect, a demurrer for such ground should have been special. The demurrer, therefore, was properly overruled.

We think the judgment for the return of the property, with costs, also correct. So far as the order for return is concerned, the judgment adds nothing to the obligation which the statute, General Statutes, § 1326, itself imposes in every case where the plaintiff in replevin for any reason fails to establish his right to possession. As to costs, courts which have no other jurisdiction of the person or cause, do possess such jurisdiction, and may exercise it in the matter of taxing costs in favor of a person properly pleading to the jurisdiction and obtaining judgment in his favor upon such plea. 1 Swift's Dig., 696. "The defendant should not suffer by being forced to come into a court having no jurisdiction of the controversy, and the plaintiff should be estopped to deny jurisdiction, so far as the question of costs is concerned." *Moran* v. *Masterston*, 11 B. Monroe (Ky.), 17; *Brown* v. *Allen*, 54 Me., 436; *Bradstreet Co.* v. *Higgins*, 114 U. S., 262; *Thomas* v. *White*, 12 Mass., 367.

This action is one of a statutory and extraordinary character. The plaintiff in replevin is furnished with a process which requires the officer to take any specified article of property from the defendant, notwithstanding he has it in possession and may be the rightful owner. To prevent the writ from working any wrong, the statute exacts, before its issue, the execution of a joint and several bond by the plaintiff and a sufficient surety, in favor of the defendant, conditioned, among other things, for the payment of any judgment for damages and costs that he may recover. This security virtually takes the place of the goods replevied, and as the plaintiff seeks what is in the nature of a judgment *in rem*, so the *res*, so far as the defendant is concerned, is after the

replevy, represented by the replevin bond. *Ormsbee* v. *Davis*, 16 Conn., 568, 576. This suit has necessarily involved the defendant in costs, which the surety on bond has severally covenanted to pay. The proper and orderly mode of ascertaining the sum for which he is liable is by final judgment in the cause. It does not lie in the mouth of the plaintiff to say that the bond, upon which he invoked and obtained the interference of the law in his behalf, is wholly void, or to embarrass a recovery against his surety, by defeating a judgment which measures the obligation assumed.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

PATRICK MURRAY *vs.* GEORGE KLINZING.

Third Judicial District, New Haven, January Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

Every deed to be effectual to convey land must be upon consideration; otherwise there will be a resulting trust in favor of the grantor. A deed in which the consideration is stated as "—— dollars," *held* to be sufficient.

Any alteration in a deed, to render it void, must be a material one; that is, one which causes the deed to speak a language different in legal effect from that which it spoke originally.

A map or diagram drawn on a deed properly admitted in evidence, in such relation to, or connection with, the descriptive words of the deed as to indicate to any reasonable person that the grantor intended it to be taken as a part of the description of the land conveyed by such deed, is itself admissible in evidence and may be treated as a part of the deed although not referred to in the deed itself.

[Argued January 17th—decided February 19th, 1894.]

ACTION for unlawful entry upon land of the plaintiff and tearing down his fence; brought originally before a justice of the peace and thence by the plaintiff's appeal to the Court of Common Pleas in Fairfield County where the court, *Curtis, J.*,

rendered judgment for the defendant and the plaintiff appealed to this court. *No error.*

The defendant admitted entering upon the land described in the complaint, but alleged that he did so as the servant and by the direction of The Danbury & Bethel Horse Railway Company, and that said company had the right to enter upon the same. The other paragraphs of his defense were as follows:

"2. On the 5th day of April, 1888, the plaintiff executed and delivered to the said Horse Railway Co., a deed with full covenants of seizin, a certain piece of land south of and adjoining the land described in the complaint, which said land was bounded and described as follows: north by a new road laid out on grantor's land, east by grantor's land, south by land of said Railway Company, and west by the highway.

"3. That under said deed the said Railway Co. went into possession of said land, and was in possession thereof at the time of the acts alleged in the plaintiff's complaint.

"4. That afterwards the new road described in said deed was opened, laid out and graded by the plaintiff, and the said Railway Company entered upon and used the same as a highway by its servants and employees.

"5. That the plaintiff is estopped from denying the right of the said Company by its servants, employees and agents to use said land so laid out as a highway."

These averments were all denied by the plaintiff.

On the trial the defendant offered in evidence the said deed dated April 5, 1888, from the plaintiff to the said railway company, in which the land conveyed was described as set out in the second paragraph of defense. The plaintiff objected to the said deed being received on the grounds:—(1) That the plaintiff never executed it; (2) that subsequent to its execution and delivery a material alteration had been made therein; and (3) that after said alteration the said deed was never re-executed. As to these objections the court found:—That the said deed was executed and delivered by the plaintiff to the said railway company; that at the time of such execution and delivery the consideration clause therein read,—

"for the consideration of dollars," etc.; that afterwards on the 8th day of April, 1888, the said blank was filled by writing in the words "four hundred and fifty-six," which sum was the real consideration paid by said railway company to the plaintiff for the land conveyed in said deed; and that this was done in the presence of the plaintiff, and with his full knowledge and consent; and accordingly admitted said deed in evidence.

The court also found that there was and is on said deed a map or diagram showing or defining the land conveyed, and describing the northern boundary as "Patrick Murray's new road." There is in said deed no reference to such diagram or map.

The defendant also offered in evidence another deed from the plaintiff to the said railway company dated the 12th day of July, 1887, in which the land conveyed is described as bounded "north by a new street to be opened by the grantor." To this deed the plaintiff objected on the ground that it had never been executed and delivered. The court found it had been duly executed and delivered and admitted it in evidence.

The court also found that the land on which the defendant entered, was the land described in said last mentioned deed as "a new street to be opened by the grantor;" and in the said first mentioned deed as "a new road laid out on grantor's land," and as "Patrick Murray's new road;" that after the giving of said deeds, to wit, in December, 1888, the plaintiff did lay out and work a new road along the northern boundary line of the land deeded by him to the railway company, by plowing and rounding the ground into the form and shape of a well-defined road, and opened the same to the public. Subsequently, to wit, about seven months thereafter, but before the public used the same, he closed the said roadway by erecting a fence across its entrance to the highway; and that the acts complained of were the using by the defendant of only so much of said premises as was sufficient to give said company a reasonable and convenient right of way along the northern boundary of the land acquired by said deeds to the highway; and that said using was in a reasonable manner.

The court found the issues for the defendant and for the defendant to recover his costs.

James E. Walsh, for the appellant (plaintiff).

I. "If a deed of land is altered in a material point even by consent of the parties after it has been executed according to the statute, it will be invalid unless re-executed." 1 Swift's Digest, side page 126. "If the alteration be material, though by consent of the parties, the deed is fatally defective without a new attestation and a new acknowledgment." *Coit* v. *Starkweather*, 8 Conn., 292; *Lewis* v. *Payn*, 8 Cowen, page 7. But the alterations are material. An alteration which makes an instrument speak a different language in legal effect is a material one. So of an alteration which changes the obligation of the parties, and the supplying of that which the law would not imply. 1 Greenleaf on Evidence, §§ 565, 566, 567. Inserting or erasing words expressive of a consideration is a material alteration. American and English Encyclopedia of Law, vol. 1, page 509. The deed as originally executed operated only as a resulting trust in favor of the grantor because it was without consideration. 1 Swift's Dig., side page 127; *Belden* v. *Seymour*, 8 Conn., 304; *Meeker* v. *Meeker*, 16 id., 386. The subsequent insertion of a consideration would make the deed an absolute one, carrying the beneficial interests to the grantee, thus changing materially the obligation of the parties and making the instrument speak a different language in legal effect.

II. But if the deeds were properly admitted they do not show an intent to grant the railway company a right of way in addition to the land conveyed which, it should be noted, is set out in exact feet and inches. In this state the question of intent is an important one, and the deeds must be construed to effectuate intent. *Bryan* v. *Bradley*, 16 Conn., 486; *Roberti* v. *Atwater*, 43 id., 545.

The defendant does not claim that the new road was a necessary appurtenance to the estate granted to the railway company. He simply claims, it seems, that because of the description in the deeds the company is entitled to the use

of the premises as a way, though such use be a mere whim or through caprice, and though the road is never opened by the grantee. Let us examine the law upon that point:

An easement may be created where there is a reference in the deed to a plan or another writing which sets out the easement, as where land is sold by reference to a plan upon which are marked out on land belonging to the grantor, streets, alleys, or public squares. *Pierce* v. *Roberts*, 57 Conn., 31; *Derby* v. *Alling*, 40 id., 410; *Taylor* v. *Hopper*, 62 N. Y., 649; *Smyles* v. *Hastings*, 22 id., 217. Unless the deed does refer to a plan made or adopted by the grantor showing the right of way no easement is given, where no way exists in fact, because of the mere recital of a way in the deed as a boundary. Washburne on Easements, page 169; *Bushman* v. *Gibbons*, 15 Neb. 676; *Hopkinson* v. *McKnight*, 31 N. J. L. 422; *Harding* v. *Wilson*, 2 B. & C. 96; *Roberts* v. *Karr*, 1 Taunt., 495; *Underwood* v. *Stuyvessant*, 19 Johns., 181; *Darker* v. *Beck*, 32 N. Y. St. Rep., 193; *Bloomfield* v. *Ketcham*, 32 N. Y. S. C. 218; *Jackson* v. *Hathaway*, 15 Johns., 454; *Wheeler* v. *Clark*, 58 N. Y., 267.

III. It is clear that the way was not in contemplation of the parties. Nor does it appear that a greater consideration was paid because of the way. To invoke an estoppel in this case would be the means of a positive gain in favor of the railway company instead of preventing fraud upon it, and this is entirely contrary to the doctrine of estoppel. *Savings Bank* v. *Todd*, 47 Conn., 219; *Kinney* v. *Whiton*, 44 id., 262. It is also very clear, from the finding, that the way was never dedicated to the public, or any use made of it by the company so as to bring the case within the ruling laid down in *Derby* v. *Alling*, 40 Conn., 410.

IV. The way must be in actual existence to give the grantee the fee to the center. *Blumer* v. *Johnson*, (Mich.) 5 West., 753; *Gaylord* v. *King*, 142 Mass., 495; 3 N. E. Rep., 90; *Kahler* v. *Kleppinger*, (Pa.) 2 Cent. Rep., 525; *Jackson* v. *Hathaway*, 15 Johns., 447.

V. The map or diagram was not admissible. There is nc reference to the deed in such diagram. Nor did the defend-

ant show or even claim that the diagram was made by and with the knowledge and consent of the plaintiff. The defendant can claim no right by virtue of the plan unless he shows this. An unrecorded plot referred to in a deed must be identified as the one to which reference is made. *Weld* v. *Brooks*, 152 Mass., 297; *Bloomfield* v. *Ketcham*, 32 N. Y., S. C., 218. But in this case the deed did not even refer to a plan; *a fortiori* should this plan be totally disregarded where it is not even shown to have been made or adopted by the plaintiff, or placed on the back of the deed with his knowledge or consent.

Benezet A. Hough, for the appellee (defendant).

I. It is the undisputed law of the land that when the language used in bounding land conveyed by deed is "bounded by the street," or "bounded by the highway," the grantee takes the fee to the center of the street or highway. *Bingham* v. *Potter*, 52 Conn., 252; *Goodyear* v. *Shanahan*, 43 id., 204; *Geer* v. *Barnum*, 37 id., 23, etc. In this case, however, the northern boundary to the land conveyed is described as, "North by a new street to be opened by the grantor," "North by a new road laid out in grantor's land," "North by said Patrick Murray's new road." And if the way is laid down on a plan referred to in the deed, it carries the right of having it kept open for the use of the granted land. *Stark* v. *Coffin*, 105 Mass., 330; *Falls* v. *Rees*, 74 Penn. St., 439; *Lewis* v. *Beattie*, 105 Mass., 410. The same doctrine is laid down in Devlin on Deeds, Vol. 2, § 1023, etc. *Smyles* v. *Hastings*, 22 N. Y., 217; *Smith* v. *Lock*, 18 Mich., 56; *Walker* v. *City of Worcester*, 6 Gray, 548; *Pierce* v. *Roberts*, 57 Conn., 31.

The plaintiff claims that whatever rights the grantee may have acquired have been lost by nonuse. The case of *Smyles* v. *Hastings*, *supra*, is a conclusive answer to this claim. See also *City of Hartford* v. *N. Y. & N. E. R. R. Co.*, 59 Conn., 250.

II. The deed was properly admitted. The objections to its acceptance are: 1. That Patrick Murray never executed

it. The court finds as a fact that he did execute it. 2. That subsequent to its execution and delivery a material alteration had been made therein.

We answer: 1. That said alteration was not material. It consisted in filling-in in the blank space left for the purpose, the consideration, viz.: the words "four hundred and fifty six." The consideration is not a material part of the deed. If no consideration were named, or if the actual consideration were not stated, it could be proved by parol. But if it were material, Swift's Digest, Vol. 1, side page 123, says: "Formerly it was holden that where blanks were left in an obligation in a material place, if they were filled up, even with the assent of the parties, after the execution of the instrument, the obligation was void; but this opinion has been overruled, and it is now settled that such blanks may be filled with the assent of the parties." The blank in this case was filled by an attorney of the grantee in the presence of the plaintiff, and with his full knowledge and consent; and the plaintiff reacknowledged the same at said time, in manner and form as appears on said Exhibit "B."

III. Again, the plaintiff is estopped from denying the rights claimed by the defendant. At the time of the conveyance of the property to the grantee, the plaintiff represented in the language of his deeds that the adjoining property, which was his, was to be a road, a street open to the public use, that the grantee would have the full benefit of such a use of the adjoining land. The value of the property was thus enhanced. It was an additional inducement to the paying of the purchase price. He cannot now in justice take away from and deprive his grantee of the rights and privileges purchased.

The doctrine of estoppel is plainly applicable. See *Parker* v. *Smith*, 17 Mass., 411.

ANDREWS, C. J. Most of the questions raised at the trial by the plaintiff's counsel are settled by the finding of facts. Only two remain for this court to examine. The first of these is whether the writing in of the consideration in the

deed of April 5th, 1888, was a material alteration which rendered that deed void.

Every deed which is effectual to convey land must be upon consideration. Thus it is stated in Blackstone's Commentaries, Vol. 2, at page 296, where the requisites of a deed are mentioned:—"Secondly, the deed must be founded upon good and sufficient consideration. * * * A deed also, or other grant, made without any consideration, is, as it were, of no effect; for it is construed to enure, or to be effectual on y to the use of the grantor himself." But the deed of April 5th, was upon a consideration sufficient to rebut a resulting trust. The word "dollars" without any numbers prefixed is enough for that purpose.

An alteration to a deed, to render it void, must be a material one; that is one that causes the deed to speak a language different in legal effect from that which it spoke originally. 1 Greenleaf Ev., § 565. The necessity of a consideration in a deed is to prevent a trust resulting in favor of the grantor, and one valuable consideration does this as well as another. Changing the amount of the consideration does not cause the deed to speak a language differing in its legal effect. Such an alteration is not a material one. *Belden* v. *Seymour*, 8 Conn., 304; *Meeker* v. *Meeker*, 16 id., 387; *Vose* v. *Dolan*, 108 Mass., 155. In many cases after delivery blanks may be filled up so as to complete the grantor's intention. *Devin* v. *Himer*, 29 Iowa, 297; *Clark* v. *Allen*, 34 id., 190; *Field* v. *Stagg*, 52 Mo., 534; *Waugh* v. *Bussell*, 5 Taunton, 707; *Eagleton* v. *Gutteridge*, 11 M. & W., 465; *West* v. *Seward*, 14 id., 47.

The second is whether the court erred in treating the map on the deed as a part of the description of the land therein intended to be conveyed. The court so treated the map and held that the plaintiff had conveyed to the railway company the right to a highway on the north side of its land. The plaintiff's counsel admits that such a course would be correct if there had been in the deed an express reference to the map. But he insists that in absence of such a reference it was error for the court to do so. We are not able to agree with the

counsel. Where a map or a diagram is drawn on a deed in such relation to or connected with the words of the deed as to indicate to any reasonable person that the grantor intended it to be taken as a part of the description, then no reference is needed. It is entirely a question as to what the grantor intended to convey. If the map is on another paper a reference might be necessary in order to identify it. When the map is on the deed itself, the court of necessity must examine it and from it taken together with the words of description determine what the deed conveys.

There is no error.

In this opinion the other judges concurred.

ANNIS J. LORD *vs.* FRANK R. RUSSELL.

Third Judicial District, New Haven, January Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

In an action by the payee against the maker of a promissory note it is unnecessary to allege in express terms the execution and delivery of the note by the defendant. It is sufficient if the pleader follows the appropriate form given in the Practice Act.

Where the note itself was set out in the complaint it showed on its face that it had been executed by the defendant; while the averment that the note was the property of the plaintiff implied a delivery to her.

No pleading is insufficient for the want of a direct allegation of a fact if the fact otherwise sufficiently appears; nor if the fact is necessarily implied from other averments.

[Submitted on briefs January 19th—decided February 19th, 1894.]

ACTION by the payee of a promissory note against the maker; brought to the City Court of New Haven and tried to the jury before *Cable, J.*; verdict and judgment for the plaintiff and appeal by the defendant. *No error.*

The first count of the complaint, and the only one now material, was as follows:

"1. On May 29, 1886, the defendant by his note promised

to pay to the order of Annis J. Lord six hundred dollars six months after date, at the office of Henry E. Pardee, New Haven: Value received.

"2. Said note is now the property of the plaintiff, and the same has not been paid except twenty-five dollars.

"The plaintiff claims $1,000 damages."

The defendant moved for a more particular statement and that the note should be filed. This motion was granted and the plaintiff amended the complaint by setting out the note as follows: "$600. New Haven, Ct., May 29, 1886. Six months after date I promise to pay to the order of Annis J. Lord six hundred dollars at the office of Henry E. Pardee. New Haven, Conn. Value received. Frank R. Russell."

To the complaint as amended the defendant demurred, "because it does not aver the execution or delivery by the defendant of the note therein set forth." The trial court overruled the demurrer, and this is the only assignment of error urged in this court.

Jason P. Thompson, for the appellant (defendant).

John F. Wynne, for the appellee (plaintiff).

ANDREWS, C. J. We think there was no error. The note itself being made a part of the complaint showed on its face that it had been executed by the defendant. The form is the same as that used in the Practice Act; form 212. The averment that the note was the property of the plaintiff implied a delivery to her. It is a rule of pleading that there need be no direct allegation of a fact which otherwise sufficiently appears; nor of a fact necessarily implied from the other averments. 1 Chitty Pleading, 225. Bliss on Code Pleading, § 176. The delivery, even of a deed, although essential to its validity, need not be averred in pleading. 1 Chitty Pleading, 365. New Conn. Civil Officer, p. 13. *Prindle* v. *Caruthers*, 15 N. Y., 425; *Keteltas* v. *Meyers*, 19 id., 231; *Farmers & M. Bank* v. *Wadsworth*, 24 id., 547. A court ought not to misunderstand or refuse to comprehend the or-

dinary import of the words used, nor the meaning of the facts alleged. *Colburn* v. *Tolles*, 13 Conn., 524; *Draper* v. *Moriarty*, 45 id., 476.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

Aaron P. Mallory *vs.* The Town of Huntington.

Third Judicial District, New Haven, January Term, 1894. Andrews, C. J., Torrance, Fenn, Baldwin and Hamersley, Js.

The plaintiff and the selectmen acting on behalf of the defendant town were unable to agree as to the amount of special damage the former had sustained to his land adjoining a highway by reason of a change of grade therein made by the town, and accordingly submitted the question to arbitrators, who heard the parties and made an award requiring the town to pay the plaintiff $740 damages. The town declined to comply with the award and the plaintiff brought suit upon the arbitration agreement. The defendant demurred to the complaint, the demurrer was sustained and the plaintiff appealed. *Held*:—

1. That the selectmen by virtue of their general authority to act for the town were authorized to submit the claim in question to arbitration.
2. That such submission was not a delegation of the authority vested in the selectmen as agents, but was rather an exercise of that authority by proper and legitimate means.
3. That claims might arise which neither the selectmen nor the town could submit to arbitration, on account of the legal incapacity of the town to incur any liability for the payment of such claims.
4. That the provisions of §§ 2703 and 2706 of the General Statutes, establishing a special proceeding for ascertaining the amount of the special damages for which the town in such a case is liable, prescribe the only way in which the town can act *in invitum*, but do not make such statutory proceeding essential to the liability of the town, nor prohibit the town from settling such liability by agreement with the landowner, either through direct negotiation or submission to arbitration.
5. That while it is true the selectmen act as the agents of the law in laying out a highway, since the town in its corporate capacity cannot be said to lay it out, yet, after this is done, the town becomes a party to further proceedings affecting its interests, and in such proceedings the selectmen act as the agents of the town.

The case of *Griswold* v. *North Stonington*, 5 Conn., 367, in so far as it denies the right of selectmen to prosecute and defend suits without special

authority from the town, and the authority of selectmen to bind the town by arbitration because they are not authorized to prosecute and defend suits, must be considered as overruled.

[Argued January 19th,—decided February 19th, 1894.]

ACTION to recover damages for the neglect and refusal of the defendant to pay the plaintiff the sum awarded him by arbitrators, upon his claim for special damages sustained by a change of grade of a highway in the defendant town; brought to the Superior Court in Fairfield County, and tried to the court, *Ralph Wheeler*, *J.*, upon defendant's demurrer to the complaint; the demurrer was sustained, and judgment rendered for defendant, and the plaintiff appealed. *Error and judgment reversed.*

The case is sufficiently stated in the opinion.

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

I. The plaintiff at the time of the execution of the arbitration agreement, had a legal claim against the town of Huntington for special damages sustained by him by the change of the grade of said street, and the town of Huntington also had a claim against him for any special benefits accruing to his property by reason of said change of grade. At the outset, therefore, these parties had legal claims one upon the other. How could they be settled? The statute says that if they cannot agree that the selectmen shall apply to a judge of the Superior Court for the appointment of a committee, etc. Could they not also select a committee themselves, without the expense, delay and annoyance of having to apply to a judge to do it for them? The selectmen, by statute, are charged with looking after the concerns of the town. The settlement of *a legal claim* against the town is one of its concerns; likewise is the settlement of a legal claim which the town has against an individual.

Arbitration has always been favored by the courts as a speedy, economical and satisfactory method of adjusting disputes. *Hine* v. *Stephens*, 33 Conn., 504.

The strict construction of the statute as to selectmen's powers laid down in *Griswold* v. *North Stonington*, 5 Conn.,

367, was substantially overruled in *Hine* v. *Stephens*. See also, *Union* v. *Crawford*, 19 Conn., 331; *Haddam* v. *East Lyme*, 54 id., 38.

It cannot well be said that in these days our selectmen cannot submit a legal claim against the town, or in its favor, to arbitration. It is in the interest of the town, and of the property owner as well, that any matter in dispute may be adjusted with as little delay and expense as possible.

II. The proceeding provided by statute is not exclusive of all other remedies. *Healey* v. *New Haven*, 49 Conn., 394; *Holley* v. *Torrington*, 63 id., 426. Neglect on the part of the selectmen to pursue the statutory remedy gives us the right to sue. Refusal to pursue the statutory remedy gives us the same right. Why shouldn't both neglect and refusal to act and the substitution of some other method give us the same right? There is no legal distinction between neglect and refusal to act and action taken in another way in a case of this character.

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

I. Did the selectmen have power or authority, as such, and by virtue of their office, to make the contract in question so as to bind their town?

At common law the plaintiff would have no claim against the town for damages sustained by a change in the grade of a highway. *Fellows* v. *New Haven*, 44 Conn., 240. His right of action, therefore, rests entirely upon § 2703 of the General Statutes. It appearing from the complaint that the selectmen could not agree with the plaintiff, it would seem that the statute made their duty clear and imperative, and limited them in their authority and power to the procedure clearly pointed out for them to adopt in such a case. "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.*" *Pinney* v. *Brown*, 60 Conn., 169. It should be observed that this is an *action at law to enforce a contract* which the selectmen undertook to

enter into instead of following the *plain* and *imperative* provisions in the statute in the premises.

The selectmen in their relation to this subject-matter were the *agents of the law* and of the public, and not of the town, and their duties and powers were clearly circumscribed by the plain terms of the statute. In *Leavenworth* v. *Kingsbury*, 2 Day, 323–327, it is held that: "The selectmen of a town are not authorized by virtue of their office merely to make a settlement of the claims of the town." But the court says: "Granting that the selectmen had this power, we contend that they could not *delegate* it." In the case of *Tomlinson* v. *Leavenworth*, 2 Conn., 292, it was held that the selectmen in removing the encroachments upon the highway were "not constituted the agents of the town, but of the public, or, of the law; and they can have no claim on the town for their services, without the express provision for that purpose. Further, the statute has provided a mode by which they are to be reimbursed their expense; and this precludes any right to demand it of the town." In the case of *Griswold* v. *North Stonington*, 5 Conn., 367–370, it was held that "selectmen are not empowered *virtute officii*, to submit to arbitrament a question regarding the settlement of a pauper, which involves the right or liability of the town." At that time the statute empowered the selectmen "to take care of and order the prudential affairs of the town."

See also, *Union* v. *Crawford*, 19 Conn., 331. It will be observed that this case casts no reflection on *Griswold* v. *North Stonington*, and no suggestion is made of any authority to submit to arbitration. The case of *Hine* v. *Stephens*, 33 Conn., 497, did not decide the point now raised. In the case at bar the selectmen did not adopt the decision of the arbitrators as their own judgment, so that it could be said the terms became theirs in any sense. *Healey* v. *New Haven*, 49 Conn., 394, did not hold that the *city or its officers* could do anything with reference to the adjustment of the damage, on failing to agree, except what the statute pointed out for them to do. *Hoyle* v. *Putnam*, 46 Conn., 56–62; *Clark* v. *City of Des Moines*, 19 Iowa, 199 (87 Am. Dec. 423); *McDonald* v. *The Mayor*, 268

N. Y. 23 (23 Am. Rep. 144); *Zottman* v. *San Francisco*, 20 Cal. 96 (84 Am. Dec. 96); *Ladd* v. *Franklin*, 37 Conn., 53; *East Hartford* v. *Bank*, 49 id., 539; *Savings Bank* v. *Winchester*, 8 Allen, 109. Selectmen in laying out highways are agents of the law rather than of the town. *Torrington* v. *Nash*, 17 Conn., 197; *Bristol* v. *Water Co.*, 42 id., 403; *Haddam* v. *East Lyme*, 54 id., 34; *Turney* v. *Bridgeport*, 55 id., 412; *Dibble* v. *New Haven*, 56 id., 199; *Daniels* v. *New London*, 58 id., 156; *Pinney* v. *Brown*, 60 id., 164.

II. Did the town so far acquiesce in or ratify and adopt the action of the selectmen as to make the award binding upon it?

The fees and expenses of the arbitrators, witness fees and other expenses, were paid by orders of the selectmen on the town treasurer, and afterwards the "town at a legal meeting of said town voted to accept and approve the action of the selectmen in paying said expenses." It does not appear that the meeting was called for the purpose of taking into consideration in any way the payment of "said expenses." *Hayden* v. *Noyes*, 5 Conn., 391; *Wright* v. *North School District*, 53 id., 576; *Woodward* v. *Reynolds*, 58 id., 486. Certainly no intimation of approval of the action of the selectmen in making the submission or of acquiescence in or adoption of the award, appears in the case.

"Any claimed ratification of previously unauthorized acts of such agent must be done by the town in a lawful manner, and as a rule, directly and not by implication, and must be made with full knowledge of all material facts. *Turner* v. *Bridgeport*, 55 Conn., 415–418.

III. Could the town by a vote in a town meeting duly called for that purpose have authorized the submission to arbitration?

A liability is created by statute, and so far forth as any action in behalf of the town is concerned, *clear, express and imperative* provisions are made for ascertaining the extent or amount of that statutory liability. *Abendroth* v. *Town of Greenwich*, 29 Conn., 363; *New London* v. *Brainard*, 22 id.,

552; *Webster* v. *Harwinton*, 32 id., 131; *Booth* v. *Woodbury*, 32 id., 118–124; *Burritt* v. *New Haven*, 42 id., 174–196.

HAMERSLEY, J. The town of Huntington changed the grade of a public highway situated within the town, and by reason of such change of grade the plaintiff, who was the owner of the land adjoining the highway, sustained special damage to his property. Under the provisions of § 2703 of the General Statutes the town became liable to pay the plaintiff the amount of such special damage.

The selectmen of the town and the plaintiff were unable to agree upon the amount of damages due, and submitted to arbitrators the difference between the town and the plaintiff as to such amount. The arbitrators made an award requiring the town to pay the plaintiff $740; the town neglected and refused to comply with the award, and the plaintiff brings this suit against the town upon the arbitration agreement.

In the court below the defendant demurred to the complaint; the demurrer was sustained and judgment rendered for the defendant; from this judgment the plaintiff appeals.

No question is now raised as to the plaintiff's right to recover, if the selectmen had legal authority to submit to arbitration the questions of difference between the town and the plaintiff as to the amount of damages. The defendant claims that the selectmen did not have such legal authority, and that his demurrer was, therefore, properly sustained. This claim is based on two propositions, either of which being sound is sufficient to support the claim.

The first proposition is: Selectmen by virtue of their general authority to act for their town are not authorized to settle a claim against the town by means of a submission to arbitration. This proposition rests upon the authority of *Griswold* v. *North Stonington*, 5 Conn., 367. The precise question determined in that case was that selectmen *virtute officii* are not empowered to submit to arbitrament a question regarding the settlement of a pauper which involves the right or liability of the town. The court, however, announced

the general proposition that selectmen cannot bind the town by arbitration, and deduced this proposition mainly, if not wholly, from the assumption, which the court treated as settled law, that selectmen cannot without special authority act for the town in the prosecution and defense of suits. So that the main *ratio decidendi* of this case is the necessity of special authority to enable selectmen to prosecute and defend suits in behalf of their town; if the court had held that the law vested in selectmen general authority to prosecute and defend suits, it is not certain that they would have reached the same result on the precise question determined, and it is hardly possible they would have announced the general proposition that selectmen have no authority to bind their town by arbitration.

In *Union* v. *Crawford*, 19 Conn., 331, this question was again before the court. Upon full argument and for the express purpose of settling the question, the court held that the selectmen of a town, by virtue of their general powers as selectmen and without the delegation of any special authority for the purpose, have a right to prosecute and defend suits to which their town is a party. The practice authorized by this opinion has been followed for nearly fifty years; and the fact that during that period the legislature has not altered the statute conferring general powers upon selectmen, which this case construed, is a strong indication that the construction of the court expressed the real legislative intent. So far, therefore, as *Griswold* v. *North Stonington*, and some earlier cases, deny the right of selectmen to prosecute and defend suits without special authority from the town, and so far as those cases deny the authority of selectmen to bind their town by arbitration because they are not authorized to prosecute and defend suits, the cases must be considered as overruled.

The relations of selectmen to their town in prosecuting or defending a suit are quite different from those of an attorney-at-law to his client. In the case of selectmen, by force of the statute authorizing them to "superintend the concerns of the town, adjust and settle all claims against it and draw

orders on the treasurer for their payment," they represent the town in relation to the whole of the subject-matter; as representatives of the town they are authorized (in the absence of special direction) to decide whether to bring or defend suit, whether to make a settlement before suit or pending suit, and to draw orders on the town treasurer in payment of the claim as settled by them. It would seem clear that under such authority it is within their power to settle the subject-matter committed to their charge by arbitration as well as by an action at law. It is claimed that their authority is a delegated authority in the nature of a personal trust which they cannot delegate to others. The principle invoked is sound and should be accurately observed; but it is not pertinent to the case. The authority delegated to selectmen necessarily involves the authority to employ agents, where such employment is a proper and the ordinary mode of executing the authority. The authority delegated to selectmen to keep highways in repair does not require them to do the manual work on the roads, or personally to select the laborers; the employment of agents for such purposes is not the delegation of their authority within the meaning of the law; it is rather the exercise of their authority by proper and legitimate means, and is a very different thing from delegating to another the whole subject-matter of keeping the roads in repair, vesting in him their authority, discretion and responsibility.

So in the matter of litigation, the authority vested as a personal trust in the selectmen is the superintendence and disposition of claims in favor of and against their town, according to their best discretion; that authority they cannot delegate; but the bringing or defending a suit is one means of executing that authority, and the submission to arbitration is another means. Arbitration is as truly a lawful means of determining controversies as an action at law, and at the request of the parties the law lends to the arbitrators the machinery of the court, so that the award of the arbitrators becomes a judgment enforced by execution. Even when a suit is pending, the court will, upon request of the parties,

substitute the arbitrators for judge or jury, and then enforce the award by judgment and execution. It is idle to deny that the law of this State recognizes submission to arbitration, whether by rule of court or not, as a proper and lawful means of settling disputes; and the selectmen in submitting a case to arbitration cannot be said to delegate to the arbitrators that authority and discretion which they exercise in a proper and usual manner by the very act of submission. A delegation of the personal trust to use their best discretion in protecting the interests of the town committed to their charge, cannot be affirmed in the case of submitting a question to arbitration any more than in the case of bringing a suit for the determination of the same question; in both cases they do not delegate, but exercise their authority, using in each case a proper, lawful and usual means of exercising such authority.

The powers of a conservator are conferred and limited by the statute. He has no legal interest in the estate of his ward. In *Hutchins* v. *Johnson*, 12 Conn., 376, this court held that a conservator may submit to arbitration the claims of his ward, and was evidently influenced in reaching that conclusion by the fact that the conservator was authorized to settle and adjust claims and to institute suits. In *Hine* v. *Stephens*, 33 Conn., 497, this court expressed the opinion that selectmen may submit claims against their town to arbitration, although the case was decided on another point. We think the opinion expressed in *Hine* v. *Stephens* is correct, and we are satisfied upon principle that the general authority vested in selectmen by § 64 of the General Statutes, justifies them in submitting to arbitration a claim against their town which they are authorized by law to settle and pay. In making such a submission the selectmen do not exceed the authority given them by statute and do not delegate that authority to others.

This statement of the law is made in view of the facts in this case, and is not necessarily applicable to conditions not clearly analogous; the powers of the town and selectmen are determined by so many different statutes, involving so many

limitations, that there is special need in any statement of such powers, to keep in mind the safe and sound rule that all general statements of law in the opinion of the court, may be limited as authority by the particular circumstances of the case to which the law stated is applicable. And it well may be that some matters which individuals can lawfully submit to arbitration cannot be so submitted by selectmen, even with special authority from their town, for the reason that the submission may involve an agreement on the part of the town to pay a liability which, under the law, it is incompetent to incur.

The second proposition of the defendant in support of his claim is, that the statute prescribes a particular method for ascertaining the amount of damages the town is liable to pay, and therefore makes any other method of ascertainment illegal.

Section 2703 of the General Statutes provides that:—"When the owner of land adjoining a public highway, * * * shall sustain special damage or receive special benefits to his property by reason of any change in the grade of such highway by the town * * * in which such highway may be situated, such town * * * shall be liable to pay to him the amount of such special damage, and shall be entitled to receive from him the amount or value of such special benefits, to be ascertained in the manner provided for ascertaining damages and benefits occasioned by laying out or altering highways therein."

Section 2706 provides that:—"If the selectmen of any town, and any person interested in the layout, opening, grading, or alteration of any highway * * * therein, cannot agree as to the damages sustained by, or the benefits accruing to, such person thereby, the selectmen shall apply to any judge of the Superior Court, who, having caused reasonable notice to be given to the parties interested, shall appoint a committee of three disinterested electors, to estimate, etc., and report their doings to the Superior Court." Further sections provide for a remonstrance by any party interested, for a re-

assessment under specified circumstances by a special jury of six, and for final order and judgment of the Superior Court.

The defendant claims that the plaintiff had, at common law, no claim against the town for damage done by a change of grade, and, therefore, his right of action rests entirely upon the statute; and that the statute having prescribed a peculiar process for ascertaining the damages, they can be ascertained in no other way.

It is fully established in *Healey* v. *City of New Haven*, 49 Conn., 394, that the right created by the statute and the corresponding liability is absolute, irrespective of the method provided for ascertaining the amount of damages. The statute gives to the party injured an absolute right; it imposes upon the town an absolute liability; it also provides a mode for ascertaining the amount of damages which the town may and should follow, and which is the only way by which the town can act *in invitum;* but this provision does not otherwise affect the liability of the town or the right of the plaintiff. The town cannot institute the statutory process until it has exhausted the resources of negotiation to settle the liability, and if it then neglects to proceed under the statute, the liability remains and the party injured is entitled to his action at law.

This case does not come within the rule that where a statutory right depends upon the performance of specified acts, the statutory requirements must be strictly complied with before the right can have a legal existence. Here the right of the party aggrieved, as well as the liability of the town, is in full legal existence the moment the change of grade is made by the town in the exercise of its general powers over highways; nor does the case come within the rule that when a peculiar process for the enforcement of a right is prescribed by statute, and such process is exclusive, either by express terms of the statute or by necessary implication, the right can be enforced in no other way, and the jurisdiction given by the statute can only be exercised in strict conformity with the statutory regulations.

In *Avery* v. *Town of Groton*, 36 Conn., 304, this court held

that upon the application of the town for the assessment of damages under a statute similar to the one in question, the town was bound by its agreement to try the case before a jury of five instead of the jury prescribed by the statute. Possibly this case may indicate that the statute is not one of that exclusive character where jurisdiction under the process prescribed depends upon strict compliance with every statutory requirement; but, however that may be, it is clear that the statutory process for ascertainment of damages is not, either by express terms of the statute or necessary implication, exclusive of other methods of settling the controversy.

The question between the parties is simply the amount of a legal liability. As we have seen, this liability does not grow out of and is not dependent upon, the statutory process for ascertaining the amount. The question may be settled, like all differences as to legal liabilities, by agreement. In fact, the statutory process cannot be invoked until agreement has failed, and it is noticeable that the language of the statute does not purport to authorize the agreement, but plainly assumes that such settlement is merely the exercise of a common law right; and the right to damages may be enforced by suit if the statutory process is not followed. But the right of the party aggrieved to collect his claim by suit, in case the statutory process is not followed, or the right of the parties to settle their differences by agreement, is no more a plain legal incident to the existing liability, than the right of the parties to settle such differences as they may other differences, by agreement upon arbitration.

The statutory process as originally enacted was simply a compulsory process given to the town to enable it speedily to ascertain the amount of compensation due for land taken for public use, so that as little delay as possible might intervene between the condemnation of the land and its occupation for public use; and for this reason the statute, in imperative language, imposes upon the selectmen the duty of instituting such process. The character of the statute as originally enacted has not been changed by including assessments for benefits and damages for change of grade within its provisions.

The statute was not intended to, and does not, restrain the town from settling its liability to pay damages for the land taken by agreement; on the contrary, the town is denied the benefit of the compulsory process until agreement has failed. It cannot be legally claimed that such a statute, by necessary implication, restrains parties from exercising their right to come to an agreement, by submitting their differences to arbitration, and so accomplishing the very purpose for which the statute was framed. Such a claim would not be made if the statute referred to an individual instead of a town, and therefore has no force unless the town cannot legally submit such a question to arbitration.

It thus becomes apparent that the defendant's claim that the statute giving the town compulsory process for the ascertainment of the amount of its liabilities, restrains the town from submitting the question to arbitration, must rest upon the claim that the town itself, for causes independent of the statute, is incompetent to submit such a question to arbitration. This claim is not correct for reasons already indicated. The power of a town to arbitrate the amount of a liability it is authorized to incur and bound to pay is unquestioned. The liability to pay damages for land taken for a public highway or caused by a change of grade in such highway, is a liability the town is authorized to incur and bound to pay. It may, therefore, settle such liability by arbitration unless restrained by the statute; for the reasons stated, it is not so restrained.

The defendant also urges that in the matter of laying out highways the selectmen do not act as agents of the town, but as agents of the law, and therefore cannot bind the town by arbitration. In laying out a town highway the selectmen do act as agents of the law, in the sense that the town in its corporate capacity cannot be said to lay out the highway. *Torrington* v. *Nash*, 17 Conn., 197. But when the highway is laid out, the town, by reason of its liability to pay the damages, build the highway and maintain it in repair, becomes a party to the further proceedings; and in such proceedings relating to the protection of the interests of the town and de-

termining the amount of its liability, the selectmen must act as the agents of the town. *Plainfield* v. *Packer*, 11 Conn., 576; *Baker* v. *Town of Windham*, 25 id., 597; *Gifford* v. *Town of Norwich*, 30 id., 35. The law would not require the selectmen to agree with a party to whom the town is liable in damages, upon the amount of such damages, unless, in negotiating such agreement, the selectmen acted as agents of the town. Moreover, in this case we are not dealing with the layout of a highway but with a change of grade; and in a mere change of grade the town acts wholly in its corporate capacity, and in settling the damages caused by such change the selectmen, by virtue both of the general and special power given them by statute, act as agents of the town.

The demurrer alleged defects in the complaint of a technical nature, and which can be cured by amendment, if they are demurrable defects; but neither the plaintiff in his reasons of appeal, nor the defendant in argument, referred to such questions, and we have not considered them.

As the arbitration agreement entered into by the selectmen was within their authority, the question of ratification which was discussed in argument, becomes immaterial to the decision of the case.

There is error, and the judgment of the Superior Court is reversed.

In this opinion the other judges concurred.

THE YALE GAS STOVE CO. *vs.* JEDEDIAH WILCOX ET UX.

JEDEDIAH WILCOX *vs.* JOHN B. FOLEY.

Third Judicial District, New Haven, January Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

A secret contract between the owner of property and one who undertakes to, and does, organize a joint stock company for its purchase, at a sum much larger than the owner stood ready to take, whereby it is agreed

that the avails of such sale (which in this case was accomplished by the aid and influence of said parties, as stockholders and directors in said company), should be divided between them, is opposed to public policy and is illegal; and the promoter cannot maintain an action against the owner to recover the value of his alleged share of such avails.

Moreover the company, upon discovery of the fraud practised upon it, may sue and recover of such parties the secret profits obtained by them in the transaction, though no offer of rescission is made by the company, and notwithstanding the property purchased is worth as much or more than was paid for it.

The maxim that "he who comes into equity must come with clean hands," refers solely to willful misconduct in regard to the matter in litigation; not to some other transaction although indirectly connected with the subject-matter of the suit.

The word "promoter" is a business, rather than a legal, term; and sums up in a word business operations familiar to the commercial world by which a company is generally brought into existence. Such a person occupies a fiduciary relation towards the company or corporation whose organization he seeks to promote.

The law does not prohibit a promoter from dealing with his company; but if he does so he is bound to see that the transaction in all its parts is open and fair; suppression, concealment, or misrepresentation of material facts is fraud, upon proof of which rescission of the contract or repayment of the secret profits will be compelled; a promoter cannot act both as vendor and vendee, and in the latter capacity approve a transaction suggested by him in the former.

[Argued January 24th—decided February 19th, 1894.]

THE first of the above-named cases—the *Yale Gas Stove Co.* v. *Wilcox and wife*—was an action to recover damages and also for equitable relief, for fraud alleged to have been practised upon the plaintiff by the defendant, Jedediah Wilcox, in the sale of certain letters patent; brought to the Superior Court in New Haven County and tried to the court, *F. B. Hall, J.;* facts found and case reserved for the advice of this court. *Judgment advised for the plaintiff.*

The second case—*Wilcox* v. *Foley*—was an action to recover damages for the breach of a contract relating to the sale of the aforesaid letters patent; brought to the Superior Court in New Haven County and tried to the court, *F. B. Hall, J.;* facts found and case reserved for the advice of this court. *Judgment advised for the defendant.*

The two cases, which involved parts of one transaction,

were heard together in the Superior Court, and but one finding of facts was made, covering both cases. They were also argued together in this court. The finding of facts is as follows:

"In December, 1889, John B. Foley, being the owner of certain valuable patents for inventions in gas stoves, which he was desirous of disposing of, offered in a conversation with Jedediah Wilcox to sell said letters patent for the sum of $2,500. The said Wilcox, believing said letters patent to be valuable, and having had experience in the organization of joint stock companies for similar purposes, proposed to said Foley the organization by said Wilcox of a joint stock company for manufacturing gas stoves under said patents, the sale to such company of said letters patent, and a division between said Foley and Wilcox of the avails of such sale. Said Wilcox, after interviews with various persons, believing that he could organize such a joint stock company for the purpose of carrying out said plan of organizing such company to manufacture said stoves, under said patents, and of selling such letters patent to such company, and dividing between himself and Foley the avails of such sale, on the 14th day of January, 1890, entered into the following agreement with said Foley:

"This agreement, entered into this 14th day of January, 1890, by and between John B. Foley, of the town and County of New Haven, and State of Connecticut, of the first part, and Jedediah Wilcox of said town and county, of the second part, Witnesseth as follows:

"Whereas, said John B. Foley is the owner of letters patent of the United States of America, dated the 30th day of August, 1887, and numbered 368,938 for improvements in gas stoves, and he is also the inventor of a certain other improvement in gas stoves, for which he has applied for letters patent of the United States by application, filed the 14th day of November, 1889, and serial number 330,244;

"And whereas, said Jedediah Wilcox is desirous of owning one half part of the letters patent, and of the invention and improvements above described:

"Now, therefore, in consideration of the covenants hereinafter contained, and of one dollar, and other valuable considerations, the said Jedediah Wilcox hereby covenants and agrees with said John B. Foley, and with his heirs and assigns, that he, together with his associates, will forthwith, and within a reasonable time, organize a joint stock company, under the statute laws of the State of Connecticut, for the manufacture and sale of gas stoves, containing the improvement described, and secured by said letters patent of the United States, and to be secured.

"And said Wilcox also agrees to cause to be paid to said Foley the sum of three thousand dollars in cash upon the organization of said company, and also five thousand dollars of the capital stock of the company above described.

"Said John B. Foley, his heirs and assigns, hereby covenants and agrees with said Jedediah Wilcox, and with his heirs and assigns, that upon the execution of his covenants, herein above described, he will assign and transfer by written conveyance one half of the letters patent above described; also, one half of the invention and improvements in gas stoves, for which application for letters patent has been made, and of any letters patent which may be issued for said improvements; and also, that he will assign to said Wilcox one half of any future improvements which he may hereafter invent in gas stoves while he is associated with him in the gas stove business; and also, one half of any letters patent which may be issued to him for any of the improvements above mentioned, invented while so associated with him in said gas stove business, or any reissue thereof.

"Said Foley also covenants and agrees to give said Wilcox one half of the three thousand dollars cash, as soon as received, and one half of the five thousand dollars of the capital stock of said company, as he shall receive it.

"Said Jedediah Wilcox also hereby agrees to subscribe for one thousand dollars par value of the capital stock of said proposed company, and to pay for the same as called for by the directors thereof.

"And said John B. Foley hereby agrees to take one half

of said one thousand dollars worth of stock when issued, and to pay to said Wilcox therefor one half of what said one thousand dollars worth of stock shall have cost him.

"And said John B. Foley hereby also agrees to unite with said Wilcox in the execution of all necessary papers giving to the proposed company, and to all other companies organized for similar purposes, the full right to manufacture and sell gas stoves, containing the improvements secured by all the letters patent above described, whenever so requested by said Wilcox.

"In witness whereof we have hereunto set our hands the day and year above written.

[Signed] "JOHN B. FOLEY,
"JEDEDIAH WILCOX.

"Signed and delivered in the presence of
"JULIUS TWISS."

"The said Wilcox performed the work of procuring subscribers for the stock of the contemplated company, and of organizing said company, and carrying out said plan for the sale to said company of said letters patent. It was agreed between said Wilcox and Foley that said agreement and arrangement between themselves, that said Wilcox should receive a share of the avails of the sale of said patents to said company, should be kept secret. The plan for the organization of such company, and which was stated by said Wilcox to those whom he solicited to subscribe for the stock of said company, and who became the stockholders of said company, and upon which said company was organized, was as follows:

"The capital stock of the company was to be $30,000, divided into 600 shares of $50.00 each. There were to be ten subscribers of said stock, of whom said Wilcox was to be one, each of whom was to subscribe for twenty shares, and to pay in $600 in cash. After the organization of the company the company was to purchase of Foley the said letters patent, paying him therefor $3,000 in cash, and issuing to him 400 shares of paid-up stock of the par value of $20,000, for which

said Foley was to subscribe. After having received said stock said Foley was to transfer twenty shares to each of said ten subscribers to the stock of said company, and one hundred shares to the treasurer of said company, retaining the remaining one hundred of said four hundred shares, which with said $3,000 was to constitute the purchase price of said letters patent. Thereby each subscriber by payment of $600 was to receive stock of the par value of $2,000; said Foley was to receive for his patents $8,000, $3,000 being in cash, and the remainder in paid-up stock; and there was to remain in the treasury of the company, as its working capital, $5,000 in stock and $3,000 in cash.

"Said Wilcox in soliciting subscriptions for said stock did not inform any person of said agreement between himself and Foley, or that he was to receive any of the avails of the sale of said patents, but for the purpose of inducing persons to subscribe for said stock stated to nearly all of the persons who subscribed for said stock, and who now constitute the stockholders of said company, that he, Wilcox, was putting his money into said enterprise upon precisely the same basis as the others of said subscribers; and it was with that understanding that nearly all said persons subscribed for said stock.

"Said Wilcox with nine others subscribed for said one hundred shares of said stock, each receiving ten shares, and each paying the sum of $600.

"Said Wilcox was present at the first meeting of the stockholders, and was elected temporary clerk and a director, and voted in favor of the following resolution, which was adopted:

"Whereas, John B. Foley is the owner of certain letters patent of the United States for improvements in gas stoves, issued to said John B. Foley, the one No. 368,938, granted Aug. 30th, 1887, the other No. 421,258, granted Feb. 11th, 1890, and

"Whereas, said letters patent are necessary and convenient for the purpose of this company, and are valued at the sum of twenty-three thousand dollars; and

"Whereas, the said John B. Foley is a subscriber for the

capital stock of this corporation to the amount of twenty thousand five hundred dollars: Therefore

"Voted: That the directors be and hereby are authorized and instructed to purchase said letters patent Nos. 368,938 and 421,258 from said John B. Foley for the sum of twenty-three thousand dollars, and to pay him for the same by crediting his stock account the amount of his subscription, to wit: twenty thousand dollars, and issuing to him full-paid certificates for same, and to pay him the balance of said purchase price, to wit: three thousand dollars in cash."

"On the same day at the first meeting of the directors of such corporation said Wilcox was present, and voted in favor of the following resolution which was passed:

"Voted: To purchase of John B. Foley, as authorized and instructed by vote of the stockholders passed this day, letters patent of the United States, Nos. 368,938 and 421,258, and that in payment therefor the president and secretary be instructed to issue to him stock certificates full-paid to the amount of twenty thousand dollars, and that the treasurer be instructed to pay him the sum of three thousand dollars in cash, upon receipt of proper deeds of said letters patent.

"At a meeting of the directors of the plaintiff corporation, held Feb. 24th, 1890, three days after the organization of the corporation, it was agreed between Foley and the Yale Gas Stove Company that three notes for one thousand dollars each, payable two, four, and six months from that date, should be given by the company and accepted by Foley in place of the $3,000 in cash, which it had been arranged should be paid Foley as a part of the purchase price of said letters patent.

"Said Foley was also a director of said corporation. Said three notes were duly received by said Foley, and 400 shares of paid-up stock of said company, of the par value of $20,000, were issued to said Foley in payment of his subscription for said amount of stock. As soon as could be conveniently arranged thereafter he transferred to each of his ten associate subscribers, including said Wilcox, twenty shares of the stock so issued to him, and also transferred to the treasurer

of the corporation one hundred shares of said stock, and between Wilcox and Foley transfers were made as provided in said agreement between them, Foley receiving ten of the twenty shares, subscribed for by Wilcox, and Wilcox receiving on or before Dec. 1st, 1890, from Foley fifty of the one hundred shares issued to Foley as a part of the purchase price of said patents.

"The first note for $1,000 was paid to said Foley, and out of the proceeds thereof, on April 30th, 1890, he paid to said Wilcox $300, which was expressed to have been received by Wilcox on "account of contract." When the second note matured, though the corporation had the funds in the bank to pay the same, and though said Foley could have had the payment of the same at once, and was requested by said company to receive payment, yet Foley declined to receive payment. His reason for so doing was his unwillingness to pay any further sum to Wilcox. Foley did not draw the payment of the second note until a few days before the 9th of October, 1890, and on the 9th of October, 1890, he paid Wilcox $500, and took from him a receipt for such sum "on account."

"Foley did not draw the payment of the third note when due, although he could then have done so, and was requested so to do by the company. Said note has never been paid, and said company having learned of said agreement between Foley and Wilcox respecting the division of the proceeds of the sale of said patents to the company, now decline to pay the same.

"Payment of said note has never been demanded by said Foley. His reason for not having demanded the same was his unwillingness to make any further payment to Wilcox.

"On the day of 1891, Wilcox brought suit against Foley upon the said written agreement between them, the same being one of the suits in which this finding is made.

"If said agreement between Foley and Wilcox is valid there is due thereon from Foley to Wilcox the sum of $1,000.

"After said suit was brought the terms of the written agreement between Wilcox and Foley first became known to

the directors of the Yale Gas Stove Company, whereupon said company, having been advised that said agreement between Wilcox and Foley was illegal and void, instituted their action against said Wilcox, which is one of the cases in which this finding is made.

"Of the eighty shares of stock so received by said Wilcox five shares had been transferred by him to one Starr before the commencement of said suits, fifty-five of said shares stand in the name of Henrietta B. Wilcox, and twenty are owned by said Wilcox. Of the 55 shares owned by Henrietta B. Wilcox twenty shares were the shares originally subscribed for by Wilcox in his own name. He in fact acted at the request of his wife and as her agent in making such subscription, and the $600 paid for said stock was the money of said Henrietta B. Wilcox; said twenty shares were issued to said Wilcox as trustee. Twenty shares were afterwards at the request of Wilcox transferred to her by said Foley as bonus upon said subscription. The remaining fifteen of said fifty-five shares were transferred to said Henrietta B. Wilcox by her husband in consideration of an indebtedness of said Wilcox to his wife in about the sum of $800. Said Wilcox at no time informed his wife of said agreement between himself and Foley.

"Since its formation said corporation has continued to manufacture and sell gas stoves under said patents, the business of said company has been prosperous, and said company has paid in each and every year upon its capital stock dividends ranging from 10 to 16 per cent. I find the value of said stock to be $50.00 a share.

"Said corporation has never offered to return or transfer to either said Foley, or said Wilcox, said patents, or any part or interest therein, and has not done any act in rescission of its purchase of said inventions.

"At the request of all the parties to said causes the questions of law arising upon the same and upon said facts are reserved for the advice and consideration of the Supreme Court of Errors, next to be holden at New Haven, within and for the Third Judicial District, on the third Tuesday of

January, 1894, except that judgment is rendered in favor of Henrietta B. Wilcox in the first entitled case."

John W. Alling, for the Yale Gas Stove Co. and John B. Foley.

I. Two propositions are now so well established that it is hardly necessary to cite authorities in their support. 1. A director is under the obligations of a trustee, and the corporation is his *cestui que trust*. 2. Such a trustee may not make a personal profit out of his *cestui que trust*, and if he attempts so to do, and actually receives money or property as such profit, the *cestui que trust* can recover by legal action.

The proposition that a director is a trustee has been so recently decided in the case of *Mallory* v. *Mallory, Wheeler Co.*, 61 Conn., 131, as to make it unnecessary to refer to any other decision. We would call special attention to the opinion, on pages 137–142.

It is clearly well settled that a director is liable to be sued by the corporation for all profits which he may have secretly made, directly or indirectly, from dealings with the corporation. Cook on Stocks and Stockholders, §§ 649, 650; *Railroad Co.* v. *Kelly*, 77 Ill., 426; *Wardell* v. *R. R. Co.*, 103 U. S., 651; *Courier* v. *West Shore R. R. Co.*, 35 Hun, 355; *Emma Silver Mining Co.* v. *Lewis*, L. R., 4 C. P. D., 396; *Bank of London* v. *Tyrrell*, 5 Jur. N. S., 924; *McGourkey* v. *Toledo & Ohio Central R. R. Co.*, 146 U. S., 536; *Sargent* v. *Kansas M. R. R. Co.*, 12 Ry. Corp. L. J., 28; 29 Pac. Rep., 1063.

II. The case would be clear against Wilcox, even if he was not a director, because he was the promoter of this corporation. Cook on Stockholders, § 651; Morawetz, § 546; *Bagnall* v. *Carlton*, L. R., 6 Ch. Div., 371; *New Sombrero Phosphate Co.* v. *Ehrlanger*, 5 Ch. Div., 73; *Simonds* v. *Vulcan Oil & Mining Co.*, 61 Pa. St., 202. A case in point is *South Joplin Land Co.* v. *Case*, 104 Mo., 572. The promoters of a corporation stand in a confidential relation, not only to each other, but to all who may subsequently become members of the corporation, from the time they begin to promote the as-

sociation, and will be required to account for the profits made by the purchase of the property for the company, and its sale to it at an advance. *Paducah Land C. & I. Co.* v. *Mulholland*, (Ky.) Gen. Digest, 1893, vol. VIII, page 584, § 226. That no fiduciary relations existed between the corporation and its promoters, at the time the latter obtained a contract for the purchase of land, will not prevent the retention on their part of the secret profits in the sale of the land to the corporation from being fraudulent. *Mission Land & Water Co.* v. *Flash*, (Cal.) 32 Pac. Rep., 600.

III. It is understood that the claim of Wilcox is two-fold. *First.* The corporation made a good thing out of the purchase of the patents, and it does not lie in its mouth to object that he made a better thing. This claim needs no comment. *Second.* That the corporation is bound to rescind the purchase of the patents, and to offer to return the same to Foley and Wilcox. The law gives no such option to such director. The option is with the defrauded corporation. Neither Foley nor Wilcox are in any position to claim the benefit of a rescission of the contract in question. Wilcox has not offered to the corporation the profits which he attempted to make. Nor does it yet appear that Foley or Wilcox desires that the sale of the patents to the corporation should be rescinded. Wilcox having permitted the corporation to embark its capital in the business, in such a way that the rescission of the purchase of the patent is not feasible, cannot base his title to the profits of this transaction upon any such ground as that he is entitled to retain them, unless the corporation abandons its whole enterprise. Such a proposition is inconsistent with the law, which holds that a director or a promoter cannot make a secret profit out of his transactions with his corporation. *Bagnall* v. *Carlton*, *supra*; *Whaley Bridge Printing Co.* v. *Green & Smith*, L. R., 5 Q. B. Div., 109; *Sydney & Wigpool Iron Ore Co.* v. *Bird*, L. R., 31 Ch. Div., 328; reversed, 33 Ch. Div., 85; *South Joplin Land Co.* v. *Case*, *supra*; *Emma Silver Mining Co.* v. *Lewis*, 4 L. R., Com. Pleas Div., 397–409; *Gray* v. *Lewis*, L. R., 8 Ch. App., 1035; *Hersey* v. *Vesey*, 24 Me., 9.

IV. With reference to the suit of *Wilcox* v. *Foley*, it requires but little argument, and no authority to sustain the proposition that the contract between them was illegal and against good morals, and in fraud of the corporation of which both were directors and promoters.

V. The organization of the Yale Gas Stove Co. was legal. The 20 per cent required was paid in in cash. But if illegal it would not avail as a defense. *Stafford Nat. Bank* v. *Palmer*, 47 Conn., 443; *Naugatuck Water Co.* v. *Nichols*, 58 Conn., 403; Morawetz on Corporations, Vol. 2, chapters 8 & 9, *de* validity of corporate acts and illegal incorporation.

William L. Bennett, for Jedediah Wilcox.

I. The agreement between Foley and Wilcox was a valid contract. It was entirely proper for Foley, in consideration of the energy and experience of Wilcox, to give to his associate an interest in half his patents and half the proceeds of their sale; and it was equally legal for them to stipulate that the patents should be sold for money and stock in a corporation to be formed to manufacture under the patents. All these provisions could be carried out without fraud and contemplate no fraud. It cannot be presumed that the contract was entered into to be performed in any other than a legal manner.

When, therefore, Mr. Wilcox began to solicit subscriptions to the stock of the new corporation he had an interest with Mr. Foley in the patents to the full extent to which the contract gave him an interest. He had in fact entered into a partnership, to which Mr. Foley contributed his patents, and Mr. Wilcox his influence and experience, the profits of which were to be divided. Neither could sell the patents for any less consideration than that fixed by their contract.

II. In making the contract, Jedediah Wilcox acted wholly for himself and stood in no fiduciary relation to the Yale Gas Stove Company, or any of its stockholders. *Gover's Case*, L. R., 20 Eq. Cas., 114; *Ladywell Mining Co.* v. *Brookes*, L. R., 34 Chan. Div., 398; *New Sombrero Mining Co.* v. *Erlanger*

L. R., 5 Ch. Div., 73; *Erlanger* v. *New Sombrero Mining Co.*, L. R., 3 App. Cas., 1218.

III. If it be assumed that Wilcox, as director, or while holding a fiduciary relation to the corporation, sold the patents to it without disclosing his interest therein, such sale is yet not void but is voidable only. Until rescinded by the company it is good. *Barr* v. *N. Y., L. E. & W. R. R. Co.*, 125 N. Y., 263, 277, and the cases therein referred to.

There has been no rescission of the contract of sale. The patents have proved far too valuable for such action to be thought of. This action is brought against Wilcox—Foley not being a party—to recover his, Wilcox's, profits. As the action has been brought by the company with full knowledge of the facts, they have elected to hold the patents.

IV. Inasmuch as Wilcox was acting for himself alone, and was not a fiduciary of the company at the time when he acquired his interest in the patents, there were but two courses open to the company, to wit: they could affirm the sale, or rescind it, return the patents and sue for their price. They cannot, as they are here attempting, keep the patents, and recover the consideration received by Wilcox from Foley. This question arose in the case of *In re Cape Breton Land Co.*, L. R., 29 Ch. Div., 795, and it was held that the company had no action against the agent. This case, *In re Cape Breton Land Co.*, is said by the judges to be the first in which the point directly arose, but COTTON, L. J., on page 804, refers to the opinion of Lord CAIRNS in the noted case of *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas., 1234–35. The decree in this case required the return of the island with an accounting and return of the profits made in working it.

The question again came up and was directly decided in *Ladywell Mining Co* v. *Brookes*, L. R., 34 Ch. D., 398; 35 Ch. Div. 400. The principle that a voidable contract remains good until rescinded, and that, to rescind, the property obtained under the contract must be returned, is well illustrated in a case decided in the Court of Appeals, in New York, in 1891. *Barr* v. *N. Y., L. E. & W. R. R. Co.*, 125

N. Y., 263; and see also *Baird* v. *Mayor, etc.*, 96 N. Y., 567; *Grymes* v. *Sanders*, 93 U. S., 63; and the cases cited in *Tryon* v. *White & Corbin Co.*, 62 Conn., 171.

V. The Yale Gas Stove Co. does not appear in court with clean hands.

The real bargain between Foley and the Yale Gas Stove Co. fixed the price to be paid for his patents at $3,000 in cash and $5,000 in stock. But to avoid the joint stock corporation law and to defraud the public and such as might thereafter purchase their stock, the company, all the subscribers joining with Foley, made a sham contract by the terms of which it appears in the records and organization of the corporation that the value of Foley's patents was $23,000, and that the company had agreed to pay him therefor $3,000 in cash and $20,000 in paid-up stock. Under a secret agreement afterwards carried out, Foley was to return to the subscribers $10,000, and to the corporation itself $5,000 in full-paid stock. By this false valuation of the patents, one half of the capital stock appears, falsely, to have been paid up.

We submit that a court of equity finding the Yale Gas Stove Company and its subscribers to have been parties to this contract and arrangement, and that it is from the terms of this same contract and arrangement that they are here asking to be relieved, will leave them where they have placed themselves. With what propriety can the court decree that one party shall give up to the other an illegal profit while permitting that other to keep an equally illegal profit obtained in the same transaction?

The court may well permit the parties to remain as they are.

VI. The case of *Jedediah Wilcox* v. *John B. Foley* is an action brought upon the contract of Jan. 14th, 1890. This contract was fully performed by Mr. Wilcox, but has not been performed by Foley.

The contract has been performed by Wilcox. Foley's refusal to receive from the Yale Gas Company the money which they were ready and willing to pay cannot, of course, be set up in his behalf as a defense to the action.

If our contentions in the case of the *Yale Gas Stove Co.* v. *Wilcox* are sustained, there is, of course, no defense to this action.

FENN, J. Upon the facts appearing upon the record, it is claimed in behalf of Jedediah Wilcox, the defendant in the principal case, that the agreement between Foley and himself was a valid and proper contract which could be carried out without fraud, and contemplated none; that therefore, when he began to solicit subscriptions to the stock of the new corporation, he had an interest in the patents; that he was in fact a partner with Foley, that in making this contract with Foley he acted wholly for himself, and stood in no fiduciary relation to the Yale Gas Stove Company, or any of its stockholders. "There was," says his counsel, "no man, and no body of men, who had any hold upon him at the time he made this contract; nor any to whom he owed a duty, nor any selected, and in contemplation, to whom he might owe a duty." The objections "that a resale to some new corporation was contemplated; that the purchase price was to be new stock of such corporation; that but little time elapsed between the two contracts;" are said to be "all met and answered" by the cases of *Ladywell Mining Co.* v. *Brookes*, L. R., 34 Ch. D., 398; and on appeal, L. R., 35 Ch. D., 400; *Gover's Case*, L. R., 20 Eq. Cases, 114; *New Sombrero Phosphate Co.* v. *Erlanger*, L. R., 5 Ch. D., 73; and *Erlanger* v. *New Sombrero Phosphate Co.*, L. R., 3 App. Cases, 1218.

It is further said that these cases, and also the case of *Barr* v. *New York, Lake Erie & Western Railroad Co.*, 125 New York, 263, 277, and *In re Cape Breton Co.*, L. R, 29 Ch. D., 795, are authorities for the defendant's further claim, that: "If it be assumed that Mr. Wilcox, as director, or while holding a fiduciary relation to the corporation, sold the patents to it without disclosing his interest therein, such sale is yet not void, but is voidable only," and that "but two courses are open to the company, to wit: they could affirm the sale, or rescind it, return the patents and sue for the price. They

cannot, as they are here attempting, keep the patents and recover the consideration received by Wilcox from Foley."

In the light of the above claims we will first examine the cases cited in their support, and see precisely what they hold. The principal and most recent of these English cases is that of *Ladywell Mining Co.* v. *Brookes*, *supra*, in which the facts were, that on February 1st, 1873, one Palin and three associates purchased a leasehold mine for £5,000, with a view of reselling it at a profit to a company to be formed. They afterwards made a provisional contract with a trustee for an intended company for £18,000 in cash. The company was formed, having for its principal object the purchase of the mine, and Palin and his associates received their purchase money of £18,000, April 4th, 1873. The contract of February 1st, 1873, was not disclosed to the company, nor did it become known to it until about June, 1883, after it had gone into voluntary liquidation. In June, 1883, the company allowed judgment by default to go against them, in an action by the lessor to recover possession of the mine. In 1884, the company commenced two actions, one against the executors of two deceased vendors, and the other against the two surviving vendors, to recover the secret profits made by the vendors on their sale to the company, on the ground that they stood in a fiduciary capacity to the company at the time they bought the mine. It was held that the evidence failed to show this to be the fact, and that they were not liable to refund the profit they made on the transaction. The judgment of Justice STIRLING, 34 Ch. D., *supra*, was appealed from, and this appeal constitutes the case in 35 Ch. Div., *supra*, in which the former judgment was sustained. There are several opinions. In that by COTTON, L. J., it is said that the plaintiff claims that the defendants stood in such a position at the time of their purchase that they could not have claimed to have bought the mine for themselves, and could not, therefore, sell it at an advanced price, to the company. This is said to be mainly a question of fact; and on that question the contract of February 1st, 1873, was in its terms perfectly absolute, and not dependent on any company being formed; that though

doubtless it was contemplated a company should be formed, no part of the purchase money was to be provided for out of the funds of the company, or to consist of shares of the company; and it is added: "One thing which is very strong in favor of the defendants, is that the whole of the price £5,000, was, in fact, completely paid when the lease was granted out of their own money, and not in any way out of money provided by means of this company;" and finally, it is said that the facts found did not make the defendants, at the time when they entered into the contract to purchase, persons so acting as to entitle the company afterwards to say: "When you bought this mine, you were acting for us; this purchase, although made by you, is one which must be considered as having been made by you for the company which was afterwards formed at your invitation." LINDLEY, L. J., concurring, said there might be a case for rescission, if rescission were possible; but that rescission was not possible, because the property assigned by the company did not belong to it any longer. He added: "Then we are driven to consider the point which was really raised and decided in *In re Cape Breton Company*, whether rescission being impossible the company can obtain from Palin an account of the profit which he made by the transactions which have been alluded to, and that depends really upon the evidence. But the evidence is not sufficient to enable them to succeed. It is not proved that when Palin bought—that is on the 1st of February, 1873, he bought for the company which was ultimately formed; nor that when he bought the company was so far formed as to entitle it or its members to claim the benefit of the purchase on any theory of trusteeship; nor is it proved that persons were induced to take shares on the faith that the new company was buying from the old company. It is plain that the new company did not, in fact, find the money with which the vendors were paid. Under those circumstances, can we say that there was any such relation between Palin and the company as to entitle the company to say, You bought for us? It appears to me that the evidence is not sufficient for that purpose. If it were we could see our way to give relief.'

LOOPES, L. J., also concurring, said: "The question is, did Palin and his associates, on the 1st of February, stand in a fiduciary position towards this company that was thereafter to be formed; or, in other words, were they then acting for the company about to be formed? If they were the plaintiffs are entitled to succeed." This, he said, was entirely a question of evidence, and that in his view the evidence did not establish this conclusion. "They bought the mine themselves and paid for it out of their own pockets. No person is called to say they were asked to take shares, by any of these vendors, because they were forming a company." He concludes: "No doubt, having regard to the secret profit that was made by these vendors the company might have claimed rescission of the contract, but, in the circumstances, rescission had become impossible."

The other cases may be more briefly stated. In *Gover's Case*, *supra*, one Mappin agreed to buy a patent from Skoines for £65,000, payable partly in cash, and partly in shares of a company to be formed to use the invention. Mappin also engaged to use his best efforts to organize the company. Three months later Mappin agreed with one Wright, who acted as trustee for the proposed company, to sell the patent to it for £125,000 payable in cash and shares, and it was also agreed that Mappin should be appointed managing director. The company was formed and Mappin became a director. The suit was an application by Miss Gover, a subscriber pressed to pay "calls," to have her name removed from the company's register of members, because of the failure to disclose the Mappin-Skoines contract in the prospectus. It was decided that the statute did not give a remedy against the company, but only against a delinquent promoter, and it held that Mappin was not a promoter when he made the contract.

In *Erlanger* v. *New Sombrero Phosphate Co.*, *supra*, a leasehold interest in the island of Sombrero was purchased by a syndicate acting for themselves alone, and not as the representatives of any corporation existing or proposed. Soon afterwards they formed a joint stock company and sold the lease to it for double the price paid by them. The contract

of purchase by the corporation, at its instance, was set aside. In *In re Cape Breton Company*, *supra*, the facts, briefly, were: One Fenn was the agent of a company to purchase a specific property, in which, before the commencement of his agency, he had acquired an interest. He did purchase it for the company without disclosing to the company his interest in the property. After his purchase the facts were fully disclosed, and with the knowledge so acquired the company elected to retain the property. It was held the company could not recover. But the court said: "This case is not the case of an agent who, after he has accepted the agency, has acquired property, the purchase of which was within the scope of his agency, and then has resold that property to his principal at a larger sum, in which case it is obvious that the principal may say that the original purchase by the agent at a small price was a purchase in behalf of the principal."

In *Barr* v. *New York, Lake Erie & Western Railroad Co.*, 125 N. Y. 263, 277, it is sufficient to say that the principle is laid down that a voidable contract remains good until rescinded, and that to rescind, the property obtained under the contract must be returned.

Who and what are promoters, so called, of corporations, and what their relations to the corporations which they help to form, has been more frequently judicially considered and determined by the English courts than by those of this country. Some English cases appear to be more in point, as applicable to the questions arising upon the record, than those cited by the defendant, to which we have just referred. A promoter has been defined to be a person who organizes a corporation. It is said to be not a legal but a business term, "usefully summing up, in a single word, a number of business operations, familiar to the commercial world, by which a company is generally brought into existence." BOWEN, J., in *Whaley Bridge Calico Printing Co.* v. *Green et al.*, 28 Wkly. Rep., (Q. B. Div., 1880,) 351, 352. That such persons occupy a fiduciary relation toward the company or corporation whose organization they seek to promote, is well settled by the decisions of both countries. Lord COTTON prefers to

call them "trustees." *Bagnall* v. *Carlton*, 6 Ch. Div., 385. Sir George JESSEL, M. R., in *New Sombrero Phosphate Co.* v. *Erlanger*, *supra*, said: "Promoters stand in a fiduciary relation to that company which is their creature." In *Erlanger* v. *New Sombrero Phosphate Co.*, *supra*, the Lord Chancellor said of promoters: "They stand, in my opinion, undoubtedly in a fiduciary position. They have in their hands the creation and molding of the company; they have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become, through its managing directors, the purchasers of the property of themselves, the promoters, it is, in my opinion, incumbent upon the promoters to take care that in forming the company they provide it with an executive, that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote and form a joint stock company, and then sell his property to it, but I do say that if he does he is bound to take care that he sell it to the company through the medium of a board of directors who can and do exercise an independent and intelligent judgment on the transaction, and who are not left under the belief that the property belongs, not to the promoter, but to some other person." Lord O'HAGAN, referring to the same subject, expressed a similiar opinion in even more emphatic language, declaring that while an original purchase might be legitimate, and not less so, because the object of the purchaser was to sell it again, and to sell it by forming a company which might afford them a profit on the transaction, yet: "The privilege given them for promoting such a company for such an object, involved obligations of a very serious kind. It required, in its exercise, the utmost good faith, the completest truthfulness, and a careful regard to the protection of the future stockholders."

The test, therefore, of the validity of such transactions is that it must, in all its parts, be open and fair, so that the promoters shall not in fact, substantially "act both as vendors and vendees, and in the latter capacity, approve a transaction suggested by them in the former." *Foss* v. *Harbottle*, 2 Hare, 461, 488; *McElhenny's Appeal*, *Hubert Oil Co.*, 61 Pa. St., 188; *Simons* v. *Vulcan Oil and Mining Co.*, 61 id., 202; *Densmore Oil Co.* v. *Densmore et al.*, 64 id., 43; *Pittsburgh Mining Co.* v. *Spooner*, 74 Wis., 307; *So. Joplin Land Co.* v. *Case et al.*, 104 Mo., 572; *In re British Seamless Paper Box Co.*, L. R., 17 Ch. Div., 467; *Phosphate Sewage Co.* v. *Hartmont*, L. R., 5 id., 394. In the last case, the distinctive feature was that the vendors paid the commission to the trustees who received the property on behalf of the company. They were compelled to pay it to the company. In *Hichens* v. *Congreve*, 1 Russ. & My., 150, (on appeal, 4 Russ. Ch., 562,) three promoters induced their company to buy a mine for £25,000, of which they received from the vendor and divided among themselves £15,000. This they were compelled to account for to the company. Similar cases are *Beck* v. *Kantorowicz*, 3 Kay & Johnson, 230; *Whaley B. C. P. Co.* v. *Green et al.*, *supra*; *Emma Silver Mining Co.* v. *Grant*, 11 Ch. Div., 918; *Bagnall* v. *Carlton*, *supra*; *Kent* v. *Freehold Land & Brick-making Co.* (*Limited*), 17 L. T., N. S., 77; *Ex-Mission Land & Water Co.* v. *Flash et al.*, 97 Cal., 610.

It is an undoubted rule of law that where two or more persons associate themselves for the purpose of purchasing property, and one of them represents to the others that particular property can be bought for a designated price, which he procures to be paid by his associates, when in fact he receives a difference between said sum and a less one, he may be compelled to account for such difference without any rescission of the contract, and although the property may be worth all or more than was paid for it. *Emery* v. *Parrott*, 107 Mass., 95. The same principle is applied against promoters of corporations, in case of any secret contract more favorable than that disclosed. *Pittsburgh Mining Co.* v. *Spooner*, *supra*, and

the very numerous cases therein cited; and an exhaustive note by Mr. Freeman, to said case, 17 Am. St. Rep., 149, 167. See also, as applied to directors, Cook on Stock, §§ 649, 650; *Gilman, Clinton & Springfield Railroad Co.* v. *Kelly et al.*, 77 Ill., 426; *Wardell* v. *Railroad Co.*, 103 U. S., 651; *McGourkey* v. *Toledo & Ohio Central Railroad Co.*, 146 id., 536.

A careful examination of the cases, will, we think, disclose two grounds of the liability of defendants to corporations for undisclosed profits resulting from transactions with such corporations; first, where the defendants are corporate fiduciaries. The characteristic of this relation is trust. Such a relation undoubtedly exists between companies and their officers, such as directors. *Mallory* v. *Mallory Wheeler Co.*, 61 Conn., 135. With reference to promoters, since a man cannot receive an appointment from a non-existent company, the proof may be less obvious; but it may nevertheless be shown conclusively, by a variety of representations, admissions and acts. The second ground of liability is fraud. The law does not prohibit a promoter from dealing with his company. But he must make full disclosure to the company of his relations to the property that is the subject of his deal. Suppression, concealment, or misrepresentation of material facts, is fraud; upon proof of which, rescission of contract, or repayment of the secret profits will be compelled.

A very recent English case, in which a secret arrangement between a promoter and a director of a company was considered, is that of *In re North Australian Territory Company* (*Archer's Case*), L. R. 1892, Ch. Div., Vol. 1, p. 322. The facts in the case were these: Archer being requested by the promoter of a projected company to become a director, agreed to do so upon the terms that if he should at any time desire to part with the shares he was to take in order to qualify him as director, the promoter should purchase them of him at the price he should pay for them. The company was subsequently formed, and Archer became a director, took the qualification shares, and paid for them at par, out of his own money, and from time to time acted as director; but he never

disclosed to his co-directors, or to the company, his agreement with the promoter. He afterwards resigned his office of director, and, subsequently to his resignation, the promoter, at his request, paid to him the sum which he had paid for the shares, and accepted a transfer of them. At that time the shares were valueless in the market. In the winding up of the company, the liquidators asked that Archer be ordered to pay to them the sum received by him from the promoter, with interest; and it was held, reversing the lower court, that, having regard to his position, as director of, and therefore agent for the company, whatever benefit or profit accrued to him under the indemnity constituted by his secret agreements with the promoter, belonged to the company; and that the retention by him of the proceeds of the indemnity occasioned a loss to the company, for which he was accountable, with interest, upon what was declared to be the principle of *Hay's Case*, Law Rep., 10 Ch., 593, and *Pearson's Case*, 5 Ch. Div., 336. During the argument the counsel for the liquidators, in support of the appeal, were stopped by the court, and counsel for Archer then proceeding, were submitted to some peculiar interruptions by the judges. FRY, L. J., asked: "Why should not Archer be accountable for the £500, as 'property' of the company retained by him?" Counsel replied: "The real question is, Did the company suffer loss by what was done? They never had the £500, and therefore cannot be said to have lost it. In the majority of cases in which a director has been held accountable to the company he has, in effect, received money which originally came from the coffers of the company, as in *Hay's Case*, and the cases already mentioned." BOWEN, L. J.: "*Smith* being in a fiduciary relation to the company, had no right to give a director a benefit without the company knowing it. An indemnity against loss is a valuable consideration." Counsel said: "At the time the letter was written *Archer* had not taken the shares, and had not then agreed to become a director. Again, there is no evidence that the contract was not disclosed to the company." FRY, L. J., asked: "Would an honorable man assent, as *Archer* did, to accepting this indemnity, on the

terms that he was to keep it secret? If it was not actually dishonest, it seems to me to be a very improper course of proceeding." BOWEN, L. J.: "Is it right that the wolf should give a sop to the watch-dog, without his master's leave?" This question appears to have practically "closed the debate." The opinions of the judges, separately declared, appear at considerable length in the report, and are so able and apposite, that we regret that we cannot feel warranted in quoting from them.

Applying the principles recognized in the decisions to which we have referred, to the case before us, it seems clear that the plaintiff in the principal case is entitled to recover. The finding is explicit that the original arrangement between Wilcox and Foley contemplated no acquisition of any interest in the patents by Wilcox, but the organization by Wilcox of a corporation, and the sale to it of such patents; then a division between Foley and Wilcox of the avails of such sales. The written contract between Wilcox and Foley was entered into for the purpose of carrying out said plan of organizing the company, selling the patent and dividing the avails. In the agreement itself, while it is stated, under a "whereas," that Wilcox is desirous of owning one half of said patents, yet the very writing discloses that the proper construction of this language is that the patents, as belonging to Foley, should be sold to a joint stock corporation to be organized by Wilcox, for twice the sum that Foley was willing to dispose of them for, namely, for the sum of three thousand dollars in cash to be received from the company, and five thousand dollars of the capital stock of the company, and that then Foley should give to "said Wilcox, one half of the three thousand dollars cash, as soon as received, and one half of the five thousand dollars of the capital stock of the company, as he shall receive it."

Such being the arrangement, it was, very appropriately, agreed that it should be kept secret. Wilcox, in soliciting subscriptions for stock, most scrupulously observed such obligation of secrecy, and also went further, and "for the purpose of inducing persons to subscribe for said stock, stated to

nearly all of the persons who subscribed for said stock, and who now constitute the stockholders of said company, that he, Wilcox, was putting his money into said enterprise upon precisely the same basis as the other of said subscribers. And it was with that understanding that nearly all of said persons subscribed for said stock." The corporation was organized, and Wilcox, at its first meeting, was present, and was elected temporary clerk and a director, and voted in favor of a resolution which was adopted, which recited that Foley was the owner of certain letters patent, necessary and convenient for the purposes of the company, and which directed their purchase for certain stock, and the sum of three thousand dollars in cash.

It will thus be seen that the transaction between Wilcox and Foley contemplated, and Wilcox, in its execution, both as promoter and director, used every possible species of bad faith, breach of trust, and infidelity while occupying such a fiduciary relation. Placing the actual conduct of Wilcox side by side with the standard of conduct required of those in such positions, as declared by the judges in the *New Sombrero Phosphate Co. Case*, *supra*, so much relied upon as authority by the defendant, the contrast is overpowering.

Although many of the very numerous cases which we have cited, and almost numberless others to which reference might also be made, are direct authorities for the doctrine that in such cases as that before us, a defendant may be compelled to account, though no offer of rescission is made, and the property may be worth as much or more than was paid for it, and although the subject has already been incidentally referred to and considered in certain aspects of it, in this opinion, yet, in view of certain language in some of the cases upon which the defendant relies, including *Mallory* v. *Mallory Wheeler Co.*, *supra*, and *Tryon* v. *White & Corbin Co.*, 62 Conn., 171, it may be useful further to say, that properly understood, there is nothing in any of such cases cited by the defendant in conflict with the doctrine stated. Thus, in *Mallory* v. *Mallory Wheeler Co.*, *supra*, the plaintiff sought to recover a sum as balance of salary claimed to be due him

for services rendered as chief manager and director of the defendant's business. It was claimed that the contract under which such service was performed was void, or if not void that it was voidable at the option of the corporation. This court, treating it as a case in which a director had made use of a fiduciary relation to secure for himself an advantageous contract for a salary, held that, independent of the question of public policy, such transaction was voidable at the election of the corporation. The court then added: "It may fairly be gathered from the authorities cited, that the rule we are now considering does not operate *ipso vire* to avoid every transaction of a trustee made with his beneficiary, in which he is interested. It is generally limited in its operation to rendering it voidable at the election of the party whose interests are concerned in the question of its affirmance or disaffirmance. If, therefore, nothing was done in avoidance, the transaction remains. 2 Pomeroy's Eq., § 1077; *Duncomb et al.* v. *New York, Housatonic & Northern Railroad Co.*, 84 N. Y., 190, 198. Much more if the transaction has been ratified by that party. *Barr* v. *New York, Lake Erie & Western Railroad Co.*, 125 N. Y., 255." This court, in that case, was considering a transaction in which there was no concealment or secret profit, and nothing proved to have been done, in actual, as distinguished from constructive bad faith, or fraud, and the plain distinction between such a case and the one under consideration in reference to equitable relief, is clearly shown in the section referred to in Pomeroy, 1077, and the very numerous authorities cited in the exhaustive note to that section, in the second edition. The same thing may be said in reference to other cases relied upon by the defendant; and we think the contention that a person who, first as a promoter, then as a director, induces a corporation to embark its capital in a business in such a way that the rescission of its purchase of property, essential to the continued life of the company, can only be made by the sacrifice of such existence, can retain his secret profits in the transaction, unless the contract shall be rescinded and the enterprise abandoned, is contrary to the doctrine of numer-

ous cases, and without the intended sanction of any. Such a rule would permit retention of secret profits, and its enforcement would turn the courts into promoters, not of corporations, but of frauds upon them, numerous enough as they are, and needing no such promotion. "It is a general rule that a party defrauded in a bargain, may, on discovering the fraud, either rescind the contract and demand back what has been received under it, or he may affirm the bargain, and sue and recover damages for the fraud." Cooley on Torts, 589, 591, and cases cited in note 2. Thus, if, after discovering a shortage in goods, the price is paid, an action lies for the fraud, although the contract may not be disaffirmed. *Numan* v. *Oberle*, 90 Mo., 666. So also, in case of wrong dealing by a trustee, the rule is, when the facts come to the knowledge of the *cestui que trust*, he may either affirm or repudiate the transaction, and if he does the former he may yet recover secret profits. Thus, where a partner sold his own goods to a partnership without the knowledge of his associates, he was held liable to account to them for the profits. *Bentley* v. *Craven*, 18 Beavan, 75. See also, *Kimber* v. *Barber*, L. R., 8 Ch. App., 56; *Getty et al.* v. *Devlin et al.*, 54 N. Y., 412.

The same rule applies in the law of principal and agent, and of attorney and client; indeed in every case where one improperly conducts himself to his own advantage while acting in any fiduciary capacity. The language, therefore, cited from *Mallory* v. *Mallory Wheeler Co.*, and the statement in *Tryon* v. *White & Corbin Co.*, *supra*, p. 173, that "an acceptance of the benefits of the transaction imposes an obligation to assume its burdens," and the principles stated in other decisions relied upon by the defendant, have no legitimate application to cases where a corporation seeks to recover from a promoter or director money had and received, which in equity and good conscience belonged to the corporation. Instead of rescinding the transaction of purchase, the corporation by its suit, affirms it and enforces the real contract as made for its benefit, and not the pretended contract, as simulated, in order to defraud it. In such a case the

corporation recognizes the obligation to assume the burdens, and only demands that it shall receive "the benefits of the transaction." Indeed the principle of *Murray* v. *Jennings*, 42 Conn., 9, is decisive of this whole matter.

The defendant in the principal case further contends that the Yale Gas Stove Company does not appear in court with clean hands. It is said the finding shows that, "the real bargain between Foley and the Yale Gas Stove Co., fixed the price to be paid for his patents at $3,000 in cash and $5,000 in stock;" but that to avoid the joint stock law, and to defraud the public, a sham contract was made; that thereafter a court of equity should leave them where they have placed themselves. "With what propriety," it is asked, "can the court decree that one party shall give up to the other an illegal profit, while permitting that other to keep an equally illegal profit obtained in the same transaction."

The maxim that "he who comes into equity must come with clean hands," has no such application as the defendant seeks to give it. It refers solely to willful misconduct in regard to the matter in litigation. Snell's Eq., 35. Though an obligation be indirectly connected with an illegal transaction, it will not thereby be barred from enforcement, if the plaintiff does not require the aid of the illegal transaction to make out his case. *Armstrong* v. *American Exchange Bank of Chicago*, 133 U. S., 433; *Lewis' & Nelson's Appeal*, 67 Pa. St., 153, 166; *Woodward* v. *Woodward*, 41 N. J. Eq., 224; *Pittsburgh Mining Co.* v. *Spooner*, *supra*.

Finally, the suit was properly brought by the corporation, instead of by its stockholders. The question arose in *New Sombrero Phosphate Co.* v. *Erlanger*, *supra*, and JAMES, L. J., said (5 Ch. Div., p. 122): "The company represent the contracts of yesterday as of to-day, as they will the contracts of to-morrow or the next day, or next year. They represent the contracts which were made by the company; they are liable upon the contracts, and they have every right in respect of those contracts which an individual being would have if he had the like case, or was under the like liability. Therefore, I am of the opinion that the company not only can sue, but

that the company was the only proper plaintiff that could sue upon the case made by this bill." See, also, 1 Morawetz, § 546; 3 Pomeroy's Eq., §§ 1094, 1096, and the numerous cases therein cited. Indeed, no contention upon this point was made.

In reference to the suit of *Wilcox* v. *Foley*, the contract between them was manifestly opposed to public policy, to good morals; it is illegal, and cannot be enforced. If any one has a cause of action against Foley, not upon the contract but by reason of the transaction to which it led, it is the corporation, and not Wilcox.

The Superior Court is advised that judgment be rendered for the plaintiff, in *Yale Gas Stove Co.* v. *Wilcox*, to recover three thousand dollars, with interest on $500 of said sum, from Oct. 9th, 1890, to the date of said judgment, and interest on the balance of $2,500, from Dec. 1st, 1890, with costs. And in the case of *Wilcox* v. *Foley*, that judgment be rendered for the defendant.

In this opinion the other judges concurred.

CHARLES C. FORD *vs.* JOSEPH HUBINGER.

Third Judicial District, New Haven, January Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

It is no ground of abatement that the plaintiff is the assistant clerk of the court in which the action is brought. The mere opportunity to do wrong which an officer or servant of the court has, does not deprive the court of jurisdiction.

The plaintiff sued to recover for services rendered the defendant in negotiating for the purchase of certain real estate afterwards bought by the defendant. The defendant claimed to have proved that he had paid the plaintiff a certain sum, which the latter received and accepted in full of all claims and demands on account of such services; and requested the court to charge the jury that if they should so find, the plaintiff could not recover, even though he might originally have been entitled to more. *Held*, that the request was a proper one and should have been

complied with, either in the words of the request or in equivalent language; and that the failure to so charge was error.

If payment was made and accepted as claimed by the defendant, he might rightfully and without further liability to the plaintiff avail himself of such services in any subsequent purchase by him of the property.

[Argued January 24th—decided February 19th, 1894.]

ACTION to recover for services rendered the defendant in negotiating for the purchase of certain real estate; brought to the Court of Common Pleas in New Haven County and tried to the jury before *Hotchkiss, J.*; verdict and judgment for the plaintiff and appeal by the defendant for alleged errors in the rulings and charge of the court. *Error, and new trial granted.*

The defendant also filed a motion for a new trial for a verdict against evidence.

The defendant pleaded in abatement and to the jurisdiction of the court, because the plaintiff was the assistant clerk of the court. To this plea the plaintiff demurred, and the court sustained the demurrer.

The defendant's second defense alleged that the plaintiff undertook to purchase for the defendant said real estate for the sum of $90,000, and that it was an express condition of the agreement that if he succeeded in making the purchase for that sum, then the defendant was to pay him therefor the sum of $200, and no more; and that if he did not succeed, then the defendant was to pay him nothing but his expenses; that the plaintiff did not succeed in making the purchase, and abandoned all effort to do so; that he rendered his account to the defendant amounting in the whole to $60.00; —"and thereupon the defendant paid the same and the plaintiff received and accepted said sum in full satisfaction of all claims against him, for and concerning the matters set up in said complaint." This defense was denied by the plaintiff. This payment was claimed to have been made about the first day of September, 1891.

Upon the trial the defendant offered evidence tending to prove and claimed that he had proved the allegations of said defense.

It appeared that the defendant in February, 1892, purchased the said real estate of the owner for the sum of $100,000.

The defendant asked the court to instruct the jury as follows: "The defendant claims that in September, 1891, he paid the plaintiff a sum of money which was accepted by the plaintiff in full of all demands and claims in the premises, and if the jury find that said sum was so paid by the defendant, and was so accepted by the plaintiff, the plaintiff cannot now recover any more even though he might originally have been entitled to more."

In the charge to the jury the judge referred to this claim of the defendant and to the above request several times. He said: "If you find that it (said payment) was in full settlement, and that Ford was then discharged, and that the final purchase by Hubinger was not facilitated by what Ford had done, then he would be precluded from further recovery." In another part of the charge he said: "If, on the contrary, you find that the defendant once employed the plaintiff and settled with him and dismissed him, and the plaintiff did no more for Mr. Hubinger, and that his services did not facilitate the purchase of this property, that the contract was ended, then you cannot properly find for the plaintiff and should find for the defendant." In another place after reading to the jury the plaintiff's request, as above, the judge said: "I have modified that so it will read as follows: 'The defendant claims that in September, 1891, he paid the plaintiff a sum of money, which was accepted by the plaintiff in full of all demands and claims in the premises. And if the jury find that such sum so paid by the defendant, and so accepted by the plaintiff in full' here I add: 'and the defendant did not authorize the plaintiff to proceed and continue in his service, and did not afterwards in the purchase of the property avail himself of the plaintiff's efforts and services, and such services did not facilitate the purchase, then the plaintiff cannot recover any more even though originally he might have been entitled to more'—and I will add, 'provided it was the intention of the plaintiff to release him from

any further claims in the matter, so far as having been originally entitled to recover more, and having given a receipt which claimed to have been in full.' In other words, (I didn't get the entire meaning of that request in looking it over): As I understand it that request to charge is, that if the defendant paid him in full of all demands in September, then he would not be entitled to recover any more, even although he may originally have been entitled to more; while if the plaintiff, with full knowledge of all the circumstances, and intending to give the defendant a receipt in full of all his demands, accepted this sum, it would be a receipt in full; but if he only intended to apply it on account, or if it was only on account of certain services, and with the expectation that if the sale was thereafter consummated he would be entitled to a further sum, then such receipt would not preclude him from making further demand."

Charles S. Hamilton, for the appellant (defendant).

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

ANDREWS, C. J. There was no error in sustaining the demurrer to the defendant's plea in abatement. The cases cited by his counsel are not in point. *Dyer* v. *Smith*, 12 Conn., 384; *Doolittle* v. *Clark*, 47 id., 316. In those cases it was the act of the party which rendered the proceeding void. The jurisdiction of the court was not challenged. If it had been averred in the plea that the plaintiff had done or attempted to do some improper act, doubtless the court could declare the whole action void. But the opportunity to do wrong which the servant or officer of a court has, does not deprive the court of jurisdiction.

In respect to the request for instructions to the jury there is error. If the plaintiff had accepted payment in full, that was a bar to his recovering anything more. The receipt of a payment tendered and accepted in full was a discharge of his entire claim. *Aborn* v. *Rathbone*, 54 Conn., 444; *Gates* v. *Steele*, 58 id., 316; *Buell* v. *Flower*, 39 id., 462; *Ayer* v.

Ashmead, 31 id., 447; *Beam* v. *Barnum*, 21 id., 200; *Canfield* v. *Eleventh Sch. Dist.*, 19 id., 529; *McGuire* v. *Lawrence Mfg. Co.*, 156 Mass., 324.

The request was apparently predicated on the law as laid down in these and other like cases, and it should have been complied with in the very words in which it was made, or in equivalent words. If the defendant satisfied the jury that he had made such a payment as he claimed to have made, he was entitled to have them told explicitly what its effect would be on the plaintiff's right to recover. This was not done. The instructions given implied that the payment, although the jury should find that it was made and accepted in full of all claims, would not preclude a further recovery unless it should also appear that the services which the plaintiff had rendered did not in any way facilitate the subsequent purchase of the property. Each time the judge alludes to this payment in the charge he couples it with this condition. It is, perhaps, true that the judge didn't get the entire meaning of the request in looking it over. The defendant contended that he had made a payment to the plaintiff in September, 1891, to be in full, and which the plaintiff accepted in full of all the matters claimed in the action. If such a payment was made, then the defendant owned all the services which the plaintiff had rendered, and might make such use of them as he chose or as he found advantageous. He might rightfully, and without further liability to the plaintiff, use such services in facilitating a purchase of the property. If such a payment had been made, then the plaintiff had parted with and the defendant had acquired those services, as fully as though the plaintiff had sold to the defendant some tangible thing, as barrels of flour or tons of coal. The jury should have been told that in such case their verdict must be for the defendant.

There is error and a new trial is granted.

In this opinion the other judges concurred.

WALLACE E. JOHNSON *vs.* SAMUEL NORTON.

Third Judicial District, New Haven, January Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

Chapter LI. of the Public Acts of 1893 permits any cause tried to the jury to be brought before the Supreme Court of Errors upon the ground of a verdict against evidence. But it has not changed the principles which determine under what conditions a verdict may be set aside as against evidence.

It still remains true that a new trial will be granted only where manifest injustice has been done by the verdict, and the wrong is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles, or as to justify the suspicion that they, or some of them, were influenced by corruption, prejudice, or partiality.

The court in the present case, having reviewed the entire evidence, reached the conclusion that not only was the verdict not against the evidence, but that it expressed the only correct conclusion to which the jury could come.

[Argued January 25th—decided February 19th, 1894.]

ACTION to recover damages, under § 1344 of the General Statutes, for injuries caused to plaintiff's land by a fire alleged to have been set by the defendant upon his land, whence it ran upon the plaintiff's land; brought before a justice of the peace and thence by defendant's appeal to the Court of Common Pleas in New Haven County, where it was tried to the jury before *Hotchkiss, J.*; verdict and judgment for the plaintiff for $20.00, and appeal by the defendant upon the ground that the verdict was against the evidence. *New trial denied.*

Henry F. Hall, for the appellant (defendant).

E. A. Merriman, for the appellee (plaintiff).

ANDREWS, C. J. The complaint in this case alleges that the plaintiff was, on the 1st day of April, 1892, the owner of a certain piece of land in the town of Cheshire, and that the defendant was the owner of a certain other piece of land in

the same town; that on the 19th day of that month the defendant set a fire on his own land, which ran upon the land of the plaintiff and did damage. The action was first brought before a justice of the peace in the said town of Cheshire, where judgment was rendered for the plaintiff to recover the sum of $20.00. The defendant then appealed to the Court of Common Pleas in New Haven County.

In the latter court the cause was tried to a jury who returned a verdict in favor of the plaintiff for the same sum. The defendant thereupon moved for a new trial on the ground that the verdict was against the evidence, and the court certified the evidence to this court. After reading the whole evidence and duly considering the same, we are convinced not only that the verdict is not against the evidence, but that it is fully supported by the evidence, and expresses the only correct conclusion to which the jury could come.

In dismissing the motion we think it necessary only to observe, that while Chapter LI. of the Public Acts of 1893, under the provisions of which this case comes before us, has made some changes in the mode of access to this court, it has made none in the principles which determine under what conditions a verdict may be set aside, as against evidence. It still remains true that this relief will be granted only when manifest injustice has been done by the verdict, and the wrong is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles, or as to justify the suspicion that they, or some of them, were influenced by corruption, prejudice, or partiality. It could not have been the intent of the new statute to enable counsel to bring a case here, at the expense of the State, upon a motion of this character, which they did not think might fairly be claimed to fall within this rule.

A new trial is denied.

In this opinion the other judges concurred.

LIZZIE T. BARNES *vs.* WILLIAM H. STARR, EXECUTOR, ET AL.

Third Judicial District, New Haven, January Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

The plaintiff and the defendants' testator, who were engaged to be married, executed an ante-nuptial contract whereby the former, in consideration of receiving $5,000 from the latter, or from his estate in case she outlived him, relinquished all her statutory rights in his estate. This agreement was made for the purpose of being shown to the friends and relatives of the testator who were opposed to, and endeavoring to dissuade him from, such marriage, and thereby removing their opposition; and the testator promised that as soon as it had accomplished its object, the contract should be destroyed. The parties were shortly afterwards married. The husband, however, did not destroy the contract, but caused it to be carefully preserved, and meanwhile made a will in which he bequeathed to the plaintiff $5,000, in lieu of dower and of any statutory right in his estate, "according to the terms of a contract of marriage," etc., referring to said ante-nuptial contract. The plaintiff knew, about a year before her husband's death, that the contract was still in existence, but did nothing to assert her alleged rights until after his death.

Held, that the plaintiff's conduct in executing the ante-nuptial contract for the purpose of deceiving the heirs at law of her intended husband, debarred her from receiving aid from a court of equity; and that the maxim that he who comes into a court of equity must come with clean hands, was applicable, and prevented the plaintiff from obtaining equitable relief. And especially so where, as in the present case, the plaintiff unreasonably delayed, without any apparent cause, in exposing the alleged fraud, until after the death of the other contracting party; although the law imposed upon her the duty of speedy action after obtaining knowledge of the facts.

[Argued January 16th—decided March 6th, 1894.]

SUIT for the cancellation of an ante-nuptial contract entered into between the plaintiff and the defendants' testator; brought to the Superior Court in Fairfield County and tried to the court, *John M. Hall, J.*; facts found and judgment rendered for the plaintiff and appeal by the defendants. *Judgment reversed.*

The case is sufficiently stated in the opinion.*

* Counsel for the appellants, having received the supplementary brief of

Samuel Tweedy and *Lyman D. Brewster*, with whom was *J. Belden Hurlbutt*, for the appellants (defendants).

I. Will a sealed and acknowledged agreement, expressly authorized by statute, mutual in its consideration, entered into by the petitioner for the express intention of deceiving third persons contingently interested in the subject-matter of the agreement, and whose conduct and duties would necessarily be affected by the sham agreement, and which was to be destroyed after accomplishing its purpose, and which does in fact deceive the persons it was intended to deceive, be canceled by a court of equity on the request of the petitioner, after the death of the other party to the instrument, to the injury of the parties whom it was intended to deceive? Is not the *delictum* of the plaintiff increased by not exposing the deception after the making of the will and during the life of the husband, after she knew it had not been destroyed? *In re Great Berlin Steamboat Co.*, L. R., 26 Ch. Div., 616.

If it be said that this sham agreement differs from a sham deed, in fraud of creditors, to which it has been likened, in that the creditors in that case are defrauded of a present property right, we say in reply: the irrevocability applies to subsequent creditors, as well as to existing ones, and that after the will was executed the relatives had an existing property right, as they had an assignable interest before the will was made. *Trull* v. *Eastman*, 3 Met. (Mass.), 121; *Jenkins* v. *Stetson*, 9 Allen, 128; *McBee* v. *Myers*, 4 Bush (Ky.,) 356; *Fitzgerald* v. *Vestal*, 4 Sneed (Tenn.), 258; *Stewart* v. *Stewart*, 5 Conn., 321.

The plaintiff must come into court with clean hands. He must not be a party to the deception of which he complains. *Cadman* v. *Horner*, 18 Vesey, 10; *Clermont* v. *Tosbrough*, 1 J. & W., 112; *Strathmore* v. *Bowes*, 2 Cox, 28; 1 Pom. Eq.

the appellee only an hour or two before the argument was to begin, requested an extension of the usual time for argument, on that account. Counsel for the appellee made no objection.

The court, under the circumstances, granted the request, but stated that if the appellants' counsel had asked that the brief should not be received because presented so late, the court would have enforced the rule and declined to receive it.—R.

Juris., §§ 398, 401, 404; 1 Beach, Modern Eq., § 78; *Huxley* v. *Rice*, 40 Mich., 73; *Peek* v. *Derby*, L. R., 37 Ch. Div., 541; *Pidding* v. *Howe*, 8 Sim., 477; Story's Eq. Juris., 13th ed., Vol. I., § 293. As to underhand agreements in cases of marriage, see *Boynton* v. *Hubbard*, 7 Mass., 102; *Roberts* v. *Roberts*, 3 Peere Williams, 74 and note; Bigelow on Fraud; *Palmer* v. *Neave*, 11 Vesey Jr., 165; *Ainslie* v. *Medlycott*, 9 id., 24 and note; *Scott* v. *Scott*, 1 Cox Ch., 366, 378, 379; 2 Swift's Digest, 89 (side p. 79); Story's Equity, 13th ed., §§ 266, 270; Pomeroy on Equity, § 931, note 2; *Duval* v. *Wellman*, 124 N. Y., 156. The parties to this contract did not occupy any confidential relation. *Neely's Appeal*, 124 Penn. St., 406; *Shear's Appeal*, 121 id., 308; *Kesler's Estate*, 143 id., 386.

II. The facts found do not warrant the decree. The court does not find that any of the alleged false representations were proved, except the promise to destroy. Does a parol promise not to perform a written promise, of itself warrant the canceling of the written promise? Such oral promise is within the statute of frauds. Reed on Stat. of Frauds, § 478 and cases cited. If admissible, the fact thereby proved did not constitute an actionable fraud. A mere promise to do an act in the future is not a fraud. *Fenwick* v. *Grimes*, 5 Cranch C. C., 439; *Long* v. *Woodman*, 58 Maine, 49; *Burt* v. *Bowles*, 69 Ind., 1; *Foutie* v. *Foutie*, 34 id., 433; *Bethell* v. *Bethell*, 92 id., 318; *Seivking* v. *Litzer*, 31 id., 13; *Gage* v. *Lewis*, 68 Ill., 604; *Knowlton* v. *Keenan*, 146 Mass., 86; *Dane* v. *Morris*, 149 id., 188; *Feret* v. *Hill*, 15 C. B., 207; *Farrar* v. *Bridges*, 3 Hump. (Tenn.), 566; *Viscountess* v. *Maxwell*, 1 Peere Will.. 618; *Maunsell* v. *White*, 4 H. L. 1055; *Beattie* v. *Lord Ebury*, 7 Ch. App., 804; *Ex parte Fisher* v. *Court C. P.*, 18 Wend., 608. The cases of *Ayres* v. *French*, 41 Conn., 142, and *Dowd* v. *Tucker*, 41 id., 197, are not in conflict with our position and claim. In *Ayres* v. *French* the general rule is recognized (page 153), and that case is likened to that of a purchaser of goods with a preconceived design not to pay for them (and not a mutual design); and *Dowd* v. *Tucker* is put on the same ground and also that of a trust.

III. Even if the false promise to destroy the sham agreement is actionable it is not the gist or substance of the complaint. Pomeroy on Remedies and Remedial Rights, 554–557; Bigelow on Fraud, 490, 491; *Pettigrew* v. *Chellis*, 41 N. H., 95; *Page* v. *Parker*, 40 id., 47; *Phalen* v. *Clark*, 19 Conn., 433.

IV. The decree is bad for contradiction and uncertainty. Where the findings are contradictory, those must be applied which are most favorable to the defeated party in aid of his exceptions. *Bonnell* v. *Griswold*, 89 N. Y., 122, 127; *Schwinger* v. *Raymond*, 83 id., 192.

Goodwin Stoddard and *Samuel Fessenden*, for the appellee (plaintiff).

I. Courts of chancery have long exercised jurisdiction to adjudge void in the hands of a defendant instruments unlawfully obtained from a plaintiff, and to order their surrender and cancellation whenever such order ought, in equity and good conscience, to be made.

It is one of the facts in this case that the signature of the plaintiff to the ante-nuptial agreement involved was obtained from the plaintiff by Mr. Barnes through his misrepresentation, deceit and deliberate and designed fraud, while he stood in the relation of betrothed husband to her. Beach on Modern Equity, Vol. 2, § 551; Pomeroy's Eq., Vol. 2, § 870; Vol. 3, § 1377; Vol. 2, § 850 and note; Story's Eq., Vol. 2, §§ 692, 694, 695, 695*a*.

Courts of equity exercise a vigilant scrutiny of marriage settlements and ante-nuptial agreements generally, *owing to the confidential relations of the parties*, whenever fraud has been alleged.

The following are some of the leading modern cases on this subject: *Pierce* v. *Pierce*, 71 N. Y., 154 (1877); *Kline* v. *Kline*, 57 Penn. St., 120 (1868); *Nealey's Appeal*, 124 id., 406 (1889); *Falk* v. *Turner*, 101 Mass., 494 (1869); *Russell's Appeal*, 75 Penn. St., 269 (1874); *Page* v. *Horne*, 11 Beav., 227 (1848); *Cobbett* v. *Brock*, 20 id., 524 (1855); *Taylor* v. *Rickman*, 1 N. C., 278 (1853); *Coulson* v. *Allison*,

De Gex, F. & J., 521 (1860); *James* v. *Holmes*, 31 L. J. (N. S.) Ch., 567 (1862); *Oliver* v. *Oliver*, 4 Rawle, (Penn.) 141 (1833). And see review of the adjudication on this subject, White and Tudor's Leading Cases in Equity, 4th Am. ed., p. 1156, case of *Huguenin* v. *Basely*, and note.

II. The plaintiff's complaint presented to the court this question: "Was her signature to the writing obtained by the fraudulent and deceitful promise of Mr. Barnes to destroy the paper and his fraudulent misrepresentation of his financial condition?" This proposition was denied by the defendants, and upon the issue so joined relevant testimony to show any part or portion of the fraud set forth in the complaint is admissible. *Holly* v. *Brown*, 14 Conn., 268; *Sprague* v. *Taylor*, 58 id., 548. Of course we could not prove the promise to be fraudulent and deceitful without proving, (*a*) what the promise was, (*b*) that it was broken, and (*c*) with what purpose and intent it was made. Bigelow on Fraud, 146; *Stauffer* v. *Young*, 39 Penn. St., 455; *Knight* v. *Houghtalling*, 85 N. C., 17; Pomeroy's Eq., Vol. 2, § 859. The statute of frauds has no application to such a state of facts. *Jervis* v. *Berridge*, 23 L. R., N. S., 43; Browne on the Stat. of Frauds, 4th ed., § 441*a*; Rice on Evidence, Vol. I, p. 256; *Kersselbrack* v. *Livingstone*, 4 Johns. Ch., 144; *Glass* v. *Hulbert*, 102 Mass., 41; *Hicks* v. *Stevens*, 121 Ill., 186; *Murray* v. *Mann*, 2 Exch., 558; Am. & Eng. Ency. of Law, Vol. 17, Art., Parol Ev., page 447, and cases cited. Parol evidence is admissible to resist the fraudulent use of a writing obtained without fraud. *Oliver* v. *Oliver*, 4 Rawle's Rep., 141, (Penn.) (1833); *Hirst* v. *Kirkbridge*, 1 Binn., 616; *Hultz* v. *Wright*, 16 Serg. & R. 345; *Lyon* v. *Huntington*, *etc.*, 14 id., 283; *Thompson* v. *White*, 1 Dall., 424; *Rearich* v. *Swinehart*, 11 Pa. St., 240; *Christ* v. *Diffendach*, 1 Serg. & R., 464; *Fishback* v. *Woodford*, 1 J. J. Marshall, 84; *Edrington* v. *Harper*, 3 id., 353; Brown on Parol Evidence, 55; *Hicks* v. *Stevens*, 121 Ill., 193; *Goodwin* v. *Horne*, 60 N. H., 486.

III. If by the rules of evidence the plaintiff's testimony was admissible, and the facts alleged are true, the only remaining question on this point of the case is whether the

court is warranted in granting the relief prayed for, namely, that the writing should be declared void and delivered up to be canceled. *Kelley* v. *McGrath*, 70 Ala., 75.

That a husband, in contemplation of marriage, may commit frauds upon the rights which on the marriage would accrue to the intended wife, from which, after marriage, a court of equity will relieve her as it relieves the husband from the ante-nuptial frauds of the wife, is recognized by a large number of adjudications in this country, and has the sanction of a direct decision by Chancellor KENT. 2 Bish. Mar. Wom., §§ 352–3; 1 Scrib. Dower, 560, 564; *Swane* v. *Parine*, 5 John. Ch., 482; 9 Am. Dec., 318; *Cranson* v. *Cranson*, 4 Mich., 230; *Petty* v. *Petty*, 4 B. Monroe, 315; 29 Am. Dec., 501; *Tate* v. *Tate*, 1 Dev. & Bat. Eq., 22; *Smith* v. *Smith*, 2 Halst. Ch., 515; *Jenney* v. *Jenney*, 24 Vt., 324; *Deermon* v. *Deermon*, 10 Ind., 59.

IV. A false, deceitful and fraudulent misrepresentation of intention and purpose whereby the plaintiff is prejudiced in her rights, is an actionable fraud.

The plaintiff claims that Barnes' state of mind, intention and purpose was, under the circumstances, a fact and a material fact on which the plaintiff had a right to rely. Cooley on Torts, p. 487; *Long* v. *Woodman*, 58 Me., 49; *Mundy* v. *Beckwith*, 48 Ill., 391; *Loupe* v. *Wood*, 51 Cal. 586; *Jarden* v. *Money*, 5 H. L. Cas., 185; Cooley on Torts, 486; *Bradley* v. *Obear*, 10 N. H., 477; *Kley* v. *Healey*, 127 N. Y., 555; *Page* v. *Bent*, 2 Met., 371; *Conlan* v. *Rolmer*, 23 Vroom, 58; *Norfolk, etc.* v. *Arnold*, 49 N. J. Eq., 395. Intention is a fact to be proved as any other fact. 11 Am. & Eng. Ency. of Law, 376.

"It may be difficult to prove the state of a man's mind at a particular time, but if it can be ascertained it is as much a fact as anything else." *Edgington* v. *Fitzmaurice*, 55 Law Journal Rep. Ch., 650; *S. C.*, 29 L. R. Ch. Div., 474; *Murdick* v. *Chenango Co. Mutual Ins. Co.*, 2 N. Y. (2 Comstock), 220–1; See 1 Story Eq. Jur., § 193, note; *Smith* v. *Richards*, 13 Pet., 26; Adams' Eq., p. 177; 2 Parsons on Contracts, p. 177; *Grimm* v. *Byrd*, 32 Gratt., 302; *Linhart* v. *Hartman*,

77 Va., 540; *Roer R. & Co.* v. *Trout*, 83 id., 397; *S. C.*, 5 Am. St. Rep., 292–3.

"False representations as to future events will vitiate a contract where those events depend upon the acts of the party making the representations and form the inducement for the contract." *Henderson* v. *San Antonio, etc. R. R. Co.*, 17 Tex., 560; *S. C.*, 67 Am. Dec., 676; 1 Beach Modern Eq., § 88; *Shackelford* v. *Handley*, 1 A. K. Marshall, 496; *S. C.*, 10 Am. Dec., 753; Bigelow on Fraud, p. 12; *Gross* v. *McKee*, 53 Miss., 538; *Ayres* v. *French*, 41 Conn., 153; *Dowd* v. *Tucker*, id., 203; *Wainwright* v. *Talcott*, 60 id., 43; *Feltz* v. *Walker*, 49 id., 93.

V. The parties stood in a confidential relation and a court of equity will not suffer the dominant party to gain an advantage over the other. 3 Leading Cases in Equity, 119; *Gilmore* v. *Burch*, 7 Or., 374; *S. C.*, 33 Am. Rep. 715; *Kline* v. *Kline*, 57 Penn. St., 120; *Kline's Estate*, 64 Pa. St., 122; *Tarbell* v. *Tarbell*, 10 Allen, 278; *Fay* v. *Rickman*, 1 N. C., (Bush's Eq.), 278; *Woodward* v. *Woodward*, 5 Sneed, 49; *Achilles* v. *Achilles*, 137 Ill., 589; *Neeley's Appeal*, 124 Penn. St., 406; *Page* v. *Horne*, 11 Beav., 227; *Wollaston* v. *Tribe*, 9 L. R. Eq., 44.

"Undue influence may easily be exercised under the intimate relation created by an engagement to marry." The Law of Fraud by Bigelow, p. 351; 2 White & Tudor's Leading Cas. in Equity, *Huguenin* v. *Baseley*, p. 633.

VI. The plaintiff was not *in pari delicto*.

"Parties are not in *in pari delicto* unless the act itself is immoral or a violation of the general laws of public policy, and when the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover." Lord MANSFIELD in *Smith* v. *Bromley*, 2 Douglass, 697.

The general rule that equity will not aid either party to a fraud, does not apply where one of the actors exercises an undue dominion over the other, by reason either of physical or intellectual weakness, or from a confidence admitting of imposition. *Boyd* v. *d'la Montagnie*, 73 N. Y., 498; *S. C.*, 29 Am. Rep., 197; *Barnes* v. *Brown*, 82 Mich., 146; *O'Connor*

v. *Ward*, 60 Miss., 1025; *Freelove* v. *Cole*, 41 Barb., 318; *Anderson* v. *Meredith*, 82 Ky., 564; *Pinckston* v. *Brown*, 8 Jones Eq., 494; *Osborne* v. *Williams*, 18 Ves., 379; *Roman* v. *Mali*, 42 Md., 513; *Harrington* v. *Grant*, 54 Vt., 236; *Poston* v. *Balch*, 69 Mo., 115; *Kleeman* v. *Peltzer*, 17 Neb., 381; *Davidson* v. *Carter*, 55 Iowa, 117.

The agreement itself is not contrary to public policy nor in fraud of the rights of third parties. It is only an improper contemplated use by Mr. Barnes of the agreement that can be complained of, but this surely is not sufficient to support the doctrine invoked.

"A party to a contract innocent in itself is not responsible for or affected by the use which the other may make of the subject of the contract." *Tracy* v. *Talmadge*, 14 N. Y., 162.

ANDREWS, C. J. The plaintiff is the widow of Samuel H. Barnes who died at Wilton on the 23d day of April, 1891. He left a paper which was duly executed as his last will. The defendants are the executors and legatees named therein, and all the persons who would be distributees of his estate in case of intestacy. The plaintiff was married to the said Samuel H. Barnes on the fourth day of August, 1886. On the 19th day of July, prior to their marriage, they mutually executed a marriage contract in these words:—

"This agreement and written contract made this 19th day of July, A. D. 1886, by and between Lizzie T. Cartwright, of the town of Norwalk, in Fairfield County and State of Connecticut, party of the first part, and Samuel H. Barnes, of the Town of Wilton, in said county, party of the second part, witnesseth: That whereas, a marriage is intended to be had between the parties to this agreement and contract, and each has property of his or her own; and in the event of such marriage, the survivor of them would be entitled to a statutory share of the property owned by the other at the time of his or her death, as appears by the Statutes of this State. And whereas, both parties desire that by this written contract said Lizzie T. Cartwright shall receive from the said Samuel H. Barnes, his promise to pay her the sum of five

thousand dollars, in the event of such marriage, out of his estate in case she outlives him, to be hers and her representatives forever, which sum is intended as a provision in lieu of such statutory share.

"Now, therefore, in consideration of the premises, and of the sum of one dollar, received from the said Samuel H. Barnes by the said Lizzie T. Cartwright, she hereby agrees to receive and doth receive the same from him as a provision in lieu of such statutory share of his property, in case she outlives him, and she doth relinquish and release his estate from any and all further claims and demands by her and her representatives thereupon whatever.

"And the said Samuel H. Barnes, in consideration of the premises and of the sum of one dollar received to his full satisfaction from Lizzie T. Cartwright, doth hereby promise and agree to relinquish any claim upon her estate in case he outlives her, and in case she outlives him, doth promise to pay, or that she shall be paid, by his representatives, out of his estate, to her or her representatives, the sum of five thousand dollars, as a provision for her in lieu of her statutory share of his estate, to be hers and her representatives and heirs forever.

"In witness whereof said parties have severally set their hands and seals the day and year above first written, and to the faithful performance of which they mutually bind and engage themselves, each to the other, his executor and administrator, and her executrix and administratrix.

"LIZZIE T. CARTWRIGHT, [L. S.]
"SAMUEL H. BARNES, [L. S.]

"Signed, sealed and delivered in presence of
"CURTISS THOMPSON,
"HOWARD N. WAKEMAN.

"County of Fairfield, Town of Bridgeport, *ss.*, July 19th, 1886.

"Personally appeared Lizzie T. Cartwright and Samuel H. Barnes, signers and sealers of the foregoing instrument,

and acknowledged the same to be their free act and deed, before me, CURTISS THOMPSON, Notary Public."

The complaint in this action, after setting out the fact of the marriage of this plaintiff to the said Samuel H. Barnes, and that prior to their marriage they executed the said marriage contract, alleges that:—

"3. The said Samuel H. Barnes, in order to induce the plaintiff to execute the said instrument, represented that he had received a letter from some anonymous writer, declaring that the plaintiff's sole object in the proposed marriage with him, the said Barnes, was to obtain his, the said Barnes', money; that he believed it was inspired by relatives of his and persons connected with him by marriage, and who were desirous of becoming the objects of his bounty; that he desired to convince them that there was no foundation for their anxiety or fear in this respect; that he did not believe that such was the object of the plaintiff, or that she had any such purpose in view, and that he had given them to understand that he so believed, but that he desired her to execute the said instrument that he might show it to those who were taking so much interest in his affairs, in order to relieve himself from annoyance and vexatious interference by them; and that as soon as she had executed it and he had shown it to these parties, and thereby accomplished the purpose which he had in view, he would destroy it, and that the plaintiff's rights should not be in any manner injuriously affected by the execution of said instrument or agreement. * * *

"5. Subsequently, and before the execution thereof, the said Barnes renewed his request that the plaintiff should join with him in the execution of said instrument, and as a further inducement to cause the plaintiff to acquiesce and to execute the same, represented to her that it would make but little difference to her anyway, as he was worth only fifteen thousand dollars, and he again stated to the plaintiff the reason why he desired her to execute the instrument, and again declared that he would destroy it as soon as he had shown it to the parties to whom he referred.

"6. Relying upon these statements, and the promise of the said Barnes, the plaintiff was induced to execute the said instrument, and did execute the same on the 19th day of July, A. D. 1886. * * *

"10. The said representations made by the said Barnes to the plaintiff to induce her to execute said instrument, and relying upon which she did execute the same, were false, and were made with the fraudulent intent to defraud the plaintiff, and to induce her to execute said agreement, and without any intention to use it for any such purpose with the parties referred to by said Barnes, or to destroy it after he had shown it to them; and at the time when the said representations were made the said Barnes was worth seventy-five thousand dollars.

"11. Said representations were made, and said instrument was procured to be executed in the manner in which it was, fraudulently and with intent to defraud, and to deprive the plaintiff of her statutory rights in the estate of said Barnes."

The complaint ended with a prayer that the said marriage contract be declared to be void, and to be delivered up to be canceled. The Superior Court passed a decree granting the prayer of the complaint. The defendants have appealed to this court. There are in the complaint, as claimed by the plaintiff, three specifications of fraud by her late husband, relying upon which she says she signed the said marriage contract, and on account of which she asks that it should be set aside: (*a*) That he had received an anonymous letter, the authorship of which he attributed to his relatives and persons connected with him by marriage, warning him not to marry the plaintiff, and he wanted the contract to relieve him from their interference, etc.; (*b*) that he promised to destroy the contract as soon as he had secured that purpose; and (*c*) that he represented to her that he was not worth more than fifteen thousand dollars.

The finding so far as it bears upon these claims of the plaintiff is as follows: The plaintiff, whose maiden name was Lizzie T. Cartwright, first became acquainted with Mr. Barnes about the first of January, 1885. He was then a widower—

his wife having died in the month of September 1884. He was then seventy-five years of age. It was about the middle of July that he first proposed marriage to her. She was then forty-five years old and had never been married. She did not accept the proposal at that time, hesitating on account of the disparity of their ages and for other reasons. At that time and for about ten years prior thereto, she had been living with her sister Mrs. George T. Hunter, where she was treated as one of the family. She had upwards of one thousand dollars deposited in savings banks to her credit. Mr. Barnes was a well preserved man for his years and apparently vigorous. He had always been a farmer. The plaintiff knew in a general way that he had considerable property. She knew that he owned his farm, which was a nice farm, well stocked, and that he owned the Van Zant place in Norwalk, which was worth $5,500, and believed he had sufficient income, or property from which an income was derived by him, to enable him to give up farming, rent or sell his farm, and live upon the Van Zant place in a moderate and comfortable manner, and support her and himself upon the income of his said property, without the necessity of his performing any labor himself. But she did not know nor did she inquire the amount of his property, nor in what it was invested. They became engaged to be married about the last of August or the first of September of that year. At an interview which took place between them about a month after their engagement, Mr. Barnes showed the plaintiff an anonymous letter which he said he had recently received which read:

"NORWALK, July 9, '85.

"MR. BARNES.

"Dear Sir:—I write this to warn you against taking a step you will always regret. Miss. Cartwright is not the woman you should select for a wife; she is too hateful and quarrelsome; she is the most disagreeable person to be found, she wants to rule and ride over everybody. Now I will tell you of something I overheard her say. She said when asked if she loved you, No, how could I love that old thing, but I

could love his money, and when I get him I will have things all my own way, and I will make him stand around. Yes, and so she would. I felt sorry for you to think you were going to throw yourself into such an abyss of trouble and so wrote as a friend to warn you in time to steer clear of her. She expects to marry you and when once installed in your home, you can bid farewell to happiness. Now this is the truth, you may not believe it, but will have a chance of believing it, should you marry her.

"Mr. Hunter would be happy to have some one take her off his hands, because she quarrels with all around her. Of course she will be sweet on you, as the spider was on the fly, until she gets you where she wants you. Then look out. Remember, you have been warned, now do as you please. This is in confidence. If you should speak of this it would all be denied, and smoothed over, but this is the facts I have written. FROM A FRIEND."

He said to her he thought it came from Mr. Nelson Gorham's folks. He also showed her the marriage contract and asked her to sign it. She asked what it was. He said it was a little form he wanted her to sign, so that he could show it to those people who felt so badly about his getting married, and said to her: "I don't believe you have any idea about marrying me for my money, but I would like this, so that I can show it to them, they feel so badly about my marrying you, and I want to convince them that you are not such a person, and you can have confidence in me that I will destroy it as soon as we are married." He appeared to be angry and excited about the letter, and said he did not believe the purport of the letter but thought it a scheme to set him against her, yet at the same time he would like to have her sign the marriage contract, so that he could show it to those people who were complaining or objecting about his getting married, and that if she would sign it he would destroy it as soon as he had shown it to them. The plaintiff at that time declined to sign the contract. In the autumn of that year Mr. Barnes again spoke to the plaintiff about the marriage contract, and

she again declined to sign it, telling him "that the other people might get hold of the paper and make trouble." About the last of June, 1886, Mr. Barnes spoke again to the plaintiff about the marriage contract. At that time he told her "that she need not be afraid to sign this marriage contract; that all he wanted it for was to convince those people that she was not the person they represented; that if she signed it, it would stop those people bothering her; that it would make little difference with her any way, as he was not worth more than $15,000; that after they were married he would have it in his power to do what was right, and that if she would sign it he would destroy it as soon as he had showed it to those people."

Mr. Barnes had had only one child, a daughter, who was married to Mr. Nelson Gorham in 1855. She died in 1857, leaving no children. Mr. Barnes lived with Mr. Gorham for a number of years after Mrs. Gorham died, and for some time after Mr. Gorham had married again, and was on terms of great intimacy with him and his family. Gorham was a near neighbor to, and at all times a trusted and confidential friend of, Mr. Barnes. He attended to matters of business for Mr. Barnes, collected his rents and deposited money for him. Bradley Gorham, a son of Mr. Nelson Gorham, also attended to business matters of a like nature for Mr. Barnes.

Mr. Barnes delivered the marriage contract to Mr. Gorham shortly after the marriage, who informed the nephews and most of the legatees in the will that he had it, and of the nature of its contents. He kept possession of it until after Mr. Barnes' death.

It is found that relying upon the representations of Mr. Barnes, and believing that said contract was not to be of binding force upon her, or in any way affect her right in her husband's estate after her marriage, but was to be destroyed and canceled within a short time and as soon as it had served the purpose which Mr. Barnes said its execution was intended to accomplish; and without intending to agree to, or to be bound by the provisions of the said marriage contract, the plaintiff signed the same on the day it bears date; and that

the statements made by Mr. Barnes as to the amount of his property, and to his intended destruction of said marriage contract as soon as he had shown it to certain people who, as he claimed, were objecting to his marriage with the plaintiff, were false and untrue, and were made to the plaintiff for the purpose of fraudulently inducing her to sign said contract, and thereby relinquish the interest in his estate which would after marriage vest in her as his wife; and that Mr. Barnes was worth at that time at least $75,000, and that he had no intention whatever of keeping his promise, and destroying said contract as soon as he had shown it to certain people, or at any time thereafter. And the trial judge says: "I find that the plaintiff was induced to sign said contract mainly by reason of the promise and representation that the same should be destroyed; but I do not intend to find that she was wholly uninfluenced by the other false representations made to her by her husband previous to the execution of said contract, and hereinbefore detailed."

Mr. Barnes made his will on the 16th day of June, 1890. The plaintiff knew at the time that he was making his will, but did not know anything of its provisions until after his death. The plaintiff learned, some time before the will was made, that the marriage contract had not been destroyed.

Whenever fraudulent representation is the ground upon which relief is sought in a court, certain essential ingredients must be proved:—That the representation was made as a statement of fact; that it was untrue and known to be untrue by the party making it; that it was made for the purpose of inducing the other party to act upon it; and that the party to whom the representation was made was in fact induced thereby to act to his injury. Unless these ingredients are shown the case is not sustained.

An examination of the foregoing finding discloses that the representation mentioned in the first specification of fraud set forth in the complaint, is not found to be untrue, but rather the contrary. As to the representation which is the subject of the third specification, it is not found that the plaintiff was induced thereby to execute the marriage con

tract. The trial court, after finding specifically that the promise by Mr. Barnes to destroy the marriage contract did induce the plaintiff to sign the same, says as to the other false representations, (of which the one contained in the third specification is the only one found to be untrue):—"But I do not intend to find that she was wholly uninfluenced by the other false representations made to her." The whole significance of this language is expended in declaring the state of mind in which the judge then found himself. It is not a finding that the plaintiff was not influenced by the other false representations; and still less is it a finding that she was in fact induced by such other representations to sign that contract. At the most it is the declaration of an inability to find either way. The only fraudulent representation then, upon which the judgment in this case can be founded, is the promise by Mr. Barnes to destroy the marriage contract.

The circumstances which led up to the making of the contract involved in this case, as they appear in the complaint and in the finding, and upon which the plaintiff claims that it should be canceled, are these:—In the summer of 1885 the plaintiff, a maiden lady of high respectability, aged forty-five years, of limited pecuniary means, living in the family of her married sister as a member of the family, received a proposal of marriage from a man thirty years her senior but well preserved, against whose character and standing nothing is suggested, and whom she understood to be possessed of considerable fortune. It was an eligible offer, creditable to her, and one which in a prudential point of view, it would seem, was an exceedingly desirable one to accept. It is stated on the very highest authority that marriage is honorable in all. Preferment in marriage may always be sought by an honorable woman with the approval of the law, and with the approbation of society. The plaintiff and Mr. Barnes had both reached that time in their lives when the *ardor amantium* does not hold sway, and when considerations drawn from sober practical experience are altogether more likely to influence the conduct. At five and forty a woman can calcu

late. Unless the plaintiff was different from most of her sex she desired this marriage. That she regarded the offer as a favorable one is shown by her subsequent action. After a suitable period of delay, sufficient for such reflection and inquiry as she deemed necessary, she accepted the offer and she and Mr. Barnes became engaged to be married. No time was, however, set for the celebration of the ceremony. Shortly after their engagement Mr. Barnes received a letter which is set out in the finding. Its tone of candor towards, and friendship for, him, and its severe criticisms upon the plaintiff, were well calculated to make estrangement between them. Its authorship gave it much force. Mr. Barnes attributed it to that family to which he was most closely allied of any in the world by associations and ties of affection. They were his most trusted and confidential friends, friends of long standing who would naturally have great influence with him. Mr. Barnes also believed that others of his relatives and persons connected to him by marriage were privy to the letter. Such objections to her as the letter contained, coming from such a source, could not be disregarded. If the plaintiff desired to marry Mr. Barnes, or if Mr. Barnes desired to marry her, such objections from these people must be met and overcome, otherwise the marriage would be put in peril. If the near friends of Mr. Barnes held such an opinion of the plaintiff as that letter indicated, she would be very unwilling to marry him. If she was really such a person as that letter described her to be, it was quite certain he would never willingly marry her. The use of the marriage contract was adapted to that condition of things in which they were situated. If Mr. Barnes could have that contract duly executed, to show to those persons from whom the letter came, their oppposition would be removed. But to have this effect the contract must be a valid one. To secure that effect the plaintiff signed that contract. It apparently was used as she expected, and such use accomplished the purpose for which it was intended. Those persons to whom the contract was shown were apparently convinced that they had misjudged the plaintiff. All their opposition ceased; there was no more interference with Mr

Barnes, nor was there any more "bothering" the plaintiff; the marriage took place and the contract was found later, in the possession of the very parties to remove whose opposition it was executed and delivered.

According to the version of the matter given by the plaintiff and found by the court, the marriage contract was to be a valid one for a time—until Mr. Barnes had shown it to those parties who were objecting to the marriage. It was to be used with them as a valid one, and then it was to be "destroyed and canceled." There would be little occasion to "destroy or cancel" an invalid contract. It was this marriage contract, so executed and so used, that the plaintiff prayed the court to cancel. We think she ought not to succeed and that the Superior Court erred in granting the prayer of her complaint.

These circumstances, viewed in that aspect to which the plaintiff herself asks attention, show that, in order to remove the opposition which was being made to her marriage with Mr. Barnes, she took part with him in misleading his relatives. These relatives were the heirs apparent to Mr. Barnes —persons who had rights in his estate, of which equity takes note and permits to be conveyed. 2 Spence, Equity, 865; 2 Story's Equity, 1040*e*; *Fitzgerald* v. *Vestal*, 4 Sneed (Tenn.), 258; *Jenkins* v. *Stetson*, 9 Allen, 128. They were the same persons who are the defendants in this action. They were interested in preventing the marriage. They were taking measures to prevent it. They might have succeeded. To stop their opposition, and to keep it from being successful by removing it entirely, and to gain the corresponding advantage to herself, she participated in practicing a deceit on them. She now asks the court to add another element to her deceit, and make it a fraud by canceling the contract which she signed to deceive Mr. Barnes' relatives, the present defendants, and to take away from them the consideration upon which they ceased their opposition to her marriage. This is conduct which debars her from obtaining aid in a court of equity. The very foundation principle of equity is good conscience. One of its primary maxims is

that he "who comes into a court of equity must come with clean hands"—a maxim which has been interpreted by long use to mean that whenever a party who, as *actor*, seeks to set the judicial machinery in motion to obtain some relief, has himself violated conscience or good faith in his prior conduct connected with the matter of the controversy, then the door of the court will be shut against him; the court will refuse to interfere in his behalf, to acknowledge his right, or to award him any remedy. 1 Pomeroy's Equity, §§ 398 and 404. In Maddock's Chancery, Vol. 1, p. 404–5, this rule is stated somewhat more fully:—"A party calling for the aid of a court of equity must come, as it is said, with clean hands; it being a maxim of equity that he that hath committed iniquity shall not have equity." *Cadman* v. *Horner*, 18 Vesey, 11. This statement is followed by numerous citations of cases in which contracts have been sought to be set aside, or to be enforced, and in which, by the application of this maxim, aid has been refused to the plaintiff; as, when it is shown that there was chargeable to the plaintiff an omission or mistake in the agreement; *Joynes* v. *Statham*, 3 Atkyns' Rep., 388; *Woollam* v. *Hearn*, 7 Vesey, 211; *Mason* v. *Armitage*, 13 id., 25; *Myers* v. *Watson*, 1 Simons, New. Ch. Rep., 523; *Costigan* v. *Hastler*, 2 Schoales & Lefrey, 156; *Howel* v. *George*, 1 Maddock Rep. 1; that it was unconscientious; *Vaughan* v. *Thomas*, 1 Brown's Ch., 556; or unreasonable; *Flood* v. *Finlay*, 2 Ball & Beatty, 9; or that there has been fraud or surprise; *Clowes* v. *Higginson*, 1 Vesey & Beames, 526, 527; *Townshend* v. *Stangroom*, 6 Vesey, 328; *Twining* v. *Morrice*, 2 Brown's Ch., 326; or that there had been concealment; *Shirley* v. *Stratton*, 1 Brown's Ch., 440; *Bowles* v. *Round*, 5 Vesey, 508; or that there had been misrepresentations, whether willful or not, latent or patent; *Scott* v. *Merry*, 1 Vesey Senior, 2; or any unfairness; *Wall* v. *Stubb*, 1 Maddock Rep., 54.

The rule just quoted, that he who comes into equity must come with clean hands, is a broad one. It includes within its operation several other maxims frequently acted upon in courts of equity; as, *ex turpi causa non actio oritur; ex dolo*

malo non oritur actio; jus ex injuria non oritur; in pari delicto potior est conditio defendentis. The fundamental reason upon which each of these maxims seems to rest is, that a party does not come into court with clean hands, to whose cause either of these maxims may be justly applied. See also 1 Beach, Modern Equity, § 16; Pomeroy's Equity, §§ 397 to 404 inclusive; 1 Story's Equity Jur. (12th ed.), § 64*e*, note; Snell's Equity, 35; Smith's Manual of Equity, 23; *Overton* v. *Banister*, 3 Hare, 504; *Savage* v. *Foster*, 9 Modern, 35; *Nelson* v. *Stocker*, 4 De Gex & Jones, 458, 464; *Johns* v. *Norris*, 22 N. J. Eq., 102; *Walker* v. *Hill's Executors*, 22 id., 513; *Wilson* v. *Bird*, 28 id., 352; *Atwood* v. *Fisk*, 101 Mass., 363; *Creath's Admr.* v. *Sims*, 5 Howard, U. S., 192; *Bischoffsheim* v. *Brown*, 34 Fed. Rep., 156.

A very numerous class of cases coming within the same equitable doctrine is, where the contract or other act is substantially a fraud upon the rights, interests, or intentions of third parties. In a case of this kind, relief is refused to a plaintiff on the ground that he does not come into court with clean hands. The general rule is that the parties to a contract must act not only *bonâ fide* between themselves, but that they shall not act *malâ fide* in respect to other persons who stand in such a relation to either as to be affected by the contract or its consequences. Pomeroy's Equity, § 881; Lord HARDWICK in *Chesterfield* v. *Janssen*, 2 Vesey Senior, 156, 157; *Egerton* v. *Earl Brownlow*, 4 H. L. Cases, 160; *Ferris* v. *Hendrickson*, 1 Edward's Ch. (N. Y.), 132; *Paddock* v. *Fletcher*, 42 Vt., 389; *Huxley* v. *Rice*, 40 Mich., 73; *Denison* v. *Gibson*, 24 id., 187; *Bolt* v. *Rogers*, 8 Paige (N. Y.), 154; *Dunaway* v. *Robertson*, 95 Ill., 419; *Miller* v. *Marckle*, 21 id., 152; *Everett* v. *Raby*, 104 N. C., 479; *Parlett & Co.* v. *Guggenheimer & Co.*, 67 Md., 542, 551; *Medford* v. *Levy*, 31 W. Va., 649; *Bleaksley's Appeal*, 66 Pa. St. 187; *Scranton Electric H. & L. Co.'s Appeal*, 122 id., 175; *Lewis & Nelson's Appeal*, 67 id., 166.

There is another feature of the case which invites brief attention. It has been pointed out that the only false representation on which the judgment in this case can be founded,

is the promise by Mr. Barnes to destroy the marriage contract as soon as he had shown it to those persons from whom he believed the letter had come. In the same connection it was noted that a representation to be a fraudulent one, cognizable as such in equity, or actionable at law, must be made as a statement of fact, and that it must be untrue at the time it is made. Counsel for the defendants claim that the promise by Mr. Barnes to destroy the contract at a future time is not and cannot be a fraudulent representation. A promise to do an act in the future cannot be untrue at the time it is made, and therefore, as is claimed, cannot be a fraudulent representation. We suppose the doctrine of this claim to be well settled by the authorities. In *Beattie* v. *Lord Ebury*, L. R., 7 Ch. App., 777, 804, it is said:—"There is a clear difference between a misrepresentation in point of fact—a representation that something exists at that moment which does not exist, and a representation that something will be done in the future. Of course, a representation that something will be done in the future cannot either be true or false at the moment it is made, and although you may call it a representation, if it is anything, it is a contract or a promise." A representation of this kind if so made as to be enforceable, is so because it is a contract. "There is no middle term, no *tertium quid* between a representation so made as to be effective for such a purpose, and being effective for it, and a contract; they are identical." *Maunsell* v. *White*, 4 H. L. Cases, 1056; *Jorden* v. *Money*, 5 id., 185, 213, 214; *Citizens' Bank of Louisiana* v. *The First National Bank of New Orleans*, L. R., 6 H. L., 367; *Knowlton* v. *Keenan*, 146 Mass., 86; *Dawe* v. *Morris*, 149 id., 188–192; *Hartsville University* v. *Hamilton*, 34 Ind., 506; *Grove* v. *Hodges*, 55 Pa. St., 504; *Long* v. *Woodman*, 58 Me., 49. Counsel for the defendants insist that this is all there is of the plaintiff's case and that she cannot recover.

Counsel for the plaintiff deny that this is the whole of her case. They admit the rule established by the authorities cited, but they claim that her case is not in conflict with it. They insist that the promise to destroy is not their case, cer

tainly not the whole of it, not the essential part of it. They say that the promise to destroy the marriage contract at a future time was coupled with the present intention not to keep the promise; and that the declaration of a present intention—although the act in respect to which the intention is declared is future—is the statement of a fact (*i. e.*, the intention) existing at the time; and that if no such intention existed, it was a fraudulent representation. Cooley on Torts, 487; *Dowd* v. *Tucker*, 41 Conn., 197; *Dow* v. *Sanborn*, 3 Allen, 182. The Superior Court seems to have adopted the contention of the plaintiff on this point.

In any case where a fraudulent representation has induced a party to enter into a contract, the contract is not wholly void. It is voidable only, at the election of the party misled. If nothing is done to avoid such a contract then it stands as a valid one. Obviously the person misled could waive the fraud and elect to treat the contract as a binding one. And what such a person could do directly, he might do indirectly. A party who, having entered into a contract, afterwards learns that a fraud has been practiced upon him by reason of which the contract may be avoided, and who neglects to take seasonable measures to set it aside, will be held to have waived the fraud and elected to treat the contract as valid. Especially is this rule applied when, during the delay, the rights of other persons have been changed. The marriage contract was executed on the 19th day of July, 1886. The plaintiff was married to Mr. Barnes on the 4th day of August following. Mr. Barnes made his will on the 16th day of June, 1890. He died on the 23d day of April, 1891. The plaintiff testified that she knew "sometime before the will was made," that the marriage contract was still in existence —not destroyed. Whether the expression "sometime" means one month, or two months, or more, or less, perhaps makes no great difference. Whenever it was, at that time the plaintiff's cause of action was complete, as fully as when this suit was brought. The fraud of which she now complains was then complete, her knowledge of it was then complete. The secret agreement between herself and Mr. Barnes, the non-

performance of which constituted that fraud, could be testified to by no person other than Mr. Barnes and herself. Mr. Barnes was then eighty years old. Whether she speculated on the advantage of having a hostile witness removed is open only to conjecture. From that time until after the death of Mr. Barnes she did nothing to assert her rights as she now claims them. Nothing has been suggested as a reason why she so remained quiescent, or why she did not take measures then to have the fraud upon her exposed. During her delay Mr. Barnes made his will. She knew that he made it, although she did not know its contents. Mr. Barnes died and the rights of the defendants in his estate have become fixed. She has been under no disability or constraint; on the contrary she has acted, so far as appears, from her own choice. She did nothing because she chose to do nothing.

In suits to rescind contracts for fraud, it is the duty of a plaintiff to put forward his complaint at the earliest possible period. *Jennings* v. *Broughton*, 5 De Gex, Marnagthen & Gordon, 126. "Acquiescence in the wrongful conduct of another, by which one's rights are invaded, may often operate, upon the principles of and in analogy to estoppel, to preclude the injured party from obtaining many distinctively equitable remedies to which he would otherwise be entitled. * * * The same rule applies, and for the same reasons, to a party seeking purely equitable relief against fraud, such as the surrender or cancellation of securities, the annulling of a transaction, and the like. Upon obtaining knowledge of the facts, he should commence the proceedings for relief as soon as is reasonably possible. Acquiescence consisting of unnecessary delay after such knowledge, will defeat the equitable relief." Pomeroy's Equity, § 817; *Price's Appeal*, 54 Pa. St., 472; *Bolton* v. *Dickens*, 4 Lea, (Tenn.,) 569; *German Am. Seminary* v. *Keifer*, 43 Mich., 105.

This part of the case has been noticed, not because the case depends upon it, but because it illustrates and enforces the other parts of the case which have been previously considered. The conduct of the plaintiff touching the subject of her complaint in this action is pretty fully delineated throughout the

case. It shows that she has not acted with that sincerity, conscientiousness, candor and regard for fair dealing, which entitles her to the aid of a court of equity. She does not come into court with clean hands.

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

In this opinion the other judges concurred.

WILLIAM O'FLAHERTY *vs.* THE CITY OF BRIDGEPORT.

Third Judicial District, New Haven, January Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

Sections 8 and 11 of the Act amending the charter of the city of Bridgeport (Special Acts of 1889, pp. 856, 858), relating to the registration of voters at electors' and city meetings, are not inconsistent with, and do not repeal §§ 215 and 222 of the General Statutes requiring the registrars of voters to complete a correct list of those entitled to vote at the annual town and city election.

The registrars performing the duties so required of them are, therefore, entitled to recover reasonable compensation.

[Submitted on briefs January 16th—decided March 6th, 1894.]

ACTION to recover compensation for services rendered by the plaintiff, as registrar of voters, in preparing a registry list for use in the annual town and city election in Bridgeport on the first Monday of April, 1892; brought to the Court of Common Pleas in Fairfield County, and tried to the court, *Curtis, J.*, on demurrer to the complaint. The court sustained the demurrer, and rendered judgment for the defendant, and the plaintiff appealed. The case is sufficiently stated in the opinion. *Judgment reversed.*

Lockwood and *Beers*, for the appellant (plaintiff).

Daniel Davenport, for the appellee (defendant).

HAMERSLEY, J. This is a suit to recover payment for

services rendered by the plaintiff as registrar of the town of Bridgeport, in completing a registry list for the annual town meeting held on the first Monday of April, 1892.

The defendant demurred on the ground that there was no law requiring or authorizing the performance of such services; the demurrer was sustained and judgment given for the defendant; the plaintiff appealed, assigning as the only reason of appeal, error in the court below in sustaining the demurrer. The demurrer admits for the purposes of decision that the defendant is liable to pay for the services if they were authorized by law. The case, therefore, involves a single question—did the law authorize the registrars of the town of Bridgeport to complete a correct list of all the electors in said town prior to the town meeting held on the first Monday of April, 1892?

Section 215 of the General Statutes imposes such duty upon the registrars of Bridgeport, and under the provisions of § 277 they are liable to fine and imprisonment for neglect to perform that duty; but the defendant claims that § 215 is inconsistent with the provisions of "An Act Amending the Charter of the City of Bridgeport and Consolidating the Government of the Town and City of Bridgeport," passed March 26th, 1889, and published in the Special Acts of the January, 1889, session (p. 854), and is therefore repealed by virtue of the clause in that act repealing all acts and parts of acts inconsistent with its provisions.

The amendment to the city charter does not purport to repeal § 215; it is a special act dealing with the municipal affairs of a single city and was enacted in view of existing general statutes regulating registration; and if it can fairly be construed as consistent with those statutes, it is the duty of the court to give it such construction. The actual inconsistency alleged between § 215 and the special act is based on the claim that two sections, to wit, §§ 8 and 11, of the special act are inconsistent with each other, if § 215 remains unrepealed. Section 8 provides that all persons registered as electors prior to the biennial electors' meetings, and by virtue of such registration entitled to vote at such meeting in the town of Bridge-

port, may vote at the succeeding city meeting held for the choice of officers; and that at all city meetings all persons may vote who possess the specified qualifications (the specified qualifications being the same qualifications that are prescribed by § 36 of the General Statutes for voters at town meetings, irrespective of registration). Section 11 provided that at the annual city meeting on the first Monday of April, for the choice of officers, votes shall be received "from the electors then registered." It is plain from the context that the word "electors" is used in the phrase "electors then registered," with the meaning "freemen of the city" or "qualified voters of the city;" and some confusion in construing this special act will be avoided by remembering that the act throughout uses the word "elector" inaccurately. The Constitution has given to the word "elector" a precise, technical meaning, and it is ordinarily used in our legislation with that meaning only. An "elector" is a person possessing the qualifications fixed by the Constitution, and duly admitted to the privileges secured and in the manner prescribed by that instrument. The electors, and no others, can vote for state officers and members of the General Assembly; they are electors of the State, but they can become electors only through the action of the towns, and can only exercise their exclusive privileges, as originally defined by the Constitution, in the towns to which they belong. While the legislature can permit none but electors to take part in the "electors' meeting," it may permit other than electors to take part in town, city and borough meetings, and to vote for local officers; hence there is a broad distinction which has been observed in legislation between "electors' meetings," and meetings of towns, cities and boroughs; between "electors" and voters. Within the meaning of the Constitution there can be no electors of a city, and the act, in speaking of "meetings of the electors of the city," "electors of the city," and "electors of the town and city," is confusing and renders its accurate construction more difficult.

The inconsistency thus claimed between §§ 8 and 11 is that § 8 excludes all persons but the electors who were registered

prior to the biennial state election in November, and by virtue of such registration were entitled to vote at such election, from voting at the following annual city election for the choice of officers; *i. e.*, that § 8 excludes from voting at the annual city election for the choice of officers, all persons except electors of the State duly registered prior to the preceding biennial state election; that § 11 provides that at such annual city election votes shall be received from all voters of the city then registered; that if there is no registration except the biennial registration prior to the said election, the two sections are consistent; but if the law provides for an intervening registration, then § 8 excludes those registered at the intervening registration from voting, and § 11 commands that their votes shall be received, and so there is an inconsistency between the two sections; that § 215 of the General Statutes provides for such intervening registration, and must therefore be repealed by implication.

The difficulties involved in maintaining this claim are obvious, and conclusive against its validity. The general statute which the defendant claims is repealed in this indirect manner, deals with a subject distinct from that dealt with by the special act, and covers a ground not touched by that act. The former deals with provisions for enforcing throughout the state a settled policy in respect to the admission of electors and registration of voters; the latter deals only with the special qualifications of city voters, who must exercise their right to vote in accordance with the general laws regulating the admission of electors and registration.

Section 215 is a part of the general statutory provision for requiring in every town in the state a meeting of the selectmen and town clerk, to be held once in every year for the admission of electors, and for requiring the registrars to annually place upon the registry list the names of the electors so admitted, in order that the laws of registration for the promotion of free suffrage may not operate in any town to the exclusion of any elector, otherwise qualified, from voting at the state election, and at the annual town election immediately following his admission as an elector. This general

statutory provision is contained in §§ 219 to 224 inclusive, and §§ 207 to 216 inclusive. Section 215 is, therefore, in reality, but one section of one public act enacted to carry out one general purpose, and is essential to the accomplishment of the purpose. That purpose is to secure to every qualified citizen of the state, in whatever town he may live, the right to be admitted as an elector within the year preceding each annual town meeting; and to provide in each town for a correct registry list of all electors before each electors' meeting, and for a revision of that list for use before each annual town meeting for election of officers.

We think that legal effect is given to this intent of the legislature relative to admission of electors and registration of voters, by the sections of the General Statutes covering the subject and in force in 1889, when the special act under construction was passed. Section 219 provides for a meeting of selectmen and town clerk in every town for the admission of electors prior to each electors' meeting. As these electors' meetings occur biennially in the even numbered years, §§ 222 and 223 provide for a similar meeting for the admission of electors prior to each annual town meeting in the years intervening between the biennial state elections. Section 207 requires the registrars in every town to complete, prior to each electors' meeting, a correct list of all electors entitled to vote in that town at that meeting.

Sections 215 and 216 require the registrars in every town to further complete that list prior to the town meetings in the years intervening between the electors' meetings, by adding the names of electors whose qualifications have matured since the last electors' meeting, and erasing the names of those who have lost the right to vote. (It is to be noted that in 1887, in view of the new constitutional provision for biennial state elections, the legislature passed "An Act for the Registration of Electors prior to Annual Town Meetings," providing for the admission of electors and their registration prior to the annual town meeting in every town, in the odd numbered years; and that as Bridgeport alone held its town meeting in April, and the act, therefore, would not op-

erate so beneficially for Bridgeport as for the other towns, a subsequent act was passed providing that the intervening admission of electors and registration in Bridgeport should take place prior to its town election in April in the even numbered years. These two acts were incorporated as §§ 222 and 223, 215 and 216, in the Revision of 1888, adopted at the same session.)

Having thus carried out, though in a somewhat clumsy way, the legislative intent of securing the annual admission of electors and annual registration of all electors admitted in every town, the General Statutes, in § 233, for securing the beneficial purposes of registration, provide that "at any electors' meeting, and at any town or city meeting for the election of officers by ballot, those only shall vote who were registered on the revised list then last completed according to law." In this condition of the General Statutes as to the admission of electors and their registration, the special act amending the charter of the city of Bridgeport was passed. If the inconsistency between §§ 8 and 11 of that amendment, claimed by the defendant, exists, such inconsistency should be reconciled if possible; but if the amendment is so carelessly phrased that reconciliation is not possible, it is by no means clear that sound rules of construction will permit the court to declare a general statute, enacted for a general and entirely different purpose, to be impliedly repealed, in order to reconcile self-contradictory language contained in a special act; but when it is remembered that this charter amendment especially refers to the annual town election which, by the terms of the Constitution, must continue to be held in Bridgeport for the choice of selectmen, and that the general statute claimed to be impliedly repealed, was enacted for the express purpose of securing to all the citizens of the state, including the inhabitants of Bridgeport, by provisions for annual admission of electors and annual registration, the right to vote at such annual town meetings, and that the alleged contradictory provisions of §§ 8 and 11 of the charter amendment deal expressly with the qualification of voters at city meetings only, and do not purport to deal with

subjects of admission of electors and registration, the argument is apparent that if it is impossible in construing that amendment to give effect to the provisions of § 8 and of § 11, then, as in the construction of every law containing provisions hopelessly inconsistent, effect must be given to those provisions most consistent with the context and the clear intent of the legislature; and that such difficulty in the construction of the charter amendment does not create that absolute inconsistency between the special act and the general statute which is necessary to justify the court in declaring the general statute repealed by implication.

The defendant appreciates this argument, but seeks to avoid its force by the suggestion that the special act deprives the annual town meeting in Bridgeport of all functions except the election of selectmen, and deprives the selectmen of all functions except the admission of electors; and that it is unreasonable to hold that the legislature intended to keep in force the general statute providing for the admission of electors and a registry list for use at a town meeting held simply for the election of selectmen who have no duties or powers except the admission of electors; and that such a conclusion, entailing as it does the making of new voters and a new registration for use solely at a town meeting, cannot be entertained for a moment.

The annual town meeting for the election of selectmen is required by the Constitution. In the selectmen chosen at such town meeting, with the town clerk, is vested the power to annually determine the qualifications of electors, and without their annual election and their judicial action, the government under the Constitution could not continue; the annual town election is the single entrance to our whole system of State government. If the times have changed so that the system is oppressive or inadequate in present conditions, the remedy is with the electors; but so long as the Constitution remains unchanged, neither the legislature nor the court can alter the supreme position held by the annual town meeting, and the court cannot treat as unreasonable any law necessary or proper to secure to each elector

and citizen qualified to be an elector, his right to vote at each annual town meeting.

But the defendant goes further, and the main part of his brief is occupied with an argument tending to establish the claim that the special act is not simply an amendment of the city charter, but an act consolidating the town and city governments; that such legislation is "unprecedented and revolutionary," and that the legislature intended to practically abolish the town, and to make even the annual meeting for the election of selectmen "a part, in fact, of the city election;" and that, therefore, those general laws intended to secure to all citizens rights of voting at town meetings, are no longer applicable to the citizens of Bridgeport.

We are not called upon in this case to express any opinion upon the questions such argument involves, for even if the claims of the defendant in this matter were correct and his argument sound, there still remains the decisive question whether the amendment of the city charter in fact intends to do away with all admission of electors and all registration of voters except such as is provided for in connection with the biennial state elections. We think the amendment expresses no such intention, and that a correct construction of the language of the amendment is inconsistent with such intention.

Section 4 of the city charter, to which this special act is an amendment, provides that "every person and no other" who is an elector of the State qualified to vote at electors' meetings in the town of Bridgeport, and who shall have resided in said city at least sixty days, shall be an "elector of said city," and qualified to vote at any city meeting and to hold any city office. Section 8 of the amendment simply modifies this definition and says that, "at all city meetings all those male citizens may vote who are of the age of 21 years, and who have resided in this state the one year, and in the town the six months, next preceding, and who have been duly admitted as electors in said town, or who have a freehold estate," etc. It is admitted that the sole object of this change in the city charter was to require of the voters

of the city of Bridgeport the same qualifications that are prescribed by the General Statutes for voters of a town, and those qualifications are substantially the same as have been required for town voters for the past seventy years; and the main practical effect intended by the change is to allow residents of the city not electors, but possessing property qualifications, to vote at all city meetings; but in the immediately preceding clause of § 8 it says that, "at all meetings held by the electors of said city for the choice of officers," every person may vote who was registered as an elector on the revised registry list of said town completed for the last preceding biennial electors' meeting and who, by virtue of such registration, was entitled to vote at such biennial electors' meeting. The defendant construes this language as meaning that no person shall vote at any city meeting for the choice of officers except electors of the State who have been registered, and who were qualified to vote at the preceding biennial electors' meeting; and on this construction bases his claim that § 8 dispenses with all admissions of electors and all registration of voters, except for the biennial electors' meetings, and therefore repeals the statutes providing for the annual admission of electors and the annual registration of voters in the town of Bridgeport.

If the defendant's construction is correct, it necessarily follows:—that one clause of the section says that no one shall vote at the annual city meeting except an elector of the State who has been registered at a biennial electors' meeting held five or seventeen months previously, while the following clause says that any elector qualified by residence may vote at all city meetings; that one clause says no person possessing property qualification who is not an elector, can vote at the annual city meeting, while the next clause says that every citizen possessing the required qualifications of age, residence and property, may vote at all city meetings, although not an elector; and that the main object of the section in requiring of all city voters the same qualifications required of town voters, as well as the main intended effect

of admitting as city voters persons not electors, but possessing property qualifications, have not been accomplished.

It is too plain for argument that a construction involving such results cannot be correct, nor is there any real ground for such a construction; in carrying out its object of prescribing for the voters of the city of Bridgeport the same qualifications required for voters of a town, the legislature has adopted substantially the language of § 36 of the General Statutes which prescribes the qualifications of town voters, and, in adopting that language, may fairly be held to adopt the meaning which the language used in that section undoubtedly expresses. The method of construction applied by the defendant to § 8 of the charter amendment, if applied to § 36 of the General Statutes, would make that section inconsistent with the statutory provisions for an annual admission of electors and registration in every town in the state; but it is patent that § 36 is not susceptible of such a construction. Construed in connection with cognate parts of the General Statutes, the plain meaning of that section is, that all citizens of the town possessing the qualification of age and residence, who have been either duly admitted as electors or, not being electors, possess the required property qualifications, may vote at all town meetings; but at annual town meetings for the election of officers, the right of voting must be exercised subject to the law of registration. Those electors who were registered on the list completed for the last preceding biennial electors' meeting may vote without further registration; but that list must be completed by the addition of the names of those electors who were not so registered, or whose qualifications have since matured, in order that such electors may exercise their right to vote; and as to persons not electors, but entitled to vote by virtue of property qualification, either the legislature intended that they should vote at the annual meeting without registration, or the duty to add them to the completed list is to be inferred from the various sections relating to registration. The meaning expressed in § 36 must attach to the similar

language used by the legislature in § 8 for expressing a similar purpose.

Giving this meaning to § 8—a meaning justified as well by the language used as by the patent analogy between that section and § 36—all inconsistency apparent between § 8 and § 11 disappears. Section 8 prescribes the qualifications of the city voters, and says that certain of those voters may vote on the registry list completed for the preceding biennial electors' meeting. Section 11 says votes shall be received at the annual city meeting from all voters then registered; and § 215 of the General Statutes, with the provisions of the existing city charter, supply the machinery for registering all voters not on the list completed for the preceding biennial electors' meeting; and voters so registered, voting at the annual city meeting, are voters "then registered" within the meaning of § 11. This view is fully confirmed, if confirmation were needed, by examination of the provisions relating to city and town elections in the city charter passed in 1874, to which the special act of 1889 is an amendment.

We see no escape from the conclusion that § 215 of the General Statutes has not been repealed by the Special Act of 1889, and that the registrars of the town of Bridgeport were required by law to complete a registry list for use at the town and city elections held on the first Monday of April, 1892, by making such corrections in the registry list completed for use at the electors' meeting held in November, 1890, as the law requires in order to make that list a correct list of those entitled, by § 36 of the General Statutes and § 8 of the charter amendment, to vote at said town and city meeting.

There is error in the judgment of the Court of Common Pleas, and the judgment is reversed.

In this opinion the other judges concurred.

JOHN FAWCETT *vs.* THE SUPREME SITTING OF THE ORDER OF THE IRON HALL.

Third Judicial District, New Haven, January Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

The defendant, an Indiana corporation, was organized as a secret and fraternal society with numerous local branches in this and other States. Among its corporate purposes was the establishment of a "benefit fund" raised by assessments on the members of the various branches who elected to become participants in that fund, and from which such members were each to receive a sum not exceeding one thousand dollars, payable at such times and in such amounts as the laws of the Order and the certificate of membership prescribed. Eighty per cent of each assessment was remitted by each branch to the treasury of the corporation and the remaining twenty per cent called the "reserve fund" was retained and invested by the respective local branches, subject to the call of the corporation in installments at stated intervals for its use in paying its benefit certificates maturing in the future. The defendant having become insolvent, F. was appointed by an Indiana court receiver of all its assets, and subsequently S. was appointed receiver in this State and the "reserve fund" in the custody of the local branches was paid over to him by order of court. The two receivers and the local branches having interpleaded their respective rights to this fund, and the case having been reserved for the advice of this court, it was *Held* (*one Judge dissenting*) :—

1. That the contract evidenced by the certificate was one between the holder and the corporation, and that the promise of the latter for the ultimate payment of the stipulated benefit did not depend upon the sufficiency of the "reserve fund" of the particular local branch to which the holder belonged, nor was it secured by any pledge of such fund.
2. That such "reserve fund," whether in the custody of the branches or in the hands of the general officers of the corporation, was a trust fund applicable solely to the payment of certificate holders, and, so long as the corporation was a "going concern," was held in trust for them generally, without distinction between members of different branches.
3. That if the corporation were a "going concern" and able by making assessments and with the aid of these several trust funds held by the local branches, to discharge the trust for the benefit of its certificate holders, it would be the duty of the Connecticut receiver to remit such funds in his hands to the proper general officers of the Order. But as the corporation was insolvent, disorganized and unable to carry out the purposes of its incorporation, the payment of assessments having stopped and the Order having become practically dissolved, it was incumbent on the courts of this State to see that no injustice would be done

to its own citizens who were certificate holders, by remitting the funds to the custody of the Indiana receiver for distribution under the orders of the Indiana court.

4. That it was not clear that, under the orders and decrees of such court as they appeared on the record, the certificate holders in this State would be fully protected in their rights, in case the funds were remitted to the custody of the Indiana receiver; especially since such orders and decrees did not apparently recognize the orders of courts in other States as a justification for the delay of the local branches in those States in accounting to the Indiana receiver, and made no distinction, as to those entitled to share in the funds that might come into his hands, between general creditors of the Order and its certificate holders.

5. That the local branches in Connecticut from whom the receiver in this State collected the funds in controversy, had the right to be amply protected by the court in obedience to whose decree they made such payments; and that this right extended equally to the certificate holders in such branches by whose contribution these funds were created.

6. That the performance of the contract of the Order with its certificate holders having by its fault become impossible, each certificate holder had the right to elect whether to treat the contract as rescinded and demand a return of what he had paid on it, or to treat it as in force and claim damages for its non-fulfillment.

7. That the unanimous election of the Connecticut certificate holders to adopt the former course, had been sufficiently and seasonably made known by the answers and claims filed in their behalf by the several branches and trustees.

8. That as against a foreign receiver and assignee, the members of each branch whose contributions created its "reserve fund," had, under the condition disclosed in the record, an equitable lien upon it, which the courts of their own State could best protect; and that equity would best be promoted by retaining this fund in the hands of the Connecticut receiver for distribution among those certificate holders of the Order, by whose contributions it was accumulated.

9. That the constitution, laws and rules of the Order did not disclose upon their face that its scheme was fraudulent in offering to certificate holders more than the assessments to be made upon them could justify; and that in the absence of any finding by the trial court showing the existence of fraud in its contracts or management in this State, this court could not presume or infer that its dealings had been of so fraudulent a character as to deprive the Indiana receiver on that ground of all right to claim the funds in controversy.

10. That the standing of the defendant and of its Indiana receiver was not affected by § 2892 of the General Statutes, prohibiting foreign life or accident insurance companies from doing business in this State unless authorized by the Insurance Commissioner; since § 2908 excepted every "secret and fraternal society" from such prohibition.

11. Such a corporation does not stand in the same relation to its certificate holders as that occupied by a life insurance company to its policy hold-

ers, since it relies for the means of paying the stipulated benefits, not on the accumulation of premiums paid, but on assessments to be levied by no fixed rule, upon the different branches of the Order under a system incapable of application after it had ceased to be a "going concern."

12. That the claim of F., the Indiana receiver, should be disallowed.

13. That the funds in the hands of receiver S. should be distributed, after payment of necessary costs and charges, among the holders of benefit certificates outstanding and obligatory on the corporation at the date of the commencement of the Indiana receiver's suit; payments to be made to the certificate holders of each branch in proportion to the amounts paid by them respectively for assessments, less such dividends or benefits, if any, as each certificate holder might have previously received under his certificate.

[Argued January 17th—decided March 6th, 1894.]

ACTION for the appointment of a receiver of the assets of the defendant corporation in this State; brought to the Superior Court in Fairfield County and tried to the court, *Ralph Wheeler, J.;* facts found and case reserved for the advice of this court.

Upon the plaintiff's application Edwin L. Scofield was appointed receiver of the funds and estate of the defendant in Connecticut, and thereafter the branches of the Order in this State, pursuant to the order of the Superior Court, paid over to him as such receiver all the funds in their custody. Thereupon the several local branches and James F. Failey, the receiver previously appointed by the Indiana court, where the defendant corporation was organized and had its principal offices, interpleaded their respective claims to the funds turned over to the receiver in this State.

The other facts are sufficiently stated in the opinion.

Henry C. Robinson for James F. Failey, the Indiana Receiver.

I. The claim made by the domiciliary receiver is sound by every principle of law and equity.

The reserve fund, neither in whole nor in part, ever belonged to any branch. The entire membership of the Order owned the entire fund wherever held, and, as such owners, mutually limited their right to call it in to accomplish its

purposes, to certain periods. These purposes are now lost, and with the loss the limitations fall out, and the owners of the property own it now without limitation upon its use.

There is nothing inconsistent with the claim of title in the Order, in the fact that the branches were authorized to select trustees and that their bonds ran to the branches. The branches were merely the agents of the Order. *Schunck* v. *Withoen and Waisen Fund*, 44 Wis., 369; *Erdman* v. *Ins. Co.*, 44 Wis., 376; *Lyon* v. *Sup. Ass. R. S. G. F.*, 153 Mass., 83.

II. The principal receiver is the successor of the corporation which owned the reserve fund. He is also the successor of the parties who created the fund; and is vested by the decree of the domiciliary court with all the funds held by the branches.

To order these funds to be distributed upon State or any other geographical lines would make hotch-pot of the property. The small branches would jostle the large ones, the older certificates would jostle the younger ones, and no single individual would or could get his just share.

III. The rights of receiver Failey are paramount, and the court will assist to enforce them.

The law is now well settled that, under the principle of comity, the courts of one jurisdiction can recognize the authority and permit the exercise of functions of a receiver appointed in another jurisdiction, except in those cases where a court of the former jurisdiction finds that its own policy will be displaced or the rights of its own citizens invaded or impaired. This is especially true when such receiver is, by the terms of his appointment, to gather the assets wherever found. *Hurd* v. *Elizabeth*, 41 N. J. L., 4; *Boulware* v. *Davis*, 90 Ala., 207; *Sercomb* v. *Catlin*, 128 Ill., 562; *Bank* v. *McLeod*, 38 Ohio St., 184. It is altogether unnecessary that the property should be within the jurisdiction of the court making the original appointment. *Bank* v. *McLeod*, *supra*; *Haulditch* v. *Donegal*, 8 Bligh. N. S., 343; Beach on Receivers, §§ 17, 18, 19; High on Receivers, §§ 47, *et seq.*

IV. Where the corporation is chartered by a single State and does business through agencies and through branches organized by itself in other States, if it becomes insolvent its assets should be gathered at the domicil and there distributed according to the principles of equity. *Relfe* v. *Rundle*, 103 U. S., 222; *Rundle* v. *Life Ass. of America*, 10 Fed. Rep., 720; *Davis* v. *Life Ass. of America*, 11 Fed. Rep., 781; *Taylor* v. *Same*, 13 Fed. Rep., 493; *Bockover* v. *Same*, 77 Va., 85; High on Receivers, § 50; *Peale* v. *Phipps et al.*, 14 How., 374; *Parsons et al.* v. *Charter Oak Life Ins. Co.*, 31 Fed. Rep., 305; *Fry* v. *Same*, 31 Fed. Rep., 197; *In re Equitable Reserve Fund Ass.*, 131 N. Y., 369; *Jepson* v. *Fraternal Alliance*, 17 R. I., 471; *Burdon et al.* v. *Safety Fund Ass.*, 147 Mass., 300; *Fogg* v. *Supreme Lodge, Order of Golden Lyon*, 22 Ins. Law J., 848; *Chamberlain* v. *Lincoln*, 129 Mass., 70; *Karcher* v. *Sup. Lodge, Knights of Honor*, 137 Mass., 368; *Oliver* v. *Hopkins*, 144 Mass., 175; *Sup. Lodge K. of P.* v. *Kalinski*, 57 Fed. Rep., 348; *Stamm* v. *N. W. Mut. Ben. Ass.*, 65 Mich., 317.

So sacred are the rights of individual members in these benevolent associations, that the courts hold that one cannot be dissolved in the absence of organic provisions, except by the unanimous consent of the members. *Allman* v. *Berry*, 27 N. J. Eq., 331; *State Council* v. *Sharp*, 6 Am. & Eng. Corp. Cases, 629; *Thomas* v. *Ellmaker*, 1 Pars. Sel. Cases, 98 (Penn.); *Gouland* v. *De Varia*, 17 Ves., 19.

William F. Henney, *Lucius P. Deming* with whom was *James Bishop*, and *Henry G. Newton*, for the Connecticut Branches of the Order.

BALDWIN, J. The Supreme Sitting of the Order of the Iron Hall was duly incorporated under the general laws of the State of Indiana, in 1881. Its corporate purposes were defined, in the third of its Articles of Association, as being "to unite in bonds of Union, Protection and Forbearance all acceptable white persons of good character, steady habits, sound bodily health, and reputable calling, who believe in a

Supreme Intelligent Being, the Creator and Preserver of the Universe; to improve the condition of its membership morally, socially and materially, by instructive lessons, judicious counsel and timely aid, by encouragement in business, and by assistance to obtain employment when in need; to establish a Benefit Fund from which members of the said Order who have complied with all its rules and regulations, or the heirs of such member, may receive a benefit in a sum not exceeding one thousand dollars ($1,000), which shall be paid in such sums and at such times as may be provided by the laws governing such payment, or in the certificate of membership, and when all the conditions regulating such payment have been complied with."

Its "proper officers" were to have "power, at any time when a liability on account of the sickness, disability or maturity of certificate of a member entitled to a benefit under number three of these Articles occurs, to make the proper and specified assessment, under the prescribed regulation, to meet such liability."

By Article II, sec. 3, of the "Constitution" of the Order, duly adopted pursuant to its Articles of Association, one of its objects was particularly declared to be "to establish a Benefit Fund from which those who have held membership in the Order for thirty days or more may, should they so desire, on proper application, and complying with all the rules and regulations governing said Benefit Fund, become participants therein and may receive the benefit of a sum not exceeding twenty-five dollars per week, nor more than *one half* of the sum total held by each member, when, by reason of disease or accident, they become disabled from following their usual occupation, or an amount of not more than one thousand dollars when they have held a continuous membership in the Order for seven years. *Provided, however*, That the sum total drawn from this Order by any of its members shall never exceed, both in sick, disability, and other benfits, the sum named in the certificate of membership."

Among the "Laws of the Supreme Sitting," made pursuant to its Constitution, were the following:

"Law I.

"BENEFIT FUND.

"Section 1. There shall be attached to this Order a Benefit Fund, in which members may participate (except social members), as they may severally elect, either in the sum of one thousand dollars, eight hundred dollars, six hundred dollars, four hundred dollars or two hundred dollars, on which they shall pay the rates and be entitled to the benefits prescribed in the following table. The members of the Sisterhood Branches (except social members) may participate in the Benefit Fund, as they may severally elect, either in the sum of six hundred dollars, four hundred dollars or two hundred dollars, on which they shall pay the rates and be entitled to the benefits prescribed in the following table: *Provided*, That all payments shall be made in accordance with the following sections, and in no other way or manner:

"*Table of Rates and Benefits.*

Amount Paid on Each Assessment.	Weekly Benefit when Sick or Disabled.	Amount Paid on Total Disability.	Payable at Death.	Benefits Paid at End of Seven Years not to Exceed
$2.50	$25.00	$500.00	$500.00	$1,000.00
2.00	20.00	400.00	400.00	800.00
1.50	15.00	300.00	300.00	600.00
1.00	10.00	200.00	200.00	400.00
.50	5.00	100.00	100.00	200.00

"Law II.

"RESERVE FUND.

"Section 1. Twenty per cent of the amount received by each Branch on each assessment shall be set aside and retained as a Reserve Fund. At the expiration of the first term of six years and six months from the date of the organization of the Order, one seventh of the reserve Fund then on hand shall be called for by the Supreme Accountant and

used by the Supreme Cashier in the payment of benefits, and annually thereafter one seventh of the Reserve Fund on hand shall be called for, and used in like manner.

"Sec. 2. Each Branch shall have supervision of the Reserve Fund, and when said Reserve Fund shall amount to fifty dollars, the Trustees, in conjunction with the Cashier of the Local Branch, shall invest the same in registered United States Government bonds, county and city bonds, in first class mortgages on real estate, or it shall be deposited at interest in some reputable savings bank: *Provided*, That no loan shall be made for a longer period than six years from the end of the term to which said Reserve Fund belongs, interest to be computed, or paid, semi-annually. Should a loan be made on real estate, it shall be on first mortgage, and not exceed one half of the taxed value of said real estate. No Local Branch of the Order shall loan any portion of its Reserve Fund on chattel mortgages, and any Local Branch that shall allow its officers to loan any of the Reserve Fund or its accumulations contrary to law shall be declared suspended by the Supreme Justice, and shall not be reinstated until all funds are safely secured to the Order as the law directs.

"Sec. 3. Each Branch may remit its Reserve Fund to the Supreme Cashier for investment by the Supreme Trustees to the credit of said Branch, charging him with the amount of such Reserve Fund so remitted for investment, and the Supreme Cashier shall receipt for the same on an official blank for that purpose. The Supreme Trustees are hereby empowered to invest said funds in accordance with Section 2 of this law.

"Law I.

"Sec. 2. When the amount received for one assessment, less the Reserve Fund, as Provided for in Law II, Section 1, shall equal an amount less than one thousand dollars, the sum to be paid shall in no case exceed the amount of one assessment, less the reserve. In such case, if the member's certificate be in the amount of one thousand dollars, he shall

receive not more than the whole amount of said assessment; if in the amount of eight hundred dollars, not more than four fifths of said assessment; if in the amount of six hundred dollars, not more than three fifths of said assessment; if in the amount of four hundred dollars, not more than two fifths of said assessment; and if in the amount of two hun dred dollars, not more than one fifth of said assessment; and said amounts shall be all that can be claimed by any one.

"Sec. 4. Each member of the Benefit Fund on becoming liable, shall pay to the Accountant the amount prescribed in the foregoing table on account of the Benefit Fund, and the same amount on each assessment thereafter while he remains a member of this Order. The Accountant shall keep the date when such payment is made, and credit the member with the same in the books provided for that purpose.

"Sec. 5. The sum as prescribed in the member's certificate shall be paid to the member, his widow, or the legal heirs of said member, in case of sickness, disability or maturity, and such payment shall be made as hereafter prescribed, and according to the conditions set forth in said certificate.

"Sec. 6. On the sickness or disability of a member, or the maturity of a certificate, the Accountant of the Local Branch shall immediately notify the Supreme Accountant upon the official blanks provided for that purpose by the Supreme Sitting, giving full particulars and the date of the last assessment paid by said member.

"Sec. 11. On receipt of duly approved claims for sickness or disability, or maturity of certificate of a member, the Supreme Accountant shall draw an order on the Supreme Cashier in favor of the proper person or persons for the amount due, signed by the Supreme Justice, and forward the same to the Accountant of the Local Branch of which the beneficiary is a member: *Provided*, That in case of continuous sickness or disability, a member shall be entitled to present a claim for benefits at intervals of four weeks or less, and shall be entitled, when approved, to a payment on account of said claim, for which the member shall give to the Supreme

Sitting a receipt in full of said payment, and in all cases it shall be charged upon the Benefit Fund ledgers of the Supreme Accountant and Supreme Cashier.

"Sec. 12. Upon receipt of the order for the payment of a sickness or disability benefit, or a matured certificate, the Accountant shall immediately turn the same over to the person or persons in whose favor it is drawn; before delivering the order, he shall obtain a receipt in full of said payment on the certificate, and instruct the member to forward the warrant to the Supreme Cashier for payment: *Provided*, That in cases of the maturity of certificate, when the payment cancels the certificate, the certificate duly canceled and attested by the officers of this Local Branch, must accompany the warrant for collection.

"Sec. 14. After paying any of the above benefits, if the Supreme Treasury requires, an assessment shall be made; the Supreme Accountant shall make a call on each Local Branch for the money of each member belonging to the Benefit Fund. Such call shall be in accordance with a form prescribed by the Supreme Sitting, and shall include a list of all claims received for adjustment subsequent to the last assessment.

"Sec. 15. Whenever an assessment is called for, the Accountant shall certify to the Cashier the amounts due the Supreme Treasury on account of the Benefit Fund by the terms of the call of the Supreme Accountant. The Cashier of the Local Branch shall thereupon immediately forward to the Supreme Cashier the amount so certified by the Accountant, and at once notify the Accountant of this Branch in writing of the amount so forwarded. A Branch failing to comply with this section within thirty days shall stand suspended from that date until all arrearages are paid. And should a Branch fail to pay all arrearages within thirty days from the date of suspension, they shall be declared defunct, and the Reserve Fund, charter, and all other property shall be at once demanded by the Supreme Accountant in accordance with laws governing the same.

"Sec. 16. When an assessment is made it shall be the duty

of the Accountant to at once notify every member liable to the said assessment that the same has been issued. Assessment notices shall bear the seal of the Branch, and shall be upon the blanks furnished by the Supreme Sitting, and its date shall be the same as that of the notice received from the Supreme Accountant. Each member who fails to pay the assessment called for, to the Accountant, within thirty days from the date of the notice, shall stand suspended without further notice. Any Branch failing to enforce the law against any member who becomes delinquent on assessments shall pay out of its general fund all assessments and fines which become due from such member, and which are not paid by them, so long as they are permitted to remain in good standing.

"Law V.

"Sec. 8. Any Branch failing to comply with the Constitution and Laws of this Order, after becoming suspended, shall become liable to the Supreme Sitting for all that appears in its Benefit, Reserve and General Fund accounts, as kept by the Supreme Accountant, and more, if so shown by the accounts of the Branch; and does hereby agree, should suit be instituted against such Branch, upon proper proof of the correctness of the account, to confess judgment for the same and all costs incurred by the Supreme Sitting in making such collections, and that each officer and member thereof agrees thereto to become immediately responsible to the Supreme Sitting for the whole amount of such judgment."

Each local branch annually elected, among other officers, an Accountant, Cashier, and three Trustees; and the "Constitution governing Local Branches" contained the following provision:—

"Article V.

"Sec. 10. The trustees shall have the general supervision of all the property of this Branch. They shall, in conjunction with the Cashier, invest in such securities as they know to be safe such sums as this Branch orders drawn from the treasury for that purpose. They shall have the custody of all securities of this Branch for money loaned or invested,

except, should the Branch become suspended, they then go into the hands of the Supreme Trustees. They shall collect or realize all such sums when so directed by this Branch. They shall collect all the interests, rents or other money arising from said investments belonging to this Branch, and pay the money collected by them to the Accountant. They shall, on the 30th day of June and the 31st day of December of each year, report their transactions to this Branch, and make an inventory of all property. Before entering upon the duties of their office they shall each give bond, with approved security, for such sum as this Branch may require for the faithful performance of their duties, *provided*, the sum shall not be less than five hundred dollars each, which bond shall be approved by the Branch and deposited with the Supreme Justice."

Every member electing to participate in the "Benefit Fund" received, on the application of his "Branch," a certificate from the "Supreme Accountant," in a form, duly prescribed by the Supreme Sitting, reading as follows:

"Supreme Sitting $1,000.00
No. of the
ORDER of the IRON HALL.
Membership Certificate.

"THIS CERTIFICATE is issued to ..... a member of Local Branch No. ..... ORDER OF THE IRON HALL, located at ....., State of ..... Upon evidence received from said Local Branch that .... was duly initiated on the ..... day of....., 189..., and upon the conditions that the statements made by him in his application for membership in said Local Branch and the statement certified to by him to the Medical Examiner, both of which are filed in the Supreme Accountant's office, be and are hereby made a part of this contract, and upon conditions that the said member complies with all the laws, rules and regulations now governing said Local Branch and its funds; and that said member further agrees to comply with all future laws that may be hereafter enacted by the

Supreme Sitting to govern said Branch and funds. These conditions being fully complied with, the Supreme Sitting Order of the Iron Hall hereby promises and binds itself to pay out of its Relief and Reserve Funds a sum not exceeding

ONE THOUSAND DOLLARS

in accordance with and under the provisions of the laws of the Order governing such funds and their payments, upon satisfactory evidence of the sickness, disability or death of said member, or upon its termination, upon the proper receipt of partial payments made thereon, and upon the surrendering of the Certificate at its legal termination: Provided that said member is in good standing in this Order and provided also, that this Certificate shall not have been surrendered by said member to any other person or persons except in case of death to his legal heirs in accordance with the laws of this Order.

"It is fully understood and agreed that the mailing of notices of assessments to the last known residence or address of the member ten days prior to the expiration of the time named therein, within which the payment called for thereby should be made, or the personal delivery of such notices three days prior to said expiration of time, shall be a final and legal serving of the same, and when so mailed or delivered, all responsibility of the Order, or any Branch or officer thereof, shall finally cease and determine.

"This Certificate shall be in force from its date, when attested by the signatures of the Chief Justice and Accountant, and an impression of the Seal of the above named Branch and accepted by the afore-mentioned member all in accordance with the form printed thereon. If not so attested and accepted, within three months from its date, it shall become *ipso facto*, null and void, and of no effect whatever.

"IN WITNESS WHEREOF, We have hereunto attached our signatures, and affixed the Seal of the Supreme Sitting of the Order of the Iron Hall, this ..... day of ....., A. D. 189....

(Seal) E. J. WALKER, Supreme Accountant.

F. D. SOMERBY, Supreme Justice.

"I accept this Certificate on the conditions named herein, to take effect on the ..... day of ..... 189...., on which date I became a Beneficial Member, in accordance with the Laws of the Order.

"Witnessed and delivered in our presence,

..... Chief Justice.
..... Accountant.
} Of Local Branch No. ..... O. I. H.

.....
Signature of Member."

On the back of this paper was printed the following form of a receipt for the payment of the benefits stipulated, on a final settlement:

"FINAL SURRENDER.

"RECEIVED OF ..... Cashier of Local Branch No. ....., ORDER OF THE IRON HALL, Benefit Fund Warrant No. ....., on the Supreme Cashier of said Order, in the sum of ..... Dollars, the same being in full of all claims against the SUPREME SITTING of the ORDER of the IRON HALL, or against any Branch or officer of said Order, which exists under or on account of the within Membership Certificate, which is hereby surrendered.

.....
Person Receiving Benefit.

"We hereby certify that the person who has signed the above receipt and surrender is the proper party to receive the Benefit, and that ..... signature is genuine.

(Seal of Branch)

..... Accountant.

..... Chief Justice."

All the funds now in the hands of the Connecticut receiver were collected by him from local branches of the Order in this State, or from trustees appointed by them, and belonged to the "Reserve Funds" held for the benefit of Members of the Order who had elected to take benefit certificates.

It is plain that the contract set forth in these certificates is one between the holder and the Supreme Sitting of the Order of the Iron Hall, and that the promise of the latter for the ultimate payment of the stipulated benefit is not made dependent on the sufficiency of the Reserve Fund of the particular local branch to which the holder belongs, nor secured by any pledge of such fund. If the entire Reserve Fund of any local branch should be lost, by unfortunate investments, whether made by the local trustees, or the "Supreme Trustees" of the corporation, its obligation to meet the certificates held by members of such branch would be unaffected. Of the assessments payable from time to time under Law I, sec. 1, eighty per cent went immediately into the treasury of the corporation, to reimburse it for payments already made on matured certificates, or to be used for the payment of certificates as they might mature, without any discrimination between the members of different branches. The remaining twenty per cent was to be retained and invested subject to be drawn upon, in favor of the Order, only to the extent of one seventh of its total amount annually, which was to be "used by the Supreme Cashier in the payment of benefits."

Each local Reserve Fund was therefore a fund held in trust for the payment, through the general officers of the corporation, in its behalf, and out of its treasury, of benefits to certificate holders. In the hands of the receiver appointed by the Superior Court, it stands, of course, charged with the same trust.

If the corporation were now in a condition to fulfill its obligations to certificate holders, by the aid of the several trust funds held by the local branches, and to discharge the trusts upon which it might receive them, according to the terms of the certificates and the rules of the Order, it would be our duty to advise that the receiver in this State should remit all moneys in his hands to the proper officers of the Order. But the corporation is insolvent, and unable to carry out the purposes of its organization; and has assigned all its right and title to these funds to James F. Failey, a citizen of In-

diana, who had previously been appointed by a court of that State, receiver of all its estate, wherever situated.

Mr. Failey, as such receiver and assignee, has appeared as a defendant in this cause, and claims the funds.

Before the courts of Connecticut can sanction such a change of trustees, they must be satisfied that no injustice would thus be done to the citizens of their own State. The local branches and trustees, out of whose charge these funds have been taken by the order of the Superior Court, have appeared before us, and in behalf of those whom they represent, unanimously object to any transfer to the Indiana receiver. By the decree of the court under which he, Failey, was appointed, made on August 23d, 1892, he was ordered to collect all Reserve Funds in the hands of any local branches, whether within or without the State of Indiana, and all such branches were ordered to pay the same to him, and enjoined from any other disposition of them. He was also required to report to the court any instance of neglect to comply with the terms of such order, on the part of any person or branch, "when such further order will be made in such behalf as to the court shall in such case seem meet." All branches making such payments by October 10th, 1892, were to be entitled to share in the distribution of the estate. On December 2d, 1893, another decree was passed in the same suit, confirming that of August 23d, as to the provisions above mentioned, except that the receiver was directed to inform the courts in other States, which had appointed receivers of the corporation, of the terms of both decrees, and request them, and the receivers by them appointed, to account to him, and to pay over to him all moneys in their hands, "to be by him taken and held, together with the funds on hand, as the property of said defendant, the Supreme Sitting of the Iron Hall, which moneys, together with all the other moneys coming to the hands of said receiver herein, shall be hereafter equitably distributed among the creditors and certificate holders of the said defendant." All members of local branches thereafter properly accounting for and paying over to him, within a reasonable time, all money and property in their

possession, or who had accounted, or might within a reasonable time account, in any other State to any local receiver, who thereafter, within a reasonable time, should account for the same to Mr. Failey, as principal receiver, were declared entitled to share in the distribution of the funds in the latter's hands, when made, equally and ratably "with the creditors and certificate holders of the said defendant corporation." Any neglect or refusal of any courts or receivers to comply with the request of the Indiana receiver for a transfer to him of the funds in their custody, he was "directed with due speed to report," whereupon such order was to be made "as at such time may seem proper."

These provisions of the decree were predicated on a finding that "attachment and receivership suits have been brought against the defendant, the Supreme Sitting of the Order of the Iron Hall, in very many States and jurisdictions throughout the United States, and that in such proceedings the courts have taken into possession and control the property of the said defendant, the Supreme Sitting of the Order of the Iron Hall, in such States and jurisdictions, and now hold the same under the orders of the various courts."

The following facts are also set forth in the same finding:— At the commencement of the suit in Indiana, which was on July 29th, 1892, there were over a thousand local branches of the Order in different parts of the United States and Canada, of whose members over sixty thousand held benefit certificates. The Order had received nearly six million dollars net, from these certificate holders, and their certificates called for benefits which, at the *maximum* rate, would amount to about $49,000,000. To meet these obligations the Order had in its treasury, to the credit of the "Benefit Fund," about a million dollars, according to its books; of which, however, owing to fraud and mismanagement, less than a quarter of a million was available. It also had on hand nearly $350,000, belonging to the "Reserve Fund," and the several local branches had under their control further sums belonging to the same fund, to the aggregate amount of $1,360,000. The other funds of the Order amounted to but

about a quarter of a million dollars. The several local "Reserve Funds" held in Connecticut amounted to $18,667.05, and the Connecticut certificate holders who had paid it in, had therefore contributed to the "Benefit Fund" $74,668.20, which had been remitted to the general treasury. They numbered 1098. Four of the Connecticut branches had accounted to the Indiana receiver, and paid over to him, together, over $3,000. Two of them, after his appointment, distributed the "Reserve Funds" in their hands among their members. All of them have ceased to hold regular meetings, and to carry out the purposes of their organization.

On February 25th, 1893, Mr. Failey filed in the Superior Court, in the present action, his claim to all the funds in its custody, in which he states that they belong to him as principal receiver, "for the benefit of all the creditors of the corporation, to be distributed according to the constitution and laws of the corporation; and that no particular branch anywhere situated has any claim to the reserve fund, but that the same and all reserve funds belong to the Order."

The local branches in Connecticut, from whom or whose trustees the Connecticut receiver has collected the funds in controversy, have a right to be amply protected by the court in obedience to whose decree they have made such payments; and this right extends equally to those by whom these funds were originally contributed—the certificate holders, who became such as members of these branches.

The first Indiana decree proposed to admit to a share in the distribution of the funds coming into the hands of the Indiana receiver, those having property of the Order in their possession who accounted to him by October 10th, 1892. The decree of December 2d, 1893, extended the limit to "a reasonable time" after notice from him of his claims. Such notice was given to the parties to this suit a year or more ago, by the pleadings on file. The Indiana decree does not appear to recognize, as a justification for delay in such accounting, the orders of courts in other States having jurisdiction of the parties in interest. It seems also to make no distinction, as to those entitled to share in the funds that

may come into the hands of the Indiana receiver, between general creditors of the Order, and the holders of its benefit certificates.

In opposition to the claim of Mr. Failey, it has been urged in argument that he is before us in the position of a plaintiff, having no better rights than the Order of which he was appointed receiver, and has since become the assignee; and founding his title to recover the funds in controversy upon a fraudulent compact, namely, the scheme under which the Order was organized and conducted. The fraud is said to consist in the offer to certificate holders of more than the assessments to be made upon them could justify; and it is argued that if they were parties to the wrong, they occupy in this cause the position of defendants, in possession of the fund, so far as equitable right is concerned, and may therefore invoke the protection of the rule, *In pari delicto melior est conditio possedentis.* But the certificates contain no promise to pay any particular sum, nor do the constitution or laws of the Order impose any limit on the number of assessments that can be laid. The obligation of the corporation —so far as appears from the face of the papers which express it—would be satisfied by paying the holder of a matured certificate any sum, however small, and its right to enforce contribution from him is only limited by reference to the necessities of the treasury on account of previous payments on other certificates.

There was no representation that the assessments or other funds of the Order, except the twenty per cent Reserve Fund, were to be left to accumulate, to provide means for the ultimate payment of what might become due on certificates. On the contrary, it was expressly stated that such assessments were to be used to reimburse the Order for prior expenditures. The obligations of each year were to be discharged by the use of four fifths of the assessments of the year, and the remaining fifth only was to be kept for future recourse. In ordinary contracts of life insurance, where a fixed sum is promised, in consideration of fixed premiums, payable at stated intervals, the maintenance of an adequate

and accumulating reinsurance reserve is an essential part of of the plan; but what is known as "co-operative insurance" proceeds upon a different theory, and relies mainly upon the assessments and lapses of each year to meet the calls for maturing benefits.

It has also been argued that if there be no fraud apparent in the constitution, rules, and laws of the defendant Order, yet its whole dealings in this State have been of so fraudulent a character as to deprive its assignee and receiver of any right to claim the funds in controversy by an appeal to the doctrine of comity. The Superior Court has found that the Order was duly incorporated under the laws of Indiana; and it has not found any facts showing as matter of law the existence of fraud in its contracts or management in this State. It is evident that the rules and laws of the corporation are such as to furnish an easy means for designing men, if placed in official positions, to entrap the unwary by false and alluring representations as to the large returns to be derived from small contributions. The seal of the Order, displayed on the benefit certificates, and on the pamphlet containing the constitution, rules and laws, bears upon its face the device of a safe with the figures "$1,000." at its top, and beneath it the words "*in seven years.*" One of the rules, which provides that if two assessments are laid in any month, the first shall be laid on the first day of the month, and the second on the fifteenth, might easily give a casual reader the impression that in no month could more than two assessments be laid, whereas treble that number could hardly suffice to provide for the maximum benefits. But while these are all circumstances entitled to great consideration, upon any inquiry into the truth of charges of fraud against the officers of the Order, they do not establish its existence as a conclusion of law. Fraud is never presumed. The place to prove it, in a case like this, is in the Superior Court, and the record of the proceedings in that court fails to show that the charge now made was there maintained.

Nor do we think the standing of the corporation, or its receiver before us, is affected by General Statutes, § 2892, by

reason of the fact that it has done business in this State without authority from the Insurance Commissioner, though it may have been incorporated in another State for the purpose, among other things, of furnishing insurance on the assessment plan. Every "secret or fraternal society" is excepted from the operation of that statute by General Statutes, § 2903, and the defendant corporation appears to us to be one answering both these descriptions. "Secret work" by Article XI of the constitution is one of the functions of the "Supreme Sitting," and the branches are to meet with a "Watchman" at the outer and "Vedette" at the inner door.

But while restricted as we are to the consideration of questions of law, we cannot say that there was fraud in the original purposes of the defendant corporation, or in its dealings in this State, nor that there was any statutory impediment to its doing business here; the comity which permitted it to come here to organize its local branches and contract with their members, does not require us, in determining the consequences of such contracts, in view of its present position, to overlook the claims of citizens of Connecticut to the protection of its courts. The controversy before us is as to the possession of a trust fund in the hands of the court. The trusts upon which it is held will be the same, whoever may be the trustee. It is made up of several smaller funds, each of which was under the control and management of local trustees in this State, until the court required them to surrender it to its receiver. He now, as regards the claim of Mr. Failey, represents their rights, as well as those of the *cestuis que trustent*. These local trustees were properly constituted, and no act of maladministration is alleged against them. If their possession could not be disturbed by the Indiana receiver, neither can his be. *Cooke* v. *Warner*, 56 Conn. 234, 239. The contract between the certificate holder and the corporation was, by its express terms, made subject to the rules and laws of the Order. For its due performance, on the part of either party, it was necessary that the corporation should maintain its connection with the local branch to which the holder belonged, and continue in active

existence as a "going concern." Payments upon the certificate were to be made out of a "Benefit Fund" raised by assessments levied by the corporation on the several local branches, on account of those of their members who held certificates. The local branch was required to forward 80 per cent of the total amount called for "immediately," to the "Supreme Treasury" of the corporation, and to notify each certificate member of the call, whereupon he was obliged to pay the amount of his assessment to the branch within thirty days from the date of the original call. Twenty per cent of this was to be left with trustees appointed by the branch, and under bonds to its "Chief Justice" and "Vice Justice." The bonds were all payable to these officers "in trust for said branch," should the trustee fail to account for the funds, at the end of his term, to his "successor in office or to whoever may be legally appointed to receive the same." Assessments were to be levied only when previous payments by the corporation out of the Benefit Fund had so reduced it that it required to be replenished. The amount to be paid on each matured certificate was also to be determined, within a certain maximum limit, by the managers of the corporation; and as it was to be liquidated by means of an order on the "Supreme Cashier," drawn by the "Supreme Accountant," and signed by the "Supreme Justice," it would seem that the corporation intended to reserve some discretionary power to regulate the sum by the state of the treasury.

It is obvious, as we have already said, that the corporation looked to the calls upon certificate holders in each year, for the means to pay the benefits accruing during the year, and to maintain the "Reserve Fund," which, with the aid of lapses, it was hoped would avoid the necessity of any burdensome multiplication of assessments. In 1892, upon the insolvency of the corporation and the appointment of receivers in different States, the receipts from assessments stopped, the branches generally ceased to meet, and the Order became disorganized, and practically dissolved. The carcass remained, but the life was gone. The end was reached, so far as the rights of certificate holders are concerned,

on July 29th, 1892, the day when the suit was instituted in Indiana for the appointment of a receiver. In view of the condition of the corporation at the time, and the probability of such an appointment, no certificate holder could have been expected to make any future payment to it for assessments.

The performance on its part of the contract of the Order with the certificate holders having by its fault become impossible, each of these had the right to elect whether to treat the contract as rescinded and demand a return of what he had paid on it, or to treat it as in force and claim the damages resulting to him from the corporation having put itself in a condition incompatible with the fulfillment of its engagements. 2 Saunders on Pleadings and Evidence, *674; *Lyon* v. *Annable*, 4 Conn., 350, 355. The Connecticut certificate holders, represented before us through the several trustees or branches who have appeared or pleaded in the cause, have unanimously elected the former course, and such election has been sufficiently and seasonably made known by the answers and claims which have been filed. Under these circumstances, we think equity will best be done, as between the parties before us, by retaining the funds in controversy in the hands of the receiver appointed by the Superior Court, for distribution among the certificate holders of the Order, by whose contributions they were originally accumulated. *In re Equitable Fund Life Association*, 131 N. Y., 354; 30 Northeastern Rep., 114, 120; *Lindquist* v. *Glines*, 23 N. Y. Suppl., 272; *Peltz* v. *Supreme Chamber of the Order of Financial Union*, 19 Atlantic Rep., 668; *Fogg* v. *Supreme Lodge of Order of Golden Lion*, 156 Mass., 431; 33 Northeastern Rep., 692, 693.

For every dollar paid by them to the accountant of their local branches, eighty cents has been transmitted to the general treasury of the Order, to reimburse it for benefits paid to other certificate holders, and twenty cents has been reserved to meet similar claims to mature thereafter. It is to the reserve funds thus constituted that contributors, electing to rescind the contract evidenced by their benefit certificates, have a right to look primarily for repayment of their ad

vances. These funds were manifestly left, by the laws of the Order, in the hands of the local branches for their better assurance. As against the demand of a foreign receiver and assignee, we think the members of each branch whose contributions created its Reserve Fund, have, under the conditions disclosed in the record of this cause, an equitable lien upon it, which the courts of their own State can best protect, especially where he claims it for distribution among the creditors of the corporation generally without any distinction in favor of certificate holders.

In quoting the constitution and laws of the defendant corporation, the edition of 1888 has been followed. We have not found it necessary to consider the effect of the changes of phraseology found in later editions, and which it is claimed were made without authority; since, while they might serve to strengthen the legal title of the corporation to the custody of the various Reserve Funds, they cannot vary the trusts upon which they were created and must be administered.

The Superior Court is advised to direct the distribution of the funds now in the hands of Edwin L. Scofield, receiver, after payment of necessary costs and charges, among the holders of benefit certificates, issued by the Supreme Sitting of the Order of the Iron Hall, to them as members of branches of the Order organized in Connecticut, and outstanding and obligatory upon said corporation on July 29th, 1892; payments to be made out of the fund received from the trustees of each local branch to the certificate holders of that branch, in proportion to the amounts paid by them respectively for assessments, laid upon them as holders of such certificates, deducting from such dividends, in each case, such amount, if any, as the certificate holder may have previously received from said Order by reason of his rights under his certificate; and to dismiss and disallow the claim of James F. Failey, receiver of said corporation by appointment of the Superior Court for Marion County in the State of Indiana, to said funds or any part thereof.

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

HAMERSLEY, J. (dissenting). In the result announced by the majority of the court I concur, but not with the reasons given in support of that result.

If the funds in question were accumulated by the defendant corporation in the transaction in this State of a business lawful under our laws, then such funds ought to be placed in the hands of Mr. Failey, the principal and domiciliary receiver appointed by the Indiana court; unless there are facts in the case which establish some clear ground of exception to the general rule.

The rule that when a corporation is chartered by a single State and does a lawful insurance business in other States through agencies and becomes insolvent, its assets should be gathered at the domicil, and there distributed according to the principles of equity, is sound and should be universally observed. It is based upon a recognized principle of international comity; and that principle as applicable between our several States, rests on reasons far more cogent than the reasons which support the principle as applicable between nations wholly independent. While it is true that for many purposes our States are independent, as really as if they were for all purposes separate sovereignties, and for this reason the rules of international comity may apply to questions arising between citizens of different States, yet it is also true that the citizens of all the States are fellow subjects of one common government, supreme within the sphere of its operation, and that the necessities growing out of such common government impose upon the several States obligations of the highest authority, inconsistent with that cautious and self-protecting administration of the law of comity that may be safely indulged in by States wholly foreign to each other. The full faith and credit positively given in each State to the judicial proceedings of every other State; the good faith and confidence impliedly required in dealing with such judicial proceedings; the commercial necessity of a

distribution of assets of an insolvent corporation by one court, growing out of the guaranteed freedom and infinite variety of commercial intercourse; the impossibility in many cases of an equitable distribution except by one court; the concurrent jurisdiction, and at times exclusive jurisdiction, of Federal courts in such cases, all suggest cogent reasons for a loyal observance of the rule stated, unless the particular facts present a plain and unquestioned exception to the rule.

It will not, however, be necessary to inquire whether the particular facts in this case do, or do not, present such exception. Mr. Failey practically appears in this matter as a plaintiff; and, as the foundation of his claim and right to the assistance of this court, sets out in full the organization, constitution and laws of the defendant corporation, and a record containing the findings, orders and decrees of the Indiana court.

The Durham Branch, in its demurrer, says, that upon the documents set out by Failey, in connection with the findings, and orders of the Indiana court, it appears that the business transacted in this State was unlawful and contrary to public policy; and also in its claim alleges as a fact that the defendant corporation was not organized and qualified to do business in this State.

The Superior Court has made a finding of facts for the purpose of submitting to this court the whole record, with the facts set forth in the finding, and of obtaining the advice of this court upon all questions arising upon the pleadings and record; including the questions arising upon the demurrer and the overruling thereof, and the question of what judgment upon the facts found should be rendered.

In the finding of facts the court finds, in addition to the facts otherwise appearing on the record, that the Indiana court had made certain further findings of fact, conclusions of law, and orders, which should be added to the record set out and relied upon by Failey in his claim, and makes such findings of fact, conclusions of law and orders a part of this record; and also finds that of the funds on hand $———

were accumulated in 1889 and subsequently; (it was stated in argument, and not questioned, that this blank should be filled by a sum representing nearly the whole amount accumulated) and that the corporation has never been authorized to do insurance business in this State.

Thus the main and determinative question we are called upon to decide is upon the facts contained in the record and found by the court:—Should the Superior Court now hold that the business transacted in this State by the insolvent corporation was a business contrary to our public policy? This question requires that we should first come to an understanding of the meaning and legal effect of the remarkable mass of words called the constitution and laws of the Order of the Iron Hall. They contain the articles of association—*i. e.*, the charter of the corporation, the constitution adopted by the corporation, the constitution prescribed by the corporation for governing local branches, the general laws adopted by the corporation for its own government, and the few special laws governing delegated meetings of local branches, called district meetings, to be from time to time called by officers of and subject to the control of the corporation; special laws governing the life division—which do not appear to have been put into operation; and an official summary of the effect of the constitution and laws in a number of enumerated cases. The meaning of this literature cannot be understood without the most thorough analysis of the whole and every part, and it is too voluminous to be quoted in full; but I am satisfied that a careful examination of the documents establishes the following conclusions:—

1. The defendant was incorporated in December, 1881, by filing articles of association in pursuance of a general statute of Indiana authorizing the incorporation of three or more persons for the purpose of organizing "divisions or associations of temperance, or other charitable associations or orders." The members of the corporation so organized consist, for all practical purposes, of its principal officers. The stated meetings of the corporation are biennial or quad-

rennial, and the officers are re-chosen at such meetings. Eight specified officers must receive salaries, and may receive other compensation. A body called the executive committee exercises all powers of the corporation concerning business matters, fixes the salaries and compensation of all officers, and is composed of nine officers, of whom six are of those required to be salaried.

2. The corporation undertakes to accomplish two distinct, though related objects: First, to organize and govern local branches of a secret social society; second, to establish and carry on an insurance business on the assessment plan, in which the insured must first have been admitted members of the secret society, and must continue in good standing as such members.

3. While the secret social society is under the absolute control of the corporation, the members of the society are not members of the corporation, and the corporation assumes no liability to furnish them the pecuniary aid usually provided by fraternal and mutual aid societies. The members of the society, as such, are called "social members." One of their privileges is the right to apply for insurance—*i. e.*, to become "participant in the benefit fund," and by the laws governing the secret society such insured members have the exclusive right to vote and hold office, the privilege of paying dues being common to all the members. The constitution provides that any person who has held a membership in the society for thirty days or more may, if he so desire, become a participant in the benefit fund. To become such participant he must make application, undergo medical examination, sign the obligations relating to conditions of insurance, etc., in the same manner as in the transaction of any insurance business, and the corporation states in its official summary of its laws that before insurance the insured must become "an acceptable social member of the order, which is purely fraternal;" and that after being a social member thirty days "he may, if he so desire, make application to become a member of the benefit fund;" or, at his option, he may remain a social member for life, and "as such social

member he would enjoy all the fraternal and social privileges of the order." And again, "social members shall pay the same dues as the members of the benefit fund, and cannot vote or hold office, neither are they entitled to any benefits for sickness or disability." It is through the local branches of this secret society that the corporation secures its agents, and revenue for pushing its scheme of insurance. Each member, whether insured or not, pays into his local branch various fees and dues, by which all its expenses in maintaining attractive social features and drawing in candidates for the insurance business of the corporation, are provided for. It is also through these local branches that the corporation provides the revenues which it uses for its corporate expenses and to divide as salaries and compensation among the corporators. For such purposes the branches pay the corporation charter and registration fees, profits on the sale of paraphernalia and supplies, and such *per capita* tax on all members, whether insured or not, as the corporation sees fit to levy. It is necessary to keep in mind these distinctions. The secret society is not the corporation. The society supplies the corporation with funds for the use of the few corporators, but the corporation is by its laws forbidden to give to members of the society any pecuniary aid in case of sickness, accident or death. No element of benevolence, charity, or mutual aid exists between the corporation and members of the society. The insurance business is a business distinct from the organization of the secret society, and is transacted directly between the corporation and its certificate holders, just as truly as if the business were carried on, as has been done in connection with the Masonic fraternity, by a corporation having no connection with the fraternity, beyond the fact that its field of insurance is confined to the members of the fraternity in good standing. These distinctions between the corporation and the secret society, between the corporation as the organizer of the secret society and as the manager of the insurance business, are clearly deducible from the constitution and laws submitted to us; although those docu-

ments are well calculated and perhaps intended to obscure and conceal such distinctions.

4. The insurance business established and carried on by the corporation, consists in issuing certificates whereby the corporation undertakes to pay the holder $1,000, in seven years, upon condition that the holder shall pay all assessments of $2.50 when called upon in pursuance of the laws made by the corporation, and upon the further condition that he shall continue a member in good standing of the secret society organized and controlled by the corporation. In order to attract the savings of the very smallest earnings, provision is made for issuing similar certificates for the payment of one, two, three, or four fifths of $1,000, upon condition of paying assessments of one, two, three, or four fifths of $2.50. The obligation of the corporation also involves the payment of certain weekly sums in case of the disability of the certificate holder; but as the whole amount so paid can in no case exceed one half of the sum named in the certificate, and in every case must be deducted from the sum agreed to be paid on its termination, this provision does not affect the character of the principal agreement. The obligation also involves the payment of one half the amount named in the certificate in case of the death of the holder after the first two years of the term; but this provision only covers a life risk for one and one half, or at most, for five years; and in view of the small percentage of mortality in any one term of five years, cannot seriously affect the principle of the insurance. The substantive business consists in the payment of a fixed sum at the end of seven years. The subsidiary provisions may furnish an excuse for calling the business accident and life, as well as endowment insurance, but are in fact mere incidental attractions for the prosecution of the main scheme, which the whole literature of the corporation, as well as the seal, indicative of its main object described in the charter, authoritatively announces to be the payment of "$1,000, in seven years." The corporation promises to pay $1,000 in seven years in consideration of the payment of the assessments of $2.50 each, and upon the

representation that those assessments shall not in the aggregate equal $1,000. Counsel claim that the corporation does not promise to pay $1,000, but only a sum "not exceeding $1,000." I think this error arises mainly from a misapprehension of the effect of the certificate. That paper, it is true, contains a promise to pay "a sum not exceeding $1,000," but it contains no promise as to the time or as to any detail. The only promise is to pay a sum "in accordance with and under the provisions of the laws" of the corporation, and this paper is authenticated by the seal of the corporation, which contains the charter, declaration of its main purpose and object, "$1,000 in seven years." To the laws we must look for the actual promise. The law says:—"There shall be attached to this Order a benefit fund, in which members may participate (except social members), as they may severally elect, either in the sum of $1,000, $800, etc., on which they shall pay the rates and be entitled to the benefits prescribed in the following table:"

"TABLE OF RATES AND BENEFITS.

"Amount paid on each assessment, . .	$2.50
Weekly benefit when sick or disabled, .	$25.00
Amount paid on total disability, . .	$500.00
Payable at death, ...	$500.00
Benefits paid at end of seven years not exceeding, ...	$1,000.00"

Here is a direct promise that the certificate holder shall participate in the fund "in the sum of $1,000," and "shall be entitled" to $25.00 a week during sickness, $500 on total disability, $500 at death; (the obligation to pay these sums is absolute, it is not a mere promise to pay a sum not exceeding $500), and at the end of seven years benefits not exceeding $1,000—*i. e.*, the benefits remaining unpaid of the sum of $1,000 which he has elected as the sum which specifies his participation in the benefits. No other construction can be given this language except as a subterfuge for palpable fraud —and such construction the court cannot give. And this construction of the direct promise of "$1,000 in seven years".

is fully confirmed by a careful examination of the whole body of the laws. The only exception to the obligation is contained in the section which provides that when one assessment of $2.50 shall realize an amount less than $1,000, if the certificate be in the amount of $1,000, the certificate holder shall receive no more than the "whole amount of said assessment." That is, until the business increases so as to include more than 400 certificate holders, (the number necessary to produce $1,000 at $2.50 each,) each certificate holder whose claim matures must be content with the product of one assessment; and the insertion of this exception is strong affirmation that the promise to pay the whole sum named in the certificate is binding in every other case.

Counsel also claim that the business scheme of this corporation does not involve the representation that assessments imposed on the certificate holders shall not in the aggregate equal $1,000. There is no foundation for such a claim. We are called upon to declare the legal meaning of a body of laws prepared for the sole purpose of attracting and building up a large business. The purpose for which such laws are framed is as truly an element in their construction as the contextural meaning of the particular language used to accomplish that purpose. In passing on the character of the business disclosed by laws so framed, we are bound to exercise that knowledge of the patent, well established and universally recognized elements of human nature, and of business transactions which the court must be presumed to possess. In this case the business, the securing of which is the object and sole object of the laws, consists in obtaining from a large number of the public the payment to the corporation of $2.50 from time to time upon the promise by the corporation of paying to each contributor $1,000 at the end of seven years. It is certain that such a business cannot exist without the belief on the part of the contributors that the assessments of seven years will be less than $1,000. By the very fact of offering to the public, for the purpose of obtaining business, the prospectus contained in these laws, the corporation makes the representation that $1,000 is to be obtained in seven

years by contributing in small sums less than that amount. Such representation is written into their prospectus by the fact of publication, unless it is clearly excluded by the language used. It is true the corporation might have said: "This business cannot honestly be carried on without collecting from each contributor in assessments the full amount of $1,000." If this language had been used no business would have been done and the laws would not be before us for construction. Not only is no such language used, but the representation implied in the very fact of presenting this business to the public is plainly set forth in the laws of the corporation. The law providing for the payment of assessments says: "All payments shall be made in accordance with the following sections, and in *no other way or manner*." And until the laws are changed no assessment can be made except as provided. The only provision for calling for payment of assessments is that if the treasury requires an assessment shall be made, and that "when it is evident from the claims filed in regular form that two assessments are necessary in any one month, then it shall be the duty of the supreme accountant to make the calls for said assessments at the same time, dating the calls one on the 1st and the other on the 15th of the month, except when those dates occur on a Sunday or legal holiday, in which case they shall be dated the preceding day." And in its official summary of the laws, intended for those unable to wade through the whole mass of legislation, the corporation says: "When it is necessary to call two assessments in one month, they shall be issued from the office of the supreme accountant on the first day of such month, or as near thereto as may be expedient." Surely it needs no argument to show that these laws not only confirm the representation made in the very fact of presenting this scheme to the public, but contain the representation that not more than two assessments a month—*i. e.*, $420 in seven years, will be required to obtain the payment of $1,000, and that therefore the laws make no provision for calling further assessments.

In confirmation of the view taken, attention may be called

to the fact that the Superior Court has made a part of the record of this case, conclusions of law found by the Indiana court in the proceeding which Failey sets out as the basis of his claim. These conclusions of law are:—

"1. That the defendant, in the issuance of certificates of membership in the benefit fund in the finding of facts described, was engaged in doing a health, accident, life and endowment insurance business, and the same was neither charity nor benevolence within the meaning of the statutes and laws of Indiana.

"2. That under the said contracts made by the defendant with persons holding certificates in the benefit fund, the defendant was bound to pay the full or gross amount severally named in said certificates, at the expiration of seven years from the date thereof, if then in force, less the payments (if any) theretofore made on such certificates on account of sickness or disability benefits. * * *

"4. That the defendant is not a mutual company, in the sense that the certificate holders in its benefit fund are members of the (Supreme) Sitting of the Order of Iron Hall, as the certificates constitute contracts entered into by the defendant on the one part and certificate holders on the other part, of the legal tenor and effect stated in the second conclusion above."

We find therefore that the record and facts before us clearly establish the conclusion that the essential business carried on in this State by the corporation, was the issue of certificates promising the payment of $1,000 in seven years, upon condition that the certificate holder shall pay during that time assessments of the fixed sum of $2.50 each, for the purpose of enabling the corporation from the money so paid in assessments, to pay $1,000 as each certificate matures; and that this business necessarily involved the representation that the aggregate of assessments in each case would be less than $1,000; and further involved the representation, in fact made in the conduct of the business in this State, that the aggregates of assessments in each case would not exceed $420. The provision for a so-called "reserve fund" does

not affect the character of this business. That provision simply permits the reservation of one fifth of each assessment, one seventh of the money so reserved, to be used annually in payment of matured certificates for the purpose of reducing the amount of future assessments.

The difficulty with the business consists in the impossibility of paying $1,000, from assessments amounting to $420, or any sum materially less than $1,000; and this difficulty is not to be avoided by using one fifth of the inadequate assessments, at the rate of one seventh a year, for the purpose of reducing the inadequate assessments of the future.

Nor is the character of the business materially affected by so-called "lapses," *i. e.*, the possibility of a certain percentage of certificate holders forfeiting the assessments paid, by neglect to continue such payments. If the business really depends on such lapses, and its object is to pay a large profit to matured certificate holders from money obtained by means of such lapses, then the business is unsound and dishonest. But the lapses are a necessary incident, and do not materially affect the character and result of the business. The percentage of such lapses is established by insurance experience; the main portion of such lapses must be at the beginning, and not at the close of the term; the security of the certificate holder must consist in maintaining, not in diminishing, the number of those liable to assessment; and a slight mathematical process will demonstrate that such lapses cannot prevent the eventual loss to some one involved in a business based on a principle of paying $1,000 for $500.

Such a business is clearly distinguishable from legitimate insurance. All insurance has a wagering element, and by the common law of this State wagering contracts are unlawful. In insurance, however, the wager is not the controlling element. The object of the contract is protection; in fire and other insurance of property, protection of the actual value of the property destroyed; in life insurance, protection of the value of a man's life to his family or his creditors.

But in any such case, if the element of protection is eliminated, if there is no insurable interest, if the contract is a

mere speculative bet on contingencies, if nothing but the wagering element remains, then the contract becomes obnoxious to the law which pronounces wagers illegal. In these certificate contracts there is no element of protection to property; it is a purely business speculation. The bait held out to the certificate holder is the hope of getting $1,000 without paying for it. He risks his little stakes of $2.50 (a small sum purposely fixed for bringing the temptation home to a great mass of the people), in the expectation of succeeding in the scramble for a thousand dollars in seven years.

This business is also distinguishable from that *quasi* insurance business, which really partakes more of the nature of investment or saving bank business, called endowment insurance. This is a comparatively new branch of insurance business; but in States where the standard of safety and solvency has been established by legislation, the law says, that for a $1,000 seven-year endowment insurance policy, issued at the age of 30, the company shall charge, and the insured shall pay, $125.74 each year until maturity; and that after deducting the current cost of insurance each year, the whole balance must be carefully invested and compounded at the standard rate of interest. Whether this particular regulation is essential to the conduct of the business or not, it is plain that the business of issuing $1,000 seven-year endowment policies indiscriminately to all persons between 18 and 65, on payments not exceeding $60.00 a year, cannot be honestly conducted; and such impossibility cannot be altered by calling premiums "assessments." Life insurance may come to be safely conducted on the assessment plan, and possibly human ingenuity may devise a scheme for safely conducting endowment business on that plan; but it is a mathematical certainty that the so-called endowment business this corporation has attempted to conduct, can only result in loss to the certificate holders.

Still more clearly should this business be distinguished from that of fraternal and mutual aid societies. The latter have no element of speculation; they are purely protective, and are based upon the necessity and duty of mutual aid in

time of trouble; and so act as powerful incentives in promoting that cultivation of thrift and mutual helpfulness which is essential to the prosperity and good order of society. For this reason they are favored by the law, and entitled to its protection. But the former has no element of protection, and is purely speculative. It seeks not to help the unfortunate, but to make profits out of their misfortunes, and tends directly to discourage thrift and promote that speculative spirit which is a serious danger to society. Between these two there is an impassable gulf, and not the least of the injury resulting from the business of this corporation is its direct tendency to discourage and weaken legitimate fraternal and mutual aid societies. This business, therefore, is nominally an insurance business, whose essential characteristics are: 1. The elimination of the protective element of insurance, so that the wagering element ceases to be incidental and becomes the controlling element. 2. The certainty of ending in a money loss to a large number of certificate holders.

Such conclusion is a mathematical certainty. If fourteen men agree to pay equal assessments into a common fund, so that at the end of seven years each one may draw out $1,000, it is evident that each will pay in the amount he draws out. Such agreement is harmless, but will never be entered into. If, however, a company issues its certificates promising to pay $1,000 in seven years upon the payment of such assessments as the certificates mature, and obtains fourteen certificate holders, one each year for fourteen years, and continues the business of collecting assessments and paying benefits until the last certificate matures, we have this result:—The first man pays $143 in assessments, and draws out $1,000—a net profit of $857; the last man pays $2,593 in assessments, and draws out $1,000—a net loss of $1,593; the first six men make a profit of about $3,000; the seventh and eighth pay in and draw out the same amount, and the last six lose about $3,000; and in any method adopted for putting in execution such a scheme, either the certificate holders draw out the same

amount they pay in, or some members make a profit out of the losses of others.

The subsidiary elements introduced by the defendant in its scheme may modify results, but cannot affect the principle. It is an inherent element in every such scheme that whenever the business closes, some one must be a loser. It is also certain that practically the business cannot be carried on without a rapid increase of members. As soon as the limit of increase is reached the business must close, and so the extent of the loss will be great in proportion to the success of the business. When, to such a scheme is added the fact that the corporation which carries it on makes large gains, proportioned to the extent of its business, and induces the public to take its certificates by the representation that $1,000 will be so gained in seven years through the payment of a much less sum, the fraudulent character of the business becomes yet more apparent and far more dangerous to the public.

The facts found in the record before us strikingly illustrate the substantial fraud in which the business set forth in the pleadings must result. It appears from the statement contained in the record of the condition of this company at the time of the appointment of Failey receiver, that the corporation has received several hundred thousand dollars, used for corporate expenses and for division among its officers, and at the time of failure was in receipt of a revenue for such purposes of upwards of $60,000 a year; that a large number of the earlier certificate holders have received net profits averaging about $420 each; and that the 60,000 remaining certificate holders, if all the money collected for assessments and not paid out on matured certificates, is divided among them, must lose about $2,000,000. Such is the result of a few years successful business, when conducted with all the honesty which such a business will permit. This practically illustrates what the documents before us demonstrate, that the very essence of the business carried on in this State, and which now seeks the aid of the court of equity, is

paying unearned profits to the few from the losses of the many.

I believe no case has been decided upon the precise question whether such a business is contrary to public policy, but courts have plainly characterized its nature when opportunity has been given. In Massachusetts, in reference to a corporation doing a somewhat similar business, but organized under a peculiar statute of that State, the court says:—"It is not in our power to declare the business contrary to public policy, and a fraud on an unprotected part of the community, since the Legislature have authorized it, but it is well to understand with what kind of business we are dealing. No one who does understand it, we think, would hesitate to agree that all legislative conditions must be complied with strictly." *Fogg* v. *Supreme Lodge U. O. Golden Lion*, 156 Mass., 481. In New Jersey, in holding that a similar business was not within the meaning of the New Jersey statute authorizing the formation of benevolent and charitable institutions, the court says:—"How can it ever be said that the Legislature ever intended to allow the learned and skillful and financially able to make profit, under the guise of benevolence and charity, out of the unlearned and unskilled, and those who are so unfortunate as to suffer from financial disability? After the fullest and most careful reflection I am unable to discover any method or principle of law by which this scheme can be sustained under this Act. With all due respect to the learned counsel who presented the case for the defendant, it seems to me that the scheme prescribed by the constitution and by-laws in this case, has more the appearance of a lottery than of a charity." *Peltz* v. *Supreme Chamber Financial Union*, 19 Atl. Rep. 671. In Pennsylvania, a corporation organized under a general statute authorizing incorporation for the purpose of "the maintenance of a society for beneficial or protective purposes to its members from funds collected therein," attempted a somewhat similar business, and the Court of Common Pleas, in revoking its charter, says:—"The leading feature about which all others cluster, is this vicious proposition to give

a man good money for nothing. This cannot be done as a business matter, honestly and fairly." And the Supreme Court, in sustaining the revocation of the charter, says:— "The auditor and the court below have sufficiently demonstrated that the only persons likely to be benefited by the scheme set forth in the charter are the officers themselves. It manifestly belongs to that class of associations, by far too numerous, the practical effect of whose operations is to enrich a few at the expense of confiding and ignorant people. Such corporations are 'unlawful and injurious to the community.'" *In re National Indemnity and Endowment Co.*, 142 Penn. St., 450.

We have before us now, a corporation which has carried on in this State the insurance business described, not as a system of mutual aid between the members of a mutual aid society, but independently, the society such as it is, simply defining the field of insurance; and the question is distinctly raised—Is that business contrary to our public policy? In determining this question we are embarrassed by no unfortunate legislation directly or impliedly authorizing such business. It is a fundamental principle of our law that courts will not undertake to administer justice in behalf of one whose claim is based upon a violation of law, whether that law be a statute, a legal principle, or a rule of conduct based upon accepted views of sound ethics and public interest, which has been incorporated into our system of jurisprudence by force of the well established judicial recognition which defines our unwritten law. Courts are established to settle rights founded in law. They have no jurisdiction of violations of the law, except for the purpose of punishment. This principle is found in the earliest records of our law, and has been enforced and illustrated in innumerable cases.

That the transactions in question are in violation of law is plain. In the first place, the record finds that the corporation "has never been authorized to do insurance business in the State of Connecticut." Sec. 2892 of the General Statutes says:—It shall not be lawful for any foreign corporation, organized for the purpose of furnishing life or accident in-

surance, or indemnity upon the assessment plan, to do any business in this State unless authorized by the Insurance Commissioner. Counsel claims that this prohibition has no application, because of a subsequent section which says it shall not be construed to apply to any "secret or fraternal society, nor to any association organized for benevolent and charitable purposes whose members are employed by one or by one or more similar corporations," etc. I think an examination of the whole law clearly shows that the words "secret or fraternal society" include only the well known class of associations formed for dispensing aid or benefits to their members, and that the exception does not apply to a corporation doing an assessment insurance business distinct from the benevolent operations of any secret or fraternal society. It will hardly be claimed that the mere word "secret" is efficacious to exclude from the operation of the act any corporation that may choose to call its janitor a "watchman" or its doorkeeper a "vedette." But there is no exception to § 2905; and that section provides that no foreign insurance corporation shall, directly or indirectly, transact business in this State until it shall have first appointed, in writing, the Insurance Commissioner of this State its lawful attorney, on whom process may be served. The record shows that this has not been done. I do not wish, however, to seek a ground for violation of public policy in the mere failure to comply with such requirements, when the actual transactions have been in violation of rules of conduct touching the gravest interests of society, and which are as well established law as if expressed in the form of a statute.

The insurance business of this defendant cannot exist without resulting in a fraud. In cannot be conducted without untrue representations. It is essentially of a wagering nature. Its direct and necessary tendency is an unmitigated public injury. The evils resulting from mere wagering purchases of stock, and which the law condemns as absolutely illegal, are slight compared with the disaster that must follow schemes of insurance which can only be started by appeals to the gambling spirit of a whole people, and can only end

in widespread loss. The rules of a public policy which condemn this business are well settled by judicial decisions, and this case really involves no new application of such rules; but if, in fact, it were a case of new application, the public injury is so great, and the violation of plain principles of law so clear, that the court should not hesitate to make the application. In *Egerton* v. *Brownlow*, 4 House of Lords Cases, p. 161, Lord LYNDHURST says:—"The inquiry must, in each instance where no former precedent had occurred, have been into the tendency of the act to interfere with the general interest. The rule, then, is clear; whether the particular case comes within the rule, it is the province of the court in each instance acting with due caution, to determine." And Lord Chief Baron, SIR FREDERICK POLLOCK, in the same case, page 149, says:—"After all these authorities, am I not justified in saying that, were I to discard the public welfare from my consideration, I should abdicate the functions of my office—I should shrink from the discharge of my duty? * * * I think I am bound to look for the principles of former decisions, and not to shrink from applying them with firmness and caution to any new and extraordinary case that may arise."

The question before us is not raised by the conflicting claims of the certificate holder and the corporation as to the validity or legal effect of a particular contract, but it is raised by the application of this corporation, through its receiver, asking the aid of a court of equity, for the purpose of settling its affairs, to put him in the possession of money due on account of business transacted in this State. The facts set out in this application, and the finding of the Superior Court, clearly show that the business so transacted, was essentially fraudulent and in violation of our public policy. The courts of this State cannot assist those who prosecute their business contrary to its settled policy, either in the prosecution of that business, or after its prosecution has ceased. Courts of equity will give no aid even in adjusting the accounts in a partnership formed for such purpose. *Watson* v. *Murray*, 23 N. J. Eq., 257; *Anderson* v.

Powell, 44 Iowa, 20; *Watson* v. *Fletcher*, 7 Gratt., 1. And *a fortiori* they will give no aid to a foreign corporation, in obtaining possession of property claimed to have been acquired through such violation of law. The claim of Mr. Failey must therefore be denied.

There is no question raised as to the jurisdiction of the Superior Court to distribute the funds now in the hands of Scofield, receiver. There appear to be no creditors, and no parties in interest, except the contributors to these funds. It is alleged and shown that the only protection against the dissipation of these funds through a multiplicity of suits, lies in their distribution by order of court. It is doubtless true that in the complications now existing, the funds can be most speedily and justly distributed through receiver Scofield. Possibly the view I have taken of the case may involve some modifications of the directions for distribution announced by the court, but such modifications would not be of sufficient practical importance to justify discussion, or to furnish ground for dissent.

For the reasons stated, I concur in the advice given to the Superior Court.

The State *vs.* John Keena.

Third Judicial District, New Haven, January Term, 1894. Andrews, C. J., Torrance, Fenn, Baldwin and Hamersley, Js.

Under the common law of this State the State's Attorney may file an original criminal information in the Superior Court in any case within its jurisdiction.

This power is not abridged by § 1607 of the General Statutes, originally enacted in 1874, which provides for the filing of such an information against the accused "in cases in which an inferior court may, at its discretion, punish him, or bind him over for trial." This statute simply gives to the Superior Court an original jurisdiction it did not before possess.

The validity of an information is not affected by the fact that the accused is already in the custody of the court upon another information for the

same offense. In such case there is no need of process to bring the accused before the court for arraignment.

History of legislation concerning the powers and duties of State's Attorneys reviewed.

[Argued January 23d—decided March 6th, 1894.]

INFORMATION for arson filed by the State's Attorney in the Superior Court for New Haven County, in lieu of an information brought by the city attorney of Meriden charging the same offense, upon which the accused had been bound over, tried and convicted, but which this court, on the defendant's appeal, held defective. *State* v. *Keena*, 63 Conn., 329.

Upon the trial to the jury upon the substituted information, before *Prentice, J.*, the accused was again convicted and appealed for alleged errors in the rulings of the court. *No error.*

The case is sufficiently stated in the opinion.

Charles S. Hamilton, for the appellant (accused).

Tilton E. Doolittle, State's Attorney, for the State.

HAMERSLEY, J. An information charging the defendant with the crime of arson was filed in the Superior Court by the State's Attorney, while the defendant was in the custody of the court to answer to a former information charging the same crime, but with a different allegation of the ownership of the building burned. The defendant was tried, convicted and sentenced. Upon being put to plead, and at different stages of the trial, he objected in due form to the validity of the information. The appeal assigns error in overruling these objections, and the defendant claims that the judgment should be set aside mainly because the crime charged is exclusively within the original jurisdiction of the Superior Court, and in such case the State's Attorney has no authority to file an original information. It is also urged as ground of error that when the information was filed another information was pending charging in a different form the

commission of the same crime, and that the defendant was arraigned and tried, against his protest, without the issue of a bench warrant.

The pendency of one indictment does not prevent another being found in the same court for the same cause; and when the defendant is in custody the attorney may file an information for any offense proper to be tried by the court. *Commonwealth* v. *Drew*, 3 Cush., 279; *Hendee* v. *Taylor*, 29 Conn., 456. When the defendant is in the custody of the court there is no need of process to bring him before the court, and he may be arraigned without the issue of such process. 1 Chitty Criminal Law, 338. These propositions are well settled law in this State.

Nor is there any ground for the defendant's principal claim of error. The powers and duties of a State's Attorney have never been defined by statute law; they are (except in certain particulars specifically enumerated in the statutes) the necessary incidents of the office, by force of the common law of this State. The language used in relation to the office has not materially changed since it was first formally established. In 1704 the "Atturney for the Queen," is required to "prosecute and implead in the lawe all criminall offenders, and to doe all things necessary or convenient as an atturney to suppress vice and imorallitie." 4 Colonial Records, 468. In 1730 this Act was passed: "In each county there shall be one King's Attourney, who shall plead and manage, in the county where such attourney is appointed, in all matters proper, in behalf of our sovereign lord the King." 7 Colonial Records, 280.

In 1764, apparently to remove any doubt that the representative of the crown also represented the sovereignty of the Colony, the King's attorneys in the several counties were empowered "to appear in behalf of the Governor and Company of this Colony in all cases concerning them or brought for or against them in any of the said counties." 12 Colonial Records, 258. In 1784 it was enacted that:—"In each county in this State, there shall be one State Attorney, who shall prosecute, manage and plead in the County where such

Attorney is appointed, in all Matters proper for, and in behalf of the State." Statutes 1786, p. 11. In the Revision of 1821 and of 1838 the same language was used. In 1849 the language was condensed as follows :—" The County Court, in each county, shall appoint one attorney for the State, who shall act as attorney in behalf of the State in the county where appointed." Revision 1849, p. 208. In 1888 the statute reads thus :—" A State's Attorney in each county, who shall act therein as attorney in behalf of the State." General Statutes, § 763.

It has been uniformly held since 1730 that the office then established carried with it the duty to conduct all criminal prosecutions in the Superior Courts, and the power to institute and carry on in every court having criminal jurisdiction (unless restrained by some statute) any criminal prosecution within the jurisdiction of the court, and also the power and duty to exercise the common law powers appertaining to the office of Attorney General, so far as applicable to our system of jurisprudence.

The power of the State's Attorney to file in the Superior Courts an original information exists by reason of his being invested with common law power of Attorney General, which in this State is greatly enlarged, because we early adopted the policy of filing an information in cases of felonies as well as misdemeanors ; and, since the adoption of our Constitution, an information may be filed for every crime not punishable by death or imprisonment for life. It is then the common law of this State that authorizes the State's Attorney to file informations in the Superior Court, both in ordinary criminal prosecutions and in those prerogative writs where he represents as Attorney General the sovereignty of the State. Mandamus and *quo warranto* were authorized and regulated entirely by the common law until 1821, and to this day it is the common law that authorizes the State's Attorney to represent the sovereignty of the State when those writs are issued on application of the State alone. This common law power, inherent in the office of State's Attorney, is partially stated by Swift in his System, page 376, and in his

Digest, pages 392 and 370; and is fully established and settled beyond all question by the numerous cases in which the power has been exercised by the Attorney and sanctioned by our courts.

In filing an original information in the Superior Court, the State's Attorney, therefore, exercises a common law power, which can only be taken away by the clear terms of the statute. The defendant claims that this power was taken away by the statute of 1874, which says:—"An original information may be filed in the Superior Court against any person accused of crime, in cases in which an inferior court may, at its discretion, punish him, or bind him over for trial." General Statutes, § 1607. This statute apparently gives to the attorney a power he did not have at common law, but in reality it simply gives to the Superior Court a jurisdiction it did not before possess. In 1873, this court held, that in removing the minimum punishment for the crime of perjury, so that an inferior court might, upon complaint for perjury, either punish or bind over the accused, the legislature intended to take from the Superior Court its original jurisdiction of that crime; and therefore the State's Attorney could not file an original information for that crime in the Superior Court. *State* v. *Davidson*, 40 Conn., 281. In giving the decision the court intimated there might be occasion for the interference of the legislature. The following spring the law of 1874 was passed. It was, in purpose, a law declaratory of the legislative intent, and, in effect, provided that thereafter the Superior Court should have original jurisdiction of all crimes where an inferior court in cases brought before it may either punish or bind over the accused; and that the mere fact of the legislature removing the minimum punishment for a felony or other crime should not deprive the Superior Court of its original jurisdiction. It is evident that a law increasing the jurisdiction of the Superior Court so that the attorney may file original informations arising under the new jurisdiction, cannot be construed as taking from the attorney his common law power of filing informations in other cases. Or, if the statute can

be treated as authorizing the State's Attorney to file original informations in the Superior Court in cases of which the court has not original jurisdiction, it is, if possible still more evident that the law cannot be construed as forbidding him to file original informations in cases of which the court has such jurisdiction.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

THE STATE *vs.* GEORGE BASSETT.

Third Judicial District, New Haven, January Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

In October, 1875, a portion of the navigable waters of the town of East Haven, suitable for planting and cultivating oysters, was, apparently by mistake, not included within the territory by statute assignable for such purpose. The oyster ground committee of such town, however, designated and allotted to one F a place within such non-assignable territory, which has since been held and devoted to the purpose of cultivating oysters. In 1877 an Act was passed (Public Acts 1877, p. 200, § 2) which validated and confirmed "all designations of places for planting and cultivating oysters within the navigable waters of any town, which have heretofore been made by authority of such town through its selectmen or oyster ground committee." *Held* :—

1. That the designation to F was thereby validated and confirmed.
2. That the fact that the place so designated was natural clam and oyster ground did not invalidate the designation.
3. That a willful trespass on the ground so designated was in violation of, and punishable under, § 2381 of the General Statutes.

[Submitted on briefs January 23d—decided March 6th, 1894.]

PROSECUTION for a willful trespass by defendant upon certain designated oyster ground on which oysters were cultivated; brought in the City Court of New Haven, (*Cable, J.*,) and thence by the defendant's appeal to the criminal term of the Court of Common Pleas for New Haven County; in the latter court the defendant was tried by a jury before

Hotchkiss, J.; verdict of guilty and judgment thereon and appeal by the defendant for alleged errors in the charge of the court. *No error.*

Lucius P. Deming, for the appellant (defendant).

George M. Gunn and *Samuel C. Morehouse*, for the appellee (the State).

TORRANCE, J. This is a prosecution brought under § 2381 of the General Statutes which reads as follows:—"Every person who shall willfully commit any trespass or injury with any eel spears or other implements on any designated oyster ground on which oysters are being cultivated, shall be fined not more than seven dollars, or imprisoned not more than thirty days, or both."

The *locus in quo* is a part of the bottom of the Quinnipiac river, a tributary of the New Haven harbor, in which the tide rises and falls. It is situated on the east side of the river, about three hundred and twenty-five feet above the Shore Line Railroad bridge, where the water is navigable. It was originally designated and allotted to Mrs. D. E. Foote of the town of East Haven, for the purpose of planting oysters thereon, by a committee of the town of East Haven in the month of October, 1875. It came by regular conveyances to Daniel H. Graniss, and was, when the alleged trespasses were committed, in his possession and ownership, properly staked and marked as required by law, and was then used by him for the planting and cultivation of oysters.

The defense, in substance, was that the original designation made in 1875 was void; first, because the committee had no power or authority to make any designation or allotment of ground for the planting and cultivation of oysters; and second, because the *locus in quo* was at the time of such original designation natural clam and oyster ground. Upon this last point the finding of the court below is as follows:—"It was testified and not contradicted that from time immemorial these flats have been natural clam and oyster grounds;

that clams have grown upon them and do grow upon them in great quantities; that they can be readily gathered and dug because of the shallow water at low tide, and that many persons are accustomed to dig clams upon these flats, and have obtained a portion of their entire livelihood in that way; that prior to 1875 the flats were used by clammers without hindrance; that since the designation the owners of the grounds have had constant and increasing difficulty in protecting their rights."

The defendant asked the court to charge, in substance, that if the jury found that the *locus in quo* had been natural clam and oyster ground, the designation made by the committee to Mrs. Foote in 1875, "was illegal, contrary to common law, and void under the statutes of this State;" that the State had never authorized said committee to designate this ground; and that digging on said ground for clams was not a willful trespass under the statute. The court declined to so charge, but did charge in substance that the original designation was a valid one, which gave to Mrs. Foote and her assigns, they complying with the requirements of the statutes relating to this matter in other respects, the exclusive right to occupy and use such ground for the purpose of planting and cultivating oysters thereon. Of this charge and refusal to charge the defendant complains on this appeal.

The questions thus raised on this appeal were considered by this court in the case of the *State* v. *Simpkins* at its December Term 1888, held at New Haven. That case was not reported, but the opinion in the case was filed with the clerk of the Superior Court for New Haven County in whose custody it now is, and we think it is decisive of the present case against the defendant.

That was a prosecution of substantially the same nature as the present one. The *locus in quo* was covered by the waters of the Quinnipiac river, and was situated not far from the *locus in quo* in the present case. The original designation in that case was made in October, 1875, by the same committee that made the original designation in the case at

bar. In that case (*State* v. *Simpkins*) it is found that the State "admitted that the ground in question was at the time of the designation thereof and is now natural clam and oyster ground, but it was admitted that such ground was within one of the tributaries of New Haven harbor."

In all essential respects, then, the two cases are in their main facts identical. The points made in this case, namely, that the committee who made the designation in 1875 had no power to make any designation, and that they certainly had none to designate natural oyster grounds, were made and discussed in argument in that case. In that case this court expressly held that the action of said committee in making the designation then in question had been ratified and made valid by the legislature in 1877. In the opinion no notice is taken of the point made that the *locus in quo* was admitted to be natural oyster and clam ground, but the court, we think, must be understood as holding that, in New Haven harbor and its tributaries, such designation might be made in 1875, even of ground which was natural oyster or clam ground. At this time § 6 of Chap. 4, Tit. 16, of the Revised Statutes of 1875 (p. 214) was in force, which provides that "the designation of all places within the navigable waters of New Haven harbor, or its tributaries, which have been or may be designated to any person for the purpose of planting or cultivating oysters therein in pursuance of the provisions of this chapter shall be valid, although such places may have been natural oyster beds, if such designation is in other respects legal."

The statute forbidding the designation of any natural clam bed was not passed until 1878. Public Acts of 1878, Chap. 100. The opinion in the case of *State* v. *Simpkins* is as follows:—

"During more than thirty years the legislature has encouraged the cultivation of oysters, by vesting in individuals the right of private, exclusive ownership of grounds suitable for that purpose. The Revision of 1875 went into effect on the first day of that year. From that date the law, as therein found, has been the law concerning that subject, except as

modified by subsequent statutes. By Chapter 4, Part 1, Article 1, Section 1, p. 213, of the Revision of 1875, power was conferred on the selectmen of East Haven, to designate for the planting and cultivation of oysters, ground in a certain specified portion of the navigable waters within the limits of said town; and upon the selectmen of Orange, a like power in reference to all grounds within the navigable waters of that town, not occupied under any previous designation; and by § 2, p. 214, a like power was conferred upon a committee of electors to be appointed in every town, in reference to like ground within said town. Thus these two sections make provisions for the designation, either by the selectmen, or by some committee, for all ground in the navigable waters, within all towns, except for that portion of the town of East Haven not included within the boundaries of the territory placed in the jurisdiction of the selectmen thereof. Doubtless the omission to provide for this by the continuation of the power to appoint a committee was an oversight.

"Notwithstanding this omission, the town upon due warning for that purpose, at its annual town meeting holden in October, 1875, appointed a Committee of Electors to make designation of the ground in the navigable waters within its limits, and on October 27th, 1875, that committee designated to B. N. and Stephen Rowe, a certain specified parcel of land, covered by the waters of the Quinnipiac river, within the limits of said town, and within the portion excluded from the jurisdiction of the selectmen thereof, and the complaint is that the defendant subsequently took oysters therefrom.

"At the trial, the State offered in evidence the aforesaid designation by the committee. The defendant objected to the reception thereof, for the reason that it was invalid, because the town of East Haven had no power in October, 1875, to appoint a committee for the designation of grounds for oyster planting, and that said designation had not been confirmed by the legislature. The court excluded the designation, and the defendant had a verdict. The State appeals.

"In 1877, Session Laws of 1877, Chapter 94, p. 200, the

legislature enacted as follows:—'Section 1. Any town may appoint a committee of not more than five electors of such town, to hold office one year, and until others are chosen in their stead, which shall designate suitable places in the navigable waters of said town excepting such places only as the selectmen of said town have exclusive authority to designate, for the planting or cultivation of oysters, clams or mussels, and the town may fill any vacancy that may occur in said committee.'

"'Section 2. All designations of places for the planting or cultivation of oysters, within the navigable waters of any town, which have heretofore been made by authority of such town, through its selectmen, or Oyster Ground Committee, are hereby validated and confirmed.'

"'Section 3. Article 1, Part 1, Chapter 4, Title 16 of the General Statutes, Revision of 1875, is hereby repealed, and all acts and parts of acts inconsistent with this act, are hereby repealed.'

"'Section 4. This act shall take effect from its passage.'

"In view of the fact that section 2 is for healing purposes, and is by its terms, *comprehensive of all places and of all defects*, no good reason can be given for excluding from its beneficent operation a defect so manifest. Indeed, we should rather be bound to presume that one capable of injury to many persons is one principally within the legislative intent. Although it is true that in October, 1875, the town of East Haven was without legislative confirmation to provide for the designation by a committee, in that portion of its water withholden from the selectmen, yet, it did, in form, appoint such a committee, and the committee assumed power to act. It had, in form, the sanction of the town to its proceedings. When we consider the omission which the legislature was endeavoring to supply, we must presume that it intended to heal not only the errors of the illegally appointed committee, but the defects as well, in the appointment of the committee itself; that is, the legislature of 1877 intended to place all persons in the position which they

would have occupied, if the legislature of 1875 had been perfect. There was an error in the rejection of the offer."

As already intimated we think the opinion thus quoted applicable to, and as against the defendant decisive of, the points raised by him on the present appeal.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

CHARLES W. BLAKESLEE & SONS *vs.* ANTHONY CARROLL.

Third Judicial District, New Haven, January Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

In an action of slander the defendant may show that the defamatory words were spoken under such circumstances as to shield him from what would otherwise be an actionable wrong; that is, that the occasion was a "privileged occasion." These occasions are divided into two classes: Those absolutely privileged, and those of conditional privilege. In the former case the defamatory words, though knowingly false and spoken with express malice, impose no liability for damages; while in the latter case the speaker is liable, provided the words were false and spoken with express malice.

Where a committee of the whole of the board of aldermen was charged with the investigation of certain specific grievances, but extended its investigation to other matters and invited, permitted, or compelled persons to come before it and make statements or give testimony pertinent and relevant to such other matters, the occasion is, as to the persons making such statements or so testifying in good faith and without malice, one of conditional, but not of absolute, privilege. It is not essential in such case that the statements should have been made, or the testimony been given, in response to questions.

And where the alleged slanderous words were claimed by the defendant to have been uttered under such circumstances, it was *held* that he might prove the extent and scope of the investigation actually made by the committee, by its report and the record of the board of aldermen accepting the same.

[Argued January 23d—decided March 6th, 1894.]

ACTION to recover damages for slander, brought to the Superior Court in New Haven County and tried to the jury

before *George W. Wheeler, J.;* verdict and judgment for the plaintiffs for $500 damages, and appeal by the defendant for alleged errors of the court in excluding evidence and in the charge to the jury. *Error, and new trial granted.*

The complaint alleged that the plaintiffs were partners in business and engaged in furnishing materials and building roads, sewers, pavements and general stone structures in New Haven and other places; that the defendant was a sewer contractor in said city, and on the 27th of July, 1891, spoke in the hearing of certain persons named, and many others, the following false and slanderous words of and concerning the plaintiffs, and of the plaintiffs in their trade and profession:—"I may be poor; I don't own as much money as the Blakeslees; but I tell you, you see the city property go up there, and see the Blakeslees' yard; see the cobble stones and paving stones belonging to the city; look at the city year book, and see how much they drew out of it; no wonder they be rich; and why cast reflections on my name, when I do my work?"

The complaint then set out certain questions which were alleged to have been asked by one of the persons in whose hearing the words above quoted were uttered, and the replies thereto by the defendant; and averred that the defendant, by the words so uttered by him, "meant to be understood and was understood by those who heard him to mean that the plaintiff did not honestly obtain said cobble stones and paving stones, and that they had either stolen the same, or they had fraudulently obtained them by collusion with the board of public works; and that they had unlawfully taken into their possession and unlawfully appropriated to their own use a large quantity of paving stones and cobble stones, the property of the city of New Haven, with an attempt to defraud said city."

The other facts are sufficiently stated in the opinion.

William L. Bennett, for the appellant (defendant).

I. The court erred in excluding the testimony as to the scope of the investigation actually made by the committee.

It was important to the defendant to show that the language used by him was pertinent and relevant to that investigation, and of course he could not do this, unless he could establish what the subject-matter of that investigation was in fact. If the committee heard grievances not specifically referred to them for investigation, the defendant should have been permitted to show that fact; and the evidence excluded did show just that.

II. As the defendant's second defense was not demurred to, the facts therein stated, if proved, constituted a complete defense to the action. In this defense the defendant, without disputing the malice or relevancy of the language used by him, rests his case upon the ground that the words were spoken by him as a witness in a judicial or *quasi* judicial proceeding. The law is well established that a witness in a judicial proceeding is absolutely exempt from liability in an action for defamatory words, published in the course of such proceedings, whether the words are true or false, malicious or not, and pertinent or otherwise. *Seaman* v. *Netherclift*, 1 C. P. Div., 540, 2 C. P. Div., 53; *Hunckel* v. *Voneiff*, 69 Md., 179. If this rule has been at all modified it is to this extent: That the privilege extends only to the case where the words are pertinent to the matter under investigation, or *were believed by the witness to be pertinent. White* v. *Carroll*, 42 N. Y., 161; *Lea* v. *White*, 4 Sneed (Tenn.), 111; *Hutchinson* v. *Lewis*, 75 Ind., 55; *Calkins* v. *Sumner*, 13 Wis., 193; *Barnes* v. *McCrate*, 32 Me., 442; Am. & Eng. Ency. Law, Vol. 13, p. 408. The court erred in refusing to charge that the privilege extended to the case where the witness believed the words uttered to be pertinent. The board of aldermen sitting as a committee of the whole is a judicial, or at least a *quasi* judicial body, and the defendant was entitled to an instruction to that effect. City Charter, § 26.

If the court erred in holding that the committee was not a judicial, or *quasi* judicial body, it erred also in charging that the privilege of the defendant, if any, could only be considered as limited. The court said: "So that," [viz., because

the committee was not a judicial or *quasi* judicial body,] "the kind of privilege that this is, if it is a privilege, is a conditional privilege. And a communication to be privileged, of this sort, must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable causes." The defendant is by this instruction deprived of his second defense, which alleges an absolutely privileged communication. It also deprived him (if his words must be pertinent or believed to be pertinent) of the presumption of their pertinency. *Hutchinson* v. *Lewis*, 75 Ind., 55; *Barnes* v. *McCrate*, 32 Me., 442; *Calkins* v. *Sumner*, 13 Wis., 193; *White* v. *Carroll*, *supra*.

III. The court refused to instruct the jury as requested in regard to the third defense, and told them that there was no evidence to support it, thus removing it from their consideration. This defense states that the words were spoken by the defendant as a witness at a hearing or investigation held by the board of aldermen as a committee of the whole; that it was the duty and privilege of the defendant not only as a contractor engaged in constructing city sewers, but as a citizen, to bring to the attention of said board such grievances as were believed by him to be true and pertinent, and that the words were uttered without malice. The court says that the defendant does not claim that he went there as a citizen, but that he was there and testified as a witness, and in effect charges the jury that he could not be there both as a witness under oath, and a citizen desiring to bring to the attention of the aldermen misconduct of the board of public works. But there is nothing impossible in the positions. If the board of aldermen was holding as they say, "a general hearing of any and all grievances that anybody had against the board of public works," the defendant might appear before them and, if sworn as a witness, make his statement of grievances to them, and retain both the privilege of a witness and the privilege of a citizen acting in the discharge of a duty. It was the claim of the plaintiffs that the last time the defendant appeared before the committee he had lost the character of a wit-

ness, and that he was there to make known his private grievances. If this was found true by the jury, is the defendant to be deprived of such privilege as would properly attach to him in such case, because he is here claiming that his complaint was made under oath? It would seem that this cannot be and that in this respect the court erred.

But the court also says that the committee had no right or interest in receiving a complaint; that they had no right to pass upon or entertain it, and that this is conceded. What the court means is that it was not denied that the matter originally confided to them to investigate was an inquiry concerning a road roller. It has not been conceded that they did not in fact hear and invite testimony concerning the very matters of which this defendant testified. If the defendant making a natural and honest mistake as to their powers, conceived the committee of the whole to be clothed with the jurisdiction of the board of aldermen, and applied to that committee for relief from his grievances, such unintentional error does not deprive his statement of its privilege. *Jenoure* v. *Delmege*, App. Cas. (1891), 77; *Harrison* v. *Bush*, 5 E. & B., 344; *Thompson* v. *Dashwood*, 11 Q. B. Div., 43; *McIntyre* v. *McBean*, 13 Up. Can. Q. B., 534; *Scarll* v. *Dixon*, 4 F. & F., 250; *Waring* v. *McCaldin*, 7 Ir. Rep. C. L., 288; Odgers Libel & Slander, p. 171; Am. & Eng. Enc. of Law, Vol. 13, p. 420.

IV. The court charged the jury that if the committee had jurisdiction and the questions and answers were relevant, yet if they found that the defendant gave his testimony maliciously that destroyed the privilege. The defendant had asked the court to charge that under the circumstances stated, the inference of malice which the law draws from defamatory words is rebutted, and the burden of proving actual malice is cast upon the plaintiff. And further that actual malice must be specifically proved by evidence not contained in the language itself.

The court declined so to charge and the jury were left without instruction as to the burden of proof and were permitted to infer malice from the words alone. They may in-

deed have considered from the words used by the court that they were obliged to find malice from the words alone. *Hemmens* v. *Nelson*, 138 N. Y., 517; *Kent* v. *Bogartz*, 15 R. I., 72; *Jenoure* v. *Delmege*, App. Cas. (1891), 73; *Austin* v. *Remington*, 46 Conn., 116.

Rufus S. Pickett for the appellees (plaintiffs).

I. The report of the committee and the record of the action taken thereon by the board of aldermen were properly excluded. They make no traceable reference to the defendant, or to any question or issue, near or remote, involved in this case, and contain nothing that proves, or tends to prove, any claim made by the defendant during the trial.

Said report was mere hearsay. The defendant sought to prove by it that the committee of the whole of the board of aldermen received testimony generally from any one who had grievances against the board of public works. So far as this report relates to that subject, it is a mere statement of unsworn witnesses.

The report is only a statement of the conclusion of the signers of it, as to the matter in question. It does not give the testimony, nor the rulings of the committee.

If the report tended to prove what the defendant claimed it for, it would still be inadmissible. It is an attempt to show that the board of aldermen received testimony that was wholly irrelevant and concerning questions not at all within their jurisdiction.

The stenographer's notes and the testimony of Charles S. Hamilton were also equally inadmissible.

II. The court correctly charged the jury that the committee in its investigation was not a court of justice or a *quasi* judicial body. *Hastings* v. *Lusk*, 22 Wend., 410, 417, 421; *Mower* v. *Watson*, 11 Vt., 536, 541, 542; *McLaughlin* v. *Conley*, 127 Mass., 316, 319, 320; *Hosmer* v. *Loveland*, 19 Barb., 111, 115, 116; *Smith* v. *Howard*, 28 Iowa, 51.

The false and malicious testimony of a witness upon a matter over which the tribunal before which he is testifying has no real or apparent jurisdiction is not privileged. Starkie

on Lib. and Slan., sec. 329; *Huntley* v. *Ward*, 6 C. B. (N. S.), 514; *Smith* v. *Howard*, 28 Iowa, 51, 55, 57; *White* v. *Carroll*, 42 N. Y., 161, 165, 166; *Gilbert* v. *People*, 1 Denio, 41, 43.

The record does not show that any evidence was offered to prove, nor that any claim was made, that Carroll believed that what he said concerning the Blakeslees was a matter over which the committee had jurisdiction, or was in any way relevant to the subject they were investigating.

The charge of the court complained of as to whether testimony would be privileged if relevant, and upon a subject over which the committee had jurisdiction, was abstract and outside of the case. The courts are fully justified in refusing to charge as requested, if any part of the requests are immaterial, abstract or speculative, even if they contain some correct propositions applicable to the case, and an erroneous charge upon an abstract question of law, having no relation to the case on trial, is not a ground of error. *Marlbrough* v. *Sisson*, 23 Conn., 44, 54; *Lewis* v. *Phœnix Life Ins. Co.*, 44 id., 72, 88; *Gates* v. *Mowry*, 15 Gray, 564; *Indianapolis etc. R. R. Co.* v. *Harst*, 93 U. S., 291, 295; *Harvey* v. *Tyler*, 2 Wall., 328, 338.

III. The charge relative to damages was free from error. The court said to the jury: "No damages can be recovered for any injury to the private feeling of the partners individually. Damages can only be recovered for such jury if any, as the plaintiffs, as a firm, may have sustained in their joint trade or business." The charge taken as a whole could not possibly have misled the jury. *Smith* v. *Carr*, 16 Conn., 450, 455; *Hawkins* v. *Hudson*, 45 Ala., 482; *McKeon* v. *Citizens R. R. Co.*, 43 Mo., 405; *Bergen* v. *Riggs*, 34 Ill., 170.

IV. The defendant in order to be entitled to privilege as a citizen, ought at least to show that he came before the committee believing that it was a proper place to make a complaint, and that his purpose in appearing there was to do so. As has already been suggested, there is no claim anywhere, that the defendant had any intention of making any statement as a citizen, or that he made a complaint to the

wrong body, believing or thinking that he was making it to the right one. His entire evidence before the court was offered in support of the claim that he was testifying as a witness. Odgers on Libel and Slander, 271; *White* v. *Nicholls*, 3 How. U. S. 266, 287, 289, 291; *Shadden* v. *McElwee*, 86 Tenn., 149, 150, 154; *Neebe* v. *Hope*, 111 Penn. St., 145, 153; *Sanson* v. *Hicks*, 38 Ala., 279.

V. The charge of the court contained no erroneous proposition by which the jury were misled, and the verdict should stand, even if the charge contained an untenable proposition abstract in character, which did not bear upon the merits of the case, and not of a nature to affect the verdict. Substantial justice has been done, which should not be disturbed by a conjecture, or extinguished by a shadow. *Howard* v. *Minor*, 20 Me., 325; *French* v. *Stanley*, 21 Me., 512; *Hoitt* v. *Holcomb*, 32 N. H., 186; *Elling* v. *Bank of U. S.*, 11 Wheat., 59; *Elam* v. *Badger*, 23 Ill., 498, 502.

TORRANCE, J. This is an appeal by the defendant from a judgment in an action of slander. The complaint sets out the alleged slanderous words in full, and alleges in substance, that they charge or impute a crime and are false and malicious.

The defendant in his answer, after admitting that he uttered the words set out in the complaint, but denying that they had the meaning therein ascribed to them, alleged in substance, first, that they were true and not false and malicious; second, that "said words were spoken by the defendant as a witness testifying under oath before a committee of the board of aldermen of the city of New Haven, a body having power through their presiding officer to compel the attendance and testimony of witnesses before them by the issue of subpœnas and the administration of oaths in the manner and according to the rules governing the same in courts of justice;" third, that "said words were spoken by the defendant as a witness at a certain hearing or investigation held by the board of aldermen of the city of New Haven, sitting as a committee of the whole, concerning the performance by the board of public works of said city, as

then constituted, of the duties imposed upon said board of public works; and in connection therewith concerning the granting of contracts to persons connected with the government of the city of New Haven and serving upon any of the boards of said city;" and "that it was the duty and privilege of the defendant, not only as a person employed and making his living in constructing sewers, but as a citizen interested as such in the good and economical government of the city, to bring to the attention of said board of aldermen at said hearing such matters as were believed by him to be true and as were pertinent and relevant to the matters under consideration by said board; and that the words so uttered were pertinent and relevant and were uttered without malice and in good faith."

It is quite evident from the record, that the main contention between the parties in the court below related to the question whether the occasion upon which the alleged slanderous words were uttered was what is called a "privileged occasion," either absolutely or conditionally; and if the latter, whether the defendant had exceeded his privilege, or had been influenced by actual malice; and the questions involved in the present appeal relate almost entirely to the same matters. The reasons of appeal are somewhat numerous, assigning errors in the rejection of evidence, in the refusal of the court to charge certain requests, and in certain parts of the charge as given; but it is hardly necessary to consider them all separately or in their numerical order.

One of the questions presented, and one that it seems well to consider first, is whether the occasion upon which the words in question were uttered was one of absolute privilege as it is called, or only one of conditional privilege. It is settled law that in actions of slander and libel the defendant is permitted to show if he can, that the circumstances under which the defamatory words were published were such as to shield him from liability for what would otherwise be an actionable wrong. In such cases the occasion of the publication is, for the sake of common convenience and in the interests of society, said to free the defendant from the lia-

bility that would otherwise be imposed upon him, and is called a "privileged occasion." These occasions are usually divided into two classes: those absolutely privileged, and those conditionally privileged.

The general rule is that defamatory words spoken upon an occasion absolutely privileged, though spoken falsely, knowingly, and with express malice, impose no liability for damages recoverable in an action of slander; while such words spoken upon an occasion only conditionally privileged, impose such liability, if spoken with what is called express malice. In the former class the freedom from liability is said to be absolute or without condition, as contrasted with such freedom in the latter class, where it is said to be conditioned upon the want or absence of express malice.

The freedom from liability in the first class is founded upon the principle that in certain cases it is "advantageous for the public interest that persons should not be in any way fettered in their statements," but should speak out the whole truth, freely and fearlessly. Odgers on Libel and Slander, *p. 186. This class is comparatively a narrow one, and is, speaking generally, strictly confined to legislative proceedings, judicial proceedings in the established courts of justice, acts of State, and acts done in the exercise of military and naval authority. In judicial proceedings the protection of the rule extends to judges, counsel and witnesses. "I take this to be a rule of law not founded, as is the protection in other cases of privileged statements, on the absence of malice in the party sued, but founded on public policy, which requires that a judge in dealing with the matter before him, a party in preparing or resisting a legal proceeding, and a witness in giving evidence in a court of justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel." *Kennedy* v. *Hilliard*, 10 Ir. C. L. Rep., 195; *Munster* v. *Lamb*, 11 Q. B. Div., 588; *Seaman* v. *Netherclift*, 1 L. R., C. P. D., 540; *Dawkins* v. *Lord Rokeby*, 7 L. R. H. L., 744. In the case last cited, which was the case of a witness before a military court of inquiry, Lord Penzance thus states the foundation

of the rule :—" I wish to say one word on the supposed hardship of the law which is brought into question by this appeal. It is said that a statement of fact of a libelous nature which is palpably untrue—known to be untrue by him who made it, and dictated by malice—ought to be the subject of a civil remedy, though made in the course of a purely military inquiry. This mode of stating the question assumes the untruth and assumes the malice. If by any process of demonstration, free from the defects of human judgment, the untruth and malice could be set above and beyond all question or doubt, there might be ground for contending that the law of the land should give damages to the injured man. But this is not the state of things under which this question of law has to be determined. Whether the statements were, in fact, untrue, and whether they were dictated by malice, are, and always will be, open questions, upon which opinions may differ, and which can only be resolved by the exercise of human judgment. And the real question is, whether it is proper on grounds of public policy to remit such questions to the judgment of a jury. The reasons against so doing are simple and obvious. A witness may be utterly free from malice, and may yet in the eyes of the jury be open to that imputation ; or, again, the witness may be cleared by the jury of the imputation, and may yet have to encounter the expense and distress of a harassing litigation. With such possibilities hanging over his head, a witness cannot be expected to speak with that free and open mind which the administration of justice demands."

The existence of what is called an absolute privilege at common law in the case of a witness testifying in a court of law is generally recognized by the courts of this country, although they are not perhaps agreed as to the extent of the privilege, or as to the occasions which are absolutely privileged, to the extent of the rule as applied in England. *Kirkpatrick* v. *Eagle Lodge*, 26 Kans., 384; *Maurice* v. *Worden*, 54 Md., 233; *White* v. *Nicholls*, 3 How. (U. S.), 267; *Bradley* v. *Fisher*, 13 Wall., 335; Cooley on Torts, p. 211.

According to the English authorities the rule undoubtedly

is, that to a witness in a court of justice testifying in a cause properly before the court, the occasion is one of absolute privilege from liability for damages in an action of slander. Whether the rule as it prevails in England and elsewhere as to such witnesses, prevails in this State as to them, as claimed by the defendant, it is not necessary to determine, because we think the proceeding before the committee was not a judicial or *quasi* judicial proceeding within the meaning of the rule as to absolute privilege as it is held anywhere. It was a proceeding to investigate the truth of certain statements made to the board of aldermen, and the power and the duty of the committee were simply to obtain such information as it could concerning those statements, and report to the board of aldermen for its action. The persons who were to make the inquiry had no judicial character or office; had no settled jurisdiction or fixed mode of procedure; and they had no judicial function to exercise, for they could decide nothing, and could only report their action to a board which might altogether disregard what the committee had done. In no proper sense can the committee be called a judicial body or its proceedings judicial. A judicial proceeding within the meaning of the rule as to absolute privilege must, we think, be one carried on in a court of justice established or recognized by law, wherein the rights of parties which are recognized and protected by law are involved and may be determined. The proceedings before this committee were clearly not proceedings of that kind.

But it is said that under § 26 of the charter of the city, the presiding officer of the committee had "power to compel the attendance and testimony of witnesses * * * by the issue of subpœnas and the administration of oaths in the manner and according to the rules governing the same in Courts of Justice." This provision, however, cannot be held to confer judicial or *quasi* judicial power upon the presiding officer, and certainly not upon the committee. All it gives is power to the presiding officer to issue subpœnas for and administer oaths to witnesses whom the committee may desire to improve, and nothing more. If the witness refuses to obey the

subpœna, neither the presiding officer nor the committee has power to issue a capias; and if the witness appears but refuses to testify, neither the committee nor the presiding officer has power under § 26 to commit him for such refusal. *Noyes* v. *Byxbee*, 45 Conn., 382. We know of no authority for holding that the proceedings before this committee were either judicial or *quasi* judicial proceedings within the meaning of the rule now under consideration.

The class of occasions where the utterances of defamatory words is absolutely privileged is, as before stated, confined within narrow limits, and the courts as a rule have steadily refused to enlarge those limits. Odgers on Libel and Slander, p. 184. *Stevens* v. *Sampson*, L. R., 5 Exch. D., 53; In *Maurice* v. *Worden*, *supra*, the court enumerates the cases in which absolute privilege has been accorded and says:— "Beyond this enumeration we are not prepared to go. The doctrine of absolute privilege is so inconsistent with the rule that a remedy should exist for every wrong, that we are not disposed to extend it beyond the strict line established by a concurrence of decisions." See also *White* v. *Nicholls*, *supra*. We see no good reason upon this record for enlarging it so as to include proceedings of the kind in question. The court below committed no error in refusing to charge that the occasion was one of absolute privilege.

The defendant further claims that inasmuch as the second defense was not demurred to, the court should have charged the jury that the facts therein stated, if proved, constituted a complete defense to the action. For the reasons already given we think this claim is unfounded, and the court below committed no error in refusing to so charge.

The defendant further claimed in the court below that the occasion was one conditionally privileged. His grievance here and now is not that the lower court did not so charge, but it is that the instructions given upon this point were misleading in some respects, and erroneous in certain other respects, and failed to present the matter properly to the jury. He also claims that the court erred in rejecting

certain evidence bearing upon the question of conditional privilege. We will consider first the claim last stated.

From the evidence in the case, it appears that certain written statements or charges had been made to the board of aldermen of the city of New Haven concerning the purchase of a road roller by the board of public works of said city. This matter was, by the board of aldermen, duly referred for consideration and investigation to a committee of the whole of said board of aldermen; and it was before this committee during its investigation of the matter aforesaid that the words in question were uttered. The written statements or charges so preferred to the board of aldermen, together with the action of said board in so referring the matter, and a copy of § 26 of the charter of New Haven, constitute Exhibit 1, which was laid in evidence by the defendant in the court below without objection. It was let in "for the purpose of proving the authority and power of said committee before which the words were uttered, and to prove what matters were committed to it for investigation."

In the lower court the defendant claimed that the committee did in fact investigate and hear evidence upon other matters than the matter thus specifically referred to it; that the words charged were spoken by the defendant as a witness before the committee with reference to such other matters and were pertinent and relevant thereto; and that these facts made the occasion one of conditional privilege at least. The plaintiff denied that the words were pertinent or relevant to any matter before the committee, or at least to any matter properly before the committee. It was to show that the committee did in fact investigate and consider outside matters so to speak, and that the alleged slanderous words were pertinent and relevant to such matters, that the rejected evidence was offered.

The record states the matter as follows:—"For the purpose of showing the scope of the investigation, and that the committee of the whole included in the investigation all matters of grievance which any person might have against the board of public works, and in order to show the perti-

nency and relevancy of the evidence of the defendant before the committee of the whole, * * * the defendant offered to produce in evidence the report of the committee of the whole concerning said investigation, and the record of the board of aldermen accepting said report." This was defendant's Exhibit 2. It was admitted that it contained no reference to the defendant's statement made before the committee. Upon a general objection the exhibit was excluded.

For the same purpose the defendant then offered the stenographer's notes of the evidence taken at said investigation, which also, upon a general objection, were rejected. The defendant then for the same purpose offered the testimony of a number of the committee, who were present at all the hearings of the committee, but on a general objection the court excluded the testimony.

The court thus apparently excluded all evidence of this fact from the jury; for if it could not be shown by the record evidence, nor by the parol testimony of those present at the meeting, it could hardly be shown at all. If the fact was admissible, clearly it must be proved if at all in one of these two ways; and we think it was admissible, and that the record offered was competent evidence to prove the fact sought to be established by it, namely, that the committee did in fact investigate and hear evidence upon matters outside of that which was specifically committed to it. In the first place this record was a public document. By the charter (§ 9) it is made the duty of the city clerk to make regular entries of all votes and proceedings of the board of aldermen; and all records kept by him have the same validity as the records of town clerks and are expressly made "in all courts evidence of the truth of the matters therein recorded." By the express terms of the charter, then, it was admissible to prove the truth of the matters therein recorded. In the next place the record clearly shows that the committee did in fact investigate and hear evidence upon other and outside matters, and also shows in a general way what those matters were, and this was all the defendant

claimed to prove by it. That the fact sought to be established by this evidence was admissible is we think quite clear.

The committee it is true were by the action of the board of aldermen charged only with the duty of acting upon certain specific statements or charges made against the board of public works. It might, and perhaps ought to, have confined itself to this specific duty, but if it saw fit to extend the scope of its investigation so as to embrace other charges against the board of public works, and invited, permitted, or compelled persons to come before it and testify or make statements pertinent and relevant to the matters before it, we think the occasion would be as to such parties making such statements or testifying in good faith, one of conditional privilege. Under the charter (§§ 37 and 38) the members of the board of public works are elected by the board of aldermen, and may be removed by them for cause. This power to remove includes the power to investigate the official conduct of the board of public works; and this work of investigating may, at certain stages of it at least, be conducted, we think, by the board of aldermen sitting as a committee of the whole.

The outside investigation as to charges or grievances against the board of public works, which it is claimed the committee did in fact make, was certainly a work which the board of aldermen might have originally referred to the committee, and was one of which the board of aldermen by its vote approved. It was thus a work over which the committee had apparent authority, and to a person in the position of the defendant, such apparent authority was sufficient to protect him, if his statements before it were pertinent and relevant to the matter in hand and were made in good faith and without express malice. As the question whether the occasion was a privileged one depended so largely on the further question whether or not the words charged were pertinent and relevant to the matters actually before the committee, the importance of the rejected evidence becomes apparent. Unless the defendant was permitted to show by the record or by parol evidence that the committee did in

fact investigate outside matters, and what those matters were, it might be difficult or impossible for him to prove that the admitted words were relevant and pertinent to any matter properly or improperly before the committee; and he would thus lose the benefit of evidence tending to show that the occasion was one of conditional privilege, and that he had complied with the condition. For these reasons we think the court erred in rejecting the record evidence offered by the defendant, and that this entitles him to a new trial. The fact that a new trial must be granted renders it unnecessary to notice with any degree of particularity many of the other alleged errors assigned, and we will notice only one or two, and that briefly.

In its charge to the jury, the court seems to say in substance, that in order to make the occasion a privileged one, the words must have been spoken in answer to questions; and the defendant claims that the court thus restricted the words privileged wholly to those uttered in response to questions. The charge as given in the record at pages 29, 30 and 31 seems to support this claim of the defendant. We hardly think the court intended to be so understood, but if so, we think the charge was erroneous and misleading. If the defendant, present before the committee as a witness or otherwise, was invited or permitted or called upon to make a statement by the committee, for their information, of matters pertinent and relevant to the investigation they were then actually conducting and apparently within their power, we think the mere fact that the words uttered were not in response to questions does not avoid the privilege. The law regards substance and not form in matters of this kind; it regards what is said and the motives for saying it, rather than the precise form of statement. Of course the fact that a statement was officiously volunteered would be evidence to go to the jury upon the question of express malice, but that is quite another matter.

The defendant also complains that by the charge of the court he was deprived of the benefit of part of his third defense. We think there is some foundation for this com-

plaint. The plaintiffs, claimed that the defendant when he uttered the alleged slanderous words was before the committee not as a witness but as a volunteer, while the defendant claimed he was there only as a witness. As the jury might find according to the claim of the plaintiff on this point, the defendant asked the court to charge in substance that in such case the defendant, under the circumstances, would have the right to go before the committee as a citizen of New Haven and in good faith give such information as he might have touching the matter under investigation. Under the facts as they appear of record we think the court should have complied in substance with this request.

We deem it unnecessary to notice any of the other alleged errors.

There is error and a new trial is granted.

In this opinion the other judges concurred.

CATHERINE M. MULLEN *vs.* JOEL H. REED, GUARDIAN.

First Judicial District, Hartford, March Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

The deceased husband of the plaintiff was insured in a benefit association organized under the laws of the State of Massachusetts where it was located and where the deceased then had his domicil, and such association, in its certificate of membership, promised and agreed "to pay to the heirs-at-law of said member," a sum of money in sixty days after due proof of his death.

The husband died domiciled in this State, leaving the plaintiff, his widow, and one child, a minor. The association paid the amount due, $5,000, to the guardian of such child, and in an action by the widow against the guardian to recover a portion of the money so paid, it was *held*:—

1. That the contract embodied in the certificate should be construed and interpreted according to the laws of Massachusetts where the contract was made and was to be performed.
2. That under the laws of that State the widow was an "heir-at-law" within the meaning of that term as used in the certificate of membership, and as such was entitled to such proportion of the insurance

money as she would have taken under the statute of distributions of that State, had the money in question been intestate estate of the deceased member, to wit: one third.

3. That such construction also accorded with the actual intent of the parties as gathered from the language of the certificate when read in the light of the circumstances under which it issued.

4. That the term "heirs-at-law" should not be construed in its strict, primary and technical sense, if it is apparent from the language used that the parties intended it to have a more comprehensive and popular meaning.

A written stipulation between counsel that the appellee may raise and argue questions of law in this court, upon the appeal of the other party only, forms no part of the record although printed with it; and this court will not hear or pass upon such questions, especially where it does not appear on the record that they were raised on the trial below and decided adversely to the appellee.

[Argued March 6th—decided April 2d, 1894.]

ACTION by the widow of Joseph Mullen, to recover a portion of the insurance money paid over by the association in which he was insured, to the defendant as guardian of the minor and only child of the plaintiff and said Mullen; brought to the Superior Court in Tolland County and heard upon the defendant's demurrer to the complaint; the court, *John M. Hall, J.*, overruled the demurrer, and after a full hearing at a subsequent term the court, *Thayer, J.*, rendered judgment for the plaintiff to recover of the defendant one third of the insurance money, and the defendant appealed for alleged errors of the court. *No error.*

The case is sufficiently stated in the opinion.

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

I. The heirs of Joseph Mullen are to be ascertained by the law of this State, where he died and was domiciled at the time of his death, and not by the law of Massachusetts, where the contract was made. Story on Conflict of Laws, 6th. ed., sec. 362, 380, 481, 481*a*, 484; *Holcomb* v. *Phelps*, 16 Conn., 132; *N. W. Masonic Association* v. *Jones*, 154 Penn. St., 99.

II. The widow of Joseph Mullen is not included, as a co-heir with his son, by the use of the words "heirs at law" in

this certificate. In its technical sense an heir is he who succeeds by descent to lands, tenements and hereditaments, being an estate of inheritance. Jacob's Law Dict., "Heir." Bouvier defines an heir to be one born in lawful matrimony who succeeds by descent, right of blood, and by act of God, to lands, tenements and hereditaments, being an estate of inheritance. Bouvier Law Dict., "Heir." In this technical or legal sense it does not include a widow or husband. *Lord* v. *Bourne*, 63 Me., 368; *Richardson* v. *Martin*, 55 N. H., 45; *Wilkins* v. *Ordway*, 59 N. H., 378; *Gauch* v. *St. Louis M. L. Ins. Co.*, 88 Ill., 251; *Wright* v. *M. E. Church*, Hoff., Ch. 202; *Tillman* v. *Davis*, 95 N. Y., 17, and cases cited; O'Hara on Wills, 298, 299; *Baldwin* v. *Carter*, 17 Conn., 201.

The word heir or heir-at-law is to be construed according to its technical or legal sense, unless otherwise indicated by the instrument itself. Cases last above cited, and *Rand* v. *Butler*, 48 Conn., 293; *Gold* v. *Judson*, 21 Conn., 616; *Cushman* v. *Horton*, 59 N. Y., 149; *Clark* v. *Cordis*, 4 Allen, 466; *Leake* v. *Watson*, 60 Conn., 506.

When used in relation to personal estate the word means the same as next of kin, and next of kin does not include the widow. *Lord* v. *Bourne*, *supra*; *Richardson* v. *Martin*, *supra*; *Wilkins* v. *Ordway*, *supra*; *Gauch* v. *St. Louis M. L. Ins. Co.*, *supra*; *Wright* v. *M. E. Church*, *supra*; *Tillman* v. *Davis*, *supra*; *Ketteltas* v. *Ketteltas*, 72 N. Y. 312; *Slosson* v. *Lynch*, 48 Barb., 148; *Murdock* v. *Ward*, 67 N. Y., 387; *Luce* v. *Dunham*, 69 N. Y., 36; *Garrick* v. *Lord Camden*, 14 Ves., Jr., 372; *Drake* v. *Pell*, 3 Edw., Ch. 251; *Watt* v. *Watt*, 3 Ves. Jr., 244; O'Hara on Wills, 298, 299, 304, 319.

III. If the plaintiff takes anything under this certificate she would take only her statutory share, and not an equal share with the son. *Rand* v. *Sanger*, 115 Mass., 128; *Barrett* v. *Granger*, 100 Mass., 348; *Baskin's Appeal*, 3 Penn., 304; *Holbrook* v. *Harrington*, 16 Gray, 102; *Masonic Aid Association* v. *Jones*, 154 Penn. St., 99.

William A. King, for the appellee (plaintiff).

I. Is the widow included in this policy, as a beneficiary under the term "heirs-at-law?"

It may be conceded that the term heir, or heirs at law, in its primary sense, is an inappropriate term to be used in connection with personal property. The moment it is used in connection with personal property it is deflected from its primary meaning and takes on a new and and more flexible meaning. It seems undisputed that the terms "heirs-at-law," "legal heir," and "heir," are identical in meaning. The plaintiff submits the following authorities in support of her claim that she is included in the term "heirs-at-law," used in this policy. *Gosling* v. *Coldwell*, 1 Lea, (Tenn.) 454; Hawkins on Wills, pp. 92–94, and notes; *Wingfield* v. *Wingfield*, 26 Moak's Rep., 423; *Collier* v. *Collier*, 8 Ohio St., 369; Wigram on Wills, Part II., 303; Williams on Executors, pp. 1107–1109; *Corbett* v. *Corbett*, 1 Jones Eq., (N C.) 117; *Freeman* v. *Knight*, 2 Ired., (N. C.) 72; *Croom* v. *Whitefield*, 4 Hawkes, (N. C.) 393; Redfield on Wills, Part II., p. 385, §§ 16–18, p. 390, note 35; *In re Stevens Trust*, L. R., 15 Eq., 227; *McKinney* v. *Stuart*, 5 Kan., 384.

This contract was made in Massachusetts, where all the parties at that time resided. The Massachusetts cases are very strong in support of plaintiff's claim. *Houghton* v. *Kendall*, 7 Allen, 77; *Sweet* v. *Dutton*, 109 Mass., 589; *White* v. *Stanfield*, 146 Mass., 424; *Kendall* v. *Gleason*, 152 Mass., 457.

The following cases throw light upon the question, but deal with real and personal property, and seem to be under a Massachusetts statute. *Procter* v. *Clark*, 154 Mass., 48; *Lavery* v. *Egan*, 148 Mass., 389; *Lincoln* v. *Perry*, 149 Mass. 368; *Addison* v. *Com. Travellers' Association*, 144 Mass., 592.

The New York cases cited by the defendant are not in point. They relate either to real estate or to real *and* personal property. *Cushman* v. *Horton*, 59 N. Y., 149: *Luce* v. *Dunham*, 69 N. Y., 41; *Murdock* v. *Ward*, 67 N. Y., 387; *Keteltas* v. *Keteltas*, 72 N. Y., 312; *Tillman* v. *Davis*, 95 N. Y., 27. In the case of *Lawton* v. *Corliss*, 127 N. Y., 100, the court recognized the principle that when the context

of the will shows that the testator used the word "heir" or "heirs-at-law" or "next of kin" in a popular sense, his intent must prevail over the use of technical language.

The Pennsylvania cases strongly sustain the plaintiff's position. Jarman on Wills, (6th Am. Ed.) Vol. II. page 95, note, refers to *In re Comly's Estate*, 136 Penn. St., 153, and *In re Ashton's Appeal*, 134 Penn. St., 390; *Northwestern Masonic Ass.* v. *Jones*, 154 Pa. St., 99.

II. Joseph Mullen *intended* to include his widow as a beneficiary, and unless he has made use of language which the law will not, under any circumstances, permit to include a widow, his intent should prevail. *Insurance Co.* v. *Palmer*, 42 Conn., 60; *Addison* v. *Com. Trav. Ass.*, 144 Mass., 592.

The plaintiff claims that whether or not the policy should be construed under the laws of Massachusetts, yet the fact that it was taken out in Massachusetts, *where the parties lived at the date of the contract and for years afterward, is evidence that at the time of making the contract he intended that his widow should be included.* Without doubt the Massachusetts decisions would have included the widow, and Joseph Mullen would be presumed to have intended to include her, making the contract under laws and decisions which did include her; and the fact that he took out a policy in a State which did hold her to be included as a beneficiary, indicates that he meant to include her as such. Comity will give effect to the laws of another State in order to carry out the intent of, and to do justice between, the parties. *Dike* v. *Erie R. R. Co.*, 45 N. Y., 118; Story on the Conflict of Laws, § 272; *Lockwood* v. *Crawford*, 18 Conn., 361.

"No case can be found which denies the universal and flexible rule that the word [heir] *must bear the meaning which the testator intended to give it, and that meaning must prevail over its technical import and effect.*" *Gambell* v. *Forest Grove Lodge*, (Md.,) 3 Cent. Rep., 888; *Weeks* v. *Cornwall*, 104 N. Y., 336; *Bond's Appeal*, 31 Conn., 183. Courts are liberal in upholding a designation of beneficiaries. May on Ins., §§ 390–399*l*.

III. As between the insurance company and the benefi-

ciary, the policy is a contract and to be so construed. *Ins. Co.* v. *Palmer*, 42 Conn., 65. In this aspect of the case there is authority for construing the policy in accordance with the law of the place where it was issued,—and then the widow would without question be included; especially would this result follow if she had a vested interest therein, as many cases hold. Story, Conflict of Laws, §§ 272 and 278; *Jones* v. *Ætna Ins. Co.*, 14 Conn., 501; *Wood* v. *Wilkinson*, 17 id., 510; *Smith* v. *Mead*, 3 id., 255; *Phila. Loan Co.* v. *Towner*, 13 id., 257; *Chapin* v. *Dobson*, 78 N. Y., 75.

The change of domicil would not affect the rights already acquired by the plaintiff. *Bonati* v. *Welsch*, 24 N. Y., 161.

IV. The widow can maintain this action. The Connecticut authorities seem to abundantly establish that the beneficiaries have a *vested interest* the moment the policy is issued. *Ins. Co.* v. *Palmer*, 42 Conn., 60; *Ins. Co.* v. *Burroughs*, 34 id., 305; Statutes of Conn. and Mass.; *Chapin* v. *Fellows*, 36 Conn., 132; *Kelly* v. *Gaylor*, 40 id., 348.

"An action of debt lies by the beneficiaries named in the death certificate of a mutual insurance company." *Abe Lincoln Co.* v. *Miller*, 23 Brod., 341; *Ins. Co.* v. *Miller's Adm'r*, 13 Bush. (Ky.), 489; *Loos* v. *Ins. Co.*, 41 Mo., 538; *Myers* v. *Ins. Co.*, 27 Pa. 268; May on Insurance, § 399; *Phelps* v. *Woodhouse*, 51 Conn., 521.

TORRANCE, J. In July, 1891, Joseph Mullen, domiciled in the town of Stafford in this State, died intestate, leaving the plaintiff as his widow, and one minor child. The plaintiff and the deceased intermarried prior to 1877, and said child is the issue of the marriage.

At the time of his death, Joseph Mullen was a member of "The Bay State Beneficiary Association" of Westfield, Massachusetts, a corporation organized under the laws of that State, "for the purpose of providing Benefit and Protection to its members and their families." He became a member thereof in 1882, while domiciled in the State of Massachusetts, where he and his family continued to reside for some years afterwards. By the certificate of membership issued

to him by said Association, he was constituted a member thereof; and in said certificate the Association agreed "to pay to the 'heirs-at-law' of said member, in sixty days after due proof of the death of said member, a sum equal to the amount received from one death assessment, but not to exceed five thousand dollars."

Within sixty days after his death, said Association paid to the defendant Reed, as the guardian of said minor child, the sum of five thousand dollars in full of the amount due under said certificate, and he now holds the same as such guardian. The present action was brought by the plaintiff, the widow of Joseph Mullen, against said guardian to recover a portion of said insurance money.

The defendant Reed demurred to the complaint because it did not appear therein "that the plaintiff is an heir-at-law of the said Joseph Mullen or that she is entitled to any part of said insurance money."

The court overruled the demurrer, and subsequently, after the administrator of Joseph Mullen had been cited in as a party, and "after a full hearing" no answer having been filed in the case, rendered judgment that the widow recover of the defendant Reed one third of the insurance money together with costs of suit.

From that judgment Reed, as guardian of the child, took the present appeal, alleging as reasons of appeal, that the court erred in overruling the demurrer, and in deciding that the plaintiff was entitled to one third of the money. It does not appear that the administrator makes any claim to the insurance money or any part thereof or that he took any part in this suit. There is really but one question before us upon this appeal, and that is whether the widow is entitled to one third of the insurance money.

By a written agreement signed by the counsel for both parties, filed in the court below after the present appeal was taken, and printed with the record, the plaintiff attempts to bring up the question whether the widow is or is not entitled to one half rather than one third of the insurance money, if she is entitled to any; but this agreement is no part of the

record in any proper sense, and it nowhere appears upon the record, as required by the statute (§ 1135) that this question was raised on the trial below and decided adversely to the plaintiff. That question is therefore not properly before us, and for this reason we decline to consider it.

The question, then, is whether the widow is entitled to one third of the insurance money; and its solution depends upon the construction of the words "heirs at law" contained in the certificate of membership under which the money was paid over to the guardian of the minor child.

What do these words "heirs at law" mean in this certificate? Do they include or exclude the widow? Under these words the guardian claims the entire sum for the minor child, and the widow claims a share of it under the same words.

The question of course is, what was intended by these words at the time they were put into this certificate; and this is to be ascertained from the words used to express the intention, when read in the light of all the circumstances under which they were used. In ascertaining their meaning it must be borne in mind that the contract embodied in the certificate was made in Massachusetts, by parties domiciled or located there; that it was undoubtedly made with reference to the law of that State alone; and that both by its terms and by the understanding of the parties it was to be performed there. This being so, the general rule is that it should be construed and interpreted according to the laws of that State. *Smith* v. *Mead*, 3 Conn., 253; *Philadelphia Loan Co.* v. *Towner*, 13 id., 249; *Koster* v. *Merritt*, 32 id., 246. "For purposes of construction, it is always legitimate to consider the time when, and the circumstances in which, the will was made, and we think the law under which it was made is one of those circumstances." *Staigg* v. *Atkinson*, 144 Mass., 564. This principle is we think equally applicable to an instrument like this certificate.

We therefore think the words "heirs-at-law" in this instrument ought to be construed by us as they would be by the courts of Massachusetts, if this certificate was before them for construction upon this point; and as we understand

the matter, the courts of that State, in cases where the words "heirs at law" are used in an instrument disposing of personal property alone, have quite uniformly construed them as meaning those persons who are entitled to take under the statute of distributions, unless there is something in the context to indicate a contrary intention. *Houghton* v. *Kendall*, 7 Allen, 72; *Sweet* v. *Dutton*, 109 Mass., 589; *White* v. *Stanfield*, 146 Mass., 424; *Kendall* v. *Gleason*, 152 Mass., 457. And not only this, but the courts of that State have held that the words "heirs at law," when used in such an instrument, indicated an intent that such persons are to take in the same manner and in the same proportions as if the property had come to them as intestate estate, unless a contrary intention appears. Thus in *Houghton* v. *Kendall*, *supra*, the court says:

"In this Commonwealth we find no authority which would conflict with the adoption of the construction which seems to us reasonable, that when the word 'heirs' is used in the gift of personalty, it should primarily be held to refer to those who would be entitled to take under the statute of distributions, and to indicate that they should take in the same manner and in the same proportions as if it had come to them as intestate estate of the person whose 'heirs' they are called." See also *Bassett* v. *Granger*, 100 Mass., 348; *Rand* v. *Sanger*, 115 Mass., 124.

The rules of construction thus applied in that State in the cases cited, do not probably differ materially if at all from those that would be applied under similar circumstances by the courts of this State. In both, the principal object is to ascertain the intention of the parties from the words used to express it; in both, the word "heirs" will be given its strict, primary, technical meaning, if such appears to have been the intention of the parties; and in both, it will be given its more comprehensive and popular meaning if it appears to have been used in that sense. *Sweet* v. *Dutton*, 109 Mass., 589; *Leake* v. *Watson*, 60 Conn., 498–506.

Under the laws of Massachusetts at the time when this certificate was issued, if an intestate left a widow and issue,

the widow was entitled to one third of the residue of the personal property; if he left a widow and no issue the widow took the whole residue of personalty to the amount of five thousand dollars, and one half of the excess of the residue of such property above ten thousand dollars. Public Statutes of Mass. 1882, Chap. 135, p. 770, Sec. 3. If, then, this certificate is to be construed as the courts of Massachusetts would probably construe it, and we think it should be, it follows that the words "heirs at law" must be held to include the widow; and that she is entitled to one third of the insurance money under the certificate, because that is the share of this money she would take under the laws of that State.

The result thus reached is also, we think, in accordance with the actual intent of Joseph Mullen, so far as the same can be ascertained from the certificate read in the light of the circumstances under which it was made, as they appear of record, and without reference to the rule we have been considering. The certificate is in the natnre of a contract of insurance. The money to become due on it, under the laws of Massachusetts, Supp. to the Pub. Stat., p. 811, § 15, as appears of record, could not be taken by creditors, and it is fair to presume that this was known to the deceased at the time the certificate was issued. If so, there would be the further presumption that he thus intended to create a fund for the benefit of his family primarily, and not for the benefit of his creditors, or his estate; a fund that would go to the members of that family living at the time of his death, not as a part of his estate, but directly by force of the certificate.

He designated the class who were to take as beneficiaries, by the words "heirs at law;" and it is a fair presumption that he used those words for this purpose, in view of the uniform meaning which had been given to them in instruments of a nature similar to this certificate, by the courts of Massachusetts. In short, from the certificate itself, read in the light of the circumstances under which it was made, we think it is fair to conclude that Joseph Mullen used the

words "heirs at law" in their popular sense, as meaning those persons who would take his intestate personal property under the statute of distributions of the State of Massachusetts, and that under them, consequently, he meant to include his widow.

The money due upon the certificate at the time of his death formed no part of his estate, but belonged to the beneficiaries. It nowhere appears that the deceased had the power to substitute other beneficiaries in place of the class first designated; and if he had, it is quite certain that he never exercised it. This certificate, then, was in effect a valid agreement, on the part of the association, to pay the money to become due under its provisions, to the beneficiaries designated therein. When due, the money certainly belonged to them and not to the estate of the deceased. *Conn. Mutual Life Ins. Co.* v. *Burroughs*, 34 Conn., 305; *Continental Life Ins. Co.* v. *Palmer*, 42 Conn., 60; *Masonic Aid Asso.* v. *Jones*, 154 Pa. St., 99.

There is no error apparent upon the record.

In this opinion the other judges concurred.

City of Hartford *vs.* Caroline E. Day.

First Judicial District, Hartford, March Term, 1894. Andrews, C. J., Torrance, Fenn, Baldwin and Hamersley, Js.

In the determination of the question of "public convenience and necessity" in the layout of a highway within one hundred yards of a railroad track, under § 2700 of the General Statutes, the main elements for consideration are those of accommodation of the public travel and the dangers arising from the proximity of the railroad. The element of increased expense by reason of the location within the prohibited distance, may also be a matter for consideration, but the judge is not required to give to this element of expense the same weight and effect that might be given to it by a committee appointed by the Superior Court to hear and determine the question of the layout of a highway, under § 2713 of the General Statutes.

[Argued March 7th—decided April 2d, 1894.]

APPLICATION under § 2700 of the General Statutes, by the city of Hartford, for the approval of a proposed highway within one hundred yards of a railroad track; brought before *Hon. Samuel O. Prentice*, a Judge of the Superior Court, who found the facts and rendered a judgment of approval, and appeal by the respondent for alleged errors of the judge. *No error.*

The application alleged that the city of Hartford proposed to lay out and open to the public in said city, a street or highway (particularly described) within one hundred yards of the railroad tracks of the Philadelphia, Reading and New England Railroad, running from Church street northerly to Spring street; and that public convenience and necessity required said proposed street or highway to be located, laid out and opened to the public, as set forth in the application.

The finding of facts as made by the judge is as follows:—

Upon the hearing in the above-entitled application, made to me as a Judge of the Superior Court, Caroline E. Day, an owner of land through which the proposed highway passes, and a party in interest, offered evidence to prove that the layout and construction of said proposed highway was not of public convenience and necessity, for the reason that existing highways substantially accommodate public travel as much as the proposed highway would do; and in connection therewith, and for the purpose of showing that public convenience and necessity did not require the layout of the proposed highway, offered evidence to prove that the expense involved in the layout and construction of said highway by reason of land damages and otherwise would be of large amount, and asked me, in the determination of the questions before me—

1. To give the same consideration and weight to this element of expense as a committee appointed by the Superior Court to hear and determine upon the layout of a highway under the provisions of § 2713 of the General Statutes would be bound to give it.

2. To hold that in passing upon the question of public convenience and necessity of the proposed highway I should

govern myself by the same rules as to the effect of such expense as would be by law required of such committee.

3. To rule that under the statute under which it was brought it was the duty of the judge to pass upon the question of the public convenience and necessity of said proposed highway in the same manner as such committee is required to do; and

4. To adjudge that public convenience and necessity did not warrant the expenditure involved, if I should find the expense to be large as claimed.

I declined to so rule and hold, and did not, in fact, give to the element of expense that weight and importance asked for it. My action, and the weight given by me to said testimony concerning expense, is indicated by the following extract from the memorandum filed with my approval of said layout:

"The ultimate problem involved in the layout of a highway connecting the junction of Spruce and Church streets with Spring street, is one which necessitates the consideration of three principal factors, to wit:

"1. That of the accommodation of public travel.

"2. That of the danger arising from the railroad proximity.

"3. That of the expense and its distribution.

"In the final determination of the question of plan the factor of cost is one justly entitled to prominence. The best plan under all the circumstances is not always the best judged by results alone. It is the one which is evolved from the giving of due regard to cost and result; the one which most judiciously balances accommodation, safety and expense.

"The decision of this ultimate question of what shall be built, if anything, is for the city of Hartford alone. It is not for me. I am applied to under the requirements of a statute to give my consent to a certain layout. I have no power in the premises to direct a layout, and no action of mine can have any affirmative effect. The statute gives me only an authority akin to the power of veto, a negative authority, merely. The question before me is not whether a highway should be laid out and constructed by the city within the

lines set out in the application; it is simply whether I will, in view of the proximity of the proposed layout to a railroad, and under the circumstances, give my consent to the layout if the city shall, after the consideration it is called upon to give the matter, decide to adopt it for a highway. The element of expense is one, I take it, which has more importance in the determination which the city itself must make of the question whether or not it will build, than it has in the decision of the question before me whether or not I ought to permit the city to build if it shall desire to. In the present case, while the expense of construction will apparently be large, and so large as to rightfully put the city upon inquiry as to how it should be borne, and as to whether the results will justify it, I do not regard it so large or so out of proportion to the ability of the city to bear it, as that it ought to enter as an important factor into the problem before me. To my mind, the important considerations which must most largely control my action, are the two of public accommodation and danger. In this view of the matter, I have no trouble in arriving at the conclusion that the danger incident to the use of the highway by reason of its proximity to the railroad is not so great as to outweigh the demands for a highway in the route proposed."

The court of common council of the city of Hartford has exclusive power within said city to lay out, make and establish new highways and streets, whenever they deem it for the public good to do so. Special Laws, Vol. IX, p. 625, § 14.

Section 2700 of the General Statutes provides that:—"No highway which does not cross a railroad track shall be laid out or opened to the public within one hundred yards of any railroad track, unless the layout has been approved by a judge of the Superior Court, after notice to all parties in interest, and his written approval lodged in the office of the town clerk of the town in which the proposed highway is situated. No judge shall approve any such layout unless he finds that public convenience and necessity requires such highway to be within such distance, and upon such approval, the judge may require any town opening a highway to the

public within such distance to erect and maintain such a fence between such highway and the railroad track as in his opinion the safety of the public may require."

Caroline E. Day, a person through whose land the proposed new highway was laid, appealed from the action of the judge to this court, and assigned as reasons for her appeal that:—

1. The judge should upon the hearing before him have given the element of expense of the proposed highway the same consideration and weight as a committee appointed by the Superior Court to hear and determine upon the layout of such proposed highway, under the provisions of § 2713 of the General Statutes, would be bound to give it.

2. The judge erred in not holding as requested by this defendant, that in passing upon the question of the public convenience and necessity of the proposed highway he should govern himself by the same rules as to the effect of such expense as would be by law required of such a committee.

Charles E. Perkins and *Arthur Perkins*, for the appellant (respondent).

Timothy E. Steele, for the appellee (plaintiff).

ANDREWS, C. J. The object of laying out a public highway is to accommodate public travel—to meet the demands of common convenience and necessity between the given termini. *Clark* v. *Town of Middlebury*, 47 Conn., 334. The question involved must be regarded as to the common convenience and necessity of a highway in that locality. *Terry* v. *Town of Waterbury*, 35 Conn., 533. Whenever a new highway is proposed to be laid out by the selectmen of a town, the common council of a city, or a committee of the Superior Court, the general question always must be:—Does common convenience and necessity require a highway at substantially this place?

The expression "common convenience and necessity" is often found in the statutes of this State and in our judicial

decisions, and is applied to various subjects of a common and public nature. It is an expression not very easy to define, but its meaning may be sufficiently well understood by considering the elements of which it is composed. When it is applied to a new highway, one element which properly enters into it is the one of expense—the expense of laying out and constructing the highway, and the expense of maintaining it after it is laid out. *Townsend* v. *Hoyle*, 20 Conn., 7; *Perkins* v. *Town of Andover*, 31 id., 601; *Hoadley* v. *Town of Waterbury*, 34 id., 38; *Congdon* v. *City of Norwich*, 37 id., 414; *Howe* v. *Town of Ridgefield*, 50 id., 594.

It is not, however, the simple question of cost that is to be considered in such cases, but the mixed question of cost compared with the ability of the municipality upon which the expense is cast to bear it. Thus, as it was said in *Bristol* v. *Town of Branford*, 42 Conn., 323:—"The town upon which some portion at least of the cost of constructing the proposed highway might possibly be thrown, and upon which the duty of keeping the same in repair would rest in the future, had a right to offer evidence as to the expense of construction and reparation. To give this evidence its proper weight the ability or inability of the town should be known. There can be no fixed rule for all cases—the weight of the burden to be borne and the ability of the town to bear it are to be considered in relation to each other. A town with a grand list of fifty millions might quite conveniently, and even profitably to itself, construct a highway at a cost of thirty thousand dollars, while it would be unreasonable to impose such an expenditure upon a town with a grand list of only one million. It was the plain duty of the committee to consider the cost of building and maintaining this road and the ability of the town, in determining the question of common convenience and necessity." This is the rule which a committee appointed by the Superior Court to lay out a highway should follow.

The finding in the present case shows that the judge did, in substance, do just what a committee of the Superior Court would by law have been required to do. He considered the

question of expense as compared with the ability of the city of Hartford to bear it.

The precise point complained of by the appellant is that the judge in passing upon the question of common convenience and necessity, did not give to the element of expense the same *weight* which a committee of the Superior Court would by law be required to give it. This objection assumes that there is some standard fixed by law, by which the element of expense is, in all cases, to be determined. We are not aware that there is any such standard, and appellant's counsel do not point out one to us. Indeed, from the nature of things, it is impossible that there should be any such fixed standard. The expense, to be sure, is one of the elements which go to make up common convenience and necessity. But in any case where a new highway is to be laid out the element of expense is itself a mixed one, made up of the cost of the highway compared with the ability of the municipality to bear that cost. Until there is some fixed ratio between the cost of a highway and the ability of the municipality to bear the cost, the element of expense in the question of common convenience and necessity must be a varying one.

This reason of appeal may be viewed in another aspect. When a new highway in any locality is proposed, the question is whether or not common convenience and necessity require a highway at that place, or in substantially that place. The expense is one of the elements which must be considered. When the proposed highway is within one hundred yards of a railroad track, there is another element which also must be considered:—the one of danger arising from the proximity of the railroad; danger both to persons traveling on the highway and to persons on the railroad. Except for this element of danger the approval of a judge would not be required. And as it is this element of danger which makes necessary the approval of a judge, we think it is this element which the judge should mainly consider. The approval of the judge implies an adjudication upon this element of danger. *Bailey* v. *Hartford & Conn. Valley Railroad Co.*, 56 Conn., 457. The command of the statute (§ 2700) is that

the judge shall not approve such a layout unless he finds that common convenience and necessity require such highway to be within such distance. The question involved in the judge's approval is not the general one of whether or not there shall be a highway at this place, but the limited one whether or not the highway shall be within one hundred yards of the railroad. Before there can be anything for the judge to approve or disapprove, the general question must be answered in the affirmative. The alternative to the approval of the judge is not that the highway must not be built at all, but that it must not be built within the prohibited distance from the railroad track. So far as the question of expense enters into the limited question upon which the judge acts he must consider it. Incidentally, perhaps, the expense of the entire layout might be involved, and then he must consider the whole expense, but only so far as it affects the restricted question upon which he passes.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

Clinton H. Nelson et al., Executors, *vs.* Annie L. Pomeroy et al.

First Judicial District, Hartford, March Term, 1894. Andrews, C. J., Torrance, Fenn, Baldwin and Hamersley, Js.

A testator owning property at the date of his will amounting in value to at least $50,000, gave to his wife the use of $10,000, "so long as she remains my widow, in lieu of dower;" to his son all his real estate valued at $4,000, and also a legacy of $8,000; to his daughter, $4,000; to his eight grandchildren, $8,000, "when twenty-one years of age," giving $1,500 to each male, and $500 to each female, and appointing a trustee for each grandchild not of age when the will was executed; and to a trustee for the use of his church, $2,000. After making these gifts the will provided as follows:—"Should my present investments increase or decrease in amount or value, then each devisee or legatee or party hereto to share in equal proportion, or *pro rata*." At the

testator's death his property amounted to $60,000, but it was then impossible to ascertain with certainty whether his property owned at the date of his will was more or less than such sum. *Held*:—

1. That it was impossible to affirm that any particular construction of the clause quoted would effectuate the actual intent of the testator, and that such clause was, therefore, void for uncertainty.
2. That the property not expressly disposed of by the will became intestate estate.
3. That the acceptance by the widow of the bequest to her "in lieu of dower" did not bar her from taking the share of the intestate personal estate to which she was entitled by the statute of distribution.
4. That the gift to each minor grandchild vested at the testator's death in the trustee named, and was payable to such trustee when the other legacies became payable.
5. That such trustee must give bonds, and that his trust was limited to the sum he took under the will.

[Argued March 7th,—decided April 2d, 1894.]

SUIT for the construction of the will of Horatio K. Nelson, deceased, brought to the Superior Court in Hartford County, and reserved by that court, *George W. Wheeler*, *J.*, upon the facts stated in the complaint and admitted to be true, for the advice of this court. The case was first argued at the January Term of the court, but was continued for a further finding as to the amount and value of the testator's investments at the date of his will; and was again briefly argued at the March Term.

The case is sufficiently stated in the opinion.

J. Warren Johnson, for the executors and defendants other than Annie L. Pomeroy.

Charles E. Perkins and *Leverett N. Austin*, for Annie L. Pomeroy.

HAMERSLEY, J. This is an action brought to the Superior Court alleging that doubts have arisen as to the meaning of the will of Horatio K. Nelson, and asking advice as to its proper construction in respect to clauses and provisions mentioned. The Superior Court has made a finding of facts, and at the request of all the parties to the cause, has re

served the questions arising thereon for the advice of this court.

All doubtful questions will be disposed of by construction of the so-called residuary clause, the bequest to the widow, and the bequests to the grandchildren.

It appears that Mr. Nelson made his will in February, 1887, and died in January, 1893. At the time the will was made his property included a farm—since appraised at $4,500, household effects valued at $1,000, and property well invested in personal securities, amounting to $44,500; total $50,000. At the time of his death his property was substantially the same, except that his personal securities increased the total amount to about $60,000.

The Superior Court finds that at the date of the will his property amounted to at least $50,000, but that it is impossible to find whether it amounted to more than that sum; and therefore it cannot be certainly known whether the total amount increased or decreased between the date of the will and the date of the testator's death.

Mr. Nelson's family at the time of making the will consisted of his wife; a son, who had three children from two to eight years of age; a married daughter, who had three children, from twenty-three to twenty-seven years of age; and two children of a deceased daughter—Nelson A. Pomeroy aged nineteen years and Anna L. Pomeroy.

He devised his farm (all his real estate) to his son, and also gave him $8,000. To his wife he bequeathed the use of $10,000 "so long as she remains my widow, in lieu of dower;" to his daughter $4,000; to his eight grandchildren $8,000, giving $1,500 to each male, and $500 to each female; to a trustee for the use of his church $2,000. His will left undisposed of about one third of his property—or, if the reversion of his wife's life estate be included in the residue, about one half of his property. After making these gifts the will says:—"Should my present investments increase or decrease in amount or value, then each devisee or legatee or party hereto to share in equal proportion, as given above, or *pro rata*."

The first and principal question on which our advice is asked, relates to the meaning and effect, if any, of this clause. The difficulties involved in giving any particular construction to the clause are too patent to need enumeration. We gain no help from the general intent of the will. That general intent, aside from the clause in question, is plain. The testator intends, first, to leave a large portion of his property to be divided in accordance with the statute governing the distribution of intestate estate. It is inconceivable that he should by accident or oversight have left from one third to one half of his property undisposed of, especially when that property mainly consisted of notes and bonds of their face value, which he must have examined once or twice a year in order to collect his income; second, to divide the main portion disposed of by his will, after making liberal compensation to his wife in lieu of dower, among his children and grandchildren, on the theory of giving each male three times as much as each female. If he valued his farm at $4,000, he gives his son just three times as much as his daughter; and in his gifts to his grandchildren, each boy has exactly three times as much as each girl. This peculiar discrimination in favor of the stronger sex he evidently intends to limit to that portion of his property disposed of by his will.

If we read the language of the clause with the strongest desire of discovering the testator's real meaning, we cannot be sure of anything beyond possibilities. It may be possible that Mr. Nelson intended to limit the operation of the statute of distribution to the precise amount of property he left undisposed of at the time the will was made, and to secure its operation as to that amount; and so provided that if his property increased that increase should be divided between his legatees according to his peculiar rule of distribution, and if it decreased the amount distributed by the statute should remain unchanged and the legacies be reduced proportionately. Or it may be possible, as claimed by the counsel for the executors, that in spite of the utter inadequacy of the language used, Mr. Nelson really intended to

make an ordinary residuary clause for the disposition of the residue of his property. But it is certainly impossible to affirm that any particular construction signifies the actual intent of the testator; and in giving any construction we are met with the difficulty of disposing of the words by which the testator plainly makes the increase or decrease of his "present investments" a condition of the provisions, whatever they may be, taking effect. The finding shows that the facts essential to determining the existence of that condition cannot now be ascertained. The authorities go far, perhaps dangerously far, in countenancing an elastic exercise of the power vested in the court to make certain an obscure will on the lines of the testator's actual intent; but in every case, as a condition precedent to any exercise of such power, the law demands that the court shall be satisfied that the will in question, with the circumstances lawfully proven, does in fact disclose the actual intent of the testator. In this case we can only venture an unsatisfactory guess at what possibly the testator might have wished to express, and must therefore hold the clause which contains no clearer meaning void for uncertainty.

The next question is raised by the bequest to his wife. His will gives "in lieu of dower" the use and income of $10,000 "to my beloved wife, Martha J. Nelson." The wife is also made one of the executors, "and without bonds." Is the widow entitled to her distributive share of the intestate estate?

Redfield lays down the rule:—"The widow is not excluded from claiming her share in the undisposed personalty under the statute of distribution by reason of any provision in the will for her benefit, unless it be clearly expressed to be in satisfaction of all her claim upon the estate, or such appear from the will itself, with such aids to its construction as are allowable, to have been the intention of the testator; and the fact that she is excluded by the will from all claim of dower will not affect her claim to personal estate." 2 Redfield on Wills, 3d edition, p. 364. In *Pickering* v. *Stamford*, 3 Ves., 331, the English Court of Chancery holds, that

when a testator has made provisions for his wife by will which he meant to be in satisfaction for any claim she might have interfering with the other express objects of his bounty, if by accident such other bequest becomes inoperative, and the property so bequeathed becomes intestate estate, the claims of the widow under the statute of distribution will not be barred. *Pinkney* v. *Pinkney*, 1 Bradford, (N. Y.) 276, seems to support the broad rule that a bequest to a widow "in lieu of all right she may have in my real or personal estate, except as hereinafter mentioned," does not exclude the widow from her distributive share of any property undisposed of by the will. Doubtless such a statement should be taken subject to the modification that a bequest to his wife in lieu of all claim on the testator's estate may be so framed that if she elect to take the bequest she will be estopped from claiming any share even of intestate property.

It is not, however, necessary in this case to discuss the limitations of the general rules laid down, or the discriminations in their application, since the will before us clearly uses the word "dower" in its technical sense, and so excludes any implication of an intent to deprive the widow of her share of the intestate personal property. The testator desired to give all his real estate, with exclusive, immediate possession, to his son, and therefore purchased the widow's consent by the bequest to her in lieu of dower. In this State, when a widow elects to take a legacy in lieu of dower, she is considered in the light of a purchaser, and by force of the statute, (General Statutes, § 621,) if she fails within the time limited to give notice that she declines to accept such legacy, "she shall be debarred of her dower." *Lord* v. *Lord*, 22 Conn., 595. It follows that when, as in this case, the testamentary provision for the widow is nothing more than a bare purchase of her right of dower, the completion of that purchase by formal acceptance of the legacy, or by force of the statute in case of neglect to decline the legacy, bars her claim of dower, but cannot bar her from claiming that share of the intestate personalty to which, independently of the will, she is entitled by the statute of distribution.

The last question relates to the bequests to the grandchildren. The will reads: "To Anna L. Pomeroy I give $500, when 21 years of age." * * * "I appoint Charles C. Sheldon as trustee for Anna L. Pomeroy." Substantially the same language is used as to each other grandchild, omitting the appointment of the trustee for each one of age when the will was made. Do these legatees take a present vested interest? The appointment of a trustee, in connection with the language of the gift, clearly shows that the legacies are to be paid as the other legacies upon the settlement of the estate. There can be no question as to the intent of the testator to treat the grandchildren of each sex with absolute equality, both as to amount and as to interest. To emphasize this intention he even uses the same language—"I give to A. $500, when 21 years of age," in the gifts to the grandchildren who were over 21 years of age when the will was made, as well as in the gifts to the minors. The intention was that the gift to each grandchild should be just as beneficial and complete as the gift to every other, and a construction which might deprive half the children of any benefit from the gifts for from twelve to eighteen years is in violation of testator's plain intention. He did not appoint trustees for those who had reached their majority because he wished each child twenty-one years of age at the time of his death to have full control of the gift; and he appointed trustees for the minors because he wished so to protect the title to his gift, and not because he wished to discriminate against the minors; and the gift to each minor vests in the trustee named, at the death of the testator. Of course these trustees must give bonds, and it is also clear that the trust extends only to the bequest, and not to any property that may come to the minor by distribution or otherwise.

The Superior Court is advised—

1. The clause—"Should my present investments increase or decrease in amount or value, then each devisee or legatee or party hereto to share in equal proportion as given above, or pro rata," is void for uncertainty, and the property undisposed of by the will must be administered as intestate estate.

2. The acceptance by the widow of the bequest given her in lieu of dower, does not bar her from claiming that share of the intestate estate to which she is entitled by the statute of distribution.

3. The gift to each minor grandchild vested, at the testator's death, in the trustee named and must be paid to the trustee when the other legacies are paid. The trustee must give bonds, and his trust is limited to the sum he takes under the will.

In this opinion the other judges concurred.

BERNARD SMITH *vs.* MARTIN DELANEY AND WILLIAM MCGEE.

First Judicial District, Hartford, March Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

The defendant *D* requested the plaintiff to execute, as surety, a liquor license bond with defendant *M*, promising to indemnify him, and also stated to the plaintiff that he, *D*, intended to go into the liquor business with *M*. The plaintiff executed the bond as requested, and thereupon a license was issued to *M*, who carried on the business of selling liquor until his conviction, some months later, of a violation of the liquor law, when the license was revoked and the plaintiff was compelled to pay the amount of the bond. Shortly after the license was issued *D* became a partner with *M* and the business was carried on for their joint benefit; but before *M's* conviction *D* had withdrawn from the partnership. In an action to recover the amount of the bond paid by the plaintiff, which was reserved for the advice of this court, it was *held*:—

1. That the special promise of *D* was not within the statute of frauds.
2. That as *D* might have become interested in the liquor business carried on under the license to *M*, in a legal way, as a silent partner taking no active participation and only concerned to the extent of capital invested, it could not be presumed, on the facts found, that the plaintiff contemplated, or that the parties intended, any illegal connection upon *D's* part with the proposed business.

[Argued March 7th—decided April 2d, 1894.]

ACTION to recover of the defendants the amount of a liquor

license bond paid by the plaintiff; brought to the Court of Common Pleas in Hartford County and tried to the court, *Calhoun, J.;* facts found and case reserved for the advice of this court. *Judgment advised for plaintiff.*

The amended complaint of the plaintiff was as follows:—

1. On or about the day of November, 1890, the defendants had agreed between themselves to become partners in the business of selling spirituous and intoxicating liquors in the town of Bristol, and were about to commence to carry on said business as soon as the license required therefor was or might be duly issued.

2. In order for the defendants to secure a license for said business the bond provided by Section 3064 of the General Statutes of this State was required, and the plaintiff upon the special request of the defendants, and in consideration of their joint and several promises to save him, the plaintiff, harmless from any and all loss, cost, or damage thereon, and induced by said request and promise duly executed the bond required together with the defendant McGee.

3. Said license was thereupon duly issued, and said business begun and carried on by said defendants pursuant to their agreement as stated in paragraph 1.

4. On or about the day of 1891, and during the lifetime of said bond given as aforesaid, the defendant McGee was duly convicted before justice of the peace within and for the county of Hartford, residing at the town of Bristol, of a violation of the statute law relating to the sale of spirituous and intoxicating liquor by a licensed dealer, and said bond thereupon became and was forfeited.

5. Immediately thereafter, Arthur F. Eggleston, treasurer of said county of Hartford, made demand upon the plaintiff of the amount of said bond, to wit: $300, and the plaintiff was thereupon compelled to pay, and did pay, said treasurer of said county of Hartford, the said sum of $300.

6. Neither of the defendants has ever repaid said sum of $300, or any part thereof to the plaintiff, although often requested and demanded.

The plaintiff claims $400 damages.

The defendant McGee defaulted.

The defendant Delaney demurred to the complaint, assigning the following grounds:

1. It sets forth in but one count two separate and distinct causes of action, namely: One cause of action against the defendant, William McGee, to recover for money paid by the plaintiff as surety on a liquor license bond given by said McGee, and by virtue of which a license to sell spirituous and intoxicating liquors in the town of Bristol was duly issued to said McGee, which bond was subsequently forfeited by reason of the conviction of said McGee of a violation of the statute laws relating to the sale of spirituous and intoxicating liquors by a licensed dealer, and another cause of action against the defendant Delaney, on an alleged promise by said Delaney that he would protect and save the plaintiff harmless from any loss, costs, or damage if the plaintiff would sign said bond as surety.

2. It does not appear in or by said complaint that the plaintiff signed said bond because of any promise good in law made to him by said defendant, Delaney.

3. It does not appear in or by said complaint that a license to sell spirituous and intoxicating liquors was ever issued to said McGee by any person, tribunal or authority legally authorized to grant or issue the same.

4. The single count in the complaint sets out a cause of action against the defendant Delaney, and a separate and distinct cause of action against the defendant McGee, which causes of action do not arise out of the same transaction, and said defendants cannot be legally joined in said action.

5. All of the facts alleged in said complaint do not constitute a legal cause of action against said defendant, Martin Delaney.

The court, *Walsh, J.*, overruled the demurrer, and the defendant Delaney, answered over denying the allegations of the complaint and alleging that the license was one personal to the licensee, "and any agreement to enable any person other than the licensee to engage in such business without

his becoming a licensee, and securing the proper conduct of the business by a bond, was illegal and void."

The finding of facts appears in the opinion, with the exception of the concluding paragraph which was as follows:

"At the request of the plaintiff and said Delaney this cause is reserved for the advice of the Supreme Court of Errors as to the proper judgment to be rendered therein as to said Delaney upon the foregoing facts, the said McGee having suffered a default."

Noble E. Pierce, for the plaintiff.

I. The finding clearly shows that the effort of the defendant to shield himself by the statute of frauds would, if successful, work a most outrageous fraud upon the plaintiff. "It is the accepted construction of the statute in courts of equity that, inasmuch as its design was to furnish protection against fraud, a party cannot take shelter behind its provisions, and thereby perpetrate a fraud on the other party, either actual or constructive." *Reed* v. *Copeland*, 50 Conn., 491. The fact that the action is one at law will not justify such a construction or application of the statute as to work a fraud.

II. The undertaking was an original one and not within the statute. Browne on the Statute of Frauds, §§ 161, 161*a*, *b*, *c*, and 164; *Reed* v. *Holcomb*, 31 Conn., 364; *Alger* v. *Scoville*, 1 Gray, 391; *Aldrich* v. *Ames*, 9 Gray, 76; *Davis* v. *Patrick*, 141 U. S. 487. The case of *Dillaby* v. *Wilcox*, 60 Conn., 71, relied on by the defendant, is not in point. The law there laid down is this: That the statute applies where a third person (in this case McGee) is *already liable*, and the undertaking is to secure that debt, while the third party (McGee) continues liable. In the present case when Delaney requested the plaintiff to execute the bond, there was no third person liable to the plaintiff.

The plaintiff can recover irrespective of any express promise on Delaney's part. He was to become a partner with McGee, and the bond was executed by the plaintiff for the benefit of that partnership. The statute has no application

to promises implied by law. *Stocking* v. *Sage*, 1 Conn., 521; *Sage* v. *Wilcox*, 6 Conn., 85.

III. But the defendant says further: This arrangement between Delaney and McGee, that the former was to share in the profits and be liable for the losses of the business carried on by McGee for their joint benefit, was illegal. This claim cannot be supported; and even if sound it is difficult to see how the plaintiff can be affected by it. It surely cannot be the law that a man engaged in a lawful business may not agree that another who furnishes the greater part of the capital shall be entitled to share in the profits.

This claim of the defendant seems to rest on the theory that as the license to sell is not property, but a mere permit to do what otherwise would be an offense against law, it is a mere personal privilege and is confined strictly to the individual to whom it is granted. *LaCroix* v. *County Commissioners*, 50 Conn., 328. Granting that claim, we fail to see how it can help the defendant in this case. Possibly the license would not have protected Delaney in the sale of liquors; but there is no suggestion in this case that Delaney personally ever sold any liquor whatever, or that the bond was executed with a view to this end.

If there is a legal method in which Delaney might be interested in and connected with the business, the court will not presume (in the absence of proof of illegality), that his connection and conduct were illegal; nor will the court impose upon the plaintiff any duty of supposing that when Delaney said he was to be interested in the business, he intended anything but a legal interest in the business; on the contrary, the legal presumption is that every man intends to act lawfully.

The arrangement was not illegal because the title to the liquors sold was partly in Delaney as well as McGee. *State* v. *Wadsworth*, 30 Conn., 58; *Lewis* v. *McCabe*, 49 Conn., 141; *Mack* v. *Story*, 57 Conn., 407. It is the power to sell that the statutes regulate, and not the title or ownership of the liquors sold, which is utterly immaterial.

IV. The liability of Delaney is not affected by the fact

that he had withdrawn from the partnership before the breach of the bond. The plaintiff was induced to sign this bond by the request and upon the promise of Delaney, and until the plaintiff was released from the obligations thus assumed, the obligation of Delaney to protect the plaintiff must continue.

V. The defendant claims that there is a misjoinder of causes of action in the complaint; that one counts on the bond as against McGee, and the other on a distinct and collateral agreement of Delaney. This is a total misconception of the complaint. It does not proceed on any such theory, nor can it fairly be so construed.

Undoubtedly the bond is evidence, so far as it goes, of the previous agreement of the parties, but it exhausts itself in that office; it cannot be invoked to prevent the parties from showing what the contract was pursuant to which it was given. *Collins* v. *Tillou*, 26 Conn., 368; *Schindler* v. *Mulheiser*, 45 Conn., 154; *McFarland* v. *Sikes*, 54 Conn., 250; *Hall* v. *Solomon*, 61 Conn., 476.

The defendant apparently seeks to have the "transaction" set forth in the complaint limited and confined to the giving of the bond. That is not the transaction alleged; and it would be taking a long step backward in pleading if such a claim as this could find support in Connecticut, in view of the spirit of our Practice Act. It is questionable, moreover, whether Delaney can urge this technical objection. It appears from the record that McGee suffered a default so that there was but one defendant before the trial court. If the complaint stated a cause of action against him, is it material that it also set forth some other and distinct cause against one who admits its correctness?

Marcus H. Holcomb and *John J. Jennings*, for the defendant.

I. The finding fails to support the complaint. It is not found true that in November, 1890, the defendants "had agreed to become partners," etc. It is not found true that the defendants "were about to commence to carry on said business as soon as the license required therefor was or might be duly issued." It is not found true that there was any

special promise by the defendants to save the plaintiff harmless, outside of the bond signed by McGee. There is no finding that the plaintiff relied upon Delaney's promise.

II. The contract is within the statute of frauds. *Nugent* v. *Wolfe*, 111 Pa. St., 471; *Clement's Appeal from Probate*, 52 Conn., 464; Am. and Eng. Ency. of Law, Vol. 9, p. 76; *Kirkham* v. *Martin*, 2 Barn. & Ald., 613; *Turner* v. *Hubbell*, 2 Day (Conn.), 457; affirmed in *Packer* v. *Benton*, 35 Conn., 349; Brandt on Suretyship and Guaranty, § 40.

Our court has prescribed a test by which to determine when a promise is collateral. "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 was made continues liable," is within the statute of frauds. *Dillaby* v. *Wilcox*, 60 Conn., 71–77; *Gridley* v. *Sumner*, 48 id., 16; *Pratt's Appeal from Probate*, 41 id., 191; *Packer et al.* v. *Benton*, 35 id., 343–349; *Clapp* v. *Lawton*, 31 id., 95; *Turner* v. *Hubbell*, 2 Day, 457.

III. The finding states that Delaney "also told the plaintiff that he, Delaney, intended to go into the liquor business with said McGee, and gave this as the reason why he did not wish to sign said bond." If from this is to be inferred that there was an understanding known to the plaintiff, that McGee and Delaney were to form a partnership and sell liquors under McGee's license, and that this intention and understanding was in any sense a consideration and inducement for Delaney's promise to the plaintiff, "I will see you all right," then said consideration was illegal; the contract between the plaintiff and Delaney was founded upon a consideration which was immoral, illegal, contrary to public policy, and the prohibition of the statute, and is void. Bishop on Contracts, Secs. 59, 74; *Treat* v. *Jones*, 28 Conn., 334; *Funk* v. *Gallivan*, 49 id., 124–128; *Myers* v. *Minnoth*, 101 Mass., 368; *Perkins* v. *Cummings*, 2 Gray, 258; General Statutes of Conn., § 3114. Sec. 3087 of the General Statutes provides severe penalties for "any person who without a license therefor" shall engage in the sale of intoxicating liquors. The license to McGee was personal to him—a "permit to do what

would otherwise be an offense against the general law." *La Croix* v. *County Commissioners*, 50 Conn., 328; *U. S.* v. *Grab*, 99 U. S., 225 (25 Co-op. Ed., p. 273); *U. S.* v. *Davis*, 37 Fed. Rep., 468. A license granted to a person who forms a partnership with an unlicensed person does not authorize the latter to make sales. Am. & Eng. Ency. of Law, Vol. 11, p. 646; *Long* v. *State*, 17 Ala., 32; *Shaw* v. *State*, 56 Ind., 188; *Wharton* v. *King*, 69 Ala., 355; *Com.* v. *Hall's Case*, 8 Gratt. (Va.), 388. McGee's license was no authority for Delaney, or for McGee and Delaney as partners, to sell spirituous liquors, and if the plaintiff was thus becoming surety, knowing these acts were contemplated, his contract with Delaney was void.

IV. The complaint is bad upon demurrer on account of improper joinder of actions. Defendant, McGee, is surely not liable upon any agreement antecedent to the bond, and there is surely no joint liability either upon the bond or upon any antecedent oral negotiations. The real cause of action is the breach of contract, and there are no sufficient allegations that Delaney was liable thereon, the whole contract having been reduced to writing, to which he was not a party. *Culver* v. *Wilkinson*, 145 U. S., 205; *Union Mutual Life Ins. Co.* v. *Mowry*, 24 U. S., 544.

The plaintiff seems to be singularly unfortunate in his complaint. He alleges that he signed the bond because of the joint promise of the defendants. That promise is surely merged in the written agreement, which speaks for itself. But upon the bond Delaney is not liable, for he did not sign it. The real facts seem to be, and the only reasonable theory of the case is, that there were preliminary oral negotiations at which Delaney was present, and then the bond was drawn up, into which all these prior negotiations were merged, and to which, as the deliberate, solemn, and certain act and agreement of the parties, they ought to be left.

FENN, J. The Court of Common Pleas for Hartford County, at the request of the plaintiff and of the defendant Delaney, reserved for our advice the question as to the prop-

er judgment to be rendered, as to said Delaney, upon the following facts found by said court; the other defendant, McGee, having suffered a default.

"On the 10th day of November, 1890, William McGee of Bristol, in said county, defendant, as principal, and the plaintiff as surety, signed a license bond for $300 to the treasurer of said county.

"The plaintiff executed said bond at the request of the defendant Delaney, who said to the plaintiff as an inducement to execute said bond, 'I will see you all right,' and also told the plaintiff that he, Delaney, intended to go into the liquor business with said McGee, and gave this as the reason why he did not wish to sign said bond.

"Upon the filing of said bond with the county commissioners, and on the 10th day of November, 1890, a license was issued by them to said McGee, to sell spirituous and intoxicating liquors in said Bristol, and McGee immediately commenced and carried on said business in said town until the 15th day of June, 1891, when said license was revoked by said commissioners, the said McGee having been legally convicted of a violation of the laws relating to intoxicating liquors, and said bond having been thereby forfeited, on the demand of the county treasurer, the plaintiff, on the 16th day of October, 1891, paid the amount of said bond, the said McGee having failed to pay the same.

"About a month or six weeks after said McGee began the business of selling spirituous and intoxicating liquors as aforesaid, Delaney became a partner in said business with said McGee, and said business was carried on for their joint benefit under the license to McGee alone; but said Delaney had withdrawn from the partnership about two months before the conviction of said McGee as aforesaid.

"Neither McGee nor Delaney has repaid to plaintiff any part of the amount of said bond so paid by the plaintiff to the county treasurer as aforesaid."

The defendant Delaney claims that the complaint was defective, and that one or more of the several demurrers filed should have been sustained. We judge by the language used

in the reservation that this claim was waived in the court below, and no such question reserved. If, however, we are mistaken in this, we think the court below committed no error in overruling such demurrers; certainly none which injuriously affected the defendant, so that they should now be considered. *Vail* v. *Hammond*, 60 Conn., 378.

The defendant also claims that the finding fails to support the complaint, to demonstrate which his counsel, in their brief, have made use of the "deadly parallel columns," without, however, satisfying us that the contention is correct. Doubtless the language of the finding was not copied from the complaint, but there are no wider differences than are justified by the rules under the Practice Act, 58 Conn., 564, Rule III., that "acts and contracts may be stated according to their legal effect," and that "immaterial variances shall be wholly disregarded."

The main inquiry, upon the facts found, is whether the contract therein stated is within the statute of frauds. The law upon this subject, namely, whether contracts of indemnity are special promises to answer for the default or miscarriage of another, or are original undertakings, has been correctly said (Am. & Eng. Ency of Law, Vol. 8, p. 673) to be "in a state of hopeless confusion, arising almost wholly from the different views taken of the scope of the statute. Where *Thomas* v. *Cook*, 8 B. & C., 728, is law, and the statute is confined to contracts of suretyship, results are reached entirely different from those obtained where *Green* v. *Cresswell*, 10 Ad. & E., 453, is followed, and contracts of indemnity are included in its scope."

In favor of the view of *Green* v. *Cresswell*, that contracts of indemnity are within the statute, the case of *Nugent* v. *Wolfe*, 111 Pa. St. 471, cited by the defendant; and in favor of the opposite view, held in *Thomas* v. *Cook*, the case of *Davis* v. *Patrick*, 141 U. S., 487, cited by the plaintiff, may be regarded as among the leading authorities. Doubtless, in England, the later case of *Green* v. *Cresswell*, has been practically overruled, and the authority of *Thomas* v. *Cook* fully restored. *Wildes* v. *Dudlaw*, L. R., 19 Eq., 198; *Yorkshire*

Railway Wagon Co. v. *Maclure*, L. R., 19 Ch. Div., 478. *Thomas* v. *Cook* is also followed in a majority of the American States. Browne Statute of Frauds, § 161*c*.

But it is unnecessary to examine the authorities elsewhere, more at large, because the question is not now a new one in our own jurisdiction. The cases of *Stocking* v. *Sage*, 1 Conn., 519; *Marcy* v. *Crawford*, 16 Conn., 549; *Reed* v. *Holcomb*, 31 Conn., 360, and *Clement's Appeal*, 52 Conn., 464, all bear more or less directly upon the question before us; and although *Reed* v. *Holcomb* and *Clement's Appeal* have been thought by various courts and text writers to be somewhat in conflict, we do not so think, but that from a fair examination of both, the true rule, to which both are consistent, may be discovered. In *Reed* v. *Holcomb*, where the plaintiff indorsed a note of a third party, at the request of the defendant, and upon his oral promise to see it paid, and to save him harmless if it was not paid by the makers, it was held that the statute of frauds did not apply to the case. In *Clement's Appeal*, in which no reference was made, either by counsel on either side, or by the court, to *Reed* v. *Holcomb*, Brainerd indorsed notes for Goodwin, at the request of his father, and on the father's oral promise to save him harmless. It was held that this promise was void under the statute of frauds, because not in writing. The distinction between the two cases was the principle on which *Reed* v. *Holcomb* was expressly stated to rest. In *Clement's Appeal*, although the promisor was the father of the maker of the notes, and, as such, actuated by parental affection, he had no legal or pecuniary interest whatever, so far as the record disclosed, in the transaction. In *Reed* v. *Holcomb*, the transaction was for the benefit of the defendant. Without consulting the plaintiff, he had taken the note of a firm indebted to him, payable to the order of the plaintiff, doing so for the purpose of getting the plaintiff's indorsement, that he might get the note discounted at the bank. The two cases are therefore in harmony, for the reason that *Reed* v. *Holcomb* is not, as has sometimes been supposed, an authority for the unqualified doctrine of *Thomas* v. *Cook*, that a contract of suretyship *is*, but a con-

tract of indemnity *is not*, within the statute; but only for the more limited doctrine recognized elsewhere, in most jurisdictions where *Thomas* v. *Cook* is not followed, and consistent with even *Green* v. *Cresswell*, that where the inducement is a benefit to the promisor which he did not before or would not otherwise enjoy, and the act is done upon his request and credit, such promise is an original undertaking and not within the statute.

The earlier Connecticut cases which we have cited are in accordance with this doctrine. The case of *Dillaby* v. *Wilcox*, 60 Conn., 71, and the earlier cases therein referred to, somewhat relied upon by the defendant, are not in point; but so far as they incidentally bear upon the question at all, they illustrate and affirm the distinction here made, since they establish the rule that even what is in form a new parol promise to pay the already existing debt of another, may be valid, as an original obligation on the part of the promisor, if based upon a transfer of value "the measure of which is, by the agreement of the parties, the defendant's payment of the third party's debt." *Dillaby* v. *Wilcox*, p. 80, quoting and approving Browne on the Statute of Frauds, § 214*e*.

Applying this established rule of our law to the case before us, we think the defendant is not entitled to avail himself of the statute of frauds. The bond was executed by the plaintiff at the request of the defendant, and presumably entirely upon his credit. At any rate, the only inducement given in the finding was the defendant's statement, "I will see you all right." He told the plaintiff that he, the defendant, intended to go into the liquor business with McGee, and when the finding adds that "he give this as the reason why he did not wish to sign the bond," it is of course equivalent to saying that he gave it as the reason why he did wish the plaintiff to sign it in his place, namely, as a surety upon a bond, for a license to be issued to McGee. The language used by this court in *Reed* v. *Holcomb* thus becomes as pertinent to this case as it was to that. It was there said, p. 363, referring to the plaintiff's indorsement of the third party's note: "This in substance, we think, was the same as

if the plaintiff had indorsed the defendant's own note to enable him to raise money upon it." If that be true, was not the transaction stated in the finding the same, in substance, as if the plaintiff had signed the defendant's own bond, to enable him to procure a license and become a dealer? It seems to us that there is no distinction.

But the defendant insists that if this be so, "if" (we quote from the brief) "from this is to be inferred that there was an understanding known to the plaintiff that McGee and Delaney were to form a partnership and sell liquors, under Mr. McGee's license, and that this intention and understanding was, in any sense, a consideration and inducement for Delaney's promise to the plaintiff, 'I will see you all right,' then said consideration was illegal; the contract between the plaintiff and Delaney was founded upon a consideration which was immoral, illegal, contrary to public policy and the prohibition of the statute, and is void."

It surely needs no citation of authorities to support the position that if this contract was founded upon a consideration, illegal, immoral, or contrary to public policy, it is void, and cannot support an action. So also, if the contract contemplates acts against public policy, or forbidden by statute, it is inoperative. We also concur fully with the authorities cited by the defendant, all of which are referred to in Am. & Eng. Ency. of Law, Vol. 11, p. 346, which holds that "a license granted to one person, who forms a partnership with an unlicensed person, does not authorize the latter to make sales of liquor." But, conceding all this, there is no finding that Delaney contemplated making sales himself, and certainly there can be no presumption that Delaney contemplated, or was understood by the plaintiff to contemplate, any illegal connection with the proposed business, if there was a legal way in which he might be interested in it. And we think there was, if he was only a silent partner, taking no active participation, and only concerned to the extent of capital invested. On this point, we may quote again from one of our own cases already cited, *Marcy* v. *Crawford*. When the same claim that the contract was illegal was made, this court,

by HINMAN, J., said, page 558 :—"Then as to the first error assigned, that the county court did not instruct the jury that the promise claimed to be proved by the plaintiff was an illegal promise, because, as the defendant insisted, it was a promise made in consideration of the commission of an illegal act. Now, there can be no doubt that the law will not enforce a contract to commit an illegal act. A promise to commit a battery, to pull down another's house, or to commit any such willful trespass to another, is illegal and void. But, merely because an act proves to be a trespass, which was not originally supposed to be so, will not render a promise of indemnity for the commission of it void." Again, p. 554 :—"A promise to indemnify against a trespass is valid, unless it be shown that the promisee knew the act to be a trespass." We do not think the record before us justifies us in finding that the plaintiff knew, understood or believed that the defendant contemplated the performance of any act illegal, immoral, or against public policy.

The Court of Common Pleas is advised to render judgment, upon the facts found, in favor of the plaintiff, for the amount paid by the plaintiff, with interest thereon and costs.

In this opinion the other judges concurred.

JAMES CAMPBELL'S APPEAL FROM PROBATE.

Third Judicial District, Bridgeport, April Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

The rule of the common law which excluded from inheritance all who traced their descent through alien ancestors, and therefore through uninheritable blood, has never been in force in Connecticut.

Where the facts alleged in an appeal from a decree of the probate court disclose no legal interest upon the part of the appellant in the subject-matter of the appeal, the cause will be erased from the docket of the Superior Court on motion of the appellee. In such case the general allegation of interest is a mere legal conclusion from the specific facts averred and cannot avail the appellant.

The erasure is not erroneous because a state of facts, not alleged, might be supposed, which would justify the taking of the appeal. If such facts do exist it is incumbent upon the appellant to aver them in stating the grounds of his appeal; otherwise they cannot be considered on the motion to erase.

[Argued April 24th—decided May 4th, 1894.]

APPEAL from an order and decree of the Probate Court for the district of Bridgeport, ascertaining the heirs at law and distributees of the intestate estate of Patrick Sloan; taken to the Superior Court in Fairfield County where the cause was erased from the docket by the court, *Shumway, J.*, and the appellant appealed to this court. *No error.*

The next of kin of the intestate were a brother who was an alien, and five first cousins who were naturalized citizens of the United States. The decree gave the personal estate to the alien brother, and the real estate to these cousins. The appellant, a natural born citizen of the United States, was a second cousin of the deceased, son of a first cousin who had died before him. The intestate was a naturalized alien, and all the cousins traced their kindred to him through alien ancestors.

These facts appeared on the face of the motion for an appeal, which the appellant made as heir at law and next of kin, to the Superior Court of Fairfield county. He also alleged that he was an elector and citizen of the State of Connecticut, and that if the law were so that the real estate had escheated, then he appealed for himself and for all other citizens of the State, as aggrieved by the distribution made in disregard of the escheat; and also as one to whom the next General Assembly would grant such real estate, on account of his having been adopted, though informally, by the intestate, and promised the property by devise.

The distributees and appellees moved that the appeal be erased from the docket, because it did not appear that the appellant was a party aggrieved, and did appear that he was not such. This motion was granted by the Superior Court, and the appellant appealed.

Allan W. Paige and *George P. Carroll*, for the appellant.

I. Next of kin aliens cannot inherit real estate of intestate citizens; nor can next of kin citizens inherit real estate of intestate citizens, if inheritance has to be traced through alien blood. And this is common law in the United States. *Levy* v. *McCarter*, 6 Peters, 102, 113, commenting on the great case of *Collingwood* v. *Pace*, 1 Ventris, 413; *McCreery* v. *Somerville*, 9 Wheat., 354; *Jackson* v. *Green*, 7 Wend., 333; *Jackson* v. *Fitsimons*, 10 id., 1; *Banks* v. *Walker*, 8 Barb. Ch., 438; *McGregor* v. *Comstock*, 3 N. Y., 408, citing *Grey's Case* and *Courtney's Case; Luhrs* v. *Eimer*, 80 N. Y., 171; *Campbell* v. *Campbell*, 5 Jones Eq., 246; *Bartlett* v. *Morris*, 9 Porter, 266; *Smith* v. *Zaner*, 4 Ala., 99; *Starks* v. *Traynor*, 11 Humph., 292; *In re Francis Forgue* and *Francis Forgue, Jr.*, 14 Col. Rec. Conn., 309 (1774). These principles antedate the rise of feudalism and the Norman Conquest. *Crane* v. *Reeder*, 21 Mich., 78, citing Com. Dig. "Prerogative," D. 59; Co. Litt., 8*a*, and authorities cited in the margin; 2 Bla. Com., *pp. 249 and 250.

In England the statute of 11 and 12 Wm. III., c. 6, altered the common law by enabling *natural born* subjects to take, though inheritance had to be traced through alien blood of persons deceased, in the same manner as though such persons deceased had been naturalized or natural born.

This statute was repealed in 1870 by a statute, which still recognized the distinction between natural born and naturalized citizens. Statute of 33 and 34 Vict., c. 14. The question then is: What is the common law of Connecticut? Is this British statute passed in 1700 in force with us, or does the common law prevail? "English statutes, passed *before the emigration of our ancestors here*, and applicable to our situation, and in amendment of the law, constitute a part of the common law of this country." *Patterson* v. *Winn*, 5 Peters, 233; 1 Kent's Commentaries, 473, and cases cited; 1 Story on the Constitution, §§ 155–197; 3 Am. & Eng. Ency. Law, 347, 348; *Card* v. *Grinman*, 5 Conn., 164, 168; *Fitch* v. *Brainard*, 2 Day, 189; *State* v. *Danforth*, 3 Conn.,

112, 114; *Baldwin* v. *Walker*, 21 id., 181; *State* v. *Cummings*, 33 id., 260; *Flynn* v. *Morgan*, 55 id., 130.

Connecticut was pre-eminently the charter colony of America. In no part of the British Empire was there such a high degree of self-government. The laws passed by the General Court required no assent by the King to insure their validity. 1 Story on the Constitution, Secs. 171, 176, 181; Brief of Yorke and Talbot in *Winthrop* v. *Lechmere*, Mass. Hist. Coll., Sixth Series, Winthrop Papers, Part VI., p. 488; Mass. Hist. Soc. Proceedings, 1860–62, p. 168.

"The legislation of Connecticut, and of New Haven, when the Scriptures were not thought to impose a different rule, *was based on the common law of England*, so far as it was not inapplicable to the circumstances of an infant colony. When they found it unsuited to their wants, they did not hesitate to treat it as obsolete, or to substitute a contrary rule by an express statute." Preface, p. vi, to General Statutes of 1875. See also Acts and Laws, Revision of 1715, p. 128, last line. In 1669, Connecticut passed a law concerning the distribution of intestate estate. It is significant, however, that the true nature of the act was concealed by its title. 4 Col. Rec. Conn., 306–311; Acts and Laws, Revision of 1715, pp. 61 and 62; 7 Col. Rec. Conn., 191; Mass. His. Soc. Proceedings, 1860–1862, p. 168. And this in substance has remained on statute of distributions ever since. Acts and Laws, Revision of 1750, p. 55; Revision of 1784, p. 55; Revision of 1796, p. 167; Revision of 1808, p. 267. But on Feb. 15th, 1727–8, in the case of *Winthrop, Appellant*, v. *Lechmere*, by an order of the King in Council, the Connecticut statute was declared null and void as contrary to the laws of England, relative to primogeniture, and as not warranted by the charter. 7 Col. Rec. Conn., 191 and 571–579; Mass. His. Coll., Sixth Series, Vol. V., Winthrop Papers, Part VI., 440–509; Mass. Hist. Soc. Proceedings, 1860–1862, p. 169. The decision emboldened an eldest son in Massachusetts to appeal from a decree of distribution in that Colony, despite the fact that her statute had been solemnly approved. The appeal, on Feb. 15th, 1737, was dismissed. *Phillips* v. *Savage*,

Mass. His. Soc. Proceedings, 1860–1862, pp. 64–80 and pp. 167–171; 1873–1875, pp. 101–103. Taking courage from this last decision, another appeal was carried up from Connecticut, and the decision in *Winthrop* v. *Lechmere* was reversed in 1745. *Clark* v. *Tousey*, 9 Col. Rec. Conn., 587–593. The decision in *Winthrop* v. *Lechmere* and *Clark* v. *Tousey*, settled that: 1. The principles of the common law were in force in Connecticut. 2. The Colony had power to pass laws of a domestic nature not inimicable to the prerogative of the King or the authority of Parliament. 3. The statutes of England were not obligatory on the Colony unless they were needful to uphold the prerogative of the King or the authority of Parliament.

In 1750, the General Assembly ordered the printing of all the acts passed by the Parliament of Great Britain which the crown officials had ordered the Colony to observe. The statutes are seven in number. It is needless to remark that the Statute of 11 and 12 Wm. III., c. 6, is not found there. 9 Col. Rec. Conn., 550, 551. Such being the known temper of the people of Connecticut during the whole Colonial period, and especially after the decision of *Winthrop* v. *Lechmere*, can it be conceived that they would adopt any British statute unless it was absolutely forced upon them? Johnson's Hist. of Conn., pp. 192–205, 285–305. In 1795, Judge SWIFT published his celebrated "System." In language which is similar to that of judges and text writers in other States, he lays it down that the common law, in so far as it is applicable, is in force in Connecticut: Swift's System, 40–57; 3 Wilson's Works, 203. And toward the close of the colonial period there were two cases, the latter of which especially shows that the General Court then knew and recognized the principle of the common law, that no one was capable of inheriting who traced inheritance from the intestate through alien blood. 14 Col. Rec. Conn., 94, 308, 309. *Strong's Case*, Kirby, 374, and *State* v. *Ward*, 43 Conn., 497, do not tend in the least to overturn our position. From the time of Ludlow's code, provision was made in reference to escheats. 1 Col. Rec. Conn., 525; Laws of Connecticut

of 1673, p. 23; Acts and Laws, Revision of 1715, pp. 82, 178 and 179; Revision of 1750, p. 51; Revision of 1784, p. 51. That the principles as to alienage are a part of our common law has been judicially assumed. *Evans's Appeal from Probate*, 51 Conn., 435, 439. General Statutes 1888, §§ 15–17, the earliest provisions of which were passed in 1848, (Revision of 1849, p. 455, § 6,) alter the common law as to alienage only to the extent that the language goes. Only to the extent that these provisions are by their language operative, do they remove the common law disability of inheritance. *Luhrs* v. *Eimer*, 80 N. Y., 171. General Statutes 1888, § 632, is, as its name designates, a statute of distribution. It furnishes a formula for ascertaining who are next of kin. But it presupposes that any person thus ascertained is capable of inheriting and can deduce title according to the principles of the common law. If such person is not capable by reason of alienage, either of himself or of some person through whom he traces inheritance from the intestate, or by reason of illegitimacy on the paternal side of himself or of some person through whom he traces inheritance from the intestate, or by reason of himself being a monster, then he cannot inherit. 1 Swift's Digest, *p. 157. If the statute were intended to confer capacity, then, in the case at bar, Hugh Sludden or Sloan, the alien brother, could inherit the whole estate.

In those States organized after the Revolution, it is held that statutes passed before the first emigration to this country in 1607 are a part of the common law, so far as they are applicable. *Carter* v. *Balfour's Adms.*, 10 Ala., 814, 829; *Horton* v. *Sledge*, 29 Ala., 478; *Lavalle* v. *Strobel*, 89 Ill., 370; *Swift* v. *Tousey*, 5 Ind., 196; *Fisher* v. *Deering*, 60 Ill., 114; *Gardner* v. *Cole*, 21 Iowa, 205; *Kansas Pac. R. R. Co.* v. *Nichols*, 9 Kan., 235, 252; *Lathrop* v. *Commercial Bk.*, 8 Dana (Ky.), 114, 121; *Matter of Lamphear*, 61 Mich., 108; *Lorman* v. *Lansing*, 8 id., 25. But those statutes passed after the emigration and before 1776, are not a part of the common law. *Murroy* v. *Kelly*, 27 Ind., 42; *Smith* v. *Zanes*, 4 Ala., 99; *Bartlett* v. *Morris*, 9 Porter, 266; *Matthews* v.

Ansley, 31 Ala., 20; *Stemple* v. *Herminghauser*, 3 G. Green (Iowa), 408; *Starks* v. *Traynor*, 11 Humph. (Tenn.), 292; *Le Barron* v. *Le Barron*, 35 Vt., 365. If then, by the common law, persons tracing relationship to the intestate through alien blood, could not inherit, this court should not, at this late day, alter this law by adopting any English statute. *Card* v. *Grinman*, 5 Conn., 168; *State* v. *Parker*, 1 D. Chip. (Vt.), 298. The legislature has power to distribute this property in a paternal manner to the parties in proper proportions. *Wheeler's Appeal from Probate*, 45 Conn., 306; *Evans's Appeal from Probate*, 51 id., 485; *In re Bretzfelder*, 10 Private Laws, p. 47. The courts of this country are bound to enforce all the clearly established principles of the common law not repealed by statute. *Powell* v. *Brandon*, 24 Miss. 343; *Goodrich* v. *Lambert*, 10 Conn., 448, 451; 8 Am. & Eng. Ency. Law, p. 348. This court has recently ascertained and upheld principles of the common law, though they were contrary to our early colonial practice. *Flynn* v. *Morgan*, 55 Conn., pp. 132, 133, 140 and 141. So, too, where the principle seemed to be inequitable and had been altered by a statute which, however, could not be construed retrospectively. *Goodsell's Appeal from Probate*, 55 Conn., 171.

II. But if the statute of 11 and 12, William III., chap. 6, is in force, then the appellant, James Campbell and Mary E. Muldowney, as the next of kin *natural born* relatives of the intestate, take all the real estate. The appellees who claim to be heirs at law, are John Mines, a naturalized citizen, and four women who as wives of naturalized citizens are in the same category. *U. S. Rev. Stat.*, Sec. 1994; *Kelly* v. *Owen*, 7 Wall., 496. By Art. 1, § 8, of the Federal Constitution, Congress is given power "to establish an Uniform Rule of Naturalization." But there is no constitutional or statutory provision defining what *the effect* of naturalization shall be. The only requisite is that the qualifications for naturalization and the methods of naturalization shall be the same in every State. Undoubtedly as a general rule a naturalized citizen has the same rights as a native born citizen. But there is nothing to prevent a discrimination. In England

naturalization was effected by special acts of Parliament, in most of which there were discriminations. *Rex* v. *Mierre*, 5 Burr, 2787; 1 Bla. Com. (Sharswood's Ed.), p. 374 and notes; *Collingwood* v. *Pace*, 1 Vent., 420, and 1 Sid. 197; Stats. 12 and 13, Wm. III., c. 2. The same is true of the colonial days of Connecticut. *In re Sistera*, 14 Col. Rec. Conn., 94; *In re Forgue*, 14 Col. Rec. Conn., 308. Now if the statute of 11 and 12 Wm. III., c. 6, is adopted as a part of our law, it must be taken as it is and having such force and effect as its language imports. That is to say only *natural born* subjects can avail themselves of this exception to the common law rule. *M'Creevy* v. *Somerville*, 9 Wheat., 354; *McKinney* v. *Savigo*, 18 How., 235; *The People* v. *Irwin*, 21 Wend., 128; *McLean* v. *Swanton*, 13 N. Y., 535; *Banks* v. *Walker*, 3 Barb., Ch. 438. There is nothing in the Fourteenth Amendment to the Constitution that militates against this view. In the first place, by the familiar rule, that amendment is to be construed prospectively. Then there is no discrimination against the appellees as citizens of another State, but only as naturalized citizens. The discrimination would be the same if they were citizens of Connecticut. Finally, the word citizenship does not of itself include the element of descent or inheritance. 16 Albany Law Journal, 24, 176; 25 Am. Law Register, 1–14.

III. If the property has escheated then the appellant had the right to appeal as a citizen of this State.

Stiles Judson, Jr., for the appellees, other than Susan Hensen.

I. In every appeal from probate the interest of the appellant must be stated in the motion for appeal, unless such interest appears on the face of the proceedings and records of the probate court. General Statutes, § 644; *Swan* v. *Wheeler*, 4 Day, 140; *Saunders* v. *Dennison*, 20 Conn., 554; *The Wardens etc.* v. *Hall*, 22 id., 130; *Deming's Appeal*, 34 id., 203; *Norton's Appeal*, 46 id., 528; *Taylor* v. *Gillette*, 52 id., 217; *Dickerson's Appeal*, 55 id., 229; *Buckingham's Appeal*, 57 id., 545.

II. If, however, all this estate has escheated to the State, it will not aid the appellant. He must stand or fall on his own pecuniary interest in the subject-matter of the decree. If his argument relative to escheat is sound, it certainly demonstrates his own lack of pecuniary interest, and fully justifies the action of the Superior Court in erasing the case from the docket.

III. The claim of the appellant that our forefathers brought with them to this country the entire body of the English common law, and hence must have adopted the principle that the blood of an alien ancestor would impede the descent of title to land traced through such alien, is not a sound one. For a period of 250 years, intestate estates in Connecticut have been distributed by force of our own laws concerning the distribution of intestate estates, and the English common law on the subject of descent of land within the colony, was never recognized in any of its peculiar phases; and though the Colonial Records disclose the fact that controversies arose upon this subject, neither the courts, nor the General Assembly ever departed from the principle that the statute of distribution as adopted by the General Court must govern exclusively in the distribution of estates. In the Revision of 1672, it will be found that intestate estates were to be divided between the widow and children or kindred of the intestate according to law, "and for want of law according to the rules of righteousness and equity." In 1699, a statute of distributions substantially like the present statute was adopted by the General Court; it was provided however in said act that the eldest son should receive a double portion of the estate. This provision was not derived from any principle of the common law but rather from the law of Moses, for which the colonists had much greater love and veneration than any principle pertaining to the English laws of property. It is made apparent by a glance at the legislative proceedings of the colony, that the laws of England never dominated their actions to any considerable degree. Colonial Records, Vol. 4, p. 261; Journal of Lower House, May 16th, 1716.

At a county court held at New London, Sept. 20th, 1698, in the case of *Edward Palmes et al.* v. *Fitz John Winthrop et al.*, the following entry was made on the docket: "It is agreed by plaintiff and defendant that the laws of England shall be pleaded and made use of in this case and it is allowed of by this court." The case by appeal came before the Court of Assistants when it was said by Nathaniel Foot, Esq., attorney: "That the Court of New London had not power to allow what they there entered * * * their commissions and jury's oath obliging them to the attendance and observation of the laws of Connecticut Colony." *Winthrop's Appeal*, Colonial Records, Vol. 7, p. 191; *Tousey* v. *Clark*, id., Vol. 9, p. 550. The theory upon which estates descend under our system of jurisprudence, presents no such condition as would admit of the application of the common law disability of tracing the title through alien blood. It was the fiction of the common law that the title traversed through all the intermediate ancestors who intervened between the intestate and the claimant, and for reasons of feudal origin, the title, in its descent, was obstructed by meeting with alien blood. Such is not the theory of descents in this State nor in any other State except where the common law of England has been adopted *in toto* by statute. Appellees do not trace title through their deceased alien ancestor, but their pedigree is resorted to solely to establish the degree of relationship between them and the intestate; the title flows directly to them from the intestate by force of the statute itself, and their rights are to be determined by reference solely to our own rules of descent. *Brown* v. *Dye*, 2 Root, 285; *Fitch* v. *Brainerd*, 2 Day, 189; *Hillhouse* v. *Chester*, 3 id., 213; *Heath* v. *White*, 5 Conn., 233; *State* v. *Danforth*, 3 id., 118; *Baldwin* v. *Walker*, 21 id., 180; *Dickinson's Appeal*, 42 id., 502.

The cases from New York State cited by the appellant have absolutely no application. By force of their Constitution and the Act of 1786, they had the common law respecting descent of estates in all its original state, and with all its attending drawbacks and absurdities.

Later they removed the bar of alienage in an ancestor by

Act of 1832, and by the Act of 1845, and by subsequent enactments the rigors of the common law respecting aliens became eliminated.

IV. Even were the appellant to demonstrate that the common law disability referred to became a part of our laws of descent, he will have gained nothing by the demonstration; for the bar was removed in respect to native born subjects of the realm by the Act of 11 and 12 of William III., and if the original disability was ever lurking unknown in our laws of descent, the Act of Parliament referred to would also become a part of our jurisprudence; for it was adopted by Parliament before the Declaration of Independence, and Acts of Parliament in amelioration of the common law passed prior to 1776, while having no force as statutes or positive rules of law, had their effect in determining the decision of the court, if applicable to our conditions. *State* v. *Ward*, 43 Conn., 492; *McCreery's Lessees* v. *Somerville*, 9 Wheat., 354; *Palmer* v. *Edwards*, 2 Mass., 179; *Haigh* v. *Haigh*, 9 R. I., 30. If effect, then, is given to the Act of Wm. III., whereby the descent would be no longer impeded, in the case of a native born citizen the same condition of amelioration of the hardship of the common law must, under the mandates of the Constitution of the United States, be fully accorded to naturalized citizens, and upon this line of reasoning the appellees still remain the rightful heirs at law of the intestate in respect to the real estate in controversy. "Naturalization gives an alien all the rights of a natural born citizen; he thereby becomes capable of receiving property by descent and of transmitting it in the same way." *Jackson* v. *Green*, 7 Wend., 333; *Crane* v. *Reeder*, 21 Mich., 65; 1 Bla. Com., 374; Cooley's Blackstone, Vol. 1, top page 376, note; *Anislee* v. *Martin*, 9 Mass., 454; Vol. 3, Am. & Eng. Ency. of Law, p. 248 (note); 2 Kent Com., 65, 66, 69, 71; *Osborn* v. *Banks*, 9 Wheat., 825; *Jackson* v. *Green*, 7 Wend., 339; Vol. 3, Am. & Eng. Ency. of Law, p. 253; Colonial Records, Vol. 14, p. 309; Revision, Statutes 1784, p. 239; Revision, Statutes 1838, p. 287.

The appellant, as a native born citizen of this country,

can be afforded no rights of property that cannot equally be claimed by the appellees, as naturalized citizens of this country; and as the latter are one degree nearer in relationship to the intestate, and as no representatives are to be admitted among collaterals after representatives of brothers and sisters, the appellant is not the next of kin to the intestate; and therefore has no *pecuniary interest* in the subject-matter of the decree of the probate court, and his appeal was properly dismissed by the Superior Court.

George G. Sill filed a brief for the appellee, Susan Hensen.

BALDWIN, J. The appellant claims to be aggrieved by the probate decree of distribution, as an heir at law and next of kin to the intestate, and also as a citizen of the State, acting for himself and all the rest of its citizens. His contention is that either the real estate in question escheated to the State, in which case he, as one of its citizens, has an interest in defeating a distribution to private individuals; or else that an escheat, so far as he is concerned, has been prevented by force of the statute of 11 and 12 Wm. III., Chap. 6, in favor of inheritances by natural born citizens.

It was a rule of the common law of England that "on failure of lineal descendants or issue of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser." 2 Blackst. Comm., 220. The requirement that the heir musts be of the blood, that is, descended from the first purchaser, was something peculiar to the feudal system. It rested on the principle that feuds were granted for personal service and personal merit, and that like service and like merit, on the part of the successors in estate of the feudatory, would be best assured by admitting to that number only those who derived their natural characteristics from him by descent. A legal fiction was next invented, by which, failing direct descendants of the person last seised, his collateral heirs were deemed to be of the blood of the first purchaser; that position being arbitrarily assigned to the common ancestor, whether in fact he

ever owned the land or not. In order to establish their title, however, it was necessary to trace their descent back to him, in each degree, through "inheritable blood." If, therefore, any intermediate ancestor was an alien, as he could have no heirs, so he could have no inheritable blood, and the land escheated.

It is this regard paid by the common law to the original purchaser of the estate, real or fictitious, that led it to reckon degrees of consanguinity in accordance with the canon law, by simply going back to the common ancestor, without then proceeding, as by the civil law, to compute the degrees between him and the intestate.

The real estate tenures of a country are necessarily an important feature of its political system. The institution of feudalism and primogeniture were obviously unsuited to the conditions under which New England was first settled, and her people looked more to the civil than to the common law to guide their policy as to the distribution of landed estates. 2 Washburn on Real Property, 404, 408.

In October, 1639, the General Court of Connecticut, upon the report of a committee, which had been appointed "to ripen some orders that were left unfinished the former Court," as to the "settling of lands, testaments of the deceased," and other matters, enacted that intestate estates should be divided by the Public (or Particular) Court between the wife, children, or kindred, "as in equity they shall see meet;" and if no kindred be found, the court "to administer for the public good of the Commonwealth." 1 Colonial Records of Conn., 38; Ludlow's Code, id., 553. In the Revision of 1673 (Ed. of 1865, p. 36) the provision is that such estates be divided between the wife, and children or kindred "according to Law, and for want of Law, according to rules of Righteousness and Equity; And if no Kindred be found, the Court to Administer for the publick good of the Colony." At the close of the century, in 1699, a statute of distributions was passed, copied mainly from that adopted several years before in Massachusetts. It put all the children of an intestate on a footing of equality, except

that the eldest son was to have a double portion. Statutes, Revision of 1702, Ed. of 1715, p. 61. In 1713, it was further provided that male heirs should have their shares set out in real estate, so far as this was practicable. Ibid., p. 192. In 1727, (Session Laws, p. 110,) it was enacted that real estate which came to the intestate by descent, should be distributed among his kindred of the blood of the purchasing ancestor, without distinction between those of the whole blood and those of the half blood, nor should any such distinction be made as to real estate which came to the intestate by purchase; and also that "the next degree of kindred in the Line Transverse shall be admitted to the Inheritance before the next degree of Kindred in the Line Ascendant; and the next degree of Kindred in the Line Ascendant shall be admitted to the Inheritance before a Remoter degree in the Line Transverse." This statute was omitted in the Revision of 1750.

This course of legislation plainly set up for the Colony of Connecticut rules of inheritance differing fundamentally from those of the common law of England. For that cause, our statute of distribution was pronounced null and void by the King in Council, in the well-known case of *Winthrop* v. *Lechmere*, in 1727–8. 7 Colonial Records of Conn., 191, 571–9. That judgment was, however, practically disregarded in the Colony; and the statute was finally sustained, as a legitimate exercise of chartered rights, by the same tribunal, in 1745, in the case of *Clark* v. *Towsey*, 9 Colonial Records of Conn., 587–593.

This had been the uniform doctrine of our own courts. "The *English* law of descents has never been admitted in this State." *Heath* v. *White*, 5 Conn., 228, 233. The common law maxim, *seisina facit stipitem*, was never accepted here. *Hillhouse* v. *Chester*, 3 Day, 166, 211; *Bush* v. *Bradley*, 4 id., 298, 305. The computation of degrees of relationship between an intestate and his heirs has always been made according to the rule of the civil law. *Hillhouse* v. *Chester*, *supra*. Bastards have been allowed to inherit through their mothers, without regard to the common law doctrine as to

their defect of "inheritable blood." *Brown* v. *Dye*, 2 Root, 280; *Heath* v. *White*, *supra*; *Dickinson's Appeal*, 42 Conn., 491.

The only indication, either in our legislative or judicial records, of the recognition in this Colony of the common law doctrine that no title to an inheritance could be traced through alien blood, which has been brought to our attention by the researches of counsel, is that contained in a private act passed by the General Assembly in 1774. By this statute, entitled "An Act for the Naturalization of Francis Forgue, for confirming the Purchase of Real Estate by him made and rendering his Issue capable of inheriting," a grant of naturalization was made to Francis Forgue, a Frenchman, who had purchased lands in the Colony and resided in Fairfield; his title to these lands was confirmed; and it was declared that his son, Francis Forgue, Jr., was and should be "as capable of inheriting and taking by descent or purchase all and any real estate or estates whatsoever as he might, could, or would have been, had the said Francis, the elder, been compleatly naturalized as aforesaid before the birth of the said Francis, the younger." 14 Colonial Records of Conn., 308–9. It is, doubtless, true that this express provision in favor of the son was made in order to assure or confirm his title, should he survive his father and become his heir, to the lands acquired by the latter while still a subject of France, as well as to any which he might subsequently purchase; and it is probable that it was inserted in view of the rule of common law that naturalization by Act of Parliament enables the son of the alien so naturalized to inherit from him, though born before the passage of the Act. Such was not the case, if the alien had only been made a denizen, by letters patent from the crown (Co. Litt., 129), and the draftsman of our statute could hardly have felt safe in assuming that greater effect, even in our own courts, would be given to a colonial than to a royal grant, unless it was plainly required in express terms. So late as 1795 it was an unsettled question in this State whether a conveyance of land to an alien might not

be an absolute nullity. 1 Swift's System, 166; Statutes, Ed. 1784, p. 83; Session Laws of 1777, p. 476.

It is therefore our opinion that the common law rule of the exclusion from inheritance of all tracing their descent through uninheritable blood was never in force in Connecticut, and that there was no error in the decree of distribution to the first cousins of Patrick Sloan, notwithstanding their relationship to him through alien ancestors.

Another first cousin was the mother of the appellant; but as she died before the intestate, and there is no representation among cousins under our statute of distribution, the appellant had no right to share in the inheritance, as one of the next of kin; nor has the State (if he could make claim in its behalf) any interest in the lands, since there has been no escheat.

The extent of whatever interest the appellant could claim in the estate appeared on the face of his appeal to the Superior Court. He could appeal only if "aggrieved" by the decree; and as he was neither next of kin, nor heir at law, nor representative of any party in interest, the cause was properly erased from the docket. His allegation that he is "aggrieved both as an heir at law and next of kin," is a mere averment of a legal conclusion from the facts previously set up, and these show that it is wholly without foundation.

The appellant claims that as, if his mother had been first purchaser of the land in controversy, he could have claimed it as ancestral real estate, under General Statutes, § 632, the motion to erase should have been denied. But had he such a claim to make, he was bound to set out the facts upon which it arose. In the absence of such allegations, and in the face of others showing that he is not the next of kin, the bare statement that he is the heir at law could not avail to defeat the motion to erase. *Norton's Appeal*, 46 Conn., 527.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

The State *vs.* John Cronin.

First Judicial District, Hartford, May Term, 1894. Andrews, C. J., Torrance, Fenn, Baldwin and Hamersley, Js.

It is not essential to the admissibility of dying declarations that they should directly accuse the prisoner of being the assailant of deceased.

Such declarations may tend to show that the deceased was in actual danger of death at the time the declarations were made, and had given up all hope of recovery; and if so, are admissible to lay a foundation for the admission of other declarations, made substantially at the same time, to other witnesses, which do identify the prisoner as the assailant.

The defendant was on trial for murder in the first degree in shooting one *S.* His defense was that at the time of the alleged homicide he was incapable of deliberation and premeditation by reason of intoxication. *Held* that a remark of the accused on the day following the homicide indicating a clear recollection of statements made by and to him within a few minutes after the shooting on the previous day, were admissible as tending to prove that at the time of the homicide he could not have been so intoxicated as to be incapable of deliberation and premeditation; and admissible also as tending to show a guilty connection on his part with the crime charged.

[Argued May 3d—decided May 15th, 1894.]

Indictment for murder in the first degree; brought to the Superior Court in Hartford County, and tried to the jury before *Ralph Wheeler, J.;* verdict of guilty, and appeal by the accused for alleged errors of the court in the admission of evidence. *No error.*

Upon the trial of the case, the State offered evidence to prove and claimed to have proved:—That at about seven o'clock on the morning of October 6th, 1893, the prisoner, John Cronin, who was familiarly called "Jack," walked straight to the house of the deceased, Albert J. Skinner, opened the outside door leading into the dining-room where the deceased was sitting at his breakfast with his back towards said outside door, walked into the dining-room, and deliberately shot the deceased from behind with a revolver, and that no witness saw the shooting. The bullet entered the left side of the back and passed through a rib, the spinal column, lung, stomach, spleen and other organs of his body.

That after he was shot, Skinner immediately arose from the table, walked a few steps to the door of the kitchen where his wife was at work, said to her, "I am shot, call for help," and fell unconscious to the floor. Mrs. Skinner at once ran into the dining-room, saw the accused standing in the room, and ordered him from the house. The prisoner immediately went out, and she closed and locked the outside doors. She then raised a window and screamed. A Mr. Vinton with his team and two or three hired men, one of whom was John L. Horton, were in the highway and heard the screams of Mrs. Skinner. Mrs. Skinner recognizing Mr. Vinton, called to him by name to come into the house. Cronin at this time was in the highway, and Mr. Vinton asked him: "What is the matter in the house? I am in a hurry and don't want to get off unless it is absolutely necessary." The prisoner answered back: "If you want to know what is the matter there, you had better go in and see." Mr. Vinton hurriedly went into the house, followed by Mr. Horton and other of his men, and found Skinner lying apparently unconscious upon the floor where he had fallen, between the dining-room and the kitchen. Vinton inquired what was the trouble, but the deceased did not answer. Vinton and his men picked up the deceased immediately, carried him into the bedroom a few feet away, and laid him upon the bed. This was about ten minutes past seven o'clock. After Mr. Skinner was placed upon the bed, he regained his consciousness.

At this time Mrs. Skinner was unable to tell Mr. Vinton and the neighbors who had quickly assembled there what the matter with her husband was, and both Mr. Horton and a Mrs. Page asked the deceased what the matter was, nearly at the same time. To Mr. Horton he said, "Jack" (meaning Cronin) "shot me;" and further said to him, "I shall die." In answer to Mrs. Page he said "I am shot;" and further said, "I shall die. Oh, Lord, have mercy; Lord have mercy, I shall die;" and repeatedly declared to her, "I shall die." When making these declarations he turned himself over, and drawing his clothing up, showed the bul-

let hole in his back to both Mr. Horton and Mrs. Page. At the time these declarations were made, the deceased was in a dying condition, and they were made under a sense of impending death.

That Mr. Henry A. Page who lived about 200 feet or more from the residence of the deceased, saw the prisoner going into Skinner's yard, and in two or three moments thereafter heard the shot fired by the prisoner, and also the screams of Mrs. Skinner immediately following, and soon started for Mr. Skinner's house. He came up to the prisoner and said to him: "What is the matter, Jack?" Cronin answered: "I shot the damned dog, and I want to go in and finish the damned son of a bitch;" and that shortly afterwards Cronin was discovered endeavoring to work his way into the bedroom for the purpose of shooting Skinner a second time. Cronin was soon after arrested, and on his person a revolver of six chambers was found, one of which was then loaded.

The deceased died at a quarter before eight o'clock the same morning, from the effects of the wound.

At the trial, the accused did not deny, nor did he admit, that he shot and killed the deceased.

Counsel for the prisoner offered evidence to prove, and claimed to have proved, that the prisoner was intoxicated at the time of the homicide, and to such an extent that he was incapable of exercising the mental power of deliberation. The State offered direct evidence to prove, and claimed to have proved, that the accused was not intoxicated at the time of the killing.

The State, for the purpose of further proving that the prisoner killed the deceased willfully, deliberately, premeditatedly and with malice, and that he understood the nature, character and consequences of his act, offered evidence to prove, and claimed to have proved, that after the shooting he said to Mr. Vinton that he shot the deceased and that he was glad of it; that when he was informed that Skinner was dead he told a Mr. Walker who was standing by at the time that he was damned glad of it, and that he meant to kill

him; that to one Thomas R. Whaples he said, referring to Skinner: "I shot the damned dog, and I hope the son of a bitch will die;" that he admitted to one Alfred W. Moulton that he shot the deceased and hoped he would die, and that Moulton told him he might have "to stretch hemp by the neck for it;" and the accused replied that he didn't care a damn if he did.

The State also offered the testimony of Ransom W. Burnham, the constable who had the accused in charge, and of George A. Smith who was with Burnham, that on the morning after the homicide while they were conveying the accused from the Hartford jail to South Windsor for his preliminary examination, and when passing a field in which a Mr. Edwin Whaples was sitting, Cronin said, referring to Whaples: "There is a little cuss who owes me $47.50, and if my neck is stretched I suppose he thinks he will get rid of paying me."

The testimony of the Mrs. Page, above referred to, was in substance as follows:—Examined by the State's Attorney.

You are the wife of the last witness? Yes, sir, Mr. Henry A. Page.

Now upon the morning of this homicide did you go over to Mr. Skinner's? A. Yes, sir, I did.

You went in there, and after getting in there, what room did you go into? I went right into the * * *

Immediately after getting into the house? I spoke to Mrs. Skinner as I went into the house and asked her what was the matter, and as she didn't answer me I pushed the bedroom door open and went into the bedroom.

After you got into the bedroom, whom did you see? Why I saw Mr. Horton standing at the head of the bed, and Mr. Skinner lying on the bed, and he looked at me, and I thought he was dying, that was my first impression, that he was dying.

And you say Mr. Horton stood at the head of the bed? Yes, sir.

Any other person in the room? No, sir, no other person in the house.

You say you thought Mr. Skinner was dying? Yes, sir.

I never saw that look but once on a person's face. It was the same kind of look.

Did you speak to him? Yes, sir. I said, "Why, Albert, what's the matter?"

Objected to.

Mr. O'Flaherty. You don't claim Mr. Skinner made any accusation at that time?

Mr. Eggleston. Yes, sir, I do.

Mr. O'Flaherty. That he charged anybody with being the author of this?

Mr. Eggleston. Yes, sir. I don't mean to have you understand that I am going to attempt to prove by this witness what another person heard during the time that he was there. I am going to try to prove by this witness what he said, his condition, his apparent belief in impending death; in other words, what he said at this time he said under sense of impending death, and so expressed it to this woman; in other words, if not admissible as *res gestæ*, it is admissible as a dying declaration.

You say you thought he was dying. Yes, sir, I did.

What did you say to him and he to you? I said: "Why, Albert, what is the matter?" I have known him from a boy—and he said: "I am shot." And I said: "Where, where!" And he turned himself over, and drawing his clothing up showed the bullet hole in the back, or said where it was,—showed us that, no blood having come out. I made up my mind * * *

Objected to.

What did he say? He says: "I shall die. Oh, Lord, have mercy, Lord, have mercy, I shall die," and then turned. He was in such agony he would turn and say: "I shall die, I shall die," he would say, and I felt that he was, and I couldn't say that he was not. Mr. Horton passed out when I came in. I picked up a piece of paper and folded it as well as I could in the shape of a fan and fanned him, for the sweat was rolling down his face, he was in such agony, and I said: "They have gone for the doctor, Albert."

Objected to.

Mr. O'Flaherty. I claim it is inadmissible, what she thought.

The Court. Not what she thought, but his answer.

Witness. "Perhaps he can do something for you."

He said: "I shall die, I shall die." How many times? Quite a number of times, as he turned himself he would say: "Oh, I shall die."

Did Mr. Skinner make any complaint of being cold? Yes, sir, he did. Finally, at the last turn I thought he was going to vomit, perhaps with blood that was coming up, and I stepped back and he turned, flung himself almost off the bed in his agony, and then he turned back and said: "I am cold, cover me up." I spoke to his wife to bring me a comfortable, and she flung it and I covered him; and I said: "Do you lie easier on that side?" It was the side he was shot on, and he said yes, he did. That was the last he said. He lived perhaps ten minutes from the time.

Cross-examination by *Mr. O'Flaherty.*

During the time that you were at the bedside of Mr. Skinner, did Mr. Skinner accuse anybody of shooting him? He never mentioned the name of any. He said he was shot. That is all he said.

He did not accuse any one of shooting him? No, not to me.

While you were there? No.

To anybody in your presence? No, sir, he did not.

Or within your hearing? No, sir.

Mr. O'Flaherty. Now, your Honor, I shall ask that this testimony be stricken out. It is utterly immaterial.

The Court. The woman testifies that the man Skinner said to her that he was shot. It is true that perhaps the other evidence in the case would be sufficient to prove that fact without his declaration; and yet his declaration is evidence, provided that it be shown clearly that at the time he made it he was under apprehension of death. The testimony of this woman as to what he said at the time indicating that he was under such apprehension, I think, then, must be admitted as evidence upon the question whether his declara-

tion that he was shot is admissible at all. I think it must be admitted.

Now I will ask you, Mrs. Page, if during the time you were at Skinner's bedside he accused anybody of having shot him? I said he said he was shot. I asked him what was the matter and he said: "I am shot." That is what he said.

But he didn't mention who shot him? No, he did not. Mr. Horton stood at the head of his bed when I went in. He had been with him all along until I came, and then he went for a physician.

And while Mr. Horton was there—I mean while you and Horton were together—he made no accusation against anybody then? No. He showed us where the bullet hole was in his back, and he went out for a physician, and I staid by him to help him all I could.

Counsel for the accused further objected to the court receiving the testimony of Ransom W. Burnham, the constable, and of George Smith who was with Burnham at the time, State's witnesses, to the declaration made by the accused on the day following the homicide, while being conveyed from the Hartford jail to South Windsor for his preliminary hearing, and while passing a field in which sat a Mr. Whaples, to wit: "There is a little cur" (meaning Whaples) "that owes me $47.50, and if my neck is stretched I suppose he thinks he will get rid of paying me." The court overruled the objection and received the testimony. At the time of the remark the shooting of Skinner was not spoken of. After the testimony of these witnesses to that declaration was admitted, counsel for the accused moved to strike it out, but the court denied the motion. The ground of the objection to this testimony, as stated by counsel for the accused at the time, was that it was immaterial and improper. To these rulings of the court, counsel for the accused took an exception.

There are two reasons of appeal, viz.:—I. That the court erred in admitting the testimony of Mrs. Page. II. That the court erred in admitting the testimony of the witnesses Burnham and Smith.

Hugh O'Flaherty and *Henry D. Mildeberger*, for the appellant (the accused).

I. The court erred in admitting the declarations of the deceased as testified to by Mrs. Page.

The true reason for holding that dying declarations are admissible in trials involving the question as to how the declarant received his injuries, is briefly stated in Wharton's Criminal Evidence (Ninth Edition), page 208, § 278. "Dying declarations are admitted, from the necessity of the case, to identify the prisoner and the deceased, to establish the circumstances of the *res gestæ*, and to show the transactions from which the death results." The same reason is also given by Rice on Criminal Evidence, Vol. 3, paragraphs 330 to 341, inclusive, where the subject is clearly and exhaustively treated by the writer of this valuable work. *The State* v. *Bohan*, 15 Kan., 417–419.

There was no *necessity* for introducing these declarations. They threw no light on the question as to *who* shot Albert J. Skinner, the victim of the shooting. Skinner accused no one of shooting him, at least in the hearing of this witness. That he had been shot was not questioned or denied by the defendant at any stage of the case, during the time the cause was being tried.

The rule allowing the dying declarations of a person to be proven in a court of justice, is contrary to the rule which makes hearsay evidence inadmissible.

The court, in the case of *Reg.* v. *Hinds*, reported in Cox C. C., Vol. 8, page 300, uses this language with reference to the subject, viz.: "Speaking for myself, I must say that the reception of this kind of evidence is clearly an anomalous exception to the law of England, which I think ought not to be extended."

The court, in *Montgomery* v. *The State*, 80 Ind., page 348, says: "Witnesses may describe the condition of the injured person, and may repeat expressions uttered by the sufferer indicative of present pain, *but such descriptions and such expressions cannot be put into the form of dying declarations.* The highest office which can be rightfully allotted to a dy-

ing declaration is a statement of the transaction which occasioned death. Beyond this it cannot be extended without an invasion of settled and salutary principles." *State* v. *Wood*, 53 Vt., 563; *Collins* v. *Comm.*, 12 Bush, (Ky.,) 271, 272; Taylor on Evidence, 644.

II. The testimony of Mrs. Page was not admissible as a part of the *res gestæ*. The declaration of Skinner, "I am shot," was but a narrative of a past occurrence. "All the authorities agree, so far as we are advised, that a declaration which amounts to no more than a mere narrative of a past occurrence is not admissible, * * * and in Wharton's Criminal Evidence the same author says, at § 691: 'The test is, were the declarations the facts talking through the party, or the parties talk about the facts.'" *Jones* v. *The State*, 71 Ind., 81–83; *Enos* v. *Tuttle*, 3 Conn., 250; *Russell* v. *Frisbie*, 19 id., 209; *Rockwell* v. *Taylor*, 41 id., 59; *Montgomery* v. *The State*, 80 Ind., 346; *Denton* v. *State*, 1 Swan., 281; *State* v. *Carlton*, 48 Vt., 642; *People* v. *Davis*, 56 N. Y., 101.

The two most able and lucid decisions covering the point under discussion can be found in *Sullivan* v. *Oregon R. & Nav. Co.*, 12 Oregon, 392—a civil case, and the criminal case of *The People* v. *Ah Lee*, 60 Cal., 88–92.

III. The court erred in receiving, against the defendant's objection, the testimony of the witnesses, Burnham and Smith, relative to the statement made about one Edwin Whaples, wherein the accused said: "There is a little cur (meaning Whaples) that owes me $47.50, and if my neck is stretched I suppose he thinks he will get rid of paying me." From the finding it appears that this evidence was offered by the State "for the purpose of proving that the prisoner killed the deceased willfully, deliberately, premeditatedly, and with malice, and that he understood the nature, character, and consequences of his act." The finding also states that "at the time of the remark the shooting of Skinner was not spoken of." The defense was gross intoxication—that the accused, at the time of the shooting (if he did it, for nobody saw him do it), was not in a condition, mentally, to have *premeditated* the murder of the deceased.

How then could his condition the day *after* the shooting, affect the question whether, at the time that the deceased was shot, Cronin was intoxicated, and so grossly as to be incapable of the premeditation necessary to constitute the crime of murder in the first degree?

It was inadmissible for this further reason: That, on the face of it, it bears no relation whatever to the fact whether the accused was in any manner responsible for the death of Albert J. Skinner, or with the death or the cause thereof, of the said Skinner. It was used as a declaratory admission of the accused, in its nature confessional, that he would have his "neck stretched" for shooting the deceased. This conclusion is reached by a process of inductive reasoning, there being nothing in the statement to warrant such a conclusion. Wharton's Criminal Evidence, 9th Ed., pp. 628, 542; Rice on Criminal Evidence, Vol. 3, § 306. In American and English Encyclopædia of Law, Vol. 3, page 495, § 18, we find the rule stated that: "A confession to be given in evidence must be of the offense charged in the indictment. It is not competent to give in evidence any confession or declaration of the prisoner of his having committed similar crimes upon other occasions, or of his general disposition to commit them." In no sense of the word can this statement of the accused be called a confession. He merely stated, "If my neck is stretched," etc. Stretched for what, and by whom?

Arthur F. Eggleston, State's Attorney, and *George A. Conant*, Assistant State's Attorney, for the State.

I. As to the declaration of the deceased, "I am shot; I shall die; O Lord, have mercy; Lord have mercy; I shall die."

This entire declaration was offered, and was clearly relevant, to prove that the deceased was under the sense of impending death, and as a predicate for the subsequent introduction of a dying declaration made to Mr. Horton. Mr. Kerr, in his work on the Law of Homicide, says (page 442) that the consciousness of approaching death may be proved "by the *direct language* of the decedent, or may be inferred

* * * from other circumstances of the case." 3 Russ. on Cr. (9th Ed.), 266, (side page); 1 Greenl. on Ev. (14th Ed.), 158; *Commonwealth* v. *Thompson*, 159 Mass., 56, 59 (1893); *Regina* v. *Howell*, 1 C. & K., 689.

But, if the words "I am shot" should be severed from the other language of the declaration for separate consideration, they were nevertheless admissible, and actually admitted, as a dying declaration. It is charged in the indictment that the deceased was shot by the prisoner. What ground, then, for disputing the relevancy of a fact alleged in the indictment, and denied by the prisoner's plea? The fact that Skinner was shot is not merely relevant and material to the issue, but directly in issue.

The declaration in question was none the less admissible because it was offered by the State as a dying declaration, to prove a fact in issue. Greenleaf on Evidence, Vol. 1, § 156; 3 Russ. on Cr., 267 (side page); 1 Whart. on Crim. L., § 670; Stev. Dig. Ev. (Chase's Ed.), 60; 1 Bish. Crim. Pro. (3d Ed.), § 1207; Kerr on Hom., §§ 412–415; *Pace* v. *Commonwealth*, 89 Ky., 204, 210; *State* v. *Saunders*, 14 Ore., 300; *Warren* v. *State*, 9 Tex. App., 619; *State* v. *Draper*, 65 Miss., 335; *Oliver* v. *State*, 17 Ala., 587.

II. This declaration was also admissible as part of the *res gestæ*. *Commonwealth* v. *McPike*, 3 Cush., 181; *Commonwealth* v. *Hackett*, 2 Allen, 136; *Lund* v. *Tyngsborough*, 9 Cush., 36; *Irby* v. *The State*, 25 Tex. App., 203; *Fulcher* v. *The State*, 28 id., 365.

III. As to the statement of the prisoner: "There is a little cur" (meaning one Whaples) "that owes me $47.50, and, if my neck is stretched, I suppose he thinks he will get rid of paying me." This declaration was relevant and material. It shows that the prisoner killed Skinner with malice and deliberation. Now this declaration of the accused was made within 30 hours after the homicide, and does not stand alone. It cannot be isolated, separated from the other facts of the case, and the other admissions of the prisoner; it belongs to a chain of confessions, all the same in form and substance, all pervaded with the same spirit of ill-will towards Skinner

and cold satisfaction over his death. They start from the pistol shot, and include the declaration in question. Alike in the main points of comparison, they bespeak a common origin.

The prisoner's sole defense was, that he was so intoxicated at the time of the homicide, as to be incapable of exercising the mental power of deliberation, of forming the specific intent to kill. This defense put in issue a mental condition, to wit, whether the prisoner had mind and capacity enough to enable him to judge of the nature, character and consequences of the act charged in the indictment, and that the commission of it would expose him to penalties. If he had, his defense would avail nothing, under the decisions of this court in *State* v. *Swift*, 57 Conn., 496, 510; *State* v. *Smith*, 49 id., 376, 381, 382; *State* v. *Johnson*, 41 id., 584, 588; 40 id., 136, 139, 142; *Commonwealth* v. *Trefethen*, 157 Mass., 180, 188; *State* v. *Hoyt*, 46 Conn., 330, 336; *State* v. *Alford*, 31 id., 40, 43; *Bartram* v. *Stone*, 31 id., 159, 161; *Barthelemy* v. *People*, 2 Hill, 248, 257, note b.

ANDREWS, C. J. In respect to the first reason of appeal we think there is no error. The declarations of the deceased to which Mrs. Page testified, were not only admissible as dying declarations, but were very clearly admissible because they tended to show that the deceased, at the time he made the declarations to which Mr. Horton testified, was in fact near death, as well as under a sense of impending dissolution. It was for this purpose, mainly, that the court admitted the testimony. Dying declarations are admissible only when it is shown to the satisfaction of the judge that the declarant was not only in actual danger of death, but had given up all hope of recovery at the time the declarations were made. Stephen's Digest of Evidence, Article 26; Best on Evidence, §§ 82, 505; 1 Greenleaf on Evidence, § 158; *State* v. *Swift*, 57 Conn., 496.

The other reason of appeal presents a somewhat different question. Whenever any person is on trial for a criminal offense, it is proper to show his conduct, as well as any declarations made by him subsequent to the alleged criminal

act, which may fairly be supposed to have been influenced by that act. The manner in which he conducted himself when accounts by others in respect to the subject were made in his hearing, may always be shown. If he should be in possession of, or should attempt to conceal, anything acquired by the crime, or should make false statements respecting himself, or as to his whereabouts at the time of the affair, these might be shown; because such conduct or such statements often tend to show a guilty connection by the accused with the crime charged. *Commonwealth* v. *Tolliver*, 119 Mass., 312; *Commonwealth* v. *Trefethen*, 157 Mass., 180; *State* v. *Williams*, 27 Vt., 724. The declarations of the accused to which the witnesses Burnham and Smith testified seem to us to fall within this rule.

There is another ground also upon which proof of these declarations was equally admissible. The appellant was on trial for the crime of murder in the first degree. As the homicide with which he was charged was not perpetrated by poison, or by lying in wait, or in committing or attempting to commit any of the crimes named in the statute, he could only be convicted of the crime charged by evidence which enabled the jury to find that it was a willful, deliberate and premeditated killing. A deliberate intent to take life is an essential ingredient of that offense, and the existence of such intent must be shown as a fact; and it must be shown that there was a specific intent to take life which was formed prior to the act of killing, so that the jury can say that that act was willful, deliberate and premeditated. *State* v. *Johnson*, 40 Conn., 136; *State* v. *Smith*, 49 id., 376.

The defense offered evidence and claimed to have proved that the accused at the time of the homicide was in such a state of mind from intoxication that he was incapable of deliberation. This evidence it was the duty of the jury to consider. Intoxication is admissible to be proved in such case, not as an excuse for crime or in mitigation of the punishment, but as tending to show that the accused, if guilty at all, is only guilty of a less offense than that named in the indictment. *The People* v. *Fish*, 125 N. Y., 136.

It is in this aspect of the case that the evidence of the witnesses Burnham and Smith becomes significant. It is stated in the finding that the accused told Mr. Moulton "that he had shot Skinner and hoped he would die." This could have been not more than a few minutes after the shooting, and while he must have been in the same condition of intoxication that he was at the time he fired the fatal shot. It also appears that Moulton said in reply to the accused, that "he might have to stretch hemp by the neck for it." Now the words which the accused made use of in speaking of Whaples, as related by these witnesses, repeated this expression of Moulton with singular fidelity. While the words are not literally the same, yet the idea—that of neck stretching—is precisely identical in both. The accused was then on his way from the county jail in Hartford, in the care of the officer, to his preliminary hearing upon the act he had committed the morning before. On the journey nothing had been said about the shooting of Skinner. There was nothing at that time to suggest "neck stretching" except his own memory. It was more than twenty-four hours after the homicide. He was not then intoxicated. If his recollection of what had taken place the previous morning within a very few minutes of the time he killed Skinner was so clear that he could repeat the very idea there used, and almost the identical words, it certainly tended to show—not that he might not have been intoxicated—but that he could not have been *so* intoxicated as to be incapable of deliberation and premeditation. It was a fact proper to be laid before the jury.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

JOHN B. RAY *vs.* GEORGE A. ISBELL.

Third Judicial District, Bridgeport, April Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

In an action to recover upon a *quantum meruit* for work done and materials furnished, the parties were at issue as to whether the whole job was to be done for a stated price, or whether that price included only a part of the work and materials. It appeared that a part of the negotiation for the work was had by the defendant with the plaintiff and a part with plaintiff's foreman. *Held*, that evidence of the foreman to the effect that his estimates, made at the request of the defendant, were confined to a part only of the work and materials, was admissible as a contemporaneous act, analogous to a written entry in the course of a business transaction, corroborating the plaintiff's own testimony, and also as independent evidence, since it formed a part of the transaction between the parties.

[Argued April 17th—decided May 16th, 1894.]

ACTION to recover for work and labor and materials furnished in the repair of a house; brought to the City Court of New Haven and tried to the jury before *Cable, J.*; verdict and judgment for the plaintiff and appeal by the defendant for alleged errors of the court in admitting evidence. *No error.*

The case is sufficiently stated in the opinion.

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

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

ANDREWS, C. J. The plaintiff is a plumber, and brought this action to recover the price of certain material furnished and plumbing work done by him on the "Royton House" in New Haven at the request of the defendant, the owner of the house. The plaintiff claimed to recover what the material and the service were reasonably worth. The defendant insisted that the whole, service and material, was to be furnished for the agreed price of one hundred dollars.

This was the only controversy at the trial. The case was tried to the jury, who returned a verdict for the plaintiff to recover the amount of two hundred forty-six and 17-100 dollars. The defendant appealed to this court. He assigned three reasons of appeal, only one of which is material:—"That the court erred in admitting the testimony of Alfred Murphy, the plaintiff's foreman."

The plaintiff in his bill of particulars had charged:—"1892, Oct. 4. To contract price for closet, $12.00;" and under the same date:—"To contract price for two new closets, $65.00;" followed by other charges at later dates amounting to the whole sum which he claimed to recover. The defendant contended that all the work mentioned in the bill of particulars under the date of Oct. 4th, 1892, was done under a contract, and the amount to be paid therefor was thirty-five dollars; and that all the work and material mentioned in said bill of particulars after said date of Oct. 4th, 1892, were furnished under a special contract by which the plaintiff agreed to do all said work and furnish all said material for sixty-five dollars.

The plaintiff offered evidence tending to show that all the work done by him on the said "Royton House" had been ordered to be done by the board of health of said city, and to be done to the satisfaction of the plumbing inspector, and under his supervision; that the defendant had requested Alfred Murphy, the plaintiff's foreman, and acting for the plaintiff, to put the plumbing in said house in a condition satisfactory to the said plumbing inspector. And in support of his claim concerning the items in his bill subsequent to Oct. 4th, 1892, he offered evidence to prove that after certain repairs had been made on said house, the plumbing inspector had said the work was not satisfactory and that new closets would have to be put in; that the defendant was notified of this by the said Murphy; and that a contract was made by him, the plaintiff, with the defendant under the following circumstances:—On a certain day the plaintiff called at the defendant's office and in a talk with him gave the price for which he would do the job, and the defendant

replied that he would let him know in a day or two, and in a day or two thereafter the defendant told him, the plaintiff, to go ahead and do the job. The plaintiff claimed that the talk was about the two new closets and their appurtenances only. To support this claim the plaintiff introduced the said Murphy as a witness, who testified that he repaired the old closets in said house; that the plumbing inspector had said they would not do, and that new closets would have to be put in; that he informed the defendant of what the inspector had said, and that the defendant then asked him how much it would cost to put in the new closets; that after the interview he made estimates on the job, and that he put in the two new closets by order of the plaintiff. He was then asked:—"What did you figure on after Isbell had told you to find out what it would cost to put in the new closets?" He answered:—"On two new closets and the fixtures thereto only."

To this question and answer the defendant objected, but the court admitted them. We think this evidence was admissible. Murphy was the plaintiff's agent. In making the estimate he was acting for the plaintiff. The defendant in requesting him to make the estimate was dealing with him as the plaintiff's agent. The estimate made by Murphy was the same as if made by the plaintiff himself. In this matter the act of Murphy was the act of the plaintiff. It was a contemporaneous act analogous to a written entry made in the course of a business transaction to which the plaintiff might refer to corroborate his own testimony, and which would be admissible as independent evidence because it formed a part of the transaction between the parties. *Bridgewater* v. *Roxbury*, 54 Conn., 213; *Platt* v. *Hubinger*, 58 id., 153; 1 Greenleaf on Evidence, § 120.

As to the other reasons of appeal we think there is no error. Indeed the ground upon which they were predicated is pretty much taken away by the finding of facts. They were not much relied on in this court.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

EDMUND R. CLYMA *vs.* WILLIAM KENNEDY ET AL.

Third Judicial District, Bridgeport, April Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

A pecuniary interest in a cause disqualifies a judge from acting judicially in it. But an incidental interest, not pecuniary, does not of itself constitute such disqualification.

The plaintiff published in a newspaper a libel concerning a certain justice of the peace. A grand juror preferred a complaint to such justice alleging said publication and praying that the plaintiff be arrested and dealt with according to law. The justice issued a warrant, the plaintiff was brought before him and tried, found guilty and sentenced. *Held* that the justice was not legally disqualified.

A judgment good in part and erroneous in part will, on appeal, be set aside only as to the erroneous part, if the two parts can be separated. In such a case, if the error is only in the assessment of damages, the new trial will be confined to a reassessment of the damages.

[Argued April 17th—decided May 16th, 1894.]

ACTION to recover damages for an alleged false imprisonment; brought to the District Court of Waterbury and tried to the court, *Root, J.;* facts found and judgment rendered for the plaintiff against all the defendants, except Clancy, and appeal by them for alleged errors in the rulings of the court. *Error and new trial granted as to damages only.*

All the defendants reside in the town of Naugatuck in New Haven county. William Kennedy is an attorney at law; Thomas Clancy is a grand juror; William Brophy is a constable, and John H. Tuttle is a justice of the peace for said county. The case shows that Kennedy, at the request and by the procurement of Clancy, drew up a complaint charging therein the present plaintiff with a criminal libel in causing to be published in a newspaper certain false, malicious and scandalous statement of and concerning the said John H. Tuttle, in respect to his conduct in the trial of a civil cause brought before and tried by him as a justice of the peace for said county. The complaint was signed by Clancy as a grand juror of said town, and was preferred to the said John H. Tuttle as a justice of the peace. Thereupon the

said Tuttle issued a warrant signed by himself commanding the arrest of the plaintiff and that he be brought before him to be dealt with as the law directs. Brophy served the said warrant, arrested the plaintiff and took him before said Tuttle. There was a trial by said Tuttle, the plaintiff was found guilty, and sentenced to pay a fine of $7.00 and costs, and to stand committed until the same was paid. Thereafter a mittimus was drawn up by Kennedy at the request of Tuttle, which was signed by him and was served by Brophy; and by the command thereof, the plaintiff was arrested and committed to the common jail in New Haven, and there imprisoned one night and two days, when he was released on *habeas corpus* proceedings.

The material portions of the complaint against the plaintiff were as follows:—

"To John H. Tuttle, Esq., Justice of the Peace for said County, residing in said town, comes Thomas Clancy, a Grand Juror for said town, and on his oath of office information makes that at said town of Naugatuck, to wit: on the 29th day of November, A. D. 1890, one E. R. Clyma, now of the town of Naugatuck, unlawfully and wickedly contriving and intending to bring into hatred and contempt the administration of justice in the said town of Naugatuck, and unlawfully intending to villify and defame John H. Tuttle, Esq., on the 29th day of November, A. D. 1890, then and now a Justice of the Peace of New Haven County, living in said Naugatuck, and acting as Justice of the Peace in said town of Naugatuck in the trial of cases, unlawfully and maliciously did print and publish and cause to be printed and published in a certain public newspaper called "The Naugatuck Citizen" a certain false, scandalous and malicious defamatory libel of and concerning the said John H. Tuttle, Esq., Justice of the Peace as aforesaid, while acting in a judicial capacity, which said libel is as follows, that is to say: meaning John H. Tuttle, Esq., Justice of the Peace as mentioned aforesaid." Then follows a verbatim copy of the newspaper article which it is unnecessary to repeat here. The complaint concluded as follows:—"To the great scandal

of the said John H. Tuttle, Esq., in contempt of law, of the judicial authority and against the peace, of evil example. Wherefore the Grand Juror aforesaid prays process, etc.

The judgment of justice Tuttle so far as material was as follows:—"At a Justice Court holden, etc., E. R. Clyma, of said Naugatuck, was brought before said Court by virtue of a warrant issued by me, a Justice of the Peace for said County, in said town, upon the complaint of Thomas Clancy, a Grand Juror for said town of Naugatuck, charged with the crime of criminal libel against the said John H. Tuttle, while acting in a judicial capacity, as per complaint on file fully appears.

"And said cause was continued till December 2d, A. D. 1890, when the said Clyma, before said Court being required to make answer to said complaint, refused to plead.

"Thereupon said Court ordered that a plea of not guilty, in manner and form as in said complaint is alleged, be entered.

"Said Court having inquired into the facts stated in said complaint finds that the said E. R. Clyma is guilty of the crime of criminal libel, in manner and form as is therein alleged, and it is thereupon ordered and considered by said Court that the said E. R. Clyma pay a fine of $7.00, and pay the costs of this prosecution, taxed at $15.25, and stand committed until judgment be performed.

"And the said E. R. Clyma neglecting and refusing to comply with the judgment of said Court he was ordered to be committed to the common jail in New Haven, in and for the County of New Haven, until he shall be discharged by due course of law.

"And the said E. R. Clyma by virtue of a mittimus by me issued was committed accordingly.

"JOHN H. TUTTLE,

"*Justice of the Peace.*"

The first clause of the mittimus, after the direction to the sheriff, etc., recited that:—"Whereas, E. R. Clyma was this day brought before the subscriber, a justice of the peace for said county, by virtue of a warrant issued upon the com-

plaint of Thomas Clancy, a grand juror for said town, and found guilty of contempt of court, as follows." The language of the complaint was then set out including the alleged libelous publication, and the mittimus continued as follows:—

"Whereupon, it was considered and ordered by me, that the said pay a fine of $7.00 to the treasury of the town of Naugatuck, and pay the costs of prosecution, taxed at $15.00 and 25 cents, and to stand committed to the common gaol in the County of and town of till this sentence be performed.

"And also that be imprisoned in the common gaol in the town of in the county of for the period of days from the date hereof.

"Whereof execution remains to be done.

"And whereas the said E. R. Clyma now before me, neglects and refuses to comply with and perform said sentence;

"These are therefore by authority of the State of Connecticut to command you to take and convey the said E. R. Clyma to the common gaol in the town of New Haven, in the County of New Haven, and him deliver to the keeper thereof, and leave with him this warrant; and the said keeper is hereby commanded to receive said E. R. Clyma into his custody, within said gaol, and him confine and imprison within the same said safely keep till shall pay said of $7.00 dollars, and said sum of $15.00 dollars and 25 cents cost, or be otherwise discharged by order of law.

"Dated at Naugatuck, the 2d day of December, 1890.

"JOHN H. TUTTLE,

"*Justice of the Peace.*"

The District Court made a finding of facts and thereon adjudged:—"That the justice had no jurisdiction to try the said action by reason of his interest, it appearing that the libel charged was against the said Tuttle." And also:—"That the said mittimus did not properly state the cause of commitment."

There are three reasons of appeal, the first and third of

which do not state specifically any error. The second one is that: "The court erred in holding that the said justice had no jurisdiction of the cause by reason of interest."

George E. Terry, for the appellants (defendants).

I. Justice Tuttle was not disqualified to try the criminal prosecution for libel.

The rules of the common law do not apply in any matter regulated by statute, especially so if they are in conflict, in such case the statute prevails. It is unnecessary to cite authorities in support of so plain a proposition.

The jurisdiction conferred upon a justice of the peace appears in the following statutes: Revision of 1821, p. 147, § 34; Revision of 1838, p. 129, § 34; p. 171, § 122; Revision of 1849, p. 219, § 71; p. 253, § 147; Compilation of 1854, p. 296, § 71; p. 343, § 174; Revision of 1866, p. 240, § 106; p. 281, § 215; Revision of 1875, p. 532, § 1; Revision of 1888, § 687. This latter statute confers jurisdiction in all cases when the penalty prescribed does not exceed a certain amount, without exception, and standing by itself makes no exception of any kind.

Under this section there would be no disqualification by reason of interest or for any other cause, and it would wholly abolish any common law disqualification which might have previously existed.

The statutes have from time to time provided disqualification for certain causes specified. The Revision of 1821 contains no statutory disqualification. In 1838, one of the common law disqualifications was removed. Revision of 1838, p. 141, § 1; Revision of 1849, p. 219, § 72; Revision of 1866, p. 240, § 107; Revision of 1875, p. 60, §§ 3, 4; Public Acts, 1882, chap. 16; Public Acts, 1884, chap. 39; Public Acts, 1887, chap. 50; Revision of 1888, §§ 672, 675. Gradually the statutes enlarged the disqualifications beyond the common law, and finally the statute was enacted which abrogated all common law disqualifications in criminal proceedings, leaving only the statutory provisions.

The question now to be considered is whether the fact that

the justice held jurisdiction of a complaint for libel, where the party libeled was himself, is made by statute a disqualification. If it is not, he had full jurisdiction under § 687.

The only provision under § 675 that can be claimed to apply is the clause: "Or when he may receive a direct pecuniary benefit by the determination thereof."

But the fact that the fee of $2.00 might in a measure depend upon whether he held jurisdiction or dismissed the case for want of jurisdiction, is too trivial for any court to take cognizance of.

In *Commonwealth* v. *Keenan*, 97 Mass., 589, the justice was also clerk of the Superior Court and entitled to fees as such clerk; on trial of a criminal case he found the prisoner guilty, appeal was taken to the Superior Court, motion made for ruling that justice had no jurisdiction, and prisoner could not be held on appeal; this was refused and exceptions taken. The court says: "The fees which the law gives for the performance of an official duty in relation to civil or criminal proceedings do not constitute an interest in the proceedings." So far as we are able to find, no case goes further than to hold that when the justice has a direct pecuniary interest in the penalty, forfeiture, or amount to be recovered, then he is disqualified.

II. If the justice had jurisdiction then all his acts done were legal and none of the defendants are liable. Nor is the defendant Kennedy liable if the justice had no jurisdiction. His acts were those only of an amanuensis or clerk, in the first instance, filling up the complaint for and at the request of Clancy, the grand juror. The court below finds that Clancy was justified in making his complaint, and not liable; clearly, then, Kennedy, who performed the clerical work, could not be liable. Nor is the defendant Kennedy liable, even though the justice had no jurisdiction, for appearing for the State as an attorney and introducing testimony in support of the complaint of the grand juror, which the court finds he was justified in making; or for acting as an amanuensis in filling up the mittimus at the request of the justice.

Henry C. Baldwin and *Robert E. Hall*, for the appellee (plaintiff.)

I. The ruling that the justice was disqualified to try the prosecution for libel, was correct.

If a judge have not the qualification which jurors must have to sit on a case, his action is absolutely void. 1 Salk., 396; Cooley on Torts, page 421; *Hall* v. *Thayer*, 105 Mass., 219; *Davis* v. *Allen*, 11 Pick., 466.

A judge is disqualified when he is the complainant or moving party in a case. Cooley on Torts, 421; *Rex* v. *Great Yarmouth*, 6 B. & C., 646; *Rex* v. *Hoseason*, 14 East, 605; *Regina* v. *Justices of Great Yarmouth*, 8 Law Rep., 2 B. Div., 525; *Van Dyke* v. *Trempeleau Ins. Co.*, 39 Wis., 390; *Dyer* v. *Smith*, 12 Conn., 389.

A commitment on a complaint barred by the statute of limitations was holden void and the justice liable. *Vaughn* v. *Congdon*, 56 Vt., 111. Where a judge of probate acted as such, approving a will which he had drawn, it was holden that the whole proceeding was void. *Moses* v. *Julien*, 45 N. H., 52; same case, 84 Am. Dec., 114, and note. When a judge or justice is disqualified to act, his acts therein are absolutely void. *Keeler* v. *Stead*, 56 Conn., 505. Where a judge of probate and commissioners appointed on an estate were disqualified by being taxpayers in a town that presented a claim, held that the whole proceeding was void and was not made valid by the withdrawal of the claim of the town before the report had been accepted by the court of probate. *Hawley* v. *Baldwin*, 19 Conn., 584. A justice of the peace who is the owner of premises trespassed upon cannot convict or act as justice in such case. *Schroder* v. *Ehlers*, 31 N. J. Law, 44. Even the legislature has no power to make a man judge in his own case. *Ibid.*

II. The court has found that the mittimus did not properly state the cause of contempt; and, although this decision of the court is unappealed from, still, if the court will consider it, we think that they will find the decision of the court in that respect also, without error.

The mittimus issued in said prosecution contains no recitation of any judgment upon said complaint.

A mittimus must set out the cause of commitment, and where it issues upon final process should show what the judgment of the court is. 15 Am. & Eng. Encyclopædia of Law, 693, and cases cited. If the court shall inspect the whole record, regardless of any assignments of error, to ascertain whether or no the judgment of the court is based upon sufficient premises, it will be found that there are other causes for rendering a judgment for the plaintiff in this case, even though not the specific ones upon which the court based its action. Under the common law, a justice of the peace has no power to punish for contempts, any acts except those committed in the presence of the court while in session. *Dean's Case*, 1 Croke, 689; 2 Salk., 698; *Regina* v. *Langley*, 2 Ld. Raym., 1029; *Queen* v. *Lafoy*, Law Reports, 8 Q. B., 134; *People* v. *Webster*, 3 Parker (N. Y.), 503; *State* v. *Applegate*, 2 McCord (S. C.), 110; *Rhinehart* v. *Lance*, 14 Vroom, 311; *S. C.*, 39 American Reports, 591. Neither a justice, nor any other court has jurisdiction to punish for contempt publications made while there was no case pending in court and long after its adjournment. *Queen* v. *Lafoy*, 8 Q. B., 134; *In re Cheeseman*, 6 Atlantic Reporter, 513; *Oregon* v. *Kaiser*, Lawyers' Reports Annotated, vol. 8, page 584; *State* v. *Anderson*, 40 Iowa, 207; *Dunn* v. *State*, 6 id., 245; *Cheadle* v. *State*, 11 North Eastern Reporter, 426; *In re Jesse Cooper*, 32 Vermont, 252–265; *Storey* v. *People*, 79 Ill., 45; Rapalje on Contempt, sec. 56, page 70. The court not having jurisdiction, the whole proceeding is void, and an action of trespass lies against all parties concerned therein. *Holden* v. *Cornish*, 8 Conn., 380; *Tracy* v. *Williams*, 4 id., 113; *Allen* v. *Gray*, 11 id., 95.

ANDREWS, C. J. We think the District Court erred in holding that justice Tuttle was disqualified to hear and determine the grand juror complaint for libel, by reason of interest. It was doubtless indecorous and unwise for him to try the case, because it exposed him to the appearance of

seeking to revenge an insult to himself. There is no statute by the terms of which he was forbidden to act in the case; and we are not able to see that he had any such interest in it as made his action void. He was not a party to the cause. He had no pecuniary interest in the subject-matter of the action. It was not his own cause. He was not the moving party. He was not liable for costs, nor was it possible for him to recover anything by any judgment which might be rendered. The event of the proceeding could not bring him gain, nor subject him to any loss. The fees which he might receive do not constitute an interest in the proceedings. *Commonwealth* v. *Keenan*, 97 Mass., 589. Justice Tuttle had no interest in the cause other than such as he had as a citizen—as one of the public.

The interest in a cause which of itself disqualifies a judge from acting therein is a pecuniary one—similar to the interest which a party in a civil action has in it. All the cases ancient and recent are to this effect. *Dr. Bonham's Case*, 8 Coke, *226, was an action brought by Thomas Bonham against George Turner and others for a false imprisonment. The defendants pleaded in bar the charter of the "College or Commonalty of the Faculty of Physic in London," by which it appeared that certain persons called the censors of that college, might summon before themselves any one who practiced physic, for examination, and on finding such person to be unskillful in such practice, impose a fine upon him, one moiety of which was to be paid to themselves; and alleged that the plaintiff had been so summoned and examined, and had been ordered to pay a fine of one hundred shillings, and that for the nonpayment of fine he had been arrested and imprisoned. Upon this plea the case says, p. *234:—"The censors cannot be judges, ministers and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture; *quia aliquis non debet esse Judex in propriâ causâ, imo iniquum est aliquem suæ rei esse judicem.*" *Day* v. *Savadge*, Hobart's Rep., 85, 87, is of the same kind. These are the oldest cases found in the books. Recent ones are *Fletcher*

v. *Peck*, 6 Cranch, 87, 133; *Taylor* v. *Porter*, 4 Hill (N. Y.), 146; *Doolittle* v. *Clark*, 47 Conn., 316; *Parrott* v. *Housatonic R. R. Co.*, 47 id., 575; *Dyer* v. *Smith*, 12 id., 384. The case most strongly pressed by the plaintiff was *Schroder* v. *Ehlers*, 31 N. J. Law, 44. A statute of that State provided that certain trespasses to lands might be punished by a fine which went to the owner of the land. The defendant in the case was a justice of the peace and was the owner of the land on which such a trespass had been committed by the plaintiff. The defendant had arrested the plaintiff, brought him before himself and sentenced him to pay a fine. The case was a writ of error to reverse that judgment. In the course of the opinion the court says:—"The entry upon the land in question was in no wise a breach of the peace, but a simple tort, of a civil character. Its punishment appertained not to criminal but to civil jurisdiction." The judgment was reversed on the ground that the defendant was disqualified by interest from acting in the case. Cooley on Torts, 421. The cases of *Rex* v. *Great Yarmouth*, 6 B. & C., 646, and *Rex* v. *Hoseason*, 14 East, 605, cited by the plaintiff, are cases which, though criminal in form, are really civil in effect. In each of these cases the magistrate who tried it was the complainant, or moving party in the prosecution.

The complaint in the case before us alleges, as ground upon which damages were demanded, the arrest of the plaintiff on the warrant signed by justice Tuttle, and the detention before him, as well as the arrest on the mittimus, the being taken to jail, and the imprisonment there. We have shown that justice Tuttle had authority to issue the warrant, and to try the case and to pass sentence.

The District Court also found that the mittimus issued by justice Tuttle did not properly state the cause of commitment. From this finding there is no appeal. We think the mittimus was void, and that the plaintiff is entitled to recover damages for whatever was done under it. All the acts done by the defendants, or any of them, subsequent to the passing of the sentence, were unlawful, viz.: the arrest

of the plaintiff on the mittimus, the taking him to and the imprisonment in the common jail. For these acts the plaintiff is rightfully entitled to demand and recover damages. It is altogether probable that the damages awarded by the trial court were assessed mainly for the acts last named. But there is no rule furnished in the record by which this court can determine. If there was such a rule there would be no need of a new trial in the case. This court could in such a case set aside that part of the judgment which was erroneous and affirm that part which was not erroneous. *Stebbins* v. *Waterhouse*, 58 Conn., 375; *Sherwood* v. *Sherwood*, 32 id., 15.

It appears that Kennedy drew up the mittimus. He participated in the unlawful acts for which the plaintiff is entitled to recover damages. The judgment properly went against him.

There must be a new trial, but it should be limited solely to the assessment of damages.

There is error and a new trial is granted. The new trial to extend only to the assessment of damages as herein indicated.

In this opinion the other judges concurred.

H. Sidney Hayden, Exr., *vs.* Connecticut Hospital for the Insane et al.

First Judicial District, Hartford, May Term, 1894. Andrews, C. J., Torrance, Fenn, Baldwin and Hamersley, Js.

A testatrix gave the residue of her estate to her executor in trust "for the purpose of establishing free bed or beds at the Hospital for Insane at Middletown for female patients, to be known as the 'Mary L. Townsend Fund,' the rents and income in each year to be used under the direction of the executor and his successor in office, appointed by the court of probate." In a suit to determine the construction and validity of this bequest it was *held*:—

1. That the trust thereby created was valid

2. That it was the duty of the testamentary trustee to hold the fund and apply the rents and income to the support of such female patients in the Connecticut Hospital for the Insane as he might designate.
3. That if he should at any time be unable to make suitable arrangements with the hospital trustees, then during such inability he should use the rents and income for the benefit of insane females possessing the requirements for admission to said hospital under the then existing laws of this State, in such ways as might be open to him and, as closely as practicable, in accord with the particular manner indicated by the testatrix.

[Argued May 1st—decided May 16th, 1894.]

SUIT to determine the construction and validity of the residuary clause in the will of Mary L. Townsend; brought to the Superior Court in Hartford County and reserved by the court, *George W. Wheeler, J.*, upon the facts stated in the complaint and admitted to be true, for the advice of this court. *The trust created by the residuary clause held valid.*

The case is sufficiently stated in the opinion.*

Charles R. Ingersoll and *Edward H. Rogers*, for the executor.

Henry E. Burton, for the Connecticut Hospital for the Insane and its trustees.

Charles E. Perkins, for the heirs at law.

FENN, J. This case reserves for our advice the question as to the validity and proper construction of the residuary clause in the last will of Mary L. Townsend, late of New Haven, deceased.

* This case was originally argued at the January term, 1894. No appearance having then been entered for the trustees of the Connecticut Hospital for the Insane, the court, being of the opinion that there ought to be an appearance in behalf of the charity intended to be created in the will, passed the following order:—ORDERED, that said cause be continued, and that the clerk of this court be directed to furnish the State's Attorney for Middlesex county with a copy of the record, and to notify him that the court, at its next term to be holden in the first judicial district, will hear any argument which he may think proper to submit touching the questions reserved for the advice of this court in said cause. R.

The language is as follows:—"All the rest, residue, and remainder of my estate I give and bequeath to my executor for the following purposes: All the furniture and wearing apparel is to be disposed of by him agreeable to a memorandum to be furnished him. Money and real estate is for the purpose of establishing free bed or beds at the Hospital for Insane at Middletown for female patients, to be known as the 'Mary L. Townsend Fund,' the rents and income in each year to be used under the direction of the executor and his successor in office, appointed by the Court of Probate of New Haven." The question relates to the aforesaid "money and real estate."

Counsel for the executor say that the clear purpose of the testatrix was to establish a free bed or beds at the Hospital for Insane at Middletown, for female patients, and "that this purpose contemplates or requires some promise or undertaking by the Trustees of the Hospital. In effect, a trust is thereby imposed upon the Hospital accepting the benefit of the devise, to provide in some manner for the free maintenance of such female patients in the future as may be entitled to the bounty of the testatrix." The executor further says that before bringing this suit, he was unable to ascertain whether such trustees would undertake any such trust or obligation, and was advised that it was doubtful whether if they were so disposed, they possessed the requisite power. No argument was made by counsel for the executor in support of the validity of the devise.

Counsel for the heirs of Mary L. Townsend claim that the devise is void. It is said that the hospital for the insane is purely a State institution, established by the State, for its own purposes; that the powers and duties of its trustees are prescribed by statute, and well defined; that it has power to receive devises and gifts, but that no question arises here as to a devise to it, and hence this is immaterial. It is denied that the trustees have power to make any agreement to establish free beds. It is further said to be doubtful who should occupy such beds if it were possible to establish them; that is, whether under the will the trustees or the executor

is to say; and finally, that the doctrine of *cy pres* cannot be invoked to aid the devise, since, it is asserted, such devise is solely and specifically for the establishment of free beds, which cannot be effected, and no other purpose is suggested in any way.

Counsel for the hospital agree with those for the executor, and for the heirs, that the intent of the testatrix was to establish at least one free bed at the hospital, and insist that it is within the power of the trustees to receive gifts for the use of the hospital, to be employed for such purpose. The claim in their behalf is this:—"The executor cannot require of these Trustees, as a condition of their receiving at his hands the gift of the testatrix, any contract or agreement which he may dictate. These Trustees are not to make any contract with him, or he with them. His entire duty is to deliver to them what the testatrix gave to them, and her will and the laws of the State will fix their obligations without any interference on his part."

It is further said that what the testatrix gave the executor was merely the privilege, as her personal representative, of choosing, should he see fit, from those admitted or eligible to be admitted to the hospital, under the statutes regulating admissions thereto, a patient or patients for the free bed or beds.

It will be seen from the foregoing statement of the contention that the question for our determination divides itself into two parts. We are first to decide what was the intention of the testatrix; and then, whether such intention can be effectuated.

It seems to us that it was the purpose of the testatrix to vest the legal title to the residuary fund in the person named as her executor, to hold in trust, (he and those appointed in his place, or to succeed him, in the administration of such trust by the court of probate,) to receive the rents and income and to cause the same to be used to maintain a free bed or beds for female patients at the Hospital for the Insane at Middletown; that such executor, as the trustee originally selected by the testatrix, and his successors appointed as

aforesaid, are designated to take, and are competent to take, such trust estate; that the beneficiaries intended are insane persons admitted, or entitled under the law of this State to be admitted, to the Connecticut Hospital for the Insane at Middletown; that the plain, general intent is to assist that class of most unfortunate individuals; and that the special, particular, subordinate intent was to benefit them by establishing free beds for them at the hospital named. Is, then, this provision valid? Clearly, as we think, it is.

Presumably the trustee under the will can make such arrangements from time to time with the trustees of the hospital as will enable him to carry out the special purpose of the testatrix, in the particular manner which she has indicated. Presumably also, if such hospital trustees entertain just doubts as to their authority in the premises, the General Assembly will confer any needed extension of authority requisite for that purpose.

But failing even this, the general purpose of the testatrix to benefit insane female persons—a class sufficiently defined, with power in the trustee to select the individuals therefrom—by the use of the annual income of the Mary L. Townsend fund, is valid and must prevail; and it will be and remain the duty of those selected to administer the trust, to use the rents and income in each year for such purpose, in such ways as may be open, according most nearly to that designated by the testatrix. To hold this is in no sense to invoke the English sign manual crown prerogative doctrine of *cy pres*. It is only to apply the judicial principle of construction to ascertain and effectuate intention, (Perry on Trusts, §§ 727–8,) as this court has done in previous cases. *Birchard* v. *Scott*, 39 Conn., 63, 68; *Coit* v. *Comstock*, 51 id., 352, 377, 384; *Tappan's Appeal*, 52 id., 412; *Goodrich's Appeal*, 57 id., 275.

The effect of this rule of construction as applied to charitable trusts, is clearly and tersely stated in *Russell* v. *Allen*, 107 U. S., 163. "The instruments creating them should be so construed as to give them effect if possible, and to carry out the general intention of the donor, when clearly mani-

fested, even if the particular form or manner pointed out by him cannot be followed." This, as was said in *Philadelphia* v. *Girard's Heirs*, 45 Pa. St., 9, "is the doctrine of approximation, and is not at all confined to the administration of charities, but is applicable to all devises and contracts wherein the future is provided for, and it is an essential element of equity jurisprudence." Perry on Trusts, §§ 376, 728.

The Superior Court is advised that the trust created by the residuary clause of the will is valid; that it is the duty of the trustee under said will to hold the principal of the Mary L. Townsend fund, and to apply the rents and income thereof, in each year, to the support in the Connecticut Hospital for the Insane, of such female patients as he may designate; and should he be unable from time to time, or at any time, to make suitable arrangements with the trustees of said hospital, then while said inability continues, to use said rents and income, annually, for the benefit of insane females possessing the requisites to entitle them, under the then existing laws of this State, to admission into such hospital, in such ways as may be open to him, corresponding as nearly as practicable to the particular manner indicated by the testatrix.

In this opinion the other judges concurred.

EDWARD V. CAULFIELD *vs.* WILLIAM HERMANN.

First Judicial District, Hartford, May Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

A written agreement which appears to be a complete and final statement of the whole transaction between the parties, when read in the light of the circumstances attending its execution, will be presumed, in the absence of fraud, accident, or mistake, to contain all the terms and conditions actually agreed upon by the parties.

In such case parol evidence of other terms and conditions, claimed to have been agreed upon prior to the execution of the written instrument, is

inadmissible; especially so, where such terms and conditions are inconsistent with the provisions of the written instrument.

[Argued May 4th—decided May 16th, 1894.]

ACTION to recover rent for the use of an organ alleged to have been hired by the defendant; brought to the Court of Common Pleas in Hartford County and tried to the court, *Calhoun, J.;* facts found and judgment rendered for the plaintiff and appeal by the defendant for an alleged error of the court in excluding evidence. *No error.*

The case is sufficiently stated in the opinion.

Sidney E. Clarke, for the appellant (defendant).

Joseph L. Barbour, for the appellee (plaintiff).

FENN, J. On February 18th, 1892, the plaintiff delivered an organ to the defendant, on trial, for the use of the defendant's child. On March 1st, 1892, the plaintiff and defendant made and executed a written agreement respecting said organ, of lease and conditional sale, upon which agreement the present suit was brought. The agreement stated that the value of the instrument was $120; that it was leased for eleven months, for ten dollars in advance and ten dollars per month thereafter, and that when the said sum of $120 was paid as provided, with interest, it should be sold and delivered with an effectual bill of sale to the defendant. The advance payment was made, but the defendant neglected to make any further payment. Accordingly, about June 16th, 1892, the plaintiff went to the defendant's home to retake the organ, but the defendant would not allow the plaintiff to take the organ away until he had repaid the defendant said sum of $10.00, paid in advance, as aforesaid.

On the trial the defendant offered parol evidence by which he claimed that he intended to prove that before the execution of said agreement by the defendant, the plaintiff promised to send a music teacher to instruct the defendant's child, and that he would take back the organ and repay the $10.00, if the defendant's child proved not old enough or

large enough to operate the instrument; and that the plaintiff did afterwards send a teacher to instruct the child to play said organ, who decided that the child was too young to operate the instrument, and that the plaintiff had due notice thereof and was requested by the defendant to take away the organ and repay the $10.00, which the plaintiff declined to do. To this evidence the plaintiff objected, as varying and inconsistent with the written contract, and said evidence was therefore excluded by the court.

As based upon this ruling, the defendant's sole reason of appeal is as follows:—"The defendant offered the evidence of several witnesses under the claim that the written instrument was executed in pursuance, but only in partial execution, of a preceding valid contract. The court erred in excluding such evidence."

It will be seen that the defendant makes no contest with the familiar, elementary rule that parol evidence, in the absence of fraud, accident, or mistake, is inadmissible to contradict or vary the terms of a written agreement. The sole claim is that the rule of exclusion has no application in cases where the writing is not the contract itself, but only an instrument given in part execution of such contract. *Collins* v. *Tillou*, 26 Conn., 368; *Hall* v. *Solomon*, 61 id., 482; *Averill* v. *Sawyer*, 62 id., 560, 568, 569. It is said, and the cases cited abundantly support the assertion, that where this is the case the parol contract may itself be proved.

The only question, therefore, for us to consider, is the correct application of an undoubted rule in this present instance. In order to decide this, as the rule itself lacks somewhat in precision, it will be advisable in the first place to determine as definitely as possible its scope and proper limitations. Stephen, in his Digest of the Law of Evidence, Art. 90, after stating the general rule of exclusion of parol evidence in case of a written agreement, gives certain exceptions, the second of which is as follows:—"The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the Court infers that the parties

did not intend the document to be a complete and final statement of the whole of the transaction between them." Assuming this language to be correct, we may say that in *Averill* v. *Sawyer*, *supra*, it could not be inferred that the parties did not intend the writing to be a full and final statement of the whole of the transaction, but the contrary was presumed. And in the present case the same may be said; and in addition, that the oral contract claimed is inconsistent with the writing.

The third exception stated by Stephen is:—"The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant, or disposition of property." This exception has been recognized in our State in *McFarland* v. *Sikes*, 54 Conn., 250, and other cases there cited. But it cannot, nor is it claimed that it can, avail the defendant. Parol evidence in such cases merely goes to prove that the written contract never went into force as a binding obligation. In the case now under consideration it had so gone into force, and there had been part performance on both sides, delivery by the plaintiff, advance payment by the defendant.

In Greenleaf's Ev., § 284*a*, it is said:—"Nor does the rule," excluding parol evidence, "apply in cases where the original contract was verbal and entire, and a part only of it was reduced to writing." This was commented upon in *Eighmie* v. *Taylor*, 98 N. Y., 294, where the court said that such language is capable, if too broadly and loosely interpreted, of working utter destruction of the general rule excluding oral evidence; for, say the court, "if we may go outside of the instrument to prove that there was a stipulation not contained in it, and so that only part of the contract was put in writing, and then because of that fact, enforce the oral stipulation, there will be little of value left in the rule itself." The court added:—"The writings which are protected from the effect of contemporaneous oral stipulations are those containing the terms of a contract between the parties, and designed to be the repository and evidence of their final intentions. If upon inspection and study of the writing, read,

it may be, in the light of surrounding circumstances in order to its proper understanding and interpretation, it appears to contain the engagement of the parties, and to define the object and measure the extent of such engagement, it constitutes the contract between them, and is presumed to contain the whole of that contract."

We do not think our own court in holding parol evidence admissible under the exception to the rule of exclusion as above stated, has ever gone beyond the limits of the doctrine of *Eighmie* v. *Taylor*. Nor are we now disposed to do so. It follows that the parol evidence offered was clearly inadmissible, and properly excluded. Not only did the writing appear to contain the engagement of the parties and constitute presumably the whole contract, but the additional stipulation proposed to be shown conflicted with the instrument and was inconsistent with it.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

The State v. Samuel W. Rome.

Third Judicial District, Bridgeport, April Term, 1894. Andrews, C. J., Torrance, Fenn, Baldwin and F. B. Hall, Js.

There is no legal distinction, so far as the weight and effect which should be given it is concerned, between direct and circumstantial evidence. If the evidence in a criminal case, whether direct or circumstantial, satisfies the jury of the guilt of the accused beyond a reasonable doubt, they should convict, otherwise they should acquit. An attempt in a charge to the jury to classify evidence as direct and circumstantial, making different rules applicable to each, would only serve to confuse the minds of the jury and divert their attention from the main issue.

In criminal cases each fact or circumstance essential to the conclusion of guilt must be proved by direct evidence beyond a reasonable doubt; and the inferences drawn from the facts or circumstances so proved should be natural and logical ones, the result of an open, visible connection and relation between the fact or circumstance proved and the inference drawn therefrom.

The trial court charged the jury that in order to convict the accused the proof ought to be not only consistent with his guilt, but inconsistent with any other rational conclusion. *Held* that the accused had no cause of complaint because the court did not go further and charge that every single circumstance forming a part of the combination of circumstances relied on for conviction must be proved beyond a reasonable doubt, and that the jury must not only be satisfied from a consideration of the circumstances both singly and as a whole that defendant's guilt had been proven beyond a reasonable doubt, but that from each and all of the circumstances no reasonable hypothesis could be adduced consistent with innocence.

A charge to the jury is not argumentative and obnoxious to the spirit of § 1630 of the General Statutes merely because the court in its discretion comments upon the evidence and presents to the jury such pertinent and relevant questions, subordinate to the main question, as properly arose from the evidence and such as the jury ought to consider and decide, if the court does not direct the jury how to find their verdict or state its opinion as to what the verdict should be.

The charge of the court in this case reviewed and *held* not to violate the rule that instructions should not direct the attention of the jury too prominently to the testimony of one side, and ignore or pass lightly over the testimony of the other side deserving equal attention.

[Argued April 19th—decided May 29th, 1894.]

CRIMINAL PROSECUTION for arson in the Superior Court in Fairfield County; tried to the jury before *Hamersley, J.*, The accused was convicted and sentenced, and appealed for alleged errors of the court in its charge to the jury. *No error.*

The case is sufficiently stated in the opinion.

J. C. Chamberlain and *Nathaniel W. Bishop* for the appellant (the accused).

Samuel Fessenden, State's Attorney, for the State.

FENN, J. The appellant was tried and convicted in the Superior Court for Fairfield County upon an information charging him with the crime of arson.

Upon the trial the State offered no direct evidence of the act of setting fire to the building burned, but relied upon facts and circumstances claimed to have been proved to establish the guilt of the accused. The reasons of appeal,

seven in number, relate solely to alleged errors in the charge of the court to the jury. These reasons present in effect three claims: *First*, to use the language of the appellant's brief, that the court erred in giving to the jury instructions which "amount, substantially, to the following proposition of law: that for the practical purposes of the trial, there is no difference between what is called circumstantial and what is called direct evidence; that the same weight is to be given to each; and that the same criterion of sufficiency is applied to both alike." *Second*, that the court gave instructions to the jury which were "argumentative, and well calculated to give to the jury a strong impression that the court was of the opinion that the accused was guilty of the crime charged, and was endeavoring to bring them to his views." *Third*, that the charge as a whole is erroneous, "because it contains only the claims of the State and the facts upon which it relied for conviction, and completely passes over the evidence offered by the defense to disprove these."

These claims we will consider in the order above indicated. The material language of the charge in reference to what is called circumstantial evidence is as follows:—"It is sometimes said that circumstantial evidence is not as satisfactory as direct evidence. As a general proposition, that is not true. Indeed, all evidence is essentially circumstantial evidence; that is, evidence in every case consists in the proof of certain circumstances from which you are asked, in the exercise of your reason and common sense, to infer the guilt of the accused.

"By direct evidence is usually meant the testimony of a witness who claims to have seen the commission of the act charged as crime. But such testimony is merely one circumstance from which you are asked to infer the guilt of the accused; and such circumstance, by itself, is rarely sufficient to justify a conviction. To illustrate: a witness testifies that he saw the accused strike a match from which the fire charged as a crime resulted. Such testimony, by itself alone, by no means satisfactorily proves the crime. To constitute the crime the act must be accompanied by a criminal intent;

and that intent can only be inferred from the circumstances surrounding the act. But the commission of the act cannot safely be inferred from the bare statement of the witness; he says he saw the accused, that is he saw a person so resembling the accused that he believed the accused to be that person. Now whether you can safely infer the fact that the accused is the person, depends upon the circumstances to be proved, such as the condition of the light, the distance, familiarity with the appearance of the accused, and accuracy of sight. And the fact to be inferred from the statement of the witness depends also upon other circumstances, such as the capacity of the witness to remember accurately, his truthfulness, bias or interest in the result, and the like.

"You can readily see that in every case the inference of guilt must be drawn from circumstances, and that all satisfactory proof must depend on circumstantial evidence. And I am sure that your own common sense will lead you to a conclusion that when a satisfactory inference of guilt is based mainly on the one circumstance of the testimony of one eye witness, there is more danger of error—more danger of mistake—than when an equally satisfactory inference of guilt is based upon several important circumstances showing the guilt of the accused, and supported by the concurrent testimony of many witnesses.

"The truth is, gentlemen, that for the practical purposes of the trial there is no difference between what is called circumstantial evidence and what is called direct evidence. Any attempt to so classify evidence serves only to confuse and to divert the minds of the jury from the single legitimate question: 'Does the evidence in this case satisfy you of the guilt of the accused, beyond any reasonable doubt?'

"It is sometimes said that in cases of circumstantial evidence every reasonable hypothesis consistent with the innocence of the accused must be excluded; and it is said by the author from whom I am asked to read: 'Where a criminal charge is to be proved by circumstantial evidence, the proof ought to be not only consistent with the person's guilt, but inconsistent with any other rational conclusion.' This

is true, but no more true of so-called circumstantial evidence than of so-called direct evidence. In any case, if the evidence is consistent with a reasonable hypothesis or supposition that the prisoner is innocent, there must be a reasonable doubt of his guilt; and the meaning of this phrase is substantially the same as that of the more usual and safe formula—in order to convict the accused in any case the jury must be satisfied of his guilt, by the evidence, beyond any reasonble doubt."

The claim on the part of the appellant is, that the courts and text writers have recognized a marked distinction between the two classes of evidence, direct and circumstantial, and that while the absolute necessity of convicting on circumstantial evidence is strongly urged for the safety of society, in view of the secrecy of many crimes, yet that juries have been and should be warned that this class of evidence must be weighed with greater caution than direct. The real point of the appellant's contention appears to be this: That it was not enough to tell the jury, as they were most distinctly told by the court, that "the proof ought to be not only consistent with the person's guilt, but inconsistent with any other rational conclusion," an extreme statement, except as limited by the court to be equivalent to proof beyond reasonable doubt, but which it is said applies only to the circumstances taken as a whole, and in aggregation; but that the jury should have been further instructed that "every single circumstance forming a part of the whole combination of circumstances relied on for conviction, must be proved beyond a reasonable doubt;" and that the jury "should not only be satisfied from a consideration of the circumstances, both singly and as a whole, that guilt has been proven beyond a reasonable doubt, but that from each and all of the circumstances no reasonable hypothesis can be adduced consistent with innocence."

This, it seems to us, is requiring the statement to the jury of a rule which would indeed well serve the purpose of a defendant in a criminal case, since it would in all probability be misunderstood, and certainly if understood and followed,

would render conviction, in any case where so-called circumstantial evidence had alone been introduced, impossible.

Conclusions of jurors in all cases result from inferences. The circumstances on which the inferences are based, in all cases must be directly proved, and in criminal cases each fact, the existence of which is necessary to the conclusion of the guilt of the accused, must be so proved beyond a reasonable doubt. Every fact from which an inference necessary to a conviction is drawn, being so proved by direct evidence and beyond a reasonable doubt, the inference based on any fact so proved should be a clear, strong, natural, logical one, the result of an open and visible connection and relation between the fact proved and the matter inferred. Suppose the question is whether A stole a horse, and a witness deposes that A was found in possession of the horse the night after it was missed; the evidence on this point is the direct statement of the witness. If the jury have any reasonable doubt as to the correctness of that statement they ought not to regard it as introducing any fact into the case. If they have none, the fact is introduced, and the inference or presumption resulting from such possession by the accused arises.

In order to render any circumstantial evidence admissible, two elements are essential. It must be a direct statement, and of a relevant fact. The court is the sole judge of the question concerning its admissibility. The evidence being admitted, the jury is the sole judge of its weight. They are not bound to believe any witness, or to be convinced by any given amount of circumstantial evidence. Doubtless such circumstantial evidence varies greatly in its probative force, but there is and can be no rule of law requiring the jury to convict on the stronger evidence or to acquit on the weaker. Stephen's General View, Criminal Law, pp. 249, 251, 273, 274; *State* v. *Watkins*, 9 Conn., 47, 54; *State* v. *Green*, 35 Conn., 203. The whole subject must be left entirely in the hands of the jury. So long as they are informed as to their duty not to draw any inference whatever from any fact not sufficiently proved, the inferences which they

may draw from those which are proved, if such as the evidence tends to prove, must be left to their exclusive and free judgment; with which it is neither the duty nor the privilege of the court to interfere. The conclusion reached by Wharton in his work on Criminal Evidence, 9th ed., § 20, after elaborate discussion, appears to us to be correct. He says:—"There is therefore, no ground for the distinction between circumstantial and direct evidence. All evidence admitted by the court is to be considered by the jury in making up their verdict; and their duty is to acquit, if on such evidence there is reasonable doubt of the defendant's guilt; if otherwise, to convict." The charge of the court below upon the point now under consideration, taken as a whole, seems to us to be clear, substantially correct, and certainly sufficiently favorable to the accused. The conclusion reached, that for the practical purposes of a trial, an attempt in instructions to juries to classify evidence as direct and circumstantial, making different rules as applicable to each, would serve "only to confuse and divert the minds of the jury from the single legitimate question—'does the evidence in this case satisfy you of the guilt of the accused, beyond any reasonable doubt'"—is sound.

In the next place, it is claimed, as we have seen, that the instructions given were argumentative and calculated to give the jury an impression that the court believed the accused guilty. All the reasons of appeal from the second to the sixth inclusive, relate to this ground. We will quote such language from the charge as is most strongly relied upon. The fire occurred in a building in which the appellant was running a saloon. The property was insured in the appellant's name and for his benefit; but it was claimed by the defendant, that under a certain agreement he could not have received any benefit from such insurance. The court, considering motive, said:—"The practical question, however, is, did Rome, an illiterate man, believe, and act on his belief, that the burning of this property would prove of advantage to him? Does the evidence leave in your minds any reasonable doubt that Rome actually believed that in case of

the destruction of the property by fire, the money received on the insurance policy taken out by himself, in his own name, would come to him, and prove of pecuniary benefit to himself?" Again, referring to a claim made by the State and denied by the defendant, that there had been preparation for a fire in the saloon in a space back of the ice box, the defendant claiming the articles found there were merely rubbish accumulated in the ordinary care of the saloon, the court said:—"This fact is of great importance in the case of the State. You have heard the testimony and saw the articles taken from the place, and you will say whether you have any reasonable doubt that the articles were specially arranged and freshly saturated with oil, on the evening of the fire, as described by the officers." Other language used by the court, complained of by the appellant, is as follows:—"In view of all the evidence, in view of the facts actually proved, can you reasonably suppose these preparations could have been made without the co-operation of the accused? The conduct of the accused, after the fire, may have a bearing on this question. He arrives in time to see his property saved from destruction. Does he show any signs of rejoicing? When the officer points to the alleged preparations in the cellar, and says, 'this looks bad for you,' does he show any indignation at the unjust charge? Is his silence the stupidity of intoxication, or is it the silence of conscious guilt? Of course, it is possible that some person other than Rome, and without his knowledge, set fire to the building. There is a possibility of innocence in the case of every person convicted of crime. That is not the question. The real question is, is the possibility such as to justify a reasonable doubt? Is the claim suggested a reasonable one, or is it a mere fanciful doubt, only within the range of remote possibilities?"

General Statutes, § 1630, provides that:—"The court shall state its opinion to the jury upon all questions of law arising in the trial of a criminal cause, and shall submit to their consideration both the law and the facts, without any direction how to find their verdict." It is said that this

charge is not in accordance with that express statutory provision. It is not claimed that there was a direct violation of its letter, but it is asserted that its spirit was plainly disregarded. Is this so? The court neither directed the jury how to find their verdict, nor stated its opinion concerning what that verdict should be. Had such expressions of opinion been given, it would be as consistent to say that they would not constitute a direction, as to say that the statement of the opinion which the statute requires, as to the law, is not such direction. But the court did not do this. The most that can be correctly asserted is that it presented to the jury such pertinent and relevant questions, subordinate to the main question, as properly arose from the evidence, and which the jury ought to consider and decide, in a way somewhat suggestive of the manner in which the court itself would be likely to consider and decide them; which is precisely like in kind, though falling far short in degree, to that which courts constantly do while passing upon the relevancy of offered evidence, as tending to prove by inference a further fact, which the jury is nevertheless, in the last analysis, to be left entirely free and unbiased to say it does or does not tend to prove. To say that a court must in no case present evidence to a jury in such a way as by any possibility to indicate its own impression as to its significance, as tending to establish any point in the case, is to lay down a seemingly impossible rule for judicial conduct. A rule which, if possible to observe, could have no other reason for existence than such a distrust of the intelligence and independence of juries as is inconsistent with any respect for such a form of trial; which leaves a judge, useful perhaps as a presiding officer, but powerless as a minister of justice—shorn of his attributes, without function, colorless, useless.

If it be true, and we hold it is, as stated by this court in *State* v. *Watkins*, 9 Conn., 54, that "confidence must be put in the jury," and "that they exercised their jurisdiction soundly is a presumption of law," then there can be no sense in preventing a court from rendering assistance to them, on the ground stated in the brief in behalf of the appellant, in

which it is said that such expressions as those used by the trial court affect the verdict, because "the average juror" is "ever too eager to throw the burden of responsibility of convicting the accused upon the court, and ever too alert to catch any indication of opinion in regard to these facts on the part of the trial judge, that will enable him to bring his verdict in conformity therewith."

Doubtless the law, as quoted by the appellant from Thompson on Trials, is correct: "The jurors are the sole judges of the credibility of the witnesses, the weight of evidence, and the facts that it establishes; and any form of charge, the effect whereof is to take these from them, or to obstruct the free exercise of their judgment in passing upon these, is erroneous." The trial court, however, took nothing from the jury, but instead, by its charge presented to them the true questions for their consideration, thus assisting but not obstructing them in the free exercise of their judgment.

That the conduct of the trial court in this respect was entirely proper, is abundantly shown by previous decisions of this court. In *State* v. *Duffy*, 57 Conn., 529, it was said: "The defendant further complains of the charge of the court, but a careful examination of it shows clearly that no just exception can be taken to it. Comments of the court in its charge upon the evidence in the case are within the proper province of the court, so long as they do not amount to a direction or advice as to how the jury shall decide the matter to which the evidence relates." In *Setchel* v. *Keigwin*, 57 Conn., 478, the language of STORRS, J., in *First Baptist Church* v. *Rouse*, 21 Conn., 167, is repeated and approved: "It is competent in all cases, and in some highly expedient, for the court not only to discuss but to express its opinion upon the weight of the evidence, without however directing the jury how to find the facts; and this is a right necessarily limited only by its own discretion." This last was a civil case, but the statute, General Statutes, § 1101, applicable to such cases, is identical with General Statutes, § 1630, in its language prohibiting the court from instructing the jury how to find upon questions of fact. See also, *Morehouse* v. *Rem-*

son, 59 Conn., 392. If a court had no such power as is above indicated, it would be absurd and a contradiction to say that it was the duty of a court to do things which involve its exercise; as in *State* v. *Williamson*, 42 Conn., 261, to caution the jury as to the weight to be given to the evidence of an accomplice, and advise them, as a general rule, that it is safer to acquit where there is no corroboration of such evidence. It may be said that this is in favor of the accused. But the statutory prohibition would be violated by a court that should direct a jury to return a verdict of not guilty, as truly as by one that directed a verdict of guilty. This, too, must be held to be the intent of the statute as long as it is considered that the public have rights, as well as those accused of violation of the laws enacted for its protection and welfare. We need only add generally, for examples are infinite, that in every instance in which a court states to a jury a so-called presumption, whether it be styled one of fact, or one of law; whether it be of "aquatic habits in an animal found with webbed feet," or "of a malicious intent to kill, from the deliberate use of a deadly weapon," though doing what a consensus of judicial opinion everywhere holds to be a duty, it is also doing that which is contrary to our statute, if it is capable of the construction for which the appellant contends.

Concerning the remaining ground of alleged error, which relates to the charge as a whole, it is impossible, without reciting substantially the entire charge, to say more (nor is it necessary), than that we fully agree with the appellant in the rule which he states, quoting from Thompson on Trials, § 2330, that:—"Instructions should not be so drawn as to direct the attention of the jury too prominently to the facts in the testimony on one side of the case, while sinking out of view, or passing lightly over portions of the testimony on the other side which deserve equal attention. If the jury are misled thereby, judgment will be reversed." But we are unable, from a careful examination of the record, to see that the court below violated such rule.

There is no error.

In this opinion the other judges concurred.

ALBERT M. WOOSTER *vs.* FREDERICK C. MULLINS ET AL.

Third Judicial District, Bridgeport, April Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

A city charter provided for the designation at one and the same time of two official newspapers by the common council, and that no member of either branch should vote for more than one newspaper: it further provided that the common council should consist of the mayor, the board of aldermen, and the board of councilmen, and that the mayor should preside at the meetings of the board of aldermen and "have a casting vote only in case of a tie." The board of councilmen having designated two newspapers, the matter came up for action in the board of aldermen, and a vote was taken resulting in four ballots for each of these and four for a third newspaper, whereupon the mayor ruled that the vote was a tie; and dissolved it by voting for the two newspapers designated by the board of councilmen. *Held* that his action was proper, and that the newspapers so selected were lawfully designated. (Two judges dissenting.)

[Argued April 20th—decided May 29th, 1894.]

SUIT for an injunction to restrain the defendants from making payments to two official newspapers of the city of Bridgeport; brought to the Court of Common Pleas in Fairfield County and tried to the court, *Curtis, J.*, upon demurrer to the complaint; demurrer sustained and judgment rendered for the defendants, and appeal by the plaintiff for alleged errors in the rulings of the court. *No error.*

The charter of the city of Bridgeport requires the publication of the official proceedings of the Common Council in two of its daily newspapers, to be designated by the Common Council, and provides that "in making such designation, no member of either branch of said Common Council shall vote for more than one of said newspapers."

By sec. 7 of the charter, "the Common Council of said city shall consist of two separate bodies, namely: The Board of Aldermen composed of all the aldermen, and the Board of Councilmen composed of all the councilmen, which bodies shall meet separately except as hereinafter provided. The mayor shall preside at the meetings of the Board of Aldermen, and shall have a casting vote only in case of a tie."

Sec. 24 declares that "the Mayor, Board of Aldermen and Board of Councilmen of said city shall constitute and be a body known as the Common Council of the city of Bridgeport."

By sec. 26 it is provided that "all elections to any office or position within the gift of the Common Council, or within the gift of either board thereof, shall be made by ballot, and the person receiving a plurality of ballots cast shall be elected, and in all cases of a tie the mayor shall have the casting vote. * * * Whenever said Common Council, acting by its separate boards, shall have failed, or shall fail for any cause, to complete an election as aforesaid, it shall immediately thereafter be the duty of the mayor to call a joint convention of all members of said boards in the chambers of the councilmen, and such joint convention, the mayor presiding, shall proceed to such election, and in case of a tie the mayor shall have a casting vote."

On May 1st, 1893, the Board of Councilmen designated the Bridgeport Evening Farmer and the Bridgeport Evening Post as the two newspapers in which to make the official publications. On May 3d, this action was communicated to the Board of Aldermen, which consisted of twelve members, exclusive of the mayor. They proceeded to a ballot, upon which four votes were cast for the Bridgeport Evening Farmer, four for the Bridgeport Evening Post, and four for the Bridgeport Evening News. The mayor thereupon announced that it was a tie vote, and gave his casting vote for the two which had been named by the Board of Councilmen. Subsequently, the mayor executed, in behalf of the city, contracts with each of the two newspapers thus designated, and they proceeded to make the official publications.

The plaintiff brought this action as an elector and taxpayer of the city against the city and its clerk and treasurer, for an injunction against the payment of the bills rendered by the proprietors of the two newspapers for work done under these contracts.

Stiles Judson, Jr., for the appellant (plaintiff).

Daniel Davenport, for the appellees (defendants).

BALDWIN, J. The main question in this case is whether the vote of the aldermen was a tie vote within the meaning of the city charter.

The word *tie*, as applied to an appointment by election, signifies a state of equality between two or more competitors for the same position. Century Dictionary, *in verb.* The provision that two newspapers shall be designated by a vote in which no member of either branch of the Common Council shall vote for more than one, evidently contemplates the selection of one, and permits the selection of both, by the action of less than a majority of each board. "In elections in which the principle of plurality is adopted, the candidate who has the highest number of votes is elected, although he may have received but a small part of the whole; and, where several persons are voted for at the same time for the same office, those (not exceeding the number to be chosen) who have respectively the highest number of votes are elected. But, where two or more persons have equal numbers of votes, there is no election, and a new trial must take place, unless some other mode of determining the question is provided by law. In some of the States, where the votes are thus divided, the returning officers are authorized to decide between them, and to return which they please; but, unless thus expressly authorized by law, the returning officers have no casting vote." Cushing on the Law and Practice of Legislative Assemblies, § 118. "By a casting vote is meant one which is given when the assembly is equally divided, and when the question pending is in such a situation that a vote more on either side will cast the preponderance on that side, and decide the question accordingly; and not merely a vote which, if given on one side, will produce an equal division of the assembly, and thereby prevent the other side from prevailing. This principle extends to cases of election by ballot. In these cases the speaker does not vote by ballot, but waits until the votes are reported, and then votes orally, not for whom he pleases, but for one, or

for the requisite number, of the candidates voted for, who have received an equal number of votes. This principle applies equally in those cases where a less number than a majority is permitted, or a greater is required, to decide a question in the affirmative. Thus, if one third only is permitted or required, and the assembly, on a division, stands exactly one third to two thirds, there is then occasion for the giving of a casting vote, because the presiding officer can then, by giving his vote, decide the question either way." *Ibid.*, § 306.

An apt illustration of this method of procedure, as applied to cases of more than two contestants for the same position, is afforded by the practice of balloting for select committees in the British House of Commons. "The majority necessary to an election is not an absolute majority of all the persons voting, but only a plurality; and if there are several persons, who all have the same number of votes, and the whole would make more than the number fixed for the committee, the speaker gives a casting vote for the election of the requisite number." Cushing's Law and Practice of Legislative Assemblies, § 1882.

A tie is that which is tied. It is a knot; and when provision is made, in regulating legislative procedure, for a casting vote by the presiding officer in case of a tie, the object is to allow him to untie this knot. The charter of Bridgeport evidently looks to the designation of the two official newspapers by one and the same vote, each member of the respective boards voting for one alone. The mayor is a component part of the Common Council, but he is not a member of either of the two branches or boards, which with him constitute that body. He is therefore not forbidden, in the selection of the official newspapers, to vote for more than one of these. The ballot taken by the aldermen, resulting in four votes for each of three different newspapers presented the case of a tie, and to dissolve it the mayor's casting vote was properly and necessarily given for two of them; for the charter required the simultaneous designation of two. It

follows that the demurrer to the complaint was properly sustained.

There is no error in the judgment appealed from.

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

LYNDE HARRISON, ADMINISTRATOR, v. CHARLES MOORE ET AL.

First Judicial District, Hartford, May Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

By his will *S* divided the residue of his estate, real and personal, into three equal parts, one of which he gave to his widow during her life, with power to sell any real estate distributed to her and the right to the income of the avails of such sale, with remainder in fee to his two daughters; another third he gave to his daughter *M* and her children in fee. The remaining one third he gave to his daughter *D*, providing for its investment until she became twenty-three, "when she shall come in full possession of the same." The personal property comprising the residue was formally distributed, one third each to the widow and the two daughters, but the shares set to the widow and to *D* in fact remained in the hands of the executor. Subsequently *D* died before reaching the age of twenty-three, leaving a will by which all her interest in her father's estate was given in fee to her mother. *Held*:—

1. That the property given *D* vested in her in right at the death of the testator, and passed to her mother under *D's* will.
2. That the widow's life estate in one half of the third part set out to her under the will of *S*, merged in the fee of the same property given her by the will of *D*.
3. That the administrator *de bonis non* on the estate of *S*, with the will annexed, should pay over to the executrix of *D's* will all the personal property distributed to *D* under the will of *S*, and also one half of the personal property distributed to the widow of *S* for life.
4. That if any realty set to the widow should be sold by her under the power given her by the will of *S*, she would be entitled to one half of the avails thereof in fee.

[Submitted on briefs May 1st—decided May 29th, 1894.]

SUIT for the construction of the will of Henry M. Stannard of Westbrook, deceased; brought to the Superior Court in

Middlesex County and reserved by that court, *Phelps, J.*, upon the facts stated in the complaint, for the advice of this court.

The case is fully stated in the opinion.

Lynde Harrison, for the plaintiff.

No counsel appeared for the respondents.

ANDREWS, C. J. Henry M. Stannard late of Westbrook, died on the —— day of ———, 1875, leaving a will duly executed to pass real estate and personal property, in which, after some minor specific legacies, he provided as follows:—

"*Eleventh.* I give, devise and bequeath to my beloved wife, Mary Tyler Stannard, the use, improvement, and income of one-third of all the remainder of my real estate, personal, and of every description whatsoever, for her sole use and benefit, for and during her natural life; and if it shall be deemed best to sell my real estate that may be set out to her, she may do so, and convey the same by deed, provided the avails thereof be invested or loaned on real estate security to double the amount, and she to receive the interest during her natural life; and at her death I give, devise, and bequeath to my children and to their heirs respectively, to be divided in equal shares between them.

"*Twelfth.* I give and bequeath and devise to my daughter Mary Isabel, wife of Charles A. Moore, one-third of all the rest and residue of my estate both real and personal, to hold the same to her and her heirs, to her sole and separate use, free from the influence or control of her husband, at her death to go immediately to her children, if she have children at that time. It is my will and direction that in case of her husband's surviving her (my said daughter Mary Isabel) he shall not have any use or improvement of the same; but that it be for her children.

"*Thirteenth.* I give, devise and bequeath to my daughter Dora Elouise Stannard one-third of all the residue and remainder of all my estate, real, personal and of every de-

scription, the same to be loaned on real estate security free and unencumbered with double the amount loaned, said estate to be situated in the State of Connecticut, in Connecticut bank stock, United States bonds, or Connecticut State bonds, so to remain until she is twenty-three (23) years old, when she shall come in full possession of the same, but the income as far as necessary may be used for her education and support."

Proceedings in the settlement of Mr. Stannard's estate were duly had in the probate court for the district of Westbrook. All administration accounts were presented and allowed; and a distribution was ordered. On the 9th day of May, 1878, the distributors made their return to the said court, in which it was stated that they had distributed to Mrs. Mary T. Stannard in personal property $9,010.95; to Mary Isabel Moore $9,317.07; and to Dora Elouise Stannard $9,010.95. The administrators delivered to Mrs. Moore the amount so distributed to her. But the greater part of the amount distributed to Mrs. Stannard, and the whole of that distributed to Dora Elouise Stannard, was not delivered to them but remained in the hands of the administrators. The plaintiff is the administrator *de bonis non* of the estate of said Henry M. Stannard with the will annexed, and said funds amounting to $——— are now in his hands for the purpose of accounting and settlement with the proper parties entitled thereto.

At the time Mr. Stannard died, his daughter Dora Elouise Stannard was between fifteen and sixteen years of age. She died on the 17th day of June, 1880, being then of the age of twenty years and eleven months. She had made a will on the 8th day of August, 1877, when she was of the age of eighteen years. So much of which as is essential is as follows: "*First:* I give, devise and bequeath to my mother, Mary T. Stannard, all my estate, both real and personal, including all the interest I may have in the estate of my late father, Henry M. Stannard, whether the same be undistributed, in remainder, or otherwise, to be and remain hers in fee simple, provided, my said mother shall not die intestate

before the settlement and distribution of my estate." * * * "*Fourth:* I appoint my mother, Mary T. Stannard, the executrix of this will."

This will of Dora Elouise Stannard was duly proved and approved by the court of probate in the said district of Westbrook; and Mrs. Mary T. Stannard, therein named as the executrix, duly qualified and has proceeded with a partial settlement of the estate.

The complaint avers that certain questions have arisen and various claims have been made by the parties interested as to the construction, validity and legal effect of certain of the provisions, bequests and trusts contained in said will of Henry M. Stannard, and the effect of said will of Dora Elouise Stannard, among which are the following: First, whether under the will of Henry M. Stannard, Dora Elouise Stannard had the power to dispose by will of that portion of the estate of Henry M. Stannard, which was ordered to be distributed to her but could not be delivered to her until she should arrive at the age of twenty-three years. Second, whether Dora Elouise Stannard could dispose by will of her interest in that personal or real property of which her mother had the life use, during the lifetime of her mother. Third, whether under the wills of Henry M. Stannard and of Dora Elouise Stannard one half of the estate distributed to the life use of Mary T. Stannard has become the estate in fee simple of Mary T. Stannard. Fourth, whether the plaintiff as administrator has the power and right to deliver to the executrix of Dora Elouise Stannard all the personal property which he has received and which has been ordered to be distributed to Dora Elouise Stannard, but was never in fact delivered to her or to her executrix. Fifth, whether the plaintiff as administrator of the estate of Henry M. Stannard has the right to deliver to Mary T. Stannard, to be held by her in fee simple, all of the personal estate distributed to the life use of said Mary T. Stannard, except one half of the same. Sixth, whether if any real estate is sold under the provisions of the eleventh section of the will, one half of the avails may be distributed to Mary T. Stan-

nard in fee. These questions are reserved for the advice of this court.

The language of the thirteenth section of the will of Henry M. Stannard makes it quite certain that his intention was to give his daughter Dora Elouise one third of the rest and residue of his estate absolutely; to vest in right at his death, but the possession and enjoyment to be postponed until she should reach the age of twenty-three years. In the absence of a clear manifestation of an intent on the part of a testator to postpone to some time after his death the vesting of the title of his estate in his children, the nearest objects of his love and bounty, the law prefers and presumes he intended it should vest at the moment when the will should become operative. *Johnes* v. *Beers*, 57 Conn., 295; *Lepard* v. *Skinner*, 58 id., 329; *Platt* v. *Platt*, 42 id., 330; *Jacobs* v. *Bradley*, 36 id., 365; Jarman on Wills, chap. 25. The language of the eleventh section of Mr. Stannard's will manifests the same intention that his said daughter, Dora Elouise, should take a vested interest in one half the remainder of the property, the use, improvement and income of which was devised in said section to his wife, Mary T. Stannard.

The will of Dora Elouise Stannard was made on the 8th day of August, 1877, when she was eighteen years of age. By the statute then and ever since in force, she was competent at that time to make a valid will. Revision of 1875, p. 368, § 1; General Statutes, 1888, § 537. And any testator may by will dispose of any property or estate, or any interest in any estate or property, in which or to which he has any sort of a transferable right. We think the first and second questions should be answered in the affirmative.

By the eleventh section of Mr. Stannard's will, his wife, Mary T. Stannard, was made tenant for her own life in one third of the rest and residue of his estate, with a remainder over in fee in equal shares to his two daughters. A limitation of this kind may be created by will in personalty as well as in real estate. *Dodge* v. *Griggs*, 2 Day, 28; *Taber* v. *Packwood*, id., 52; *Hudson* v. *Wadsworth*, 8 Conn., 361;

French v. *Hatch*, 28 N. H., 331, 352; *Westcott* v. *Cady*, 5 John. Ch., 334. By the will of her daughter Dora, Mrs. Stannard has now become herself the tenant in fee in one half of the remainder so created. As to that half the life estate is merged in the fee. "When a less estate and a greater limited subsequent to it, coincide and meet in one and the same person without any intermediate estate, the less is immediately annihilated, or in the law phraseology, is said to be merged, that is sunk or drowned in the greater; or to express the same thing in other words, the greater estate is accelerated so as to become at once an estate in possession." Broom & Hadley's Com., Vol. I., p. 630. See *Rockwell* v. *Swift*, 59 Conn., 289, a case analogous. Also, *Shelton* v. *Hadlock*, 62 Conn., 155; *Landers* v. *Dell*, 61 id., 189. The third question must also be answered in the affirmative.

What we have already said disposes of the fourth and fifth questions. It follows that each of them is to be answered in the affirmative.

By the eleventh section of Mr. Stannard's will, Mrs. Stannard was authorized to sell and convey any of the real estate which might be set to her under the provisions of that section. If she should do so the avails should undoubtedly be treated as any other personal property included in the third of the rest and residue set out to her. One half of such avails would belong to her in fee by virtue of the will of her daughter Dora. The sixth question is therefore to be answered in the affirmative.

The Superior Court is advised that each of the questions propounded in the complaint should be answered in the affirmative.

In this opinion the other judges concurred.

ALEXANDER FOWLES AND WIFE *vs.* EVERETT B. ALLEN.

First Judicial District, Hartford, May Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

An attorney, with whom a claim against the defendant for taking wood had been placed for settlement, wrote to the defendant that he could now settle by paying $10.00 for the wood and $5.00 for his charges. *Held* that this letter was an offer of compromise, and inadmissible in evidence upon the part of the defendant to reduce the damages claimed by the plaintiff, where it appeared that prior negotiations, though unavailing, had been commenced by the parties, and that the defendant had been referred for settlement to such attorney.

[Argued May 2d—decided May 29th, 1894.]

ACTION for trespass on lands of the plaintiffs, and cutting and carrying away wood therefrom to the value of $50.00; brought to the Court of Common Pleas for Hartford County, and tried to the jury, before *Walsh, J.* The damages alleged were $100. The plaintiffs got a verdict of $48.50, and the defendant appealed for an alleged error of the court in excluding evidence. *No error.*

The parties were adjoining proprietors, and the defendant claimed that he had entered and removed the wood under a license from a former proprietor of the plaintiffs' land, who had cut it before conveying to the plaintiffs, and reserved the right to remove it, in the deed to the latter. The plaintiffs claimed that the wood was cut after the conveyance was made.

Evidence was introduced at the trial showing that as soon as the plaintiffs discovered that their wood had been removed they demanded payment for it from the defendant, and that he refused to settle for it, whereupon they told him that they should leave the claim with their attorney for settlement; that afterwards the defendant came to them and offered to settle the claim, but they referred him to their attorney, stating that it was now in his hands for settlement; and that the defendant then went to the attorney, and was told by him

that he would have a surveyor run the line between the lands of the parties, and, upon getting his report, would let the defendant know for what sum the claim could be settled.

On cross-examination of one of the plaintiffs, the defendant offered in evidence, to affect the damages, a letter sent him by the attorney, after getting the surveyor's report. The material part of the letter was as follows: "The survey has been made, and you can now settle the matter by coming to my house any evening, Tuesday evening preferred, and paying $10.00 for the wood and $5.00 for my charges."

Objection was made and sustained to the introduction of this letter, on the ground that it was an offer of compromise; and its exclusion was the reason of appeal.

Charles H. Briscoe and *George B. Fowler*, for the appellant (defendant).

J. Warren Johnson, for the appellees (plaintiffs).

BALDWIN, J. There was evidence before the jury that the plaintiffs' attorney had been authorized by them to settle their claim, and that they had referred the defendant to him for that purpose. The letter of the attorney was therefore admissible if one of a similar tenor from them would have been.

The defendant had refused to pay for the wood before the attorney was retained, and had afterwards offered to settle, in conversation both with the plaintiffs and with him. It was in the course of these negotiations that the letter was written. It does not purport to state the quantity or value of the wood taken, but only that the survey had been made, and that a settlement could now be effected by paying the writer $10.00 for the wood, and $5.00 for his services. The latter sum was certainly, in the eye of the law, no part of the damages sustained by the plaintiffs, and the former is not declared to be the amount of their loss. The letter was a mere offer to accept $15.00 in satisfaction of the plaintiffs' demand, and as such was properly excluded as an offer of

compromise. *Stranahan* v. *East Haddam*, 11 Conn., 507, 518; *Broschart* v. *Tuttle*, 59 id., 1, 23. The question is a very different one from that which would have been presented had the letter stated that the wood in question was worth only $10.00. *Howard Insurance Co.* v. *Hope Mutual Insurance Co.*, 22 Conn., 394, 403; *Loomis* v. *New York, New Haven & Hartford R. R. Co.*, 159 Mass., 39, 34 Northeastern Reporter, 82.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

Daniel B. Coe, Executor, Appeal from Probate.

First Judicial District, Hartford, May Term, 1894. Andrews, C. J., Torrance, Fenn, Baldwin and Hamersley, Js.

If a husband who is entitled by statute (General Statutes, § 2792) to the use for his life of all the personal property of his wife, sees fit to accept the provisions of her will which gave him but a life estate in the "rest and residue" after the payment, within six months of her decease, of certain legacies, he is bound by such election; and if he, as executor, voluntarily pays such legacies in accordance with the terms of the will, he cannot thereafter be authorized by any court to sell the remaindermen's interest in the estate to replace the amount thus voluntarily relinquished in satisfaction of such legacies.

An appeal from probate was taken by the appellant in his capacity as executor, but the reasons of appeal in the Superior Court were signed by him both as an individual and as executor. The appeal to this court was also taken by him in both capacities. *Held* that this was an exceptional and unusual course of procedure, and the consideration of the case by this court must not be regarded as a precedent for like procedure in the future.

[Argued May 16th—decided May 29th, 1894.]

Appeal from two orders and decrees of the Court of Probate for the District of Middletown, taken to the Superior Court in Middlesex County and tried to the court, *Prentice, J.*, upon demurrer of appellees to the reasons of appeal. The

court sustained the demurrer and thereafter the appeal was dismissed by the court, *Ralph Wheeler*, *J.*, upon motion of the appellees, and the appellant appealed to this court for alleged errors in the rulings of the court below. *No error.*

The case is sufficiently stated in the opinion.

Henry G. Newton and *Philip P. Wells*, for the appellant.

Burton Mansfield and *Donald G. Perkins*, for the appellees.

FENN, J. The appellant, Daniel B. Coe, was married to Emily S. Coe in 1862. She died in January, 1892, leaving an estate in personal property valued at $42,000. She also left a will in which she first provided for the payment of her just debts and funeral charges, then gave three legacies, one of three thousand dollars to her sister, and two of one thousand dollars each to grand-daughters of her husband. These legacies she provided should be paid by her executor within six months after her decease. She then gave to her husband the "rest and residue" of all her property during the term of his natural life, "to receive the rents, issues and profits thereof for his own use, benefit and support." She then gave the remainder over to certain relatives of her own, other than her sister, "to them and their heirs absolutely and forever." She further provided as follows:—

"*Sixth.* I direct that my said husband shall have the exclusive management and control of my said property without interference from any one and without giving any security for the same or the management thereof.

"*Seventh.* I appoint my husband, Daniel B. Coe, executor of this, my last will and testament, and direct that no bond be required of him."

The appellant presented said will for probate. It was proved, and he was duly qualified as executor thereof. Appraisers were appointed, and an inventory of assets prepared, filed and accepted. No suggestion was made in such document that the estate was the owner of a remainder interest

only in such assets, and no claim that the appellant had any statutory title thereto or right therein. Within six months after the death of the testatrix, the appellant paid the legacies in accordance with the direction of the will.

In December, 1892, the appellant, as executor of the will of Emily S. Coe, presented to the court of probate an application reciting the facts, alleging himself, as husband of the decedent, to be the legal owner of "the use, interest, and income of all the property comprised in the estate of said decedent," and asking for an order "that a sufficient amount of the property of the estate, subject to the life interest of the applicant, be sold to raise so much money as would be necessary to pay the legacies, and any other amounts which may be needed in the settlement of the estate." It was stated that a total sum of $5,500 would be required for such purpose. This application was opposed by those entitled under the will to the remainder interest, and was denied by the court.

Afterwards, in February, 1893, the appellant presented to the court of probate his account as executor, which was in the ordinary form, charging himself with the entire personal assets of the estate and with the income and dividends thereon, and then crediting himself with the amount of the legacies paid, probate fees, advertising, traveling, incidentals, legal services, income and dividends, and a sufficient amount of securities on hand to balance the debit side. To this account was appended the following: "11. The executor while claiming under the will the right to what the will gives him, except as to the watch and jewelry, claims also his legal life estate in the five thousand dollars used to pay legacies, and insists upon his right to be reimbursed for his life interest in the same, and to sell the remainder in sufficient property therefor." The court allowed the account, as stated, except the item recited, which it disallowed. From these two decrees of the court of probate, namely: the denial of his application as executor to sell, and the disallowance of item 11 of the account, the appellant appealed to the Superior Court, which court sustained a demurrer to his reasons of appeal,

in which the above facts and proceedings were stated, and dismissed the appeal; and from that judgment the present appeal to this court was taken.

In reference to this proceeding, we ought perhaps to notice the exceptional and unusual manner in which it comes before us. The original appeal from the court of probate, embracing both decrees, was taken by Daniel B. Coe, executor. The reasons filed in the Superior Court were signed by said Daniel B. Coe, both as executor and as an individual. The appeal to this court is also taken by him in both capacities. On the other hand the demurrer of the appellees to the reasons of appeal, which was sustained by the Superior Court, was so general in character that it would require very liberal construction to regard it, as the court below appears to have done, without objection by the appellant, as complying with General Statutes, § 873, which provides that: "All demurrers shall distinctly specify the reasons why the pleading demurred to is insufficient." Nor is the above statement exhaustive as to the informalities and infelicities in the makeup of the case presented to us. It is therefore only with a distinct declaration that our present action must not be regarded as establishing any precedent by which our future conduct may be regulated, and somewhat in view of an express waiver upon the record signed by counsel for the appellees, of objections to the appellant's appeal, that we have concluded to fully consider the real question involved, as if in all respects correctly before us; believing that thereby we shall best promote the interests of justice and most speedily terminate an unfortunate contention.

By virtue of the statute law of this State, General Statutes, § 2792, the appellant had a vested life interest in all the personal property of his wife. It is true that he held such property in trust, but the wife being dead and there being no issue of the marriage, his right to receive and enjoy the income thereof during his life, was absolute. It was not in the power of his wife by her own act and without his consent, either by will or otherwise, to place any limits or restrictions on that right. The language of this court in *Sill*

v. *White*, 62 Conn., 435, a case on which the appellant greatly relies, is equally applicable in this case. The gift of Mrs. Coe of a life interest in her personal property "for the life of her husband was an attempt to give what she did not have to give. It was not in her power to direct where this estate should vest. Upon this subject the law spoke, and spoke unqualifiedly. It was, furthermore, an attempt to give to one who by a higher right than the act of the testator was to become, upon the testator's decease, entitled to the estate purported to be given." It follows that the wife could impose no duty upon the husband to part with any portion of the estate, for the purpose of paying legacies out of it, during his life. If he chose to insist upon his statutory right there was no power in the wife, and there is none in the law, by the exercise of which he could be prevented from so doing. The will, however, gave him certain privileges in reference to the life estate which the testatrix sought to create, that the statute did not confer. It also released him from certain obligations in regard to such estate, which the statute imposed. General Statutes, §§ 2793, 2795.

The appellant, as we have seen, claims his statutory rights and also "under the will, the right to what the will gives him." He insists that *Sill* v. *White* is an authority in direct support of such claim. In that case it appeared that the husband was executor of the will, accepted the trust, and settled the estate. But so far as the property in controversy was concerned—real estate—in which the law gave him a tenancy by the curtesy, and the will a life interest together with a power, it was expressly declared in the opinion that he had made no election as to which title he would take. "He has said nothing, has done nothing. He has remained passive and silent, as he had a right to do. He has not even indicated that he proposes to avail himself of the privileges which the will gives him. Manifestly he cannot thus be held to have lost his life estate by the curtesy." In the case now before us the husband has surely "indicated that he proposes to avail himself of the privileges which the will gives him." He distinctly so states. He has not remained silent

or passive. He has said something and done something. He has paid legacies as the will directed, but which he was under no obligation to do unless he saw fit to be directed by the will. Having paid such legacies he claims the privileges which the will attaches, not to the estate which the law creates, but to the estate which the will undertook to create in law, and to which his act in paying such legacies out of the estate apparently gives existence in fact, namely: a rest and residue remaining after such legacies are paid. These privileges he now asks shall be detached from the residue of the estate, to which they appertain under the will, and attached to the estate under the statute, to which they do not seem to us to be in harmony or accord. Indeed, such an estate has no longer any existence, in its entirety. The reason is that the appellant's own voluntary act has destroyed it. He has parted with assets which, as statutory trustee, it was not only his right, but his duty to retain. What he now asks is authority to part with a remainder interest in other assets which, as statutory trustee, it is also his duty to retain, and which, so long as he holds them, not under the will but under the law, no court can authorize him to dispose of. General Statutes, § 2793. This he asks in order that a payment which was only justifiable because the will directed it, may be made up to him because, while claiming all the rights which the will gives him he also claims, in opposition to it, the legal rights which are in conflict with its provisions.

Is it possible that by any authority of statute or course of procedure, a court of probate can do that which the appellant asks, or assist him in the creation of a fresh fund on which to attach a new life estate in substitution for that with which he has voluntarily parted? Let us give to this matter a little further consideration. Taking the appellant in his somewhat manifold aspect of executor, statutory trustee, and individual, and giving him the full benefit of the complex relation—for he perhaps correctly states an anomaly of his position in saying it is necessary that he should appear in all capacities in order to have any apparent standing in

any—what do we find? He has used five thousand dollars of the principal of the *corpus* or fund, to which he was by statute entitled to the life use, to pay legacies as directed by the will. The principal is thereby depleted five thousand dollars. What, then, does he desire in return for his voluntary act? In his application to sell he requested "the sale of the remainder, subject to the life interest of your applicant, in sufficient of the assets of the estate, to raise the sum of $5,500." We have seen that, as statutory trustee, the court could give him no authority to sell for any purpose. As executor he needed none to sell any proper interest and for any proper purpose. But suppose the order passed and the sale made, either of specific assets, or of an undivided specified fractional interest in the entire remainder estate, subject to the appellant's life tenancy, sufficient to raise the sum of $5,500, what would become of the money thus raised through an inevitable sacrifice of value? The appellant would only be entitled to a life interest in it. The money raised by a sale of the estate would belong to the estate, and all this that the appellant might have the life use of a sum as large as that with which he originally started. The change would be a speculation on the duration of the life of Daniel B. Coe, on which would be based a wagering contract to give the estate of Mrs. Coe fifty-five hundred dollars down, in consideration of receiving a larger specified sum out of that estate when Daniel B. Coe ceased to have personal occasion to enjoy its use.

But the appellant, at the close of his administration account, made, as we have seen, in the court of probate, a different claim, namely: that the remainder in sufficient property should be sold to reimburse him for his life interest in the sum used to pay legacies. In other words, as we understand it, that the present worth of an annuity equal to the income on the sum in question, for a length of time corresponding to his expectation of life, should be ascertained, and then sufficient, not of the principal, but of the remainder interest in the principal, subject to his life use, should be sold, and the avails paid by himself, as executor and beneficiary under the will, to himself, as statutory trustee under the law,

for his own benefit, to reimburse him for what he has lost in the latter capacity, by paying the legacies in the former capacity. Added to these distinct claims, the appellant in argument has suggested that probably the true way would be to empower him in each year to use, in addition to the income, sufficient also of the principal to make good what he has lost by way of interest or use by using principal to pay legacies; of course, also, with an annually increasing sum for reimbursement of what he will thus lose in interest by such further absorptions of principal.

It seems to us that every one of the courses above indicated, and every other which can be conceived for the relief of the applicant from his entirely self-assumed and unnecessary position, is capable of being met by insuperable objections. A fundamental difficulty with them all is, that however the appellant's position may be stated, it necessarily involves an unwarranted interference with the rights of the residuary remainder legatees under the will of Mrs. Coe, to receive precisely what the instrument confers upon them in its expression of the bounty of the testatrix. Their rights can in no way be impaired or rendered less beneficial by any act done by the appellant, either as statutory trustee, as executor, as individual, or as each separately or all at once, without their approval or consent.

It is said that these legacies, if unpaid, would bear interest, commencing six months from the decease of the testatrix. The question is not before us, and we cannot decide it; but if this be true, it may be that these remainder legatees are benefited by the act of the appellant in paying the legacies, as the matter now stands. If so, it was a benefit which they never requested, and does not sanction an injury to which they refuse to assent. They are entitled to insist that the appellant should either decline to pay these legacies at all, during the continuance of his life estate; or that having paid them out of the property of the estate, he should be content to remain in the position in which such payment leaves him, and not extricate himself from a situation which he was under no obligation to take, by compelling them to a

change in their own. So long as the appellant stood squarely upon his rights as trustee under the statute, or as legatee under the will, his single position as to either could not in any wise infringe the rights of these legatees. In case of his election to claim as statutory trustee, and not under the will, they receive at his death the residuary estate, that is the entire remainder, charged with the legacies, and this, whether such legacies do or do not bear interest while payment is deferred. In case of the appellant's election to claim under the will, and not as statutory trustee, these legatees receive precisely what the testatrix intended, and as she intended. But by the appellant's double election to claim under both; to gain all the rights conferred by both, including the assumed right of exemption by each from complying with the requirements of the other; by such election, if valid, these legatees, instead of the estate which the will gives them, would receive by compulsion of law, a different title, and interest, of its arbitrary creation.

It surely requires neither argument nor extended statement to demonstrate that a clear remainder title to specific assets, charged only with the payment of definite legacies, with or without interest arrears, is far more desirable and beneficial than a tenancy in common in the remainder interest, either in such specific assets or in the general bulk and *corpus* of residuary personal estate. It is also evident that any sale of such future interest, expectant on a particular life estate of uncertain and speculative duration, would yield at best, only an unsatisfactory approximation of its actual value, and would involve a probable sacrifice to the remainder interest, which nothing but the specific, express sanction of law could either justify or excuse.

It is perhaps only stating the above considerations in another way, to say that not only is no power vested in that strictly statutory tribunal, the court of probate, to grant the appellant any such relief as that which he seeks—and there is none in the Superior Court on appeal, to do more than the court of probate itself could do in the first instance—but further, we can conceive of no such power in any court or

in any form of proceeding. Indeed, it must be said that we are unable to see anything equitable in the appellant's contention. Doubtless the testatrix desired that he should pay these legacies within six months after her decease. She said so expressly. She must have presumed that he would be entirely willing to do it. Two of them were to his own grandchildren, not to hers. It matters little whether she knew what his legal rights were or not. If she did know, she knew also that he was not obliged to pay the legacies unless he chose; but if he did not he would take no estate in the rest and residue under her will. If she did not know, then she believed he would be obliged to pay these legacies as directed. In either case alike, the payment of such legacies in fact was a condition precedent to the creation of an estate in a "rest and residue," to which the liberal provisions of exemption, not to the executor from giving bonds, but to the life tenant from interference or security, attached. It is certain she did not contemplate, and no one could have contemplated, that the appellant would settle the estate under the will, with inventory and administration account, showing the payment of the legacies as required, and out of the estate, thereby waiving, at least for the time being, his right under the statute to the uninterrupted possession of the property, and entitling himself to claim under the will "the right to what the will gives him;" and that then, having done this, he should ask that because he had complied with her wishes, as to her sister and his grandchildren, the courts for the administration of justice should sanction his destruction of her equally clear and defined purpose as to those of her kin other than her sister, and not of his, in whom she had vested the remainder of her estate.

Finally, it is undisputed law in this State that "a husband may by his own acts divest himself of the trust which the statutes give him in his wife's property." *State* v. *French*, 60 Conn., 481. Whether this has been done in a particular case is ordinarily a question of intention to be inferred or presumed from conduct. In this case the demurrer is said to admit, for the purposes of the trial, an allegation not in

the appeal but in the application to sell, therein referred to and made an exhibit, that the appellant has "never abandoned" his right to the income of his wife's property. It is immaterial whether such admission prevents our holding what the facts would certainly otherwise conclusively establish; for the well recognized doctrine of election, with which *Sill* v. *White* is in no sense in conflict, but which it clearly recognizes, is equally applicable and conclusive. That principle was aptly stated by SHAW, C. J., in the old case of *Hyde* v. *Baldwin*, 17 Pick., 303, 308, where he lays it down as an established rule of equity that "a man shall not take any beneficial interest under a will, and at the same time set up any right or claim of his own, even if otherwise legal and well founded, which shall defeat, or in any way prevent the full effect and operation of every part of the will."

There is no error in the judgment complained of.

In this opinion the others judge concurred.

ROBERT PRICE *vs.* THE SOCIETY FOR SAVINGS.

First Judicial District, Hartford, May Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

Statutes protecting pension money from attachment and execution are remedial in their nature and entitled to a liberal construction in favor of the pensioner.

A savings bank deposit, consisting solely of the proceeds of a pension check received from the United States, is exempt from attachment and execution under the clause of § 1164 of the General Statutes which exempts "any pension moneys received from the United States, while in the hands of the pensioner."

[Submitted on briefs, May 15th—decided May 31st, 1894.]

ACTION of *scire facias* against a garnishee, brought to the Court of Common Pleas in Hartford County and tried to the court, *Calhoun*, *J.*, upon plaintiff's demurrer to defendant's answer. Inasmuch as the demurrer presented all the

questions involved in the case, the court, with the consent of the parties, reserved the case for the advice of this court.

Judgment advised for the defendant.

The answer set up that Frederick T. Covel, the original debtor, had $600 on deposit in the Society for Savings, subject to the conditions stated in his deposit book, being a sum exceeding the plaintiff's demand; but that it was part of the proceeds of a pension check received from the United States, which was so deposited on the same day that the check was cashed. To this answer the plaintiff demurred, and the questions arising on the demurrer were reserved for the advice of this court.

The deposit book stated that the Society was "formed for the purpose of affording a secure investment to persons of either sex, when circumstances do not afford them the facilities of safely putting their income to use, or of investing it in business;" that "the principal object of this bank is to provide for the secure keeping of money lodged in it;" that the Society and its directors made no charge for services, and would not be responsible for any losses; that "the net income of the Society, so far as may be deemed consistent with the interests of the depositors, shall be divided and placed to their credit semi-annually;" that as depositors might "become sick or otherwise want their money," they "may take it out by giving notice to the treasurer one week beforehand, unless the sum proposed to be withdrawn shall exceed two hundred dollars; in that case four months notice must be given;" and that "the trustees have a right to pay off any depositor the whole or any part due on his deposit within one month next following any dividend."

William F. Henney, for the plaintiff.

I. The property attached is not "pension moneys received from the United States." The statute, being a statute of exemption, is to be strictly construed. "As a general legal truth, a statute in derogation of the common rights of creditors ought to receive a strict construction." *Patten* v. *Smith*, 4 Conn., 454; *Farrell* v. *Dart*, 26 id., 381. There is a man-

ifest intention in the act to distinguish between the "pension moneys" themselves and the property in which such moneys are invested. Property in a savings bank deposit is not "pension moneys."

This court has repeatedly defined and explained the nature of property in such deposits. *Savings Bank* v. *New London*, 20 Conn., 117; *Bunnell* v. *Collinsville Savings Society*, 38 id., 206; *Osborn* v. *Byrne*, 43 id., 155.

II. The funds in question were not "in the hands" of the pensioner. *Spellman* v. *Aldrich*, 126 Mass., 113; *Friend* v. *Garçelon*, 77 Maine, 25; *Berry* v. *Berry*, 84 id., 541; *Cavanaugh et al.* v. *Smith*, 84 Ind., 381; *Faurote* v. *Carr et al.*, 108 id., 123; *Jardin* v. *Fairton Sav. Fund Ass.*, 44 N. J. L., 376; *McFarland* v. *Fish*, 34 W. Va., 548; *Pobion* v. *Walker*, 82 Kentucky, 61; *Martin* v. *Hurlburt*, 60 Vt., 364; *Cranz* v. *White*, 27 Kan., 319.

No deposit in a savings bank could be reached by trustee process, if such deposit is still in the hands of the depositor.

Judgment should be advised for the plaintiff.

Joseph L. Barbour, for the defendant.

I. Is pension money which has come into the possession of the pensioner, and been deposited to his credit, and subject to his control, exempt from attachment and execution?

There is some authority for holding that Covel's money on deposit with the defendant in this case is exempt under the operation of the United States statute. The Iowa Supreme Court in *Crow* v. *Brown et al.* (1890), reported in Lawyers' Reports Annotated, book XI., page 110, *held* that property purchased by a pensioner of the United States government with his pension money, is exempt from execution or attachment for his debts, under the proviso that pension money shall inure wholly to the benefit of the pensioner. See also *Folschow* v. *Werner*, 51 Wis., 87; *Reiff* v. *Mack*, 28 Atl. Rep., 699; *Holmes* v. *Tallada*, 125 Pa. St., 133.

II. Our own statute is broader, and exempts pension money after it has reached the pensioner, and while in his hands. This is a remedial statute and ought to be liberally

expounded in favor of the benovolent object for which it was enacted. *Montague* v. *Richardson et al.*, 24 Conn., 347.

The Court of Appeals, in the case of *Yates County National Bank* v. *Carpenter*, 119 N. Y., 550, extends the exemption of receipts from a pension, under the State law, much farther than the defendant claims here. And see also *Stockwell* v. *Bank*, 36 Hun., 583, where it was decided that moneys received from a pension and deposited in a bank in the name of the pensioner were not subject to seizure by his creditors.

Finally, the defendant claims that this money, being exempt from attachment while in Covel's hands, is also exempt from garnishment. "A garnishee is not chargeable for property in his possession or debts by him owing to the principal defendant, which are by law exempt from execution or attachment if in the hands of the principal defendant." American Encyclopædia of Law, VIII., 1223, and cases there cited.

Judgment should be rendered for defendant.

BALDWIN, J. The Revised Statutes of the United States, § 4747, provide that "no sum of money due, or to become due, to any pensioner shall be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, whether the same remains with the Pension Office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner." This statute protects pension money from attachment so long as it remains due to the pensioner, but not after it has been actually paid over, and has come into his possession. *Spelman* v. *Aldrich*, 126 Mass., 118; *Friend* v. *Garcelon*, 77 Me., 25; *Rozelle* v. *Rhodes*, 116 Pa. St. 129, 9 Atlantic Reporter, 160.

General Statutes, § 1164, exempts from attachment or execution "any pension moneys received from the United States, while in the hands of the pensioner." The validity of the plaintiff's attachment must therefore depend on whether that part of Covel's pension money which he deposited with the defendant can be considered as still in his hands.

The deposit, as soon as made, transferred the title to the

particular bills or specie, which were deposited, from the pensioner to the savings bank. But he also became substantially a part owner of all the assets of the bank. It was an agency for receiving and loaning money on account of its depositors. *Savings Bank* v. *New London*, 20 Conn., 111; *Bunnell* v. *Collinsville Savings Society*, 38 id., 203; *Osborn* v. *Byrne*, 43 id., 155.

A pension is a bounty for past services rendered to the public. It is mainly designed to assist the pensioner in providing for his daily wants. Statutes protecting his interest in it, until so used, are of a remedial nature and entitled to a liberal construction. *Montague* v. *Richardson*, 24 Conn., 338, 348; *Patten* v. *Smith*, 4 id., 450, 454; *Yates County National Bank* v. *Carpenter*, 119 N. Y., 550, 23 Northeastern Rep., 1108.

It would be unreasonable to require a pensioner to keep so large a sum as $600 in his personal custody until he had occasion to expend or opportunity to invest it. It would be still in his hands, within the meaning of the law, though left with another for safe-keeping, and would still retain its original character as pension money. See *United States* v. *Hall*, 98 U. S., 343, 358. The natural depositary, in case of a sum so large as $600, would be some kind of a trust or banking institution. The fund in controversy was placed in a savings bank, where, so far as appears, the pensioner had no previous account. It was a single deposit, entered upon a pass-book, where it constituted the sole credit in his favor, and no dividend from the profits of the bank had or could have been declared upon it, prior to the attachment. He simply exchanged his ownership of $600 for an ownership of such part of the property of the defendant, as corresponded to the proportion between that sum and the total of its net assets; with the right to take out the amount deposited, in whole or part, on demand, after reasonable notice, provided he withdrew in all no more than his proper share, as a part owner of the funds of the institution. *Osborn* v. *Byrne*, 43 Conn., 159. Presumably the defendant had assets ample to satisfy its depositors in full, and therefore the pensioner

could, at his discretion, have drawn out the sum deposited, at any time. While in the bank, it was in the hands of an institution conducted for the sole benefit of its depositors, and of which they were the equitable owners; and although the bills or coin that the pensioner originally left there could no longer be identified, and it might be that they and all the cash funds then belonging to the bank had been loaned out, or otherwise invested, it is our opinion that his pension money can fairly be said to have been still in his hands, within the meaning of our statute of exemptions.

The Court of Common Pleas is advised to render judgment for the defendant on the demurrer to the second paragraph of the answer.

In this opinion the other judges concurred.

JAMES BYRNE *vs.* THE TOWN OF FARMINGTON.

First Judicial District, Hartford, May Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

In the maintenance of its highways a town is under no obligation to keep open and unobstructed a sluice-way or culvert constructed by it across the roadway for highway purposes, in order to accommodate mere surface water occasionally flowing from adjoining land; and therefore is not liable to the owner of the land in an action for negligence in permitting such sluice-way or culvert to become obstructed, in consequence of which such surface water is set back upon his premises.

Section 2683 of the General Statutes which permits towns to make or clear any watercourse or place for draining highways, into or through private lands, has no application to such a sluice-way or culvert.

[Argued May 15th—decided June 1st, 1894.]

ACTION to recover damages of the defendant for negligence in permitting a sluice-way or culvert across the highway to become obstructed, in consequence of which the surface water was thrown back upon the plaintiff's premises; brought to the Court of Common Pleas for Hartford County

and tried to the court, *Calhoun, J.;* facts found and judgment rendered for the defendant from which the plaintiff appealed for alleged errors in the rulings of the court. *No error.*

The case is sufficiently stated in the opinion.

Roger Welles, for the appellant (plaintiff).

I. We contend that the town violated its duty in allowing the plaintiff's premises to be inundated by surface water, as in this case, and a due consideration of the question involves an examination of the statutory law of this State as to the drainage of highways, and the decisions of our courts and others applicable thereto.

The present form of the statute is as follows, Sec. 2683: "Persons authorized to construct or to repair highways may make or clear any watercourse, or place for draining off the water therefrom, into or through any person's land, so far as necessary to drain off such water." The word "may" will be construed as "shall" or "must," if the necessity exists. *Supervisors* v. *U. S.*, 4 Wall., 435; *Mayor* v. *Furze*, 3 Hill, 612; Endlich on Stat., p. 427, § 312. The "persons authorized" to make such drainage have a *quasi* judicial discretion, under this statute, to determine, in the first place, whether the necessity for such drainage does, in fact, exist or not; but when they have determined that it does exist their judicial duty ends, and the providing for and maintaining such drainage thereafter is a ministerial duty. *Estes* v. *China*, 56 Me., 407, 410; *Rowe* v. *Portsmouth*, 56 N. H., 291; *Bates* v. *Westborough*, 151 Mass., 174; *Johnston* v. *Dist. of Columbia*, 118 U. S., 19, 21; Harris's Damages by Corp., § 110.

In this case the town of Farmington determined the judicial question long ago, when the wooden sluice was put in. After years of observation and experience it reaffirmed its former decision by putting in a more permanent stone culvert in 1878. Thereafter it was its ministerial duty to keep the culvert "clear" from obstruction, that it might answer the purpose for which it was constructed. "But where ju-

dicial duty ends, and ministerial duty begins, there immunity ceases and liability attaches." *Jones* v. *N. Haven*, 34 Conn., 1, 14, cited in *Barnes* v. *Dist. of Columbia*, 91 U. S., 540. The defendant, in the care of this culvert, was under obligation to act "with a reasonable consideration for the property and established rights of" this plaintiff. *Danbury & Norwalk R. R. Co.* v. *Norwalk*, 37 Conn., 109, 120; *Adams* v. *Walker*, 34 id., 466; *Mootry* v. *Danbury*, 45 id., 550, 556; *Healey* v. *N. Haven*, 47 id., 305, 314; *Morse* v. *Fair Haven East*, 48 id., 222.

These decisions were all rendered before the passage of the Act of April 5th, 1881 (Session Laws of 1881, p. 84, ch. 65), which is now the second clause of section 2683, of General Statutes. Those decisions are based upon a common liability, and are amply sustained by those of other States. 2 Dillon's Mun. Corp., §§ 1048–1051, 3d Ed. *Wharton* v. *Stevens*, 84 Iowa, 107; *Earl* v. *De Hart*, 12 N. J. Eq., 280; *Waterman* v. *Conn. & P. R. R. Co.*, 30 Vt., 610; *Inman* v. *Tripp*, 11 R. I., 520.

This second clause was enacted for the purpose apparently of settling all doubt upon the matter, and not to supersede any common law remedy, and absolutely prohibits the "allowance" of drainage from a highway into the front dooryard of "*any* dwelling house." Whatever may have been its former duty, ever since the enactment of this provision the town of Farmington has had a ministerial duty imposed by law, not "to allow the drainage of water" from this culvert "into or upon any dooryard in front of any dwelling house," including that of the plaintiff. *McCarthy* v. *Syracuse*, 46 N. Y., 194; *Chichester* v. *Consolidated Ditch Co.*, 59 Cal., 197; 16 Am. & Eng. Encyc. of Law, 422; *Davis* v. *Guilford*, 55 Conn., 351; *Boucher* v. *N. Haven*, 40 id., 456. This statute was construed in *Bronson* v. *Wallingford*, 54 id., 513, 520, 521, in which this court lays down the doctrine that towns would be liable under this statute "where damage results from negligence," or where "the water was drained into some place prohibited by the statute." There could be no question about the liability of the town if the water

was drained directly into such place. We contend that an indirect or reflex drainage into such prohibited place is within the governing principle and intent of the prohibition as much as a direct drainage. This is a remedial statute and should be liberally construed to effect its object, in protecting from such nuisances the homes of the people. Endlich on Stat., §§ 108, 110, 463; *Holley* v. *Torrington*, 63 Conn., 426; *Bates* v. *Inhabitants of Westborough*, 151 Mass., 174; *Hill* v. *Boston*, 122 id., 344, 358; See also 2 Dillon's Mun. Corp., § 1051, subd. 4; *Mootry* v. *Danbury*, 45 Conn., 550; *Ashley* v. *Port Huron*, 35 Mich., 296, 299; *Hitchins* v. *Frostburg*, 68 Md., 100; *Gaylord* v. *N. Britain*, 58 Conn., 397.

This principle should be applied to the construction of this statute. "Every statute is to be construed with reference to the rules of the common law. There is no exception to that as a general proposition. The particular rules of the common law may be made by the statute inapplicable to the particular case, but in so far as they are not made inapplicable they do not require to be enacted." *MacIntosh* v. *Waite*, Court of Session Cases, 4th Series, Vol. 18, p. 586.

II. The plaintiff had acquired a prescriptive right to the discharge of surface water across the highway at this point, where it had flowed for more than fifty years, and this right had been recognized by the town. *Ingraham* v. *Hutchinson*, 2 Conn., 584; *White* v. *Chapin*, 12 Allen, 516. The town had admitted its duty to repair the obstruction by having repaired it. *Readman* v. *Conway*, 126 Mass., 374. "Such damage to private property is not warranted by the authority under color of which it is done, and is not justifiable by it. It is unlawful, and a wrong, for the redress of which an action of tort will lie." *Perry* v. *Worcester*, 6 Gray, 544, 547. The town owed both a statutory and common law duty to this plaintiff not to flood his dooryard, and thus commit a nuisance. *Seifert* v. *Brooklyn*, 101 N. Y., 136.

The fact that the culvert was originally constructed in the performance of a governmental duty does not afford the slightest excuse to the town for neglecting its ministerial

and statutory duty to keep it clear of obstruction so as not to create a nuisance to the plaintiff, by inundating his dwelling house, outside the highway. *Hill* v. *Boston*, 122 Mass., 358. It does not appear that this obstruction caused any injury to the highway, but if it did, it is not that injury that we complain of, but an injury to the plaintiff especially, in which the traveling public is not interested, and an injury and nuisance to his dwelling house and contents, "outside of the limits of the public work." *Norwalk Gaslight Co.* v. *Norwalk*, 63 Conn., 495, 530; *Greenwood* v. *Westport*, 63 id., 597.

The severe winter or heavy rains do not excuse the town. *Salisbury* v. *Herchenroder*, 106 Mass., 458; *Smith* v. *Faxon*, 156 id., 589

Noble E. Pierce and *George E. Taft*, for the appellee (defendant).

I. No duty rested on the defendant to keep open this culvert for the benefit of the plaintiff. *First*, because its duties as to highways are purely statutory, and this is not one of them. *Stonington* v. *State*, 31 Conn., 214; *Chidsey* v. *Canton*, 17 id., 478; *French* v. *Boston*, 129 Mass., 592; *Hill* v. *Boston*, 122 id., 344; *Hewison* v. *New Haven*, 34 Conn., 136, 37 id., 475; *Jewett* v. *New Haven*, 38 id., 368. *Second*, because the rule for the town regarding surface water is the same as the rule for any individual proprietor.

The right of the owner of land to determine the manner in which he will use it, or the mode in which he will enjoy it, the same being lawful, is too high in character to be affected by considerations growing out of the retention, diversion, or repulsion of mere surface water, the result of falling rain or melting snow. *Grant* v. *Allen*, 41 Conn., 160, overruling *Adams* v. *Walker*, 34 id., 466; *Chadeayne* v. *Robinson*, 55 id., 345; *Smith* v. *King*, 61 id., 517. It makes no difference that the land is naturally wet and swampy. *Dickinson* v. *Worcester*, 7 Allen, 22; *Franklin* v. *Fisk*, 13 id., 211; Cooley on Torts, side page 578. A town is practically the owner of the land for all the purposes of a highway, and so

long as it is used strictly for those purposes, with due regard for the rights of others, no liability attaches. *Healey* v. *New Haven*, 47 Conn., 305; *Dickinson* v. *Worcester*, *supra*; *Mills* v. *Brooklyn*, 32 N. Y., 489; Damages by Corporations, Harris, Vol. I., § 108.

It is important to distinguish between natural streams flowing in channels between defined and actual banks, and surface water caused by rain or melting snow, for the law relating to them is essentially different. Dillon's Municipal Corporations, Vol. 2, § 1038, 4th Ed. As to surface water, the law very largely regards it as a common enemy which every proprietor may fight or get rid of as best he may. Id. § 1039. *Gould* v. *Booth*, 66 N. Y. 62; *Lynch* v. *The Mayor*, *etc.*, 76 id., 60; *Gilfeather* v. *Council Bluffs*, 69 Iowa, 310; *Waters* v. *Bay View*, 61 Wis., 642; *Gilluly* v. *Madison*, 63 Wis., 518.

Section 2683 of the General Statutes has no application to the case at bar. It imposes no duty upon towns, but permits them to drain the water from highways into adjoining lands. The water that collected upon the plaintiff's land did not come from the highway. The governmental duty for which this culvert was constructed was not the duty of removing surface water from the plaintiff's premises, for the very good reason that no such duty ever existed; it performed its governmental duty and there was no ministerial neglect on the part of the town.

II. The obstruction of this culvert was caused by ice and snow, and in this particular the duties of towns are very limited. *Burr* v. *Plymouth*, 48 Conn., 460; *Congdon* v. *Norwich*, 37 id., 414; *Landolt* v. *Norwich*, 37 id., 615; *Cloughessey* v. *Waterbury*, 51 id., 405; *Taylor* v. *Yonkers*, 105 N. Y., 203. The selectmen, under the circumstances, could not have been expected to visit all the highway culverts in town and thaw out the ice and snow; and their failure to do so does not constitute negligence.

HAMERSLEY, J. This is an action against the town of Farmington to recover damages for injury to the plaintiff's

dwelling house and property, from a flow of water into his cellar, caused by the negligence of the town in respect to a culvert under the highway in front of the plaintiff's premises. The defendant demurred to the complaint. The demurrer was overruled. No question is now raised as to the sufficiency of the complaint. The case was tried to the court upon the issues raised by the answer, and judgment rendered for the defendant. From that judgment the defendant appeals.

The material facts as found by the court are as follows:—

The plaintiff bought the land described in the complaint in 1876, and the following year built a house thereon, where he now resides; the house is on the west side of a highway of the defendant town, and stands in a swale where surface water from melting snow or heavy spring rains tends to collect, but only occasionally, and from these causes. The highway has been built for more than fifty years. In 1878 the road commissioner of the defendant built a stone culvert in the highway in place of a wooden sluice which had become obstructed. The culvert was situated just south of the defendant's house, in front of his lot, and at the lowest part of the swale. The sluice and culvert were built for highway purposes only, to enable the water to pass from the west to the east side of the highway when a passage was needed; no watercourse ever flowed through either. The culvert, if unobstructed, was sufficient to carry off any collection of surface water on the west side of the highway, and from the plaintiff's land; without such a water-way the surface water would be retained by the highway bank. In the winter of 1892–93, owing to the extreme and protracted cold, this culvert was frozen up and thus became completely obstructed; the accumulations of surface water caused by melting snow and rain during January and March, 1893, were extraordinary; on three occasions during that time, the culvert being obstructed by ice, such water accumulated in the swale on the plaintiff's premises and flowed into his cellar damaging his property. On April 8th, the defendant opened and cleared the culvert. The defendant was guilty

of negligence in not opening and clearing the culvert at an earlier date, if it were the duty of the defendant to keep the culvert open and unobstructed for the benefit of the plaintiff.

The plaintiff claims that the trial court erred in not holding upon the facts found, as a matter of law, that it was the defendant's duty to keep the culvert unobstructed for the benefit of the plaintiff; and that therefore the defendant was liable to the plaintiff for damages caused by negligence in the performance of that duty. There is no foundation for such claim. In the discharge of its obligations in the maintenance of a highway, a town, if it has any duty to an adjoining proprietor in reference to the flow of surface water, has no greater duty than is imposed on an individual owner of land. The rule in such cases is well settled.

"The right of an owner of land to determine the manner in which he will use it, or the mode in which he will enjoy it, the same being lawful, is too high in character to be affected by considerations growing out of the retention, diversion, or repulsion of mere surface water, the result of falling rain or melting snow." *Grant* v. *Allen*, 41 Conn., 156. "No action can be maintained for changing the course or obstructing the flow of mere surface water by erections on adjoining land. It makes no difference in the application of this rule that the land is naturally wet and swampy. A conterminous proprietor may change the situation or surface of his land by raising or filling it to a higher grade, by the construction of dykes, the erection of structures or other improvements which cause water to accumulate from natural causes on adjacent land and prevent it from passing off over the surface." *Dickinson* v. *City of Worcester*, 7 Allen, 19; Gould on Waters, § 256; *Chadeayne* v. *Robinson*, 55 Conn., 346; *Smith* v. *King*, 61 id., 517; *Gannon* v. *Hargadon*, 10 Allen, 106; *Franklin* v. *Fisk*, 13 id., 211; *Bates* v. *Westborough*, 151 Mass., 174.

In the present case, the use of its land by the town in raising slightly the grade of the traveled part of the highway was a lawful use; the town was not liable in damages

for the obstruction of the flow of mere surface water caused by such raising of grade. It was under no obligation to the adjoining proprietor to build a culvert; it had a right, as against such proprietor, to close the culvert either permanently or by failing to remove a temporary obstruction. As the court says in *Chadeayne v. Robinson*, p. 350: "It is the right of the defendants to erect for the entire depth of their lot a structure which will be a perfect barrier to surface water. Of course that which they may do perfectly and permanently, they may do imperfectly and temporarily; and the plaintiffs must accept the consequences." The facts found by the trial court bring this case clearly and without any room for doubt, within this well established rule.

It is unnecessary to consider what rule might apply, if the defendant had succeeded in proving, as he seems to have claimed upon the trial, that the water obstructed and set back upon his land was not merely the natural and occasional accumulations of surface water, but was in the nature of a watercourse which the defendant undertook to control, and by its negligence diverted or repelled from its natural course to his damage.

The plaintiff claims that § 2683 of the General Statutes makes the defendant liable in damages for neglecting to clear the culvert. That section is: "Persons authorized to construct or repair highways may make or clear any watercourse or place for draining off the water therefrom into or through any person's land so far as necessary to drain off such water; and when it should be necessary to make any drain upon or through any person's land for the purpose named in this section it shall be done in such way as to do the least damage to such land; provided that nothing in this section shall be so construed as to allow the drainage of water from such highways into or upon any door-yard in front of any dwelling house, or into and upon yards and inclosures used exclusively for the storage and sale of goods and merchandise."

This statute has no application to the plaintiff's case. The defendant has neither made nor cleared any watercourse or

place for draining water from the highway into or through the plaintiff's land, and therefore has not within the meaning of the statute drained any water from the highway into or upon the plaintiff's door-yard.

If the plaintiff has been aggrieved by the judgment of the trial court, his grievance consists solely in his failure to convince the court that he had proved the facts alleged in his complaint; upon the facts as found, the court correctly held that the defendant was not liable to the plaintiff for damage caused by its failure to keep the culvert open for the benefit of the plaintiff.

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

In this opinion the other judges concurred.

EDWARD E. ROWELL *vs.* THE STAMFORD STREET RAILROAD COMPANY.

Third Judicial District, Bridgeport, April Term, 1894. ANDREWS, C. J., TORRANCE, BALDWIN, F. B. HALL and THAYER, Js.

A written notice of the nature of an injury received on a highway stated that the plaintiff's "horses were thrown violently to the ground, and both were strained, bruised and lamed, one especially was injured in the ankle joint whereby he has been useless to the subscriber since the accident, and is more or less permanently injured." *Held* sufficiently definite.

The visible condition of a highway while undergoing alterations or repairs may of itself be a signal or warning of danger to one driving over the highway.

The defendant dug a trench seven feet long under its railroad tracks located in the middle of the highway, and threw the dirt, cobble stones, pieces of ties, etc., to the west of its tracks in a pile which extended to the west side of the street. The plaintiff, who had driven through the street two or three times shortly before the accident and had a full opportunity to see the defendant's men at work, drove on to the track and one of his horses was injured by the trench. The trial court admitted the evidence as to the visible condition of the highway but ruled that the pile of dirt, cobble stones, pieces of ties, etc., indicated only

that the westerly side of the highway was impassable. *Held* that the refusal or omission of the court to consider or weigh this evidence as tending to indicate to one who had the knowledge of the circumstances which the plaintiff had, that there was danger at the place of accident, for which purpose it was offered by the defendant, was error, and entitled the defendant to a new trial.

[Argued April 25th—decided June 12th, 1894.]

ACTION to recover damages for an injury to a horse alleged to have been caused by the negligence of the defendant; brought to the Court of Common Pleas in Fairfield County and tried to the court, *Curtis, J.*; facts found and judgment rendered for the plaintiff, from which the defendant appealed for alleged errors in the rulings of the court. *Error, and new trial granted.*

The negligence charged against the defendant was its failure to keep in sufficient repair that part of a highway in the town of Stamford which it was bound to maintain.

The plaintiff gave to the defendant the following notice: "*To the Stamford Street Railroad Co.:*

"Please take notice that on June 30, 1892, a little before one o'clock in the afternoon, the subscriber suffered an injury to his property on account of driving into an excavation in that part of the highway occupied by your track on Atlantic street, opposite the barber shop at 122 Atlantic street, and which excavation was made by your servants, and negligently left without any signal, or notice to a person driving that it was there. The nature of such injury to his property being that his horses were thrown violently to the ground, and both were strained, bruised and lamed, one especially was injured in the ankle joint whereby he has been useless to the subscriber since the accident, and is more or less permanently injured. Stamford, August 8, 1892. Edward E. Rowell, By Hart & Keeler, His attorneys."

The other facts are sufficiently stated in the opinion.

Julius B. Curtis and *Robert A. Fosdick*, for the appellant (defendant).

Nathaniel R. Hart and *John E. Keeler*, for the appellee (plaintiff).

ANDREWS, C. J. The notice given by the plaintiff to the defendant was sufficient. *Tuttle* v. *Winchester*, 50 Conn., 496; *Brown* v. *Southbury*, 53 Conn., 213; *Lilly* v. *Woodstock*, 59 Conn., 219.

Section 1135 of the General Statutes forbids this court to consider on any appeal any errors, "unless they are specifically stated in the reasons of appeal." In this case the reasons of appeal do not state specifically any error of fact. We therefore omit all such claimed errors from consideration.

The track of the defendant is laid on and along Atlantic street in the city of Stamford. That street is a paved and much traveled highway in said city, running north and south. The charter of the defendant requires it to maintain in good and sufficient repair that part of any street or highway over which its track is laid, and a space five feet wide on each side of its track. The plaintiff alleged in the complaint that on the 30th day of June, 1892, the defendant dug a trench under its track in said Atlantic street and "negligently left said trench unguarded and without any signal, warning, or other indication that there was danger in driving over the said highway;" and that in consequence of such negligence of the defendant, and without any fault or negligence on his part, his horses, while he was driving over said highway, got into said trench, and were violently thrown and greatly injured.

The defendant in his first defense, denied all the material allegations of the complaint; and a second defense averred certain facts from which it claimed that the said trench was not left "without any signal, warning or other indication that there was danger in driving over the said highway." These facts were in turn denied by the plaintiff. Upon these averments and denials the trial was had.

It seems not to have been disputed at the trial that there was, on the day mentioned, across and at right angles with the defendant's track in said street, a trench about seven feet long, fifteen inches wide, and thirteen inches deep, and extending about fourteen inches outside of the track on each side, into which the plaintiff drove, and his horse received

the injury of which he complained. It appeared that a day or more prior to the said day, the Stamford Water Company, for the purpose of repairing or relaying its pipe in said street, had made an excavation therein for a distance of about fifty feet diagonally across and under the track of the defendant, and in so doing had severed six or seven of the railroad ties, and had disturbed the paving stones. The water company left the dirt and other material from its excavating on the west side of the track, extending from the track nearly to the curb of the street, and rendering that side of the street impassable; and it also appeared that on said day the defendant dug said trench under its track for the purpose of replacing one of the ties which had been so severed by the water company with a new one.

The plaintiff's injury happened at about one o'clock in the afternoon while the defendant's workmen were absent from their work at dinner. He was driving a pair of spirited young stallions at a speed of six or seven miles an hour, and did not slacken that rate or attempt to turn from the railroad track until he was within from twenty to ten feet of the said trench. During the forenoon of that day the defendant's workmen had dug the trench, and had placed the earth taken therefrom upon the pile of earth which the water company had left. This was fresh earth. There was also on said pile the cobble stones thrown out, the paving stones,—about one and a half cubic yards of Belgian block,—the pieces of severed ties, and scattered around, the tools of the workmen. The plaintiff had driven through the street during the forenoon two or three times, and had a full opportunity to see the laborers of the defendant at work digging the said trench.

The sole contention, so far as this court is concerned, was whether the plaintiff was chargeable with contributory negligence; or—to state the matter somewhat more narrowly—whether the said trench was left, as the plaintiff had alleged, without any indication that there was danger in driving over that part of the said highway, or, as the defendant had asserted, was not so left. The defendant relied on these facts

as tending to prove its contention; and insisted that the fresh earth thrown upon the pile left by the water company, the cobble stones, the paving stones and the scattered tools of the workmen, did indicate to one who had the previous knowledge of the condition of things at that place which it is shown the plaintiff had, that there was danger in traveling on that part of the defendant's track. The court, however, found that all these things were "additions simply to the débris already there, indicating only as the same débris had indicated for days, that the westerly side of the street was impassable.". The force of this finding is in the word "only." If these facts indicated *only* that the west side of the street was impassable, then they did not tend to indicate that there was any danger in traveling on the railroad track at that place; and the finding of the court is equivalent to a ruling that the facts above recited did not tend to prove the defendant's claim. That this is the meaning which the court intended this language to bear, is made entirely certain by what the judge says in the memorandum of decision. He there says, in reference to these same facts: "I do not think this mass of débris or any part of it can properly be considered as giving a traveler any notice other than that the west side of the street was impassable." We think there was error. While there was no formal ruling that the evidence was inadmissible, the finding shows that the court did not consider it or weigh it at all as tending to prove what the defendant had alleged. The error is no less when the court refuses, or omits, to consider evidence which is properly admitted, than it would be if the court should refuse to admit the evidence. The party offering the evidence is deprived of its value in the case as much by the former course as by the latter. It is very clear that the evidence, taken in connection with the knowledge and the means of knowledge which the plaintiff had, did tend to show that he was justly chargeable with negligence contributory to his own injury. It is true that a traveler has a right to presume that the highway will be free from dangerous pitfalls. It is equally true that every traveler must act reasonably. He must use

his senses to avoid danger. He must not shut his eyes. If he has knowledge that a dangerous place exists, there can be no presumption in his favor. He must exercise care not to fall into it, and he is bound to make use of all the means of knowledge which are reasonably open to him. But we are not concerned now with the weight of the evidence. We are only showing that it was admissible, and should have been considered by the court for the purpose for which the defendant claimed it; and because it was not so considered there must be a new trial. There is error and a new trial is granted.

In this opinion the other judges concurred.

MARGARET SHALLEY ET AL. *vs.* THE DANBURY AND BETHEL HORSE RAILWAY COMPANY.

Third Judicial District, Bridgeport, April Term, 1894. ANDREWS, C. J., TORRANCE, FENN, HAMERSLEY and THAYER, Js.

Under § 2673 of the General Statutes notice of an injury caused by a defective road must be given to a private corporation owning and operating a street railway, when the injury is caused by a defect in that portion of the highway which the railway company is bound by its charter to keep in repair.

Such requirement is not unconstitutional as a denial or unreasonable abridgment of the plaintiff's right to sue.

In her complaint against such street railway company, the plaintiff alleged that her agent, upon the day following the accident, stated to the president of the defendant, who was fully authorized to act for it, the time, place, occasion and circumstances of the injury and demanded damages therefor; that such officer, with full knowledge of all the facts, told said agent that after the whole damage had been ascertained the claim must be presented to an insurance company which insured the defendant against such losses, as the defendant was not liable and had nothing to do with the losses or damages in such cases; that such insurance company would see to it, and that said agent must wait and follow his, said officer's, instructions; that in reliance upon such statements, the plaintiff did not give the statutory notice to the defendant; that by such statements and by sending its physician to examine the plaintiff

after the time for giving a notice had expired, the defendant regarded its liability as still subsisting and had waived the statutory notice and was estopped from claiming it as a defense. *Held*:—

1. That the alleged direction of the president of defendant to the plaintiff's agent, to wait and follow his instructions, could not reasonably be construed as a promise to give future instructions, but referred rather to waiting until the full extent of the damage had been ascertained.
2. That each of the parties was presumed to know the law and dealt with each other at arms length.
3. That the facts alleged did not constitute a waiver by the defendant of the statutory notice, nor estop it from availing itself of the want of such notice.

[Argued April 19th—decided June 29th, 1894.]

ACTION to recover damages for personal injuries suffered through the alleged negligence of the defendant; brought to the Superior Court in Fairfield County and tried to the court, *F. B. Hall, J.*, upon demurrer to the complaint; the demurrer was sustained, the plaintiffs filed an amended complaint which was also demurred to, and the court, *Shumway, J.*, sustained this demurrer and thereafter rendered judgment for the defendant, and the plaintiffs appealed for alleged errors of the court in sustaining the demurrers. *No error.*

The case is sufficiently stated in the opinion.

Lyman D. Brewster and *Samuel A. Davis*, for the appellants (plaintiffs).

When a defendant intentionally or negligently misleads a plaintiff by his representations, and causes him to delay suit until the statutory bar has fallen, the defendant will be estopped from pleading the statute. 18 Am. & Eng. Ency., 719; *Armstrong* v. *Levan*, 109 Pa. St., 177; *Lengar* v. *Hazlewood*, 11 Lea (Tenn.), 539; *Simplot* v. *Chicago, etc., R. R. Co.*, 16 F. R., 350, 363; *Joyner* v. *Massey*, 97 N. C., 149; *Whitehurst* v. *Dey*, 90 N. C., 542; *Duguid* v. *Schofield*, 32 Gratt. (Va.), 803; *Lamb* v. *Ryan*, 40 N. J. Eq., 67; *Martin* v. *Lamb*, 40 N. J. Eq., 669; *Webber* v. *Pres. etc., Williams College*, 23 Pick., 302; *Paddock* v. *Colby*, 18 Vt., 485; *Carruth* v. *Paige*, 22 Vt., 179; *Preston* v. *Mann*, 25 Conn., 118; *Chase's Appeal*, 57 Conn., 264; *Horn* v. *Cole*, 51 N. H., 287;

Jordan v. *Money*, 5 H. L., 185. Equitable estoppel applies to actions at law as well as to suits in equity. *Stubbs* v. *Pratt*, 85 Me., 429; *Paine* v. *Stewart*, 33 Conn., 516. Examination by physician is of itself held evidence of waiver. *Carpenter* v. *Ins. Co.*, 135 N. Y., 298. So negotiations recognizing the liability. 2 Biddle on Ins., § 1142. The causing the delay is called "waiver" rather than "estoppel" by Wood, in his work on Limitations. 1 Wood on Limitations, 106. The ordinary definition of waiver, "an intentional relinquishment of a known right," is but a partial definition of one class of waivers. *Deihl* v. *Adams Ins. Co.*, 58 Penn. St., 443. "Intention" is not always necessary. 2 Biddle, § 1052. Nor is knowledge of the right waived. *Parker v. Parker*, 146 Mass., 320. And, in many cases, the thing waived is a condition, or privilege, rather than a right, in any true sense of that word. It is therefore immaterial whether we say "the defendant has waived the notice," or, that "he is estopped from claiming it."

Samuel Tweedy and *Howard B. Scott*, for the appellee (defendant).

The statutory notice is indispensable to the maintenance of an action under the statute. *Gardner* v. *New London*, 63 Conn., 267; *Fields* v. *Hartford and Wethersfield Horse R. R. Co.*, 54 Conn., 9; *Hoyle* v. *Putnam*, 46 Conn., 61; *Low* v. *Windham*, 75 Me., 115; *Clark* v. *Tremont*, 83 Me., 421; *Underhill* v. *Washington*, 46 Vt., 291; *Gay* v. *Cambridge*, 128 Mass., 387; *Reining* v. *Buffalo*, 102 N. Y., 310; *Sowle* v. *Tomah*, 81 Wis., 349.

TORRANCE, J. The defendant is a corporation owning and operating a street railroad in the towns of Danbury and Bethel. By the provisions of its charter it is made the duty of the defendant, among other things, to keep in repair that portion of the streets and highways over which its railway is laid down, and a space of two feet on each side of its tracks, without expense to the municipalities through which

its road is laid, or to the owners of land adjoining said railway.

The complaint alleges in substance that on the 21st of September, 1892, in the course of repairs to the defendants' tracks at the corner of West and Montgomery streets in Danbury, "the same were by said railway company, negligently and carelessly left at night in a hazardous and dangerous condition, by reason of the natural soil or earth between and around said tracks having been removed by said company to a considerable depth, viz., six inches or more, and said tracks were left exposed, without lights by said company, or other warning to those in passing vehicles on the public highway;" and that the plaintiff on the night of said 21st of September, while riding with her husband in a vehicle on said highway at the corner of West and Montgomery streets, "drove upon and across said railway tracks, then and there being in said negligent and dangerous and exposed condition, and with no lights or warning to give notice of their condition, and said Margaret Shalley was violently thrown from said vehicle upon the ground," and sustained the injuries for which she now seeks to recover.

No statutory notice of the accident or injuries was alleged to have been given, but the complaint in paragraph four sets forth in detail certain facts which the plaintiffs claimed either amounted to a waiver of the required notice by the defendant, or estopped the defendant from availing itself of the want of such notice. That paragraph reads as follows:—

"Said John Shalley, husband of Margaret Shalley, and in her behalf and for himself, on the following day, viz., September 22d, 1892, called upon and informed Mr. Samuel C. Holley, president of, and fully authorized to act for, said railway company, of said injury; stated to him the time, place and circumstances of the injury, the occasion thereof, and made demand of the company for damages. At said interview said Holley, president as aforesaid, acting for, and with full power to act for, said railroad company, and who was well aware of the dangerous condition of said railway, after questioning said John Shalley, and ascertaining fully

the cause, nature and extent of her, the said Margaret Shalley's injuries, then and there acting for said railway company, and authorized so to do, told said John Shalley that he must present his claim for damages after he found out the whole damage, to the insurance company, which insured the said railway company against losses, and not to the said railway company, as the said railway company had nothing to do with the losses or damages in such cases, and denied said railway company's liability. Said Holley, then and there acting for said railway company, and authorized so to do, informed and assured the said John Shalley that the insurance company would see to it, and directed said John Shalley to wait and follow said Holley's instructions. Said plaintiff relying on the said statements, assurances and instructions of the defendant, made by the said Holley, acting for said defendant, and because of said statements, assurances and instructions, did not give any written statutory notice to said railway company, within the sixty days after said injury was received as provided by statute. The said railway company subsequently to the expiration of said sixty days, and before this suit was brought, sent their physician, with plaintiff's consent, to examine said Margaret Shalley, and made said examination as part of their evidence in this case, and has since the expiration of said sixty days, by negotiation, always treated said liability as subsisting and said notice as waived. Now said railway company by its denial of liability as aforesaid, to said plaintiffs, and by it misleading the plaintiffs, as aforesaid, in regard to said notice on the day after said injury, with full knowledge of the facts, and by said subsequent conduct, has waived said statutory notice."

To this complaint the defendant demurred for the following reasons:—

"1. It appears therefrom that no written notice of the injury, and of the nature and cause thereof, and of the time and place of its occurrence, was left with the defendant or any of its officers, within sixty days from the time of the accident as required by law. 2. The matters alleged in

said complaint as an excuse for failure to give such statutory notice, are not sufficient excuse for such failure. 3. The matters alleged in said complaint to constitute a waiver by the defendant of such statutory notice, do not constitute such waiver. 4. The defendant cannot be estopped by reason of anything alleged in said complaint from denying said waiver, or from claiming said statutory notice."

The court below sustained the demurrer, and thereupon judgment was rendered for the defendant.

It thus appears that the principal question upon this appeal is whether the facts alleged in paragraph four constitute a waiver of the statutory notice, or estop the defendant from availing itself of the want of such a notice.

Before discussing that question it will perhaps be well to notice and dispose of a claim made by counsel for plaintiffs near the close of the argument in this court, to the effect that if § 2673 of the General Statutes must be construed as requiring the notice, therein prescribed, to be given to a private corporation in a case like the one at bar, the requirement is unconstitutional.

This point is not made in the printed briefs, it was suggested rather than argued before us, and the reasons in favor of it were not stated, either fully or clearly. It apparently was not made nor decided adversely to the plaintiffs in the court below, and for this reason we should be justified in passing it without further notice; but inasmuch as the point is fundamental, and if well taken renders a discussion of the former question unnecessary, we will briefly consider and dispose of it.

By its charter, as we have seen, the defendant is charged with the duty of keeping in repair a certain portion of the highways over which its railway is extended, and by statute it, and not the municipalities through which its road runs, is made liable for an injury of the kind alleged in the complaint. A burden and a liability in respect to a limited portion of the highways are thus laid upon the defendant, which are somewhat similar in their origin and nature to the burden and liability imposed by statute upon towns and

other municipalities in respect to highways. This being so it would seem to follow that the reasons for requiring the notice prescribed by statute to be given to public corporations, would equally apply to a private corporation when charged with a duty and a liability similar in its nature and origin to that imposed upon towns and other municipalities. Such a requirement is not a denial or unreasonable abridgment of the right to obtain redress for an injury occasioned by a neglect to perform the duty thus imposed; it is simply a restriction, deemed by the legislature to be reasonable, upon the exercise of such right. We think the legislature had the power to impose such a restriction, and that § 2673 of the General Statutes requires the prescribed notice to be given in cases like the one at bar. *Fields* v. *Hartford & Wethersfield Horse R. R. Co.*, 54 Conn., 9.

The complaint in question must also, we think, be treated as one founded upon the duty and liability thus imposed upon the defendant by its charter and by statute.

Whether a private corporation in a case like this can waive the statutory requirement may perhaps admit of some doubt, but in the view we take of the case at bar it is unnecessary to decide that question. The case was argued before us, in one aspect of it, on the assumption that this could be done, and for the purposes of the discussion merely, we will proceed on the same assumption.

The question then is as before stated, whether the facts set forth in paragraph four constitute a waiver of the requirement of statutory notice, or estop the defendant from availing itself of the want of notice. In discussing it we will also assume for the purposes of the discussion that it sufficiently appears from the complaint that Mr. Holley had authority to bind the defendant by what he said and did.

What then are the facts relied upon to constitute such waiver and estoppel? They relate to what took place at the interview between Shalley and Holley on the day after the accident, and to certain acts of the defendant after the sixty days had expired. At that interview Mr. Shalley told Mr. Holley all about the accident and ended by demand-

ing damages. Mr. Holley tells him to ascertain the whole extent of the damage, and then to present his claim to the insurance company and not to the railway company; he assured him that the insurance company would see to it, and directed him to wait and follow his (Holley's) instructions. This last direction to wait and follow Holley's instruction must, we think, have reference to waiting till the entire extent of the damage was ascertained, and then presenting the claim to the insurance company, and not to future instructions to be given by Holley in this matter. This seems to be a reasonable construction to give to this sentence under the circumstances, because Holley then and there had instructed Shalley to a limited extent what to do; and after the instructions then given, it would hardly seem that any further instructions were contemplated, unless we assume that Holley then and there promised to counsel and advise Shalley as to all or some of the steps necessary to perfect his claim against the defendant; and as this is neither expressly nor impliedly asserted the assumption would be a very violent one. These parties occupied at this interview a hostile attitude, so to speak, towards each other. The defendant was under no duty to tell Shalley what to do to obtain redress for the injuries to his wife, nor did Shalley go to him to obtain information upon this point. We must presume that they both knew the law, and dealt with each other at arms length and upon an equal footing. Shalley went there to state his injuries and to demand redress and not to be advised as to his legal rights. In the absence then of any clear allegation to that effect, we ought not to construe the sentence in question as alleging a promise to give future instructions. But if we did, the complaint nowhere alleges that the defendant failed to give such future instructions; so that even if it should be held that he promised to do so, this point may be laid out of the case.

This then is the extent and the whole extent of the interview: Shalley informs the defendant of the accident and demands damages; the defendant tells him to wait till he ascertains the whole extent of his damage, and then to pre-

sent his claim to the insurance company and not to the railway company, because it had nothing to do with the matter, and assures him that the former company "would see to it." Holley neither admits nor denies the validity of the claim or the extent of the damage; he simply says, in effect, "whatever claim you have, present it to the insurance company as we have nothing to do with the losses in such cases." He does indeed, in words deny that his company is liable; but this is said not with reference to Shalley's case only, but with reference to all such cases; and he gives the reason for his denial in the fact that his company was insured against such losses in cases where damage might be justly due. This is plainly what he meant and all he meant by his denial of liability, and we think Shalley must have so understood him. For aught that appears Holley's advice was given in entire good faith in the honest belief that the claim should be presented to the insurance company. Presumably, and for aught that appears, Shalley knew just as much about the legal aspect of this matter as Holley did; but however this may be, it is nowhere alleged that the plaintiffs followed this advice, or that they were in any way misled or prejudiced thereby. It is indeed alleged, that in reliance upon it they did not give the statutory notice, but we fail to see how they had a right to rely upon it for any such purpose. The parties at that interview were each standing upon their legal rights and dealing with each other as prospective litigants. Nothing whatever is said about the rights or duties of each to the other further than is stated, and certainly there is not the slightest allusion to the statutory notice during the interview; indeed, for aught that appears, it was not then present to the minds of the parties at all. The plaintiffs had ample time after the interview in which to give it, and nothing was said or done there calculated to mislead them with respect to giving notice, or that can be reasonably construed as a waiver of such notice on the part of the defendant. Nor is there anything in what it is alleged the defendant did, after the sixty days expired, which can be or ought to be construed as a waiver of the statutory notice. In short, looking

carefully at the facts alleged in paragraph four, it is impossible to find anything to justify the conclusion that the defendant waived the statutory notice, or anything that estops it from denying that such notice was given.

There is no error.

In this opinion the other judges concurred.

TIMOTHY GILBERT *vs.* JAMES WALKER ET AL.

Third Judicial District, Bridgeport, April Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

Where the reasons of appeal are confined wholly to questions of law, this court will not consider questions of fact claimed to have been erroneously decided by the trial court, although the record lays a basis for an appeal upon those questions; but will take the facts as found by the court below.

Conversion is an unauthorized assumption and exercise of the right of ownership over goods belonging to another, to the exclusion of the owner's rights.

An action against the defendants for the conversion of a promissory note sent them for collection by the plaintiff is not sustainable, when it appears from the conceded facts that the plaintiff authorized the defendants, who were brokers in this State and engaged in selling mortgage loans for a western investment company, to forward the note for collection to such investment company where it was payable, which was done, and such investment company collected the amount of the note of the maker, and duly notified the defendants of such collection, but neglected to remit the proceeds to the defendants, and, while retaining the same, became insolvent.

The defendants did not inform the plaintiff that the note had been collected of the maker, although he several times inquired of them about the note; but stated that they had not received the money although they expected it soon. *Held*, that whatever effect this conduct of the defendants might have in an action for negligence in respect to the collection of the note, it did not constitute a conversion of the note by the defendants.

A new trial will not be granted for the admission of improper evidence where, upon the facts admitted by the losing party, it appears that one, if granted, would be of no avail to change the result.

[Argued April 24th—decided June 29th, 1894.]

ACTION to recover damages for the alleged conversion of a promissory note sent the defendants for collection; brought to the Superior Court in New Haven County and tried to the court, *F. B. Hall, J.*; facts found and judgment rendered for the defendants, from which the plaintiff appealed for alleged errors in the rulings of the court. *No error.*

The case is sufficiently stated in the opinion.

William B. Stoddard, for the appellant (plaintiff).

Henry C. White and *Leonard M. Daggett*, for the appellees (defendants).

TORRANCE, J. The complaint in this case is for the conversion of a certain promissory note belonging to the plaintiff, and it contains but a single count. The answer admits the ownership and delivery of the note, and the demand as alleged, but denies the conversion. It also sets out in detail certain facts, the substance of which is that the defendants with the plaintiff's consent received the note to forward for the plaintiff to a western company for collection; that they had done so and the note had been paid to said western company; that said western company had never paid over to the defendants the proceeds of said note, but that it, shortly after such payment and while said proceeds were in its hands, became insolvent, and had been put into and was still in the hands of a receiver for the benefit of its creditors; that in so receiving and forwarding said note for collection, the defendants acted as the agents of the plaintiff, with his knowledge and consent; and that they had notified the plaintiff of the facts alleged. The parties were at issue upon all or nearly all of the special facts so set up.

The court below made a finding of facts, and upon them rendered judgment for the defendants.

The basis for an appeal upon certain claimed errors in the finding of facts appears upon the record, but no appeal was taken on this ground, and the reasons of appeal are based wholly upon certain claimed errors of law. For this reason

we must decline to consider any errors save those specifically assigned in the reasons of appeal, and must take the facts as they are found by the court below. *Rowell* v. *Stamford Street Railroad Company*, 64 Conn., 376.

The material part of the facts found may be stated as follows: The note in question was for one thousand dollars, dated December 11th, 1885, payable to the order of one Toncray, five years after date, at the Farmers and Merchants Bank of Freemont, Nebraska, and was made by one Stenvers. It was given for money loaned by said bank to Stenvers, the payee Toncray being an officer of the bank, and was secured by a mortgage to Toncray upon land in Nebraska. After it was given, and some time prior to 1890, the officers of said bank organized the Nebraska Mortgage and Investment Company to carry on the mortgage loan business of the bank, and this investment company succeeded the bank in the loan business, and Toncray became an officer and the manager of said investment company.

The defendants are brokers in New Haven and have been engaged in selling loans for said bank and said investment company and other western companies and agencies, receiving a commission from such companies for such sales. The note in question, with the mortgage securing the same, was sold to the plaintiff in December, 1885, by Alfred Walker, who was then engaged in the business since carried on by the defendants, and whom they succeeded in business. Said note and mortgage had been sent by the bank to Alfred Walker to be sold. The note was indorsed by Toncray without recourse, but the mortgage was never assigned by Toncray. The note remained the property of the plaintiff till it was paid, December, 1890, and during this time the interest upon it was paid by Stenvers to the investment company, who forwarded the same to the defendants, and the defendants by their own check paid it to the plaintiff. In December, 1890, the defendants were informed by the investment company that Stenvers desired to pay the note, and requested them to forward the papers to it to the end that payment might be made. Thereupon in that month,

at the defendant's request, the plaintiff sent the note and mortgage to them for collection and received from them the following receipt: "$1,000.00. New Haven, Dec. 12, 1890. Received for collection the farm mortgage of John Stenvers of Dodge Co. Neb. 7½ per cent. amount one thousand dollars, date Dec. 11, '85 due Dec. 1, '90, with all papers pertaining thereto, the same being the property of Timothy Gilbert. The Alfred Walker Co." The defendants forwarded the papers as requested to the investment company, and on the 28th of January, 1891, were informed by letter from said company that Stenvers had paid the note to it on the 27th of December, 1890. The investment company never forwarded any of the money so collected to the defendants, nor have the defendants in any manner received any benefit from the payment of said note. In December, 1891, the investment company became insolvent and its property and affairs were placed in the hands of a receiver. Between December first, 1890, and December, 1891, the plaintiff called two or three times upon the defendants and inquired about the note; and the defendants informed him each time that they had not received the money but that they expected it soon. It was not proved that the defendants between December, 1890, and December, 1891, took any other steps toward collecting the note, than the forwarding of it as aforesaid, nor that they informed the plaintiff of their knowledge that it had been paid.

At the time the note was paid to the investment company, the defendants had in their hands for sale notes and mortgages belonging to the investment company to the amount of about ten thousand dollars, which upon the books of the investment company were charged to the defendants; and the investment company upon receiving payment from Stenvers credited the defendants with the amount paid. The defendants, however, fully accounted to the investment company for all of said loans, and they had no knowledge that the investment company had charged them with the amount of said loans or had credited them with the amount of said payment. The investment company had no authority to do

either, and it knew the note and its proceeds belonged to the plaintiff and not to the defendants. In his dealings with Alfred Walker and the defendants respecting the note and mortgage, the plaintiff understood that Walker and defendants were acting as the agents of some other company or agency, and understood that the defendants were not themselves to collect the note from the maker, but that they were to forward the same to others for collection at the place where the note was payable, and that the defendants would pay to the plaintiff the amount due on said note when the same should be remitted to them from the investment company.

Upon these facts the plaintiff claimed that the defendants had converted the note to their own use as alleged, and whether the court below erred in overruling this claim is the principal question upon the present appeal.

As already stated the only wrong alleged, and the only matter in issue, was the conversion of the note.

The plaintiff does not sue for the proceeds of the note, nor for any claimed negligent or wrongful conduct of the defendants in respect to the collection of the note, or its proceeds; but for the loss and conversion of the instrument itself, the paper upon which Stenvers' promise was written. To that specific wrong and to that alone, he has himself limited his proof, and for that and for that alone he has limited his right of recovery. *Ives* v. *Goshen*, 63 Conn., 79; *Sanford* v. *Peck*, id., 486. Unless then the facts found show a conversion of the note, the plaintiff cannot recover in this suit.

Conversion is usually defined to be an unauthorized assumption and exercise of the right of ownership over goods belonging to another, to the exclusion of the owner's rights. *Laverty* v. *Snethen*, 68 N. Y., 522. It is some unauthorized act which deprives another of his property permanently or for an indefinite time; some unauthorized assumption and exercise of the powers of the owner to his harm. The essence of the wrong is that the property rights of the plaintiff have been dealt with in a manner adverse to him, inconsist

ent with his right of dominion and to his harm. Pollock's Law of Torts, p. 290.

In the light of these principles, it is impossible to say that the conduct of the defendants amounted to a conversion of the note in question. The note was payable at the bank in Nebraska, and the payee of the note was the owner of record there of the mortgage made to secure it.

Even if the defendants had agreed, as the plaintiff claims, to personally collect the note, they were at liberty to do it through the investment company if they chose to take the risk of so doing. This certainly authorized them to forward the note in the manner they did, and authorized the bank to receive payment of the note. The defendants promptly forwarded the note, and it was promptly paid. As a note it then ceased to be the property of the plaintiff, and in place of it he became the owner of the amount paid.

It thus appears that every act done with respect to the note from the time it came into the defendants' hands until it was paid and delivered up and ceased to be the property of the plaintiff, was done by his authority and with his assent. The defendants then did nothing with the note which they were not authorized by the plaintiff to do. In *Palmer* v. *Jarmain*, 2 Mees. & W. 282, an agent was authorized to get a note discounted, which he did, and appropriated the avails. It was held that this was not a conversion of the note, because he did nothing with that save what he was authorized to do. The case at bar comes clearly within the principle here applied.

It may be, as claimed by the plaintiff upon argument before this court, that the defendants are or should be liable to him in some form of action, for their acts and conduct since the payment of the note and with reference to the money the proceeds of the note. How this may be we have no means of knowing, as the matter is not before us in any manner; but whatever wrongs the defendants may have done to the plaintiff in the premises, it is quite clear that their acts and conduct do not constitute a conversion of the note.

There remains to be considered very briefly the matters

set forth in the last reason of appeal relating to the admission of testimony. The defendants for the purpose of showing that in their transactions respecting the note they were acting as the agents of the Nebraska bank and of the investment company, offered the testimony of one James Walker who had been a clerk in the office of Alfred Walker, deceased, and also certain letters from the investment company to the defendants, showing all the transactions between the defendants and said bank and said company with reference to the note in question, and showing the original sale of said note by Alfred Walker to the plaintiff. The plaintiff objected to this testimony on the sole ground that the receipt given by the defendants to the plaintiff and hereinbefore set forth, constituted a contract on the part of the defendants, with the plaintiff, to personally collect said note, and that the evidence in question contradicted the writing. The court overruled the objection. Looking at all the facts and circumstances under which the receipt was given, we are inclined to regard it as a mere receipt,—a mere admission of a previous fact or facts,—and not as containing any contract. The defendants were not attorneys at law engaged personally in the collection of claims of this kind; they were mere brokers acting as agents for others, and this was well known to the plaintiff. As such they had acted, to his knowledge, for the investment company, in the matter of the collection of interest on his note. When the note is about to become due they inform him that the investment company want the note and mortgage sent on for payment, and ask him to send the papers to them for the purpose of being forwarded to that company; he does as requested, and after this the receipt is made out and forwarded to him describing the papers received and stating in very general terms the purpose for which they had been received. Under the circumstances it is difficult to believe that either party supposed or intended the words "for collection" to be a contract on the part of the defendants to personally collect the note. In this view of the matter the court clearly did not err in admitting the testimony in question.

But we need not, and do not mean to decide whether or not the receipt has the effect claimed for it by the plaintiff; for even if it has, and if it be true, as claimed, that the court erred in admitting the evidence, still this cannot avail the plaintiff, because on the facts admitted, and found without reference to this evidence, its admission did him no harm, and a new trial in the present case would not change the result. The plaintiff admits that he authorized and directed the defendants to collect the note, and this empowered them to deliver it up on full payment. He admits in his reply that it has been paid in full, and his real claim is that the proceeds of it, in law and so far as he is concerned, were paid to the defendants. As we have already seen they thus did with the note just what the plaintiff claims he empowered them to do, namely, deliver it up on full payment. This being so he can never recover for the conversion of the note in this or any other suit. A new trial, if one should be granted for the claimed error in question, would therefore be of no avail, as upon the conceded facts the result would not be changed. "The court therefore will not grant a new trial of the case, which if granted must come to the same result as the former trial." *Scofield* v. *Lockwood*, 35 Conn., 425–429.

There is no error and a new trial is denied.

In this opinion the other judges concurred.

JOHN DUNHAM ET AL. *vs.* JAMES A. BOYD.

First Judicial District, Hartford, May Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

In an action upon a promissory note by the payees against the maker, the latter alleged in his answer, first, that prior to the maturity of the note it was paid by the acceptance by the plaintiffs of certain stock previously deposited with them by the maker as collateral security; and second, that while holding such stock as collateral security the plain-

tiffs so managed the same that its value was entirely lost to the defendant who was thereby damaged to more than the amount of the note. These defenses were denied by the plaintiff. *Held*:—

1. That while evidence tending to prove that the plaintiffs treated the collateral as their own stock was admissible under the first issue, yet the exclusion by the trial court of a statement of a witness that he had an indistinct impression that the plaintiffs at some time voted on this stock, was not erroneous, as such evidence, if relevant, might properly be found by the trial court too remote to be material.
2. That the evidence of reorganization of the company whose stock was held by the plaintiffs as collateral security and the formation of a new company which received all the property and assumed the liabilities of the former, pursuant to a vote of its stockholders, in which action the plaintiffs participated as stockholders in their own right, was, in the absence of any evidence connecting it with any mismanagement of the collateral stock, properly excluded as irrelevant to the second issue.

When the record fails to show what portions of a deposition, offered only in part, were excluded, this court will not dissect the deposition to determine what portions tend to support the claims of the losing party, although a stipulation of counsel printed with the record states that such portions were the ones excluded by the trial court.

(Argued May 1st—decided June 29th, 1894.)

ACTION upon three promissory notes, brought to the Superior Court in Hartford County and tried to the court, *George W. Wheeler, J.*; facts found and judgment rendered for the plaintiffs, from which the defendant appealed for alleged errors of the court in excluding evidence. *No error.*

The first count alleged that by his note of October 15th, 1885, the defendant promised to pay the plaintiffs $5,000, with interest sixty days (without grace) after date, and that the note has not been paid and is still the property of the plaintiffs. The second and third counts relate to two notes of $75.00 each, and do not call for any separate consideration. The fourth count alleges a loan of $8,000, by the plaintiffs to the defendant, on or before September 20th, 1892. No answer was made to the fourth count.

The answer to the first count sets up two defenses:—

First, payment before the note was due, by an agreement between the defendant and plaintiffs whereby the plaintiffs agreed to receive and in pursuance thereof did receive, 100 shares of the Anoka Pressed Brick & Terra Cotta Co., of the par value of $100 a share, previously delivered to the

plaintiffs by the defendant as collateral security for said note, in full payment of said note and in full satisfaction of all claims against the defendant upon the same.

The second defense averred that at the time said note was given, the plaintiffs had in their possession said 100 shares of stock, which was then worth $8,000, and which the defendant had previously delivered to the plaintiffs as collateral security for a former note, for which the note in suit was given as a renewal; and upon the execution of the note in suit it was agreed that the plaintiffs should, and the plaintiffs did, hold said stock as collateral security for the payment of that note; "and the plaintiffs so managed said stock that the same was entirely lost to the plaintiffs, whereby the defendant was damaged to more than the amount of said note and interest thereon, which amount the defendant claims to recoup against any liability under said note, by way of set-off or counterclaim in such manner as may be equitable and just." The plaintiffs' reply denied the allegations in the defendant's first and second defense.

The court below found the issues for the plaintiffs and rendered judgment in their favor. The defendant's appeal assigns as the only reason for appeal that, "the court erred in refusing to admit the evidence which was offered by the defendant, this appellant, and ruled out by the court, as stated in the finding of facts."

The court finds, as material to the question of the admissibility of evidence, the following facts:—

August 15th, 1885, the defendant, for his accommodation, induced the plaintiffs to indorse his note for $5,000, and in consideration of such indorsement gave the plaintiffs 20 shares of the capital stock of the Anoka Pressed Brick & Terra Cotta Co., which were absolutely transferred to them, and also left with the plaintiffs as collateral security for such indorsement 80 shares of the same stock, which were never transferred to the plaintiffs. The stock was of the par value of $100 per share. The actual value of the stock from August 15th, 1885, to December 15th of the same year, was diminishing and the stock was worth between

$10.00 and $25.00 a share. When the indorsed note became due, to wit, October 15th, 1885, the plaintiffs were obliged to pay the same, and the defendant then gave them his note for $5,000, being the note in suit. It was agreed between the parties that the plaintiffs should continue to hold the 80 shares of stock as collateral security for the defendant's note. When the defendant's note became due (December 14th, 1885), the plaintiffs endeavored to secure payment from the defendant, but he put them off with promises of future payment. The parties lived in Minneapolis, and before March 1st, 1886, the defendant left said city, and although the plaintiffs made diligent effort to find him, or learn his address, they did not succeed until some time in 1890. The defendant had been president of the said company, and was succeeded by the plaintiff Dunham about October 15th, 1885. None of the officers of the company knew the defendant's address after he left Minneapolis. The plaintiffs never held stock in the company to exceed 70 shares, being 50 shares purchased before this transaction, and the 20 shares transferred to them by the defendant. The capital stock of the company was $60,000. No evidence of neglect or mismanagement in relation to the stock held by the plaintiffs as collateral was offered, except the excluded evidence.

Upon the trial the defendant offered to prove:—

1. That the plaintiff Dunham became president of the company about December 15th, 1885. 2. As such president he conveyed, without consideration, all the property of said company to a new company, called the Anoka Pressed Brick Co., and that the shares in the new company took the place of the shares in the old company, on payment of an assessment on the old stock. 3. The defendant was given no notice by the plaintiffs or by any one else of the new company, or of the assessment on the stock. 4. That some years after, the plaintiff Dunham got possession of the greater part of the property of the new company, and transferred it to the plaintiff Johnson for a consideration unknown to the defendant. 5. That thereby, with the knowledge

and consent of the plaintiff Dunham, the whole property of the old company went out of the old company, and the value of the stock of the said company was destroyed.

This was all the defendant claimed to prove on this point, and to prove this he offered the following evidence:—

1. Portions of the deposition of Emmit W. Rossman. 2. A certified copy of the articles of association of the new company, signed February 23d, 1886. 3. A certified copy of a quitclaim deed from the old company to the new company, dated April 7th, 1886, and conveying certain land therein described. 4. A certified copy of a warranty deed from the plaintiff Dunham and wife to the plaintiff Johnson, dated October 27th, 1892, and conveying, in consideration of the payment of $2,500, about one quarter of the land described in said deed of April 7th, 1886.

The defendant offered this evidence to establish:—

1. The first defense, as showing the conduct of Dunham and Johnson in treating the stock, not as the defendant's, but as their own. 2. The second defense, that the plaintiffs had so managed the stock (the stock in the hands of Dunham and Johnson, received originally from defendant Boyd as collateral), that the same was entirely lost to the defendant. The evidence was objected to as irrelevant and immaterial, and was excluded by the court.

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

Arthur F. Eggleston, with whom was *Lyman S. Burr*, for the appellees (plaintiffs).

HAMERSLEY, J. The defendant claims that the evidence offered and excluded was admissible in support of both his defenses.

First. The issue of fact raised by the first defense is, did the plaintiffs and defendant, before the defendant's note became due, agree that the stock held by the plaintiffs as collateral security for the note should be owned by the plaintiffs, and received in full payment of the note? The fact that

the plaintiffs subsequently treated the stock as their own property, would be relevant to that issue. Any fact tending to show that the plaintiffs had treated the stock as their own would be a relevant fact; and the defendant claims that portions of the deposition of Rossman tend to show that fact. The testimony of Rossman on this point is substantially as follows:—

I was secretary of the Anoka Pressed Brick & Terra Cotta Co. in the fall of 1885, and kept the books of the company, and remained secretary until after March 1st, 1886. At some meeting of the company, between October 15th, 1885, and March 1st, 1886, I think the plaintiffs represented defendant's stock by voting on the stock. That is my recollection. The books will show. I do not remember how much stock the defendant had. I am not positive whether more than twenty shares of his stock was ever transferred to the plaintiffs. It is not for me to say whether they could vote on stock not transferred to them. I think they did vote on stock standing in the name of the defendant. I am not positive. I cannot say positively whether the defendant himself was present at any of the meetings of the company during this time. The minutes will show.

If this evidence is admissible it must be so because the fact claimed to be proved by it—that the recording officer of this corporation has an impression (of which he is not positive) that at some meeting of the corporation held seven years before, the plaintiffs, who were stockholders by transfer of a portion of the stock formerly standing in the defendant's name, voted on the balance of the stock still standing in the defendant's name—is relevant as tending to show the fact that the plaintiffs did vote on the defendant's stock; which fact is relevant as tending to show the fact that the plaintiffs had treated the stock as their own property; which fact is relevant as tending to show the fact in issue as alleged in the first defense. The trial judge thought that this evidence, whether relevant or not, was under all the circumstances of this case, too remote to be material, and excluded the evidence. We cannot say that such ruling was erroneous.

The exhibits offered in connection with Rossman's testimony are clearly irrelevant to any issue raised by the first defense.

Second. The defendant relies on the admissibility of the evidence under his second defense, and this reliance is based mainly on the deposition of Rossman. In addition to his testimony above recited, Rossman testified substantially as follows:—

After I became secretary of the Anoka Pressed Brick & Terra Cotta Co., in the fall of 1885, the company was advised by counsel that its organization was not legal. The company was in debt. I cannot remember the amount of the debts within $25,000; cannot attempt to tell what the debts were. The company was reorganized in the spring of 1886. Its name was changed to the Anoka Pressed Brick Co., and the capital stock increased. The first steps were taken in February, and the new articles of incorporation took effect March 1st, 1886. The old company was absorbed by the new, and its assets sold to the new. The transfers, including a bill of sale, were in writing. I think the consideration expressed in the papers was one dollar. The actual consideration for the transfer of the property included the assumption by the new company of all the debts of the old. Those who held stock in the old company at the time of the incorporation of the new received in lieu thereof stock issued by the new company to an amount equal to that which they held in the old. There were two objects in the reorganization of the company: first, to properly organize according to the statutes of the State; and, second, to increase the capital stock. At some conversations—I cannot cite any particular conversation, at which the plaintiff Dunham was present—the substance of the talk was, that all those who could not come to the front would either have to put up or shut up. I paid my assessments.

From the exhibits offered in connection with the deposition it also appeared that the articles of incorporation were signed by the witness Rossman, who was made a member of the first board of directors, and that its capital stock con-

sisted of 1000 shares, of $100 each, to be paid in as called for by the directors; that on April 7th, 1886, the old company conveyed to the new company certain real estate, the deed being sealed with the corporate seal of the old company, and its corporate name subscribed by the witness Rossman as secretary and the plaintiff Dunham as president; that six and one half years afterwards, and subsequent to the bringing of this suit, a one fourth interest in the land described in the above deed was conveyed by the plaintiff Dunham and his wife to the plaintiff Johnson.

Essential portions of the testimony of Rossman were objected to at the taking of his deposition, not only as immaterial and irrelevant, but as secondary evidence. Counsel for the defendant claimed that the papers and books which constituted the primary evidence were lost or in the control of the plaintiffs, but no evidence to that effect was produced, and the fact was not proved, either before the magistrate or the trial court. Assuming, however, that Rossman's testimony was not inadmissible on this ground, the defendant's claim is that the evidence excluded tends to prove the fact which he claims to be relevant under his second defense—that the reorganization of the corporation, whose stock was held by the plaintiffs as collateral security, in connection with the defendant's failure to take advantage of his rights under the reorganization, destroyed the value of the defendant's stock, —the plaintiff Dunham, as stockholder and officer of the corporation, consenting to such reorganization.

It is difficult to understand how this fact can be claimed to be relevant, unless upon the theory that it tends to prove that the plaintiffs Johnson and Dunham took part in this reorganization in bad faith, for the purpose of promoting their interests and to the injury of the defendant. If admissible for that purpose, it is by no means clear that the rejection of the evidence in the circumstances of this case was detrimental to the defendant. The evidence does not tend to show that the reorganization was against the interests of the stockholders; on the contrary, it shows that it was necessary in some form, and plainly indicates that the form adopt-

ed was the best for the stockholders. It justifies no lawful inference that Dunham had any interest, or exercised any influence, other than as the holder of 70 out of 600 shares of the stock. It justifies no inference that the defendant did not know of the action taken by the stockholders at the time, and did not have notice of the special meeting which must have been called for taking such action. The defendant claims to have been in Minneapolis until March 1st, and was a stockholder of record, and the presumption is that he did have the same notice as other stockholders; and it does not tend to show that the value of the defendant's stock was in fact impaired by the reorganization. It gives no reason to suppose that if the stockholders had refused to reorganize, the defendant's stock would have had any greater value than it had when the reorganization was decided upon. The inference rather is that the reorganization was the only means of obtaining anything from the stock. It is true that other evidence might have given importance to that offered, but there was no such evidence in the case, and the defendant did not claim that he could produce such evidence.

The trial court, in passing on the materiality of evidence, must act in view of the circumstances of the case on trial, and a party cannot claim before a court of review the legal right to a new trial because evidence, which is apparently of no consequence in connection with the facts found, might be important in connection with some unknown evidence which was not produced on the trial and which he did not claim before the trial court could be produced.

But even if the evidence plainly tended to prove bad faith on the part of the plaintiffs in the reorganization of the company, it was properly rejected, because the question of bad faith on the part of the plaintiffs in the reorganization of the company was not a fact at issue in the case, unless connected with some mismanagement of the defendant's stock held by the plaintiffs as collateral security. If the defendant really claimed that the plaintiffs had got control of the corporation, and had so managed its affairs as to destroy the value of all its stock, and was therefore responsible to

the defendant in damages which he could recoup in this case, he should have pleaded such defense. The second defense simply alleges that the plaintiffs held the defendant's stock as collateral security, and so managed said stock that the same became entirely lost. The evidence excluded is not relevant to the issue raised by this defense. It does not tend to prove any management of the defendant's stock by the plaintiffs to the injury of the defendant, either by itself or in connection with other evidence, and the court expressly finds that there was no other evidence of neglect or mismanagement in relation to the stock held as collateral by the plaintiffs.

We have treated portions of the deposition of Rossman as if offered in evidence and excluded by the court below; but the record does not show this to have been done. The finding says that the defendant offered portions of the deposition of Rossman, but does not specify what portions. A stipulation of counsel printed with the record states that the counsel agree "that the whole deposition be printed, and that the parts thereof which tend to sustain the defendant's claim as stated in the finding are the portions which were excluded by the court." The counsel do not attempt to specify the testimony which was offered and excluded, and this court is asked to dissect a deposition filled with objections, and which, as a whole, was not offered in evidence, to determine what portions tend to support the defendant's claim, and to grant a new trial on the assumption that such evidence was excluded by the court below, when there is nothing in the record to show that it was in fact offered. We cannot so supplement a finding; and in this case, if it had not been clear from the whole record that a new trial ought not to be granted, whatever portions of the deposition may have been offered, or if our attention had been directed to the irregularity before argument, we should have insisted on the record being properly amended.

A new trial is denied.

In this opinion the other judges concurred.

MARY E. GREGORY *vs.* FRANK LEE.

First Judicial District, Hartford, May Term, 1894.* ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

The obligation of an infant to pay for necessaries furnished him is one imposed by law, rather than one which arises from his contract; as the party furnishing the necessaries can recover only their fair and reasonable value.

As a general rule an infant may avoid his contracts of every kind, whether beneficial to him or not, and whether executed or executory.

This rule applies to contracts for necessaries, and especially so when the contract is in whole or part executory at the time of its avoidance by the infant. Hence an infant may disaffirm his contract for the lease of a room suitable to his needs and situation in life, and is not liable for the rent of the room alleged to have accrued after such disaffirmance and after he has ceased to occupy it, although such period was within the term covered by his contract.

[Argued May 16th—decided June 29th, 1894.]

ACTION for rent of a leased room, brought before a justice of the peace in the town of New Haven and thence by the defendant's appeal to the Court of Common Pleas in New Haven County, where the case was tried to the court, *Studley, J.*, upon the defendant's demurrer to the plaintiff's reply; the court sustained the demurrer and rendered judgment for the defendant, and the plaintiff appealed for the alleged error of the court in sustaining the demurrer. *No error.*

The case is fully stated in the opinion.

Talcott H. Russell, for the appellant (plaintiff).

I. This action is brought to recover for the price of lodgings rented by defendant and which he entered into possession of. Defendant was a student in Yale College and it was necessary for him to secure such lodgings. It was necessary for him to have such lodgings during his college year.

* Transferred from the third judicial district by agreement of the parties and the consent of the court.

The lodgings for the year therefore were a necessary part of the expenses of his education.

II. The authorities are plain that education is a necessary and that for that purpose the infant may enter into fair and suitable contracts if necessary for an entire year. See 1 Roll., 729; 3 Comyn's Digest, 562; *Pickering* v. *Gunning*, Pal., 528; *Chapple* v. *Cooper*, 13 M. & W., 252; *Squire* v. *Hydliff*, 9 Mich., 274. A lease of itself may be a necessity. Wood's Landlord and Tenant, page 146, sec. 103; Coke, Lit., 172*a*; Taylor's Landlord and Tenant, p. 76, sec. 96; *Lowe* v. *Griffiths*, 1 Hodges, 30, and 1 Scott, 458; *Peters* v. *Fleming*, 6 M. & W., 42; *Ry. Co.* v. *McMichael*, 5 Exchequer, 113, 125.

III. Our law is laid down in *Riley* v. *Mallory*, 33 Conn., 206; 1 Swift, 52. Defendant makes much of the distinction between executed and executory contracts. This distinction is not made in the causes in this State. The rule that an infant's contracts are voidable is one made for his protection. Where it is necessary for him to have power to make contracts the law will allow him to make them. *Chapple* v. *Cooper*, 13 M. & W., 252.

IV. The contract in this case is executed. He agreed for the rooms for the college year and he entered into possession. The contract was then executed. The mere fact that he did not choose to continue to occupy or use the premises is of no consequence as regards the merits of the case.

V. As to the second defense it is sufficient to refer to *Morse* v. *The State*, 6 Conn., 9.

Edward G. Buckland and *Harry G. Day*, for the appellant (defendant).

The sole question in this case is whether an infant, after he has elected to avoid a contract, can be held on the executory portion of the same.

I. What is the nature and effect of the appellee's so-called contract?

Being a transaction with an infant it cannot on principle be a perfect contract. To every perfect contract there must

always be, 1, Subject matter, 2, Consideration, 3, Meeting of the minds, 4, Parties capable, in contemplation of law, to contract. 1 Parsons on Contracts, 8. But "the law assumes the incapacity of an infant to contract." *Riley* v. *Mallory*, 33 Conn., 206. Therefore, where an infant is a party, one element of a perfect contract is missing and it is an anomaly to say that there is any contractual obligation on his part. The contract, so far as there is a contract, is a unilateral one, binding only on the adult and voidable by the infant at any time. *Shipman* v. *Horton*, 17 Conn., 481, 484; *Mustard* v. *Wohlford's Heirs*, 76 Am. Dec., 209, 211; *Thompson* v. *Hamilton*, 12 Pick., 425, 429; *Cannon* v. *Alsbury*, 10 Am. Dec., 709, 711; *Harner* v. *Dipple*, 31 Ohio St., 72, 77. Whatever enforceability a transaction with an infant may have is due solely to the operation of law, not to any act of the infant, and the only obligation which the law implies is the obligation to pay the reasonable value of necessaries actually supplied. *Barnes* v. *Barnes*, 50 Conn., 572, 574; Keener on Quasi Contracts, pp. 20, 21; Parsons on Contracts, *313; *Trainer* v. *Trumbull*, 141 Mass., 527, 530; *Parsons* v. *Keys*, 43 Tex., 557, 559; Schouler on Domestic Relations, *555; Bishop on Contracts, §§ 86, 266; Tyler on Infancy and Coverture, § 60.

II. An infant is not liable on his executory agreement to take and pay for necessaries to be supplied.

If the obligation of an infant is that implied by law, the proper form of action to hold an infant would be on the implied obligation, called under the Practice Act the common counts. But in such an action a plaintiff can recover only for things which have been actually furnished, or benefits which have been actually enjoyed. Obviously the complaint sets forth neither of these facts. *Catlin* v. *Haddox*, 49 Conn., 492, 498; Lawson on Contracts, § 136; 2 Greenleaf on Evidence, § 367; *Flexner and Lichten* v. *Dickerson*, 72 Ala., 318, 323; 1 Parsons on Contracts, (8th Ed.,) *321, *326, note 1; *Pool* v. *Pratt*, 1 Chipman, (Vt.,) 254; Bishop on Contracts, §§ 265, 267; *Minock* v. *Shortridge*, 21 Mich., 304, 315; *Edgerly* v. *Shaw*, 25 N. H., 514, 516, 57 Am. Dec., 349; *Eu-*

reka Co. v. *Edwards*, 71 Ala., 248, 46 Am. Rep., 314, 315; *Gaffney* v. *Hayden*, 110 Mass., 137; 1 Am. Leading Cases, (Hare and Wallace,) pp. 109, 110.

III. Even if assumpsit would lie it must in addition be shown, to maintain this action, that the room was a necessary.

Said room was not a necessary. The fact that he obtained and was occupying a suitable room elsewhere during this time, disposes of this question; for those things with which an infant is already supplied are not necessaries. *Conboy* v. *Howe*, 59 Conn., 112, 114; *Trainer* v. *Trumbull*, 141 Mass., 527, 530; Pollock on Contracts, side page 50; *Barnes* v. *Toye*, 13 L. R., Q. B. D., 410, 413; *Johnson* v. *Lines*, 6 W. & S., 80, 40 Am. Dec., 542, 544.

IV. In accordance with the foregoing principles an infant is liable on his lease only while he is in possession, and then only for a reasonable price. *Ketley's Case*, Brownlow & Goldsborough's Rep., 120; *Blake* v. *Concannon*, 4 Irish Rep., Com. Law, (1869-70,) 323, 330-31; *R. R.* v. *McMichael*, 5 Exch., 114, 123; Taylor on Landlord and Tenant, § 96; 1 Keener on Contracts, 514; *Holmes* v. *Blogg*, 8 Taunton, 508.

TORRANCE, J. The complaint in this case alleges that on the first of June, 1892, the defendant, being a student in Yale College, entered into a contract with the plaintiff by which he leased a room for the ensuing college year of forty weeks, at an agreed rate of ten dollars per week, payable weekly, and immediately entered into possession of said room, and has neglected and refused to pay the rent of said room for the ten weeks ending February 7th, 1893.

The answer in substance is as follows:—

On or about September 15th, 1892, the defendant agreed to lease a room in the house of the plaintiff for the ensuing college year of forty weeks, at the agreed rate of ten dollars per week, payable weekly; that he then entered into possession of said room and occupied it till December 20th, 1892; that on said day he gave up possession of said room and ceased to occupy the same, and then paid to the plaintiff all he owed her for such occupation and possession up to that

time; that immediately thereafter he engaged at a reasonable price another suitable room elsewhere, and continued to possess and occupy the same till the end of said college year; that during all of said period he was a minor and a student in said college; and that on December 20th, 1892, he refused to fulfill said agreement with the plaintiff to occupy or pay for said room for the remainder of said forty weeks, and has always refused to pay for the time during which he did not possess or occupy said room.

The reply to the answer was as follows:—

"Par. 1. Plaintiff admits all the allegations of said defense.

"Par. 2. Defendant at the time of making said contract was between nineteen and twenty years of age.

"Par. 3. Defendant and his parents are residents of the Island of Trinidad. His father makes him an annual allowance out of which he is expected to defray all his college expenses, including room and board, transacting the business incidental thereto in his own name and not on account of his father.

"Par. 4. It is the general custom among students and lodging-house keepers to rent rooms for the college year of forty weeks, and students also usually contract for and pay tuition by the year. Defendant at the time of renting said rooms had contracted for his tuition during the college year.

"Par. 5. The rent charged for the room was fair and reasonable, and was suitable to his necessities as a student and to his condition in life. It was also necessary for him to have a room as a place of lodging and study during his college year.

"Par. 6. Defendant could not have obtained a room equally suitable for his purpose nor on such advantageous terms if he had not contracted for the year, except by going to a hotel and paying the usual charges made by hotels for such period as he wished to stay. The cost of this would have been considerably greater.

"Par. 7. Owing to the custom above noted, plaintiff cannot rent her room for the balance of the year and will be

subjected to great loss, unless defendant is compelled to pay rent for the balance of said period."

There was also filed in the case a second defense and a reply to the same, which in view of the conclusion reached upon the first defense and the reply thereto, need not be considered.

To the reply above set out the defendant demurred specially, the court below sustained the demurrer, and judgment was rendered for the defendant. The sole reason of appeal is the claimed error of the court in sustaining the demurrer.

Upon this appeal the facts stated in the answer, and also in the reply so far as the same are well pleaded, must be taken to be true.

It thus appears that the defendant, a minor, agreed to hire the plaintiff's room for forty weeks at ten dollars per week, and that he entered into possession and occupied it a part of said period; that he gave up and quit possession of the room and refused to fulfill said agreement on the 20th of December, 1892, paying in full for all the time he had occupied it; that he has never occupied it since, but has been paying for and occupying a suitable room elsewhere.

Under the facts stated, it must be conceded that this room at the time the defendant hired it and during the time he occupied it, came within the class called "necessaries," and also that to him during said period it was an actual necessary; for lodging comes clearly within the class of necessaries, and the room in question was a suitable and proper one, and during the period he occupied it, was his only lodging room. "Things necessary are those without which an individual cannot reasonably exist. In the first place, food, raiment, lodging, and the like. About these there is no doubt." *Chapple* v. *Cooper*, 13 M. & W., 252; 1 Swift's Digest, 52.

So long then as the defendant actually occupied the room as his sole lodging room it was clearly a necessary to him, for the use of which the law would compel him to pay; but as he paid the agreed price for the time he actually occu-

pied it no question arises upon that part of the transaction between these parties.

The question now is whether he is bound to pay for the room after December 20th, 1892. The obligation of an infant to pay for necessaries actually furnished to him does not seem to arise out of a contract in the legal sense of that term, but out of a transaction of a *quasi* contractual nature; for it may be imposed on an infant too young to understand the nature of a contract at all. *Hyman* v. *Kain*, 3 Jones' L. (N. C.), 111. And where an infant agrees to pay a stipulated price for such necessaries, the party furnishing them recovers not necessarily that price but only the fair and reasonable value of the necessaries. *Earl* v. *Reed*, 10 Met., 387; *Barnes* v. *Barnes*, 50 Conn., 572; *Trainer* v. *Trumbull*, 141 Mass., 527; Keener's Quasi Contracts, p. 20. This being so, no binding obligation to pay for necessaries can arise until they have been supplied to the infant; and he cannot make a binding executory agreement to purchase necessaries. For the purposes of this case perhaps we may regard the transaction which took place between these parties in September, 1892, either as an agreement on the part of the plaintiff to supply the defendant with necessary lodging for the college year, and on the part of the defendant as an executory agreement to pay an agreed price for the same from week to week; or we may regard it, as what on the whole it appears the parties intended it to be, a parol lease under which possession was taken, and an executory agreement on the part of the defendant to pay rent. If we regard it in the former light, then the defense of infancy is a good defense; for in that case, the suit is upon an executory contract to pay for necessaries which the defendant refused to take and never has had and which therefore he may avoid. If we regard the transaction as a lease under which possession was taken, executed on the part of the plaintiff, with a promise or agreement on the part of the defendant to pay rent weekly, we think infancy is equally a defense.

As a general rule with but few exceptions, an infant may avoid his contracts of every kind, whether beneficial to him

or not, and whether executed or executory. *Riley v. Mallory*, 33 Conn., 201. The alleged agreement in this case does not come within any of the recognized exceptions to this general rule. "An infant lessee may also avoid a lease, although it is always available for the purpose of vesting the estate in him so long as he thinks proper to hold it. * * * As to his liability for rent, or the performance of the stipulations contained in the lease, he is in the same situation, with respect thereto, as in case of any other contract; for he may disaffirm it when he comes of age, or at any time previous thereto, and thus avoid his obligation." Taylor's Landlord and Tenant, § 96. In this case the defendant gave up the room and repudiated the agreement, so far as it was in his power to do so, in the most positive and unequivocal manner.

The plea of infancy then, under the circumstances, must prevail, unless the matters set up in the reply make the facts set up in the answer unavailable in this case. Upon this point, without dwelling in detail upon the matters set up in the different paragraphs of the reply, we deem it sufficient to say that neither singly nor combined do the matters so set up constitute a sufficient reply to the answer.

There is no error.

In this opinion the other judges concurred.

J. De Trafford Blackstone's Appeal from Probate.

Second Judicial District, Norwich, May Term, 1894. Andrews, C. J., Torrance, Fenn, Baldwin and Hamersley, Js.

A testator gave one third of the residue of his estate to his widow for her life, and the other two thirds in certain proportions he bequeathed to his five children. By the sixth and subsequent clause of his will he directed that the amounts charged by him on his books to his several children should be deducted from their respective shares in the residuary portion of his estate, and that the amount so charged should be embraced in the inventory of the estate. Pending settlement of the

estate, the residuary portion had increased some two hundred and forty thousand dollars by additions of income accruing since the testator's death. The distributors in making a division of the residue, first determined the amount of the principal residue as it existed at the death of the testator, and from this amount deducted the total amounts charged by the testator on his books to his several children, and set aside one third of the balance for the life use of the widow; to the remaining two thirds they added the aggregate advancements made to the children and divided the sum thus ascertained in the proportions directed by the will, and from the share of each child so found they then deducted the advancements made to him or her respectively. Having thus determined the amounts of the respective shares of the widow and children in the principal of the residue, they then divided the income among the widow and children in like proportion. Neither the widow nor the appellant complained of this method of division of the principal, but the latter appealed from the decree of the court of probate accepting the distribution, in so far as the income was concerned.

Held:—

1. That the intent of the provision in the will directing that the amounts charged by the testator on his books to his several children should be embraced in the inventory of his estate, was merely the designation of a mode in which the distribution should be made, in order to insure an equitable division among the legatees; and not to make such advancements assets of the estate.
2. That the acquiescence of the widow and the appellant in the distribution of the principal of the residue, had placed such a construction upon the testator's intent in respect to the advancements, that it could not now be changed, even if under other circumstances this court might have taken a different view; and as the income was distributed in the same proportions as the principal of the residue, the appellant had no cause of complaint.

[Argued May 29th—decided June 29th, 1894.]

APPEAL from an order and decree of the Court of Probate for the district of Norwich, accepting the return of the distributors upon the estate of Lorenzo Blackstone, deceased; taken to the Superior Court in New London County and tried to the court, *Prentice, J.*; facts found and case reserved for the advice of this court. *Judgment of affirmance advised.*

The case is sufficiently stated in the opinion.

Solomon Lucas, for the appellant.

Jeremiah Halsey, with whom was *Willis A. Brisoe*, for the appellees.

FENN, J. Lorenzo Blackstone, late of Norwich, died in 1888, leaving a last will by which he disposed of a large residuary estate, giving to trustees one third of the same in trust, to pay the income therefrom to his wife, Emily Blackstone, who is still surviving, during her life. The other two thirds, by the fourth clause of his will, he directed should be divided into eighteen equal parts or shares, and these shares be disposed of to and among his five children, giving to the appellant, who is one of said children, four of such shares, one absolutely, the other three to be held in trust for his benefit. The sixth clause of said will is as follows: "There is to be deducted from the shares given to each of my said children, or in trust for their use in the fourth clause of this will, the amounts charged to them respectively on my books. These amounts are to be embraced in the inventory of my estate."

On the 31st day of July, 1893, the distributors of said estate made return of their doings to the court of probate for the district of Norwich, which on said day accepted and approved said distribution. In said instrument the distributors stated: "We have determined the amounts due to the residuary legatees under the will of said deceased, in accordance with the provisions of said will, to be the following:

Gross inventory, ...	$1,618,908.57
Less debts, expenses and legacies,	318,230.81
Residue, principal, ...	$1,300,677.76
Advancements, ...	199,470.95
	$1,101,206.81
$\frac{1}{3}$ in trust for life of Emily Blackstone,	367,068.94
Balance, ...	734,137.87
Add advancements, ...	199,470.95
	$933,608.82

$\frac{1}{18}$ of $\frac{2}{3}$ of this residue of principal=$51,867.15
J. D. T. Blackstone $\frac{4}{18}$= $207,468.63"

The above amount of $199,470.95 was the aggregate of the sums charged upon the testator's books, as mentioned in the sixth clause of his will, which were advanced by him to his children, in his lifetime, and were charged to the children to whom such advancements were respectively made; and charged also in an account on his books entitled "Distribution Account." By far the largest of these charges was to the appellant, the amount charged to him being $113,385.29. This the distributors deducted from the amount of $207,468.63 set to the appellant, leaving him as his share in the principal of the estate $94,083.34. Of this action the appellant does not complain. But in addition, the estate, during the nearly five years in which it was in settlement, had earned or produced income to the amount of $243,108.60, of which a separate account had been kept by the executors, and this amount of income the distributors had divided upon the basis of the following computation:

"Principal estate, residue, . . .	$1,300,677.76
Less advancements, ...	199, 470.95
Estate producing income, . . .	$1,101,206.81

$1,101,206.81 earned $243,108.60, or 22.07656 per cent.

	Shares.	Earned Income.
Mrs. Emily Blackstone,	$366,068.93	80,815.43
J. D. T. Blackstone,	$94,083.34	20,770.37"

From the decree of the court of probate approving such action, the said J. De T. Blackstone appealed to the Superior Court, which made a finding embracing the above facts, and thereupon reserved the case for our advice.

The appellant in his reasons of appeal claims, in substance, that the distributors should have distributed to him, and in trust for him, $\frac{4}{15}$ of $\frac{2}{3}$ of the entire earned income to the time of settlement of the administration account, namely $36,006, instead of said sum of $20,770.37; and this raises the only question which the appeal presents for our consideration.

This involves a construction of the sixth clause of the testator's will, and the determination of the intention therein

manifested; namely, whether the testator intended that each of his children should receive in the final settlement of the estate, however long deferred, their proportionate share or an amount equal to a specified number of eighteenth parts of the residue then on hand after deducting the sum charged to each of such children respectively; or whether they should only receive such share, less such deduction, of the clear residue existing at the time the will became operative by the death of the testator, as such residue should be finally ascertained; or, more briefly stated, whether the given number of eighteenths, less charges, was intended to be of a residue of principal existing at the death of the testator, or of principal, and interest thereon, existing at the time of distribution.

In favor of the appellant's contention on this point it is claimed that the amounts advanced by the testator to his children were directed to be inventoried, and were in fact inventoried, as a part of his estate, and that they were declared to be such by the testator in his will; that "if the estate had been intestate there would have been no question as to when and how the several advancements should have been deducted, or that they should have been deducted from the estate existing at the time the estate was ready for distribution, which would have included not only the estate left by the deceased at the time of his death, but the earned income during the time of the settlement of the estate;" that if the terms of the will leave this question in doubt, that construction which most nearly conforms to the statute of distributions should be adopted.

Opposed to this, it is to be considered that if the testator had not made provision in reference to these sums, they could in no wise have affected the prescribed testate shares of his children in his estate; that the object of such provision was manifestly equality between such children; between the three sons, each of whom received four eighteenths, and the two daughters, each of whom received three eighteenths of such residue. If the testator by his direction to embrace these amounts in the inventory of his estate intended, as the

appellant claims, to declare them to be his estate, he could hardly be presumed to have intended, in the interest of equality, that those in whose hands these unequal portions of what he thus elected to regard as his estate were, should, during the length of time required for settlement, enjoy so much of what would otherwise be coming to them, without accountability for interest, and yet be entitled to share fully in the income earned by the residue of the estate, during that period, as if no advancement had been made. It seems much more probable to us, however, that the testator by this provision as to inventory, did not intend to constitute these amounts charged, assets. They were not to be received by his children as a portion of the estate coming to them, but were to be "deducted" from such portion. Equality, indeed, required that for the purpose of ascertaining the share of each child, they should first be added to the amount to be divided among all the children, and then, from the fractional part of the amount so obtained to which such child appeared entitled, the sum advanced to such child should be deducted. Including the advancements for such purpose, of computation and equitable division only, does not constitute them portions of the estate. Taking the whole sixth clause together, the full intention seems to be, as we have before stated, the equalization of the several shares.

This intention is further evidenced by the provision in the third clause, as to the wife of the testator, to whom is to be paid during her life "the net income" arising from "one third of the balance of my estate." This is followed by the fourth clause, beginning with the expression: "The other two thirds of said residue shall be divided into eighteen equal parts or shares." In ascertaining the third to be set to the widow, the distributors followed the rule laid down in *Porter v. Collins*, 7 Conn. 4,—that her third did not include the advancements,—and their action was approved by the court of probate. Neither the action of the distributors, nor the approval of the court of probate has been appealed from. On the contrary, counsel for the appellant tells us in his argument in this court that the appellant regards that action

as correct. It seems to us that the action of the court of probate, so acquiesced in by all parties, has put a construction upon the testator's intent in respect to these sums called advancements, such that it cannot now be changed, even if this court under other circumstances might have put a different one on it. But this third is to be ascertained as of the date of the death of the testator. *Lawrence v. Security Co.*, 56 Conn., 423. And since this one third is to be ascertained as of that date, it is not likely that the testator intended the other shares into which the remaining two thirds were aparted, should be ascertained as of a different and subsequent time, namely, that of the final distribution of such two thirds.

It may be further added that by the fifth clause of the will, upon the decease of the wife of the testator, the one third of his estate held in trust for her use is to be divided and aparted in precisely the same manner as the remaining two thirds were directed to be by the fourth clause; preserving therein, also, the same idea of equality, so far as consistent with the perhaps peculiar preference manifested for sons over daughters.

For these reasons it seems to us it was the manifest intention of the testator, that in making the distribution of his estate there should be deducted from the share of said estate which was to be distributed to the appellant, and in trust for him, the amount charged on the books of the testator against him ($113,385.29), as of the date of the death of the testator; and that there was properly distributed to him, as his proportional share of the income of said estate, such part only of the entire income as corresponded with his share of the clear residue existing at the death of the testator, as such residue was at last ascertained. The distributors therefore adopted the true rule, and the Superior Court is advised that the decree of the court of probate appealed from should be affirmed.

In this opinion the other judges concurred.

CHARLES I. RATHBUN ET UX. *vs.* NATHAN A. GEER.

Second Judicial District, Norwich, May Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

In the construction of distributions of land, a description by known and fixed monuments will control a description by courses and distances.

A pond and dam may be such a monument.

There is no rule of law that in case of an irreconcilable repugnancy between two descriptions of the same parcel of land in the distribution of an estate, the former is to prevail.

If adjoining proprietors of land, who derive title from the same written instrument, agree upon a certain line as the true line of division between them, and mark it as such by monuments, and possession is maintained accordingly by them and their successors in title for more than fifteen years, each party can thereafter claim title up to such line, notwithstanding a different boundary was stated in such instrument; nor is it necessary to show that the terms or even the existence of the latter, were ever known to those who originally established the new line, or to their successors in interest.

Perry v. *Pratt*, 31 Conn., 433, commented on and distinguished.

[Argued June 1st—decided June 29th, 1894.]

ACTION in the nature of trespass *quare clausum fregit*, brought to the Court of Common Pleas for New London County, and tried to the jury before *Crump, J.*; verdict and judgment for the defendant and appeal by the plaintiffs for alleged errors of the court in charging the jury. *Error and new trial granted.*

The *locus in quo* was a meadow which had formerly been the southerly part of the bed of a mill-pond, the dam of which had gone to decay. The land was still occasionally flowed, and the ruins of the dam remained. This pond and all the surrounding land belonged, in 1831, to an estate, in the distribution of which there was set out to Zebadiah Comstock, Jr. (under whom the defendant claimed title), 38 acres of land, bounded by a line commencing at the southeast corner of the tract, at a fixed point on the west side of a road, and which at one point ran to a rock "on the east side of the pond; thence with the pond northerly 20

rods to John Allen's land;" and, after including land north and west of the pond, ran from a definite corner on Calvin Bolles' land, in a straight line S. 86° E. 150 rods, to the place of beginning; these words being next added, "and to include the whole pond with the dam."

In the same distribution there was afterwards set to Bethiah Baker's heirs, whose title came to the plaintiffs, 38 acres of land bounded on the north by a line beginning on the west side of the road, at the southeast corner of the tract set to Zebadiah Comstock, Jr., and running "thence S. 86° W. 150 rods to Calvin Bolles land." A straight line between these points did not in fact run S. 86° W., nor was its length 150 rods, and it would cut across the pond two or three rods above the dam.

The plaintiffs offered evidence that some years after the distribution, the then owners of these tracts had agreed upon a certain line as the proper division line between them, and marked it by monuments, and that such line had ever since and for over fifty years been recognized and acquiesced in by them and their successors in title, down to the year 1891, when the defendant acquired title.

The plaintiffs asked the court to instruct the jury that if they should find that "there are two clauses in the distribution of a certain property to Zebadiah Comstock, Jr., which are so repugnant as not to stand together, the first prevails over the last;" and "that if they should find that the parcels of land in the distribution of Zebadiah Comstock's estate are described by both general or collective and special descriptions, and nothing exists which satisfies all the descriptions, but something exists which satisfies some one of them, and is described with sufficient certainty, the others may be disregarded."

The court did not give either instruction, but after charging the jury that in case of irreconcilable conflicts, monuments controlled courses and distances, proceeded as follows: "About some of the other bounds the surveyors and witnesses have expressed doubt and uncertainty, but there is no doubt or uncertainty about the location of the dam, nor

about that clause of the description which purports to set it off to Zebadiah, Jr., so that if you should find that at the time of the distribution the pond and the dam existed as they are at present located, then it seems to me that you must find the dividing line between them, as described in the distribution, south of the dam."

The jury were further told that if they found that the original distributees, a few years after the distribution, agreed to, and ran, a division line, as claimed by the plaintiffs, south of the *locus in quo*, and that they and their grantees had ever afterwards, down to 1891, occupied and held undisputed possession accordingly, "the line so recognized must be taken as the true line, provided, of course, that the original parties establishing or acquiescing in it, had knowledge of the facts in relation to the description in the distribution, when they established or agreed to it."

Charles F. Thayer and *Charles W. Comstock*, for the appellants (plaintiffs).

Frank T. Brown and *Amos A. Browning*, for the appellee (defendant).

BALDWIN, J. The return of distribution, under which both parties claim title, must be so construed, if possible, as to give effect to every part, and make them all consistent with each other.

The southerly boundary of the tract set to Zebadiah Comstock was described as a straight line running from west to east, S. 86° E., for 150 rods, from one fixed monument to another; and the northerly boundary of the adjoining tract set to Bethiah Baker's heirs was described as a straight line running westerly from the latter of these monuments to the former, S. 86° W., 150 rods. The words, however, added to the description of the Comstock tract, "and to include the whole pond with the dam," if given their natural effect, would carry its southerly boundary, for the space of a number of rods, a few rods south of the line connecting the two

monuments. The rest of the boundary, as described, on each side of the pond, could be maintained, not indeed in the exact course designated, but in a straight line between the monuments at either end. The course designated for the northerly boundary of the Baker tract was plainly inconsistent with that previously designated for the southerly boundary of the Comstock tract; since it was a straight line running between the same monuments in a reversed direction, and, if the course of that was correctly described as S. 86° E., the course of this must have been N. 86° W., instead of S. 86° W. The length of this line was also incorrectly given. Upon this state of facts, the court properly instructed the jury that the pond and dam were controlling monuments, and that the dividing line between the parties was south of such dam.

The court was also right in refusing to charge as requested by the plaintiffs. It was a question of law, upon the facts presented, whether there were clauses in the distributors' description of the Comstock tract so repugnant that they could not stand together; and there is no rule that in case of such repugnancy the first clause necessarily prevails over the last. In respect to the second request, so much of it as was law was substantially given, and in a manner much more direct and intelligible to the jury, when they were instructed that the pond and dam were controlling monuments.

The plaintiffs, however, claimed and offered evidence to prove that the predecessors in title of both parties, more than fifty years ago, established and defined the dividing line between the Comstock and the Baker tracts, as a straight line north of the dam, marking it by heaps of stones and posts, and that they and their successors ever since, down to a time shortly before the alleged trespass by the defendant, had always recognized and acquiesced in the boundary thus established. This claim, if supported by proof, would render the meaning and effect of the original distribution quite unimportant, since the line thus agreed on by the parties in interest, and so long acquiesced in by their successors, would thereby become the true boundary for all purposes. The

court so charged the jury, but with the addition of this qualification: "provided, of course, that the original parties establishing it, or acquiescing in it, had knowledge of the facts in relation to the description in the distribution, when they established or agreed to it." These instructions were probably based upon a misconstruction of the opinion of this court in *Perry* v. *Pratt*, 31 Conn., 433. That was an equitable proceeding to establish a lost boundary. The original boundary had been a salt water creek, which in course of years had changed its bed, by avulsion; and it was claimed that the adjoining proprietors had acquiesced in it, as a boundary, in its new course. The court held that such an acquiescence, continued for fifteen years, with knowledge of the facts as to the change of bed, would establish a new line of division. But the knowledge thus required related only to the changes in the physical condition of the boundary. It was not enough to show that the parties acquiesced in the continuance of the creek as marking the boundary between them, unless it was also proved that they knew it had changed its bed. So in the case at bar, the acquiescence of the adjoining proprietors in the new line must have been with knowledge of the facts relating to the situation and marking of such line, but it was not necessary to show that they or any of them knew of the terms or even of the existence of the original distribution.

For this reason there is error in the judgment appealed from and a new trial is ordered.

In this opinion the other judges concurred.

The Borough of Wallingford *vs.* Henry F. Hall.

Third Judicial District, New Haven, June Term, 1894. Andrews, C. J., Torrance, Fenn, Baldwin and Hamersley, Js.

A borough by-law passed under legislative authority prohibited the opening or making of any excavation in, upon, or under any borough street or highway, and provided a pecuniary forfeiture for its violation. *Held* that such by-law was a penal statute within the intent and meaning of § 1379 of the General Statutes, which declares that no suit for any forfeiture, upon any penal statute, shall be brought, but within one year next after the commission of the offense.

The "opening or making any excavation" without lawful authority, is not in its nature such a continuous act that the defendant could be sued under the by-law, merely for allowing the excavation, previously made by him, to remain.

Where the plaintiff's entire evidence showed that the single offense charged was committed so long previous to the bringing of the action as to be barred by the statute of limitations, which the defendant had pleaded as one of his defenses, a judgment rendered for the defendant upon his motion, as in case of nonsuit, gives the plaintiff no just cause of complaint.

[Argued June 12th—decided June 29th, 1894.]

Action to recover a forfeiture for the alleged violation of a by-law of the plaintiff borough; brought before a justice of the peace and thence by defendant's appeal to the Court of Common Pleas for New Haven County, where the case was tried to the jury before *Hotchkiss, J.* After the plaintiff had introduced its evidence and rested, the defendant moved for judgment as in case of nonsuit which the court granted, and upon its refusal to set aside such judgment the plaintiff appealed. *No error.*

The case is sufficiently stated in the opinion.

Tilton E. Doolittle, for the appellant (plaintiff).

1. This by-law is not a penal statute. It is a mere regulation made to govern the inhabitants of a particular locality. It has no force outside of the borough. On the other hand a statute is uniform in its operation throughout the State

and obligatory upon all persons within its borders. The General Assembly gave the court of burgesses of Wallingford power to make by-laws but not statutes. Charter, § 48. A by-law has been held not to be a penal statute in the following cases: *Lewiston* v. *Proctor*, 23 Ill., 533; *Quincy* v. *Ballance*, 30 Ill., 185; *Wayne Co.* v. *Detroit*, 17 Mich., 399, 400; *People* v. *Detroit*, 18 Mich., 465. This statute of limitations existed long before there was a city in Connecticut.

II. The opening was continuous from its very nature, increasing and enlarging from day to day as the earth fell in, enlarging its width nine inches from the time it was first dug, until the commencement of the suit.

In the case of *State* v. *Brown*, 16 Conn., 54, the structure was not erected by the defendant, but by another person and was complete by itself and finished at the time of its erection, and in that case had been erected thirty years before the suit was brought and during that period had neither been enlarged nor diminished. The defendant had simply bought the land on which another person had thirty years before erected a building.

The excavation in this case widened day by day and endangered the public travel more and more.

Among the more recent cases holding that the statute of limitations is not a bar are *Wells* v. *N. H. & N. Co.*, 151 Mass., 46; *Galway* v. *M. E. R. Co.*, 128 N. Y., 132. The offense is not completed but is continuous so long as the excavation keeps widening and increasing. The statute does not begin to run until the offense is complete.

Charles Kleiner, for the appellee (defendant).

I. The action is for a forfeiture on a penal by-law. The by-law in terms provides that any one violating it "shall forfeit and pay" not exceeding a certain sum. Any law which imposes a penalty for the doing or omitting of an act is penal. *Hallenbeck* v. *Getz*, 63 Conn., 387.

The word statute is undoubtedly used in this section in its ordinary sense, as synonymous with law. And in ordinary cases the correct construction is given to a statute by

reading the words in which it is expressed in their general and popular sense. *Higley* v. *Bunce*, 10 Conn., 441; *Hallenbeck* v. *Getz*, 63 Conn., 388.

The plaintiff had no power to make any by-law except as delegated to it by the legislature, and this court has recently determined that the power of "local legislation may thus be lawfully delegated." *State* v. *Carpenter*, 60 Conn., 103.

Is not a penal by-law made "in pursuance of power conferred" by a public statute, a penal statute within the spirit as well as the letter of the section now in question? *State* v. *West*, 42 Minn., 152.

A by-law of a municipal corporation is a local law, enacted by public officers by virtue of legislative power delegated to them. When authorized, it has the force, in favor of the municipality, and against all persons coming within its territory, of laws passed by the legislature of the State. 1 Dillon on Municipal Corp., § 308; Morawetz on Corporations, §§ 491, 596; Anderson's Law Dict., "Statute;" *Robinson* v. *Mayor of Franklin*, 34 Am. Dec., 632; *Wiggin* v. *New York*, 9 Paige Ch., 23; *St. Johnsbury* v. *Thompson*, 59 Vt., 305; *Com.* v. *Plaisted*, 148 Mass., 382; *State* v. *Keenan*, 57 Conn., 288; *Com.* v. *Gay*, 5 Pick., 44.

II. The complaint is not based on the theory that a recovery should be had for *allowing* the excavation to remain. If plaintiff recovered on this complaint *for allowing* the excavation to remain, a judgment thereon would not protect defendant from another action for the same cause. *Taylor* v. *Keeler*, 50 Conn., 349; *Sanford* v. *Peck et al.*, 63 Conn., 491. But the by-law does not reach such a case. It prohibits the "opening or making" an excavation only. When the excavation is finished the act is complete and the statute then begins to run. The law concerning *continuing* nuisances and repeated trespasses does not apply to the acts prohibited by the by-law in question. Penal ordinances are strictly construed and apply only to the offense distinctly denounced. Any doubt or ambiguity arising from the terms used must be resolved in favor of the public. *Pratt* v. *Litchfield*, 62 Conn., 118; *Krickle* v. *Commonwealth*, 1 B. Monroe, 361;

1 Swift's Dig., *12. The by-law prohibits the *making* of an excavation; the plaintiff seeks to recover a penalty for *leaving* it long after it was made. Therefore the defendant cannot be held liable under the by-law, whether liable in some other form of action or not. *State* v. *Brown*, 16 Conn., 57; *Stamford* v. *Studwell*, 60 Conn., 90, 91.

FENN, J. The charter of the borough of Wallingford, which is a public act, empowers its court of burgesses to make and enforce by-laws upon certain subjects, one of which is the "excavation or opening of the streets or highways for public or private purposes." Pursuant to such authority, said court of burgesses passed a by-law "prohibiting the opening or making of any excavation, vault or cellar, in, upon, or under any street or highway in said borough, without the consent of the warden or court of burgesses," and providing that "every person violating said by-law shall forfeit and pay, for such offense, a sum not exceeding twenty-five dollars, for the use of said borough." This action was brought for a violation of such by-law, the alleged breach being an excavation made by the defendant in the highway adjacent to a tract of land owned by him.

The complaint was made returnable before a justice of the peace. The writ was dated November 18th, 1892, and served November 19th, 1892. It was alleged that the defendant made an unauthorized excavation in May, 1891, "and has ever since allowed and caused said excavation to remain;" and that "by reason of said offence of the defendant in making said excavation, the defendant has forfeited and become bound to pay to said borough the sum of twenty-five dollars, as provided by said by-law."

In the Court of Common Pleas, to which the action was appealed by the defendant, to the defense of denial the defendant added, as a second defense, the limitation of General Statutes, § 1379, which provides that: "No suit for any forfeiture, upon any penal statute, shall be brought, but within one year next after the commission of the offense." It was alleged that "the offense was not committed within one

year next before the bringing of this action." To this defense the plaintiff demurred, and the court overruled the demurrer. The plaintiff then denied the matters contained in said second defense, and upon the issues made up by the defendant's denial of the complaint and the plaintiff's denial of the second defense, the case was closed to the jury. Upon the trial, the plaintiff having introduced its evidence and rested its case, the defendant moved for judgment, as in case of nonsuit, which the court granted, upon the ground "that the plaintiff proved that the excavation in question was made, if ever, in May, 1891, and the file shows that the suit was not brought until November 19th, 1892, more than one year later, thus bringing it within the statute of limitations." The Court of Common Pleas having denied a motion to set aside said nonsuit, the plaintiff appealed to this court, assigning as reasons of appeal the overruling of the plaintiff's demurrer, and the granting and refusing to set aside the nonsuit.

It was conceded upon the argument that these reasons presented substantially the same question; for although, as was said by this court in *Brown & Brothers* v. *Brown*, 56 Conn., 252, a statute of limitations "is wholly a matter of defense, and one that constituted no part of the plaintiff's case;" yet, if the court correctly ruled upon the demurrer, and the evidence produced by the plaintiff showed that the only offense claimed was committed so long previous to the bringing of the action as to be barred, it needed no further evidence upon the part of the defendant to establish this fact. He might have rested when the plaintiff did, and then, as any other verdict than one for the defendant "would inevitably be set aside upon review," such a verdict might have been directed by the court. *Peoples' Savings Bank* v. *Borough of Norwalk*, 56 Conn., 556. The plaintiff borough, therefore, does not, and could not claim that the granting of a nonsuit injures it, providing the law and facts required that a verdict be returned against it. But it is claimed that the law and facts did not so require, and this upon two grounds: *First*, that the by-law in question is not

a penal statute; and *second*, that the complaint alleged and the evidence showed, that the defendant had ever since the excavation was made, allowed it to remain open, and that in consequence the offense was continuous; that in fact the excavation had increased as the earth fell in, enlarging its width nine inches from the time it was first dug, until the commencement of the suit.

We think the court below correctly held the by-law to be a penal statute, within the intent and meaning of General Statutes, § 1379. That it is penal cannot be doubted. *Hallenbeck* v. *Getz*, 63 Conn., 387. That it derives its force, as the plaintiff itself states in its complaint, from action taken in pursuance of power conferred by the General Assembly, is also manifest. Such action is in legal contemplation that of the General Assembly whose power enabled it. The enactment is therefore law, statutory in its nature, and as such within the purpose, and so properly embraced within the fair construction, of the language of the statute of limitations in question.

We think also the court correctly ruled upon the other point. The law concerning continuing nuisances and trespasses is, in the abstract, as the plaintiff claims. But it does not apply in this case. The complaint is not adapted to recovery on such ground. Even if it were, the by-law in question would not support it. It is exclusively confined to the opening or making of an excavation without lawful authority. That is not in its nature a continuing act. The meaning of the provision seems clear and certain. But if it were not, the defendant could not be held liable upon construction fairly doubtful of ambiguous language. *Pratt* v. *Litchfield*, 62 Conn., 118.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

ELMER L. STYLES *vs.* GEORGE F. TYLER.

First Judicial District, Hartford, May Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

The Supreme Court of Errors, as established by the Constitution of this State, is a court of last resort for the correction of errors, and its jurisdiction as described in the Constitution relates to the determination of principles of law and not to the trial or retrial of pure questions of fact.

In view of such jurisdiction chapter 174 of the Public Acts of 1893 cannot be construed as requiring this court to determine, upon evidence spread upon the record, questions of pure fact settled by the judgment of the trial court.

Effect, however, is given to the Act by construing it as authorizing this court to correct the finding of the trial court by taking into consideration such facts, not included in the finding, as the record shows to have been found by the trial court and essential to the presentation of questions of law arising in the case. As thus construed the Act extends and enlarges the operation of § 1141 of the General Statutes providing for the correction of appeals.

The memorandum of reasons for decision filed by the trial court and printed with the record, although not strictly a part of it, constitutes the official opinion of that court, and may properly be used as a basis for stating the questions of law it is desired to raise upon appeal; and if the facts and legal conclusions drawn therefrom, or applied in the determination of the facts, are stated in such opinion, error in the law so announced may be claimed and the appellant, upon a proper request, is justly entitled to a finding containing all the facts in sufficient detail to clearly present such claim upon the record.

The appellant made a written request to the judge to incorporate in the finding the facts stated in the "Reasons for Decision," but did not otherwise specify such facts. *Held* that in view of the fact that there had been no practice under the Act the court would not be justified in refusing the appellant redress for the want of such formality.

Section 4 of the Act provides that the trial court shall state in writing on the margin of each paragraph of such request whether the fact stated therein was or was not proven. *Held* that the unexplained failure of the court to make any note upon the appellant's request to find as proven the facts which the court stated in its opinion were proven and formed the grounds of its judgment, must be taken as equivalent to a formal note that such facts were proven, where that opinion, certified by the judge, was printed with the record under a rule of this court.

In an action by a physician to recover the value of professional services

rendered, the value to be proved by him is the ordinary and reasonable price for services of that nature; but he is not bound to prove the value of the services to the defendant. And where the defendant relies upon evidence of want of ordinary care and skill in the treatment of the case in defense of the action and by way of counterclaim for damages, the burden of proof in establishing such negligence rests upon him.

[Argued May 3d—decided July 9th, 1894.]

ACTION to recover the value of professional services rendered by the plaintiff as a physician and surgeon; brought before a justice of the peace and thence by defendant's appeal to the Court of Common Pleas for Hartford County, where the case was tried to the court, *Calhoun, J.*; facts found and judgment rendered for the defendant, from which the plaintiff appealed for alleged errors in the rulings of the court as to questions of law, and also upon the ground that the conclusions of the trial court as to questions of fact were clearly against the weight of evidence. *Error and new trial granted.*

The "Reasons for Decision" were as follows:—

"On the 21st day of April, 1891, the plaintiff was employed by defendant to treat, as a surgeon, a fracture of the femur of the left leg of the defendant's boy, then a little over two years of age.

"The implied promise of the plaintiff upon this employment was to treat said case with ordinary and reasonable skill and care.

"He has brought his action on the common counts, and to recover must show affirmatively that he fulfilled his own agreement aforesaid, and thus rendered his services as a surgeon for the defendant of value.

"On the trial it was not questioned that on May 21st the boy's thigh bone was so bent as to require a further surgical operation to reduce it to its proper line. This was done by Dr. Sweet, who charged for his services $35.00.

"If the plaintiff left the bone in the condition above mentioned, it is admitted that he did not use reasonable and ordinary care and skill in the case; but he claims to have done so, and that the condition of the boy's femur must have been

caused by some serious injury after his own duty had been properly done.

"To accept this theory without any direct proof and in the face of the testimony of the defendant and his wife as to the care with which the boy was preserved from any accident, would require extraordinary confidence in the statements and surgical skill of Drs. Styles and Bunnell.

"But when five witnesses have testified that this bend in the bone (or leg) was noticed by them presently on the removal of the splints, and their descriptions of it substantially coincide with that of Dr. Sweet, I must conclude that it was not the result of any injury received by the boy *after* he was discharged by the plaintiff.

"Another important question is, when was the boy taken to the plaintiff's office—the 15th or the 21st of May?

"If on May 21st, the plaintiff's claim of subsequent injury cannot stand, for both he and Dr. Bunnell declare there had been no change in the position of the bone from May 12th, when the splints were removed, to the date of the office inspection.

"And the testimony which fixes the date of that inspection as May 21st (the day the boy was taken to Hartford), decidedly overbalances that of the plaintiff and Dr. Bunnell, which names May 15th. True, the plaintiff associates that inspection with another surgical operation which was performed on the 15th.

"But there is nothing but memory to verify the association, and the plaintiff may, and quite honestly, be mistaken. Dr. Bunnell gave no special reason which I recall for remembering the date.

"The parents, in a matter so important to them, could hardly err in their recollection. They ought to know better than any other persons whether they took their child to Hartford the same day he was in the plaintiff's office. They say they did, and in this statement the grandfather and Mrs. Atkinson corroborate them.

"And if this is so, then the opinions of even so competent and candid an expert as Dr. Cook must yield to proved facts,

and it is still more improbable, and, I might say, almost impossible, that the boy received any subsequent injury, and I must decide that the plaintiff has failed to support his claim for compensation for his services, having failed to perform his promise in the case of the defendant's child.

"I design to cast no further imputation on the ability of the plaintiff as a surgeon than my decision in this case implies. I suppose that skillful surgeons may err in judgment or care.

"I must reject the counterclaim of the defendant, for there is no evidence that he has suffered any damage or been put to extra expense by the plaintiff's failure to perform his contract, and, if he has, there are no data from which the court can determine the amount.

"February 3, 1894. CALHOUN, J."

The finding of facts was as follows:—

"1. On the 21st of April, 1891, the plaintiff was employed as a professional surgeon by the defendant to reduce a fracture of the left femur of the defendant's boy, then a little over two years of age.

"2. On said day the plaintiff accepted said services and commenced, as surgeon, to treat said fracture, and continued so to do until May 12, 1891, when he voluntarily ceased to attend the boy for the purpose aforesaid.

"3. The plaintiff treated said fracture with such lack of ordinary care and skill that he left said femur unnaturally bent.

"4. The defendant was consequently compelled to employ another surgeon to reset said bone and to place it in its proper condition.

"5. The services of the plaintiff above mentioned, and for which this suit was brought, were of no value to the defendant.

"6. On the trial no question of law was ruled adversely to the plaintiff.

"February 19, 1894. CALHOUN, J."

The other facts are sufficiently stated in the opinion.

William F. Henney, for the appellant (plaintiff).

I. The court erred in holding that the burden of proof was upon the plaintiff, a practicing physician and surgeon, to show that he treated the case with ordinary skill and care. It is apparent from the opinion of the trial court filed and printed with the record, that in reaching its conclusions the court so held. The defendant relied on alleged negligence of the plaintiff as a defense, and the law is well settled that the burden of proving negligence is upon the party alleging it. Wait's Actions and Defences, Vol. 3, p. 620, and cases there cited. In a late Maryland case the court held that in an action against a physician for negligent treatment the burden of showing such negligence is on the plaintiff. *State* v. *Housekeeper*, 70 Md., 162; *Holtzman* v. *Hoy*, 91 Ill. App., 459; *Baird* v. *Morford*, 25 Ia., 531; *Vanhoover* v. *Berghoof*, 90 Mo., 487; *Craig* v. *Chambers*, 7 Ohio St., 253; *Leighton* v. *Sargent*, 31 N. H., 119; *Garruy* v. *Stadler*, 67 Wis., 512; *Gibbon* v. *Budd*, 2 H. & C., 92; 1 Greenleaf on Evidence, 14th Edition, § 81; Wharton on Evidence, Vol. 1, p. 357.

II. The burden being on the defendant on the question of negligence, it was incumbent on him to show that the injury complained of was not occasioned by some occurrence subsequent to Dr. Styles's treatment. "A physician's title to remuneration does not depend upon whether or not he has effected a cure, if he has used due care and diligence." Encyclopædia of Law, Vol. 18, p. 441; *Hupe* v. *Phelps*, 2 Stark., 480; *Gallaher* v. *Thompson*, Wright (Ohio), 466; *Ely* v. *Wilbur*, 49 N. J. L., 685.

III. There is no proof of a special contract as alleged in the third defense, such as would shift the burden of proof in the case at bar. "An allegation that a surgeon was engaged 'to set and reduce the said fracture * * * and to tend it, and cure and heal the same for a fee, and the said defendant entered upon such retainer and employment,' implies no more than that the surgeon would bring to bear a reason-

able degree of care and skill as a surgeon in the undertaking." *Hoopingarner* v. *Levy*, 77 Ind., 455.

IV. The court should have noted on the margin of paragraph 1 of the proposed finding whether it found the facts referred to in that paragraph proven or not proven. Public Acts, 1893, p. 318, § 4.

Charles H. Briscoe, for the defendant (appellee).

I. No question of law was contested on the trial. The only questions were questions of fact. 1. Did the plaintiff treat the fracture with such lack of ordinary care and skill that he left the bone unnaturally bent? 2. Was the defendant consequently compelled to employ another surgeon to reset the bone and place it in proper condition? 3. Were the services of the plaintiff of any value to the defendant? All of these questions the trial court very properly decided against the plaintiff.

II. The court correctly laid down the rule as to the burden of proof. Upon a *quantum meruit* the plaintiff must prove: 1. That he was retained to do the work by the defendant. 2. He must prove the work done and give general evidence of its being well done. 3. He must prove the price or value of the work. 1 Archibald's Nisi Prius, 310, 311. The mere fact that the law *implies* in the contract of a surgeon that he will perform his duty with ordinary care and skill, furnishes no reason for any change in the requirements of proof. 1 Chitty on Pleading, 102; Deering on Negligence, 232 and cases cited; *Blair* v. *Bartlett*, 75 N. Y., 151, 152; *Landon* v. *Humphrey*, 9 Conn., 216; *Wilmont* v. *Howard*, 39 Vt., 445; *Haythorne* v. *Richmond*, 48 Vt. 557; *Slake* v. *Baker*, 2 Wils., 359; *Seare* v. *Prentice*, 8 East, 352; *Beck* v. *German Klinik*, 78 Iowa, 696. The court could not find from any evidence the plaintiff put in in chief that the services were of any value.

III. The court did not err in failing to note whether the facts referred to in the first paragraph of the proposed finding were proven or not proven, inasmuch as the plaintiff did not conform to the statute in his request He did not

designate the specific facts which he asked the court to find. Pub. Acts, 1893, p. 318, § 2.

IV. In this case the court having made its finding, that finding like the verdict of the jury should stand. "A new trial for a verdict against evidence will be granted only when manifest injustice has been done by the verdict, and when the wrong is so plain and palpable as to exclude all reasonable doubt of its existence; and clearly to denote that some mistake has been made by the jury in the application of legal principles or to justify the suspicion of corruption, prejudice or partiality in the triers." *Waters* v. *Bristol*, 26 Conn., 404; *Daley* v. *Norwich & Worcester R. R.*, id. 591; *Sharon* v. *Salisbury*, 29 Conn., 117; *Derwort* v. *Loomer*, 21 Conn., 252; *Potter* v. *Paine*, id., 376; Public Acts, 1893, 319, § 9.

HAMERSLEY, J. This is an action brought by a practicing physician and surgeon to recover of the defendant the price of professional services rendered. The defendant answers by a general denial, and also sets up special defenses, of which only one affects the questions before us, and that one alleges that the plaintiff was a practicing physician and surgeon, and as such undertook to reduce a fracture of the thigh bone of the defendant's infant child, and performed the operation negligently and without reasonable skill; and that by reason of the plaintiff's negligence and lack of reasonable skill his services were of no value to the defendant. The court below rendered judgment for the defendant. The plaintiff appealed.

The finding of facts states that the plaintiff treated the fracture with such lack of ordinary care and skill that he left the bone unnaturally bent, and that the services of the plaintiff were of no value to the defendant. Upon such finding there is clearly no error.

There is printed with the record the "reasons for decision" signed and filed by the trial judge when judgment was rendered. It appears from these reasons that the court did not find any specific negligence or lack of skill on the part

of the plaintiff, but inferred error in judgment or care amounting to lack of reasonable and ordinary care and skill, from the fact that after the operation was completed and the splints removed the bone was so bent as to require a further surgical operation, which was done by another physician; that the splints were removed May 12th, and the bent condition of the bone was not certainly ascertained until May 21st; that the plaintiff claimed to have left the bone in good condition on May 12th, and that any bending discovered on May 21st must have resulted from some intervening accident, and was in no way attributable to the plaintiff, while the defendant claimed that the leg appeared to be bent on May 12th; that the court held as a rule of law that the burden of proof was on the plaintiff to show affirmatively that he treated the case with ordinary and reasonable skill and care, and that the court applied this rule as to burden of proof in determining the preponderance of evidence as to the main fact of the plaintiff's lack of care and skill, including the subordinate fact of the appearance of the leg on May 12th.

This statement of reasons, although printed with the record in pursuance of a rule of this court, is not strictly a part of the record. It is, however, the official opinion of the court below and as such belongs to the case. It may properly be used by counsel as a basis for his statement of the questions of law he desires to raise upon appeal. When a judgment is rendered the trial judge is not bound to state, either orally or in writing, the reasons for his decision; but when he sees fit in announcing his decision to give such reasons, and states the facts as he finds them and the conclusions of law he draws from the facts, or the rules of law he has applied in determining the facts, we think counsel are justly entitled to claim error in the law so announced, and to have a finding containing the facts in sufficient detail to clearly present such claim upon the record; and the difficulty of applying an effective remedy when a trial judge refuses to make a proper finding in such case is doubtless one reason that induced the enactment of the recent statute,

(Public Acts 1893, page 318) upon the construction of which this case depends.*

The record, in addition to the plaintiff's request for a finding under the provisions of General Statutes, § 1132, with the statement of the questions of law arising thereon which

* SECTION 1. Upon the trial of any civil action to the court without a jury, in which an appeal to the Supreme Court of Errors may now be taken, each party may request the judge to incorporate in the finding such facts as he claims to be proven by the evidence.

SEC. 2. Such requests shall be in writing, stating the facts claimed to be proven, and each shall be in a separate paragraph, and each paragraph numbered.

SEC. 3. Such requests shall be filed with the clerk, within two weeks after judgment, and become a part of the record of the case.

SEC. 4. The court shall state in writing on the margin of each paragraph of such requests whether he finds such paragraph proven or not proven.

SEC. 5. Whenever the court shall make a finding in any case, each fact therein stated shall be in a separate paragraph and each paragraph numbered.

SEC. 6. Either party may, within five days after receipt of notice that the finding has been filed with the clerk, file written exceptions to any finding of fact by the court, and to any refusal to find a fact requested, in accordance with the provisions of section four, and all the evidence claimed by either party to be material to such question or questions of fact shall, so far as the court shall find the same to have been actually given in the case, be made a part of the record in the case.

SEC. 7. Either party may appeal, from any finding or refusal to find any fact, to the Supreme Court of Errors in the manner now by law provided.

SEC. 8. The expense of printing evidence, printed in accordance with the request of the parties, shall be paid by the party so requesting the same, at the rate of one dollar per printed page for one copy, and such expense, not exceeding the sum of fifty dollars, may be taxed in favor of the prevailing party.

SEC. 9. The Supreme Court shall review all questions of fact raised by the appeal as well as all questions of law, and in all cases where no evidence has been improperly admitted or excluded in the trial court, shall determine the questions of fact and law and render final judgment thereon. In passing upon said questions of fact, said Supreme Court shall not reverse the finding of the trial court upon any question of fact, unless it find the conclusions of such trial court upon such question clearly against the weight of evidence.

SEC. 10. The rights of appeal under this act shall be in addition to those now provided by law, and the provisions of this act shall apply to all suits now pending.

SEC. 11. This act shall take effect upon its passage.

Approved, June 6, 1893.

he wishes to have reviewed, contains the plaintiff's request to the judge to incorporate in the finding the facts he claims to be proven by the evidence, including the facts found in the judge's reasons for decision; the plaintiff's exceptions to the finding of facts by the court, and to the refusal of the court to find the facts requested; and all the evidence claimed by either party to be material to such questions of fact and found by the court to have been actually given in the case. In his appeal the plaintiff assigns as reasons for appeal, the alleged error of the court before stated as to the rule of burden of proof, and adds certain reasons for appeal on questions of fact. The plaintiff claims judgment in his favor because the conclusions of the court below upon the pure issues of fact are clearly against the weight of evidence, and also because the court in reaching its conclusions of fact adopted an erroneous rule as to the burden of proof. Both claims are made under the Act of 1893, and the record is made up in pursuance of that Act.

The first claim involves the question, does the Act require this court to determine, upon the evidence spread upon the record, questions of pure fact settled by the judgment of the trial court, and, upon reaching conclusions inconsistent with that judgment, either to reverse the judgment for error in finding one or more facts, or to render a new judgment as upon the trial of the whole cause, and issue execution thereon?

The second claim involves the question, does the Act authorize this court to correct the finding of the trial court by taking into consideration such facts, not included in the finding, as the record shows to have been found by the court and to be necessary for the presentation of questions of law arising in the case?

At this term and the preceding term the construction of the Act has been ably argued by counsel, including some who took part in the preparation and passage of the Act; and the different views presented indicate that the profession is uncertain what the Act means, and how it affects their duties in the trial of causes. In view of this condi-

tion, we think the essential questions relative to the effect of the Act which are directly involved in the present case should be fully considered and settled.

First: Does the Act of 1893 require this court to determine, upon evidence spread upon the record, questions of pure fact settled by the judgment of the trial court?

In 1834, Chief Justice DAGGETT in delivering the opinion of the court in *Weeden* v. *Hawes*, 10 Conn., 54,—Judge PETERS a member of the Constitutional Convention of 1818 concurring, and Judge CHURCH another member of that convention being then a member of the court, though not present when the case was decided,—said that this court was a court of errors and had "no constitutional power to decide a question of fact." And in 1867 this court expressed the opinion that "it was the intention of the framers of the Constitution that the Supreme Court of Errors should be a court for the correction of errors *in law*. The language used clearly imports this, and such has ever been the understanding of the legislature, of the courts, and of the people of the State." *Dudley* v. *Deming*, 34 Conn., 169, 174. We did not in that case discuss the reasons for the opinion given, but we are now satisfied of its correctness after a careful re-examination of the provisions of the Constitution.

The second article provides that "the powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."

Article fifth provides:—

"Sect. 1. The judicial power of the State shall be vested in a Supreme Court of Errors, a Superiour Court, and such inferiour courts as the General Assembly shall, from time to time, ordain and establish: the powers and jurisdiction of which courts shall be defined by law.

"Sect. 2. There shall be appointed in each county a sufficient number of justices of the peace, with such jurisdiction in civil and criminal cases as the General Assembly may prescribe.

"Sect. 8. The judges of the Supreme Court of Errors, of the Superiour and inferiour courts, and all justices of the peace, shall be appointed by the General Assembly, in such manner as shall by law be prescribed. The judges of the Supreme Court, and of the Superiour Court, shall hold their offices during good behaviour; * * * all other judges and justices of the peace shall be appointed annually."

Do these provisions mean that the judicial power of the State in the final correction of errors in law is vested in this court? In passing on a principle of constitutional law we may properly consult the decisions of the courts of our sister States and derive great assistance from their conclusions, which in doubtful cases might be controlling; but in ascertaining the real meaning of our Constitution little aid can be obtained from such sources. A Constitution, our own especially, is the outgrowth of a people's history, the result of past experience and of existing conditions, and it is impossible to ascertain its real meaning without studying the conditions it was framed to meet and the fundamental principles it was adopted to secure. "The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it." Cooley, Constitutional Law, 4th Ed., page 55.

Our Constitutional Convention met in 1818. At that time eighteen States had adopted constitutions. Our system of judicature was quite different from that of nearly all these States, and in its treatment of the judicial department our Constitution differed widely from most others. In New York the Constitution of 1777 did not vest the judicial power in any specified courts, and in prescribing a court for the correction of errors provided that it shall be instituted "under the regulations which shall be established by the legislature." In Massachusetts the Constitution of 1780 did not attempt to vest the power in constitutional courts. In New Hampshire, by the Constitution of 1784, the legislature had full "power and authority to erect and constitute judicatories and courts of record or other courts." In Ohio the Constitution of 1802 gave to the legislature full power to prescribe the

jurisdiction of the Supreme Court. Indeed, there is no one of the States where the existing organization of courts and the language of the Constitution in relation to the judicial department can fairly be held analogous to our own.

In 1818 we had a judicial system peculiar to ourselves which was the growth of one hundred and eighty years. It had one fatal defect: our government was a democracy, exercising unrestricted power through representatives chosen annually; there was no restraint from any fundamental law, because each year the representatives chosen by the people exercised the same sovereign power by which every so-called fundamental law was enacted. In the assembly of representatives was concentrated all political power; absolute power of legislation, supreme executive power, supreme judicial power in the administration and construction of all laws. Our security rested, not on a Constitution as now understood, but on the annual election by which the people retained all power in their own hands, and so it was expressed in the preamble to our declaration of rights as enacted in 1776. "The People of this State, having from their Ancestors derived a free and excellent Constitution of Government, whereby the Legislature depends on the free and annual Election of the People, they have the best Security for the Preservation of their civil and religious Rights and Liberties."

But such a condition was fatal to the permanence and independence of the judiciary. The Assembly had gradually delegated its judicial power to courts. It had built up a judicial system admirably adapted to the needs of the people. But the jurisdiction and existence of the courts, as well as the tenure of office of the judges, was wholly dependent upon the action of each annual Assembly. To remedy this defect was one main object of the Constitution. The revisers appointed to adapt our laws to the changes made by the Constitution say: "The most prominent advantages derived from it, are, that it divides the government into three branches, a legislative, an executive, and the judiciary, which are confided to separate magistracies; and also secures the independence of the judiciary, by a permanent appointment."

The General Court or Assembly originally exercised all judicial power; the first step towards the establishment of a regular judicature was the delegation to "assistants," members of the General Court, of power to hold "particular" courts; the establishment of counties was accompanied by the establishment of County Courts, first held by these assistants. Shortly after the Charter of Charles II. was granted the laws were revised, and the Revision of 1672 was published. Our judicature then consisted of the Particular Courts called Courts of Assistants, with full appellate jurisdiction for the retrial by jury or otherwise of all cases, and original jurisdiction in all "Tryals for Life, Limb, Banishment and Divorce;" and County Courts with original jurisdiction of "all Causes civil and criminal, not extending to Life, Limb or Banishment." In 1718 a new edition of the laws was published; another step in the development of our system had been taken; the jurisdiction of the Court of Assistants was vested in a court formally established as the "Superiour Court of Judicature over this Colony," to consist of a chief judge and four other judges; the County Courts were formally established as the "Inferior Courts of Judicature or County Courts," and also described as the "county or inferiour courts within this colony," with the same jurisdiction before exercised; courts of probate were also established, originally held by one of the judges of the County Courts.

In 1783, upon the close of the Revolution, Richard Law and Roger Sherman were appointed to revise our laws in view of the changes caused by the successful issue of the struggle and our establishment as an independent State; the Revision of 1784 was the result of their labors. In establishing the judicatory the system of the colony is made that of the State. "There shall be a Superior Court of Judicature over this State;" the inferior courts are the same, and the jurisdiction of all courts substantially the same except that the jurisdiction in equity before exercised solely by the General Assembly is vested in the Superior Court when the

value of the matter in demand does not exceed 1600 pounds, and in the County Courts when it does not exceed 100 pounds.

The same year (1784) that this revision was adopted the last step in completing our system was taken. The Superior Court had full and final appellate jurisdiction, directly or indirectly, from all inferior courts including justices of the peace, but the General Assembly was the *dernier* resort for correction of errors in law. This evil was now largely remedied; the "Supreme Court of Errors" was established as "the dernier resort of all Matters brought by way of Error, or Complaint from the Judgment or Decree of the Superior Court (and by force of the appellate jurisdiction of that court from the judgment of all inferior courts), in Matters of Law or Equity, wherein the Rules of Law or the Principles of Equity appear from the Files, Records and Exhibits of said Court, to have been erroneously or mistakenly adjudged and determined. And said Supreme Court are hereby impowered, authorized and enabled to take Cognizance of all such Causes that shall be brought before them as aforesaid, and shall be invested with all the Powers, Authorities and Jurisdictions necessary and requisite for carrying into complete Execution all their Judgments, Decrees and Determinations in the Matters aforesaid, according to the Laws, Customs and Usages of this State, And their determinations and Decrees shall be final and conclusive to all concerned." (Ed. 1786, page 266.)

This original description of the essential character of the jurisdiction and power of the Supreme Court of Errors has remained unchanged by statute for more than one hundred years; the condensation of expression adopted in the Revision of 1875 (Tit. 4, Ch. 4, Sec. 2) was not intended to and did not alter the settled legal description. That the court was established with the deliberate purpose and intent that, in connection with the appellate jurisdiction of the Superior Court, supreme except in matters of law, a foundation should be so laid for a permanent system of judicature and jurisprudence, is indicated by the statute passed at the same time, "that it shall be the Duty of the Judges of the Superior

Court in all matters of Law by them decided on Writ of Error, Demurrer, special Verdict or Motion in arrest of Judgment, each one to give his Opinion seriatim, with the Reasons thereof, and the same reduced to Writing and subscribed; to be kept on File; that the Case may be fully reported, and *if removed by Writ of Error, to be carried up with greater advantage; and thereby a Foundation be laid* for a more perfect and permanent System of common Law in this State. And it shall be the Duty of the Supreme Court of Error to cause the Reasons of their Judgments to be committed to writing and signed by one of the Judges, and to be lodged in the Office of the clerk of the Superior Court." (Ed. 1786, page 267.) And prior to this time the policy had been adopted of trying, with consent of the parties, questions of fact to the court. (Ed. 1786, p. 5.)

The most significant feature in the establishment of the court is found in the fact that it was the deliberate adoption into our system of judicature of the fundamental principle, which has ever since characterized it, that the certainty of our jurisprudence as well as the security of parties litigant depends upon confining the jurisdiction of a court of last resort to the settlement of rules of law. The protest of the law of 1784 was not so much against the personnel of the General Assembly as a court of last resort, as against the jurisdiction exercised; the personnel of the General Assembly for the trial of causes was substantially the same as that of the new court; the judgment of the General Assembly was practically the judgment of the lieutenant governor and council, and the same officers were made judges of the Supreme Court of Errors; but sitting as members of the General Assembly their jurisdiction extended over the whole range of fact, and their judgments were liable to be mere arbitrations; while sitting as members of the Supreme Court of Errors their jurisdiction was confined to questions of law arising upon facts found by the Superior Court as the court of last resort for all matters of fact, and their judgments became the solemn and final declaration of the law which must be the same for all parties and every case; so that the

law of 1784 was more than the creation of a court; it was the declaration and adoption of a principle deemed vital to our judicial system. The only material change made prior to the adoption of the Constitution was in 1806, when it was provided that the Superior Court should consist of a chief judge and eight assistant judges, and that the judges of the Superior Court, any five of them to make a quorum, should constitute the Supreme Court of Errors. (Comp. 1808, page 218.)

The legislature had now done nearly all in its power to do in providing for a permanent judicial system; it had delegated to regular courts most of its judicial power; it had settled the jurisdiction of those courts upon principles proved by experience to be essential to the best administration of justice, but the fatal defect still remained—remediless except by constitutional change. The judicial power was only delegated; it still belonged to the legislature, and its exercise could be assumed at any moment and in any case; the jurisdiction, the existence of every court, the tenure of office of every judge, the finality of every judgment, was still at the mercy of each legislature. In 1815 there occurred an illustration of this defect that had a considerable influence in securing the remedy; the General Assembly annulled the judgment and set aside the sentence pronounced against a murderer convicted at a special session of the Superior Court. The following year Chief Judge SWIFT, who had presided at the trial, published a vindication of the action of the court, with observations on the constitutional power of the legislature. In this pamphlet stress was laid upon the danger of the legislature encroaching upon the jurisdiction of the judiciary, because the legislature "would become one great arbitration that would ingulf all the courts of law and *sovereign discretion* would be the rule of decision, * * * a state of things equally favorable to lawyers and criminals." *Peter Lung's* case, and the observations of Chief Judge SWIFT, added much strength to the long and earnest agitation for the protection of a Constitution which two years later resulted in the convention of 1818. But the

evil which *Lung's* case emphasized was not more the wrong of the exercise of such jurisdiction by the legislature than the wrong of such jurisdiction. The underlying principle involved was that the administration of justice is not safe when the court of last resort for the settlement of the law, in the exercise of an absolute and final power, can render judgment on facts and law so intermingled that its decision is not simply the declaration of the law but may become the arbitration of the case.

It is difficult to imagine a more striking proof of the reality of the evil which the people sought to prevent by article 5 of our Constitution, than is furnished by the law under discussion, if the construction claimed for it is correct. By its provisions as construed, every case tried to the court, in the Superior Court, in six County and District Courts, and in thirteen or more City Courts, may be brought directly to this court, and we may render a judgment in the exercise of a power which is final beyond all review upon all questions of law and fact, the facts being such facts as the court below has found, and such facts as the court has been asked to find but has not found, supported by such bits of testimony actually given as the lawyers see fit to print; and this judgment may be an affirmance or reversal of the judgment below, or a new and independent judgment for such amount of damages or for such other relief as we may deem just. It is too plain for argument that, under the progressive influence of such legislation, nothing but more than human wisdom and firmness on the part of its judges can prevent a court exercising such a jurisdiction from eventually becoming "one great arbitration that would ingulf all the courts of law, and sovereign discretion would be the rule of decision."

The Constitution of 1818 must be read in connection with this peculiar development and existing condition of our judicature, and in view of the special defects it was adopted to remedy; so read the provisions of the fifth article become clear and specific. The whole judicial power of the State is vested in the courts; that power is fully granted and is

subject to no limitations except those contained in the Constitution itself; inferior courts may be from time to time ordained and established by the legislature in accordance with the public needs as developed by future changes; and inferior courts are courts inferior to the Superior Court, exercising portions of that jurisdiction vested in the Superior Court, subject to such apportionment. Two courts are established and the character of their jurisdiction described by the Constitution itself; one with a supreme jurisdiction in the trial of causes, and one with a supreme and final jurisdiction in determining in the last resort the principles of law involved in the trial of causes. The "Superior Court" is a "Superior Court of Judicature over this State" with a supreme jurisdiction original and appellate over the trial of all causes not committed to the jurisdiction of inferior courts. The "Supreme Court of Errors" is not a supreme court for all purposes, but a supreme court only for the correction of errors in law; if its jurisdiction also included the determination of facts it would then be supreme for all purposes and its name a misnomer. It cannot be claimed that the designation of these courts is a mere meaningless name with no effect whatever, and leaves the apportionment of jurisdiction to the uncontrolled discretion of the legislature; but if such claim is baseless, if the phraseology of the Constitution is descriptive of jurisdiction, then it clearly follows that the character of the jurisdiction so described must be sought in the meaning attached to the language used at the time it was employed by the people who used it for the purpose of such description.

This rule was applied by Chief Justice MARSHALL in construing the term "levying war" as used in our Federal Constitution. After speaking of the natural import of the term he says: "But the term is not for the first time applied to treason by the Constitution of the United States. It is a technical term. It is used in a very old statute of that country, whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of

our Constitution in the sense which had been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them in that ascertained meaning, unless the contrary be proved by the context. It is therefore reasonable to suppose, unless it be incompatible with other expressions of the Constitution, that the term "levying war" is used in that instrument in the same sense in which it was understood, in England and in this country, to have been used in the statute of 25 Edward III., from which it was borrowed." *Burr's Trial*, Robertson's Ed., Vol. 2, pp. 496, 497; *Goddard* v. *State*, 12 Conn., 451. The term "Supreme Court of Errors" now under discussion was a technical term and had a completely ascertained meaning when employed by the people of Connecticut in their Constitution; of this there can be no doubt.

The judges and statesmen who framed the Constitution, and the people who adopted it, knew but one meaning for "a Supreme Court of Errors;" it was a phrase peculiar to our people and unknown elsewhere; the Supreme Court of Errors then existing had been created, had been named and assigned its jurisdiction and powers to accomplish an express purpose and to cure an express evil developed by our peculiar experience. It expressed the conviction of the people that a jurisdiction of mixed law and fact vested in any court of last resort, exercising a supreme and uncontrolled power, was inconsistent with a sound system of jurisprudence and was dangerous to the administration of justice; and to prevent the future exercise of such jurisdiction was one main reason why the convention was called, and one main object sought to be secured in framing the Constitution.

There is no escape from the conclusion that the Constitution vested in this court a portion of the judicial power, that it specified the power so vested, and that the power so specified is a supreme and final jurisdiction for the correction of errors in law.

The claim is made that the words which follow this grant,

to wit: "the powers and jurisdiction of which courts shall be defined by law" annul the grant; that the direction to define the practical limits of a jurisdiction of a specified character granted in general terms, is equivalent to a grant of power to change or alter at pleasure the essential character of the jurisdiction itself. It is very clear that these words will bear no such interpretation. A power to define is different from a power to grant or apportion; and however far the meaning of the word "define" might be extended when the context clearly calls for extension, it is certain that when used with reference to a jurisdiction substantially described, its meaning must be confined to fixing limits for the exercise of such jurisdiction, and cannot be extended to an alteration of its character. Assuming that these words apply to the Supreme Court of Errors, and that their effect cannot be exhausted in determining the jurisdiction apportioned between the various inferior courts and between the Superior Court and the inferior courts, it is quite doubtful if the words contain or imply the grant of any power; such grant is certainly unnecessary, for the power expressly given the legislature to ordain and establish courts inferior to the Superior Court involves, beyond all doubt, the power to apportion the jurisdiction vested in the Superior Court between that court and courts inferior to it, as well as between such inferior courts; and the general power of legislation in respect to procedure and the whole body of the law involves the power, subject to the restrictions of the Constitution, to define limits for the exercise of the jurisdiction vested in all courts; so that it may well be that these words, as their form indicates, are simply a direction that the law shall at all times clearly define the limits of the powers and jurisdiction exercised by all courts; by those courts upon which jurisdiction may be conferred by the legislature in accordance with the jurisdiction so conferred, and by those courts whose jurisdiction is derived directly from the Constitution in accordance with the jurisdiction so granted. If these words can authorize the alteration of the jurisdiction of courts as described in the Constitution, then words in the

following section, much broader in their scope and far clearer in their meaning, must be equally efficacious. Section 2 provides: "There shall be appointed in each county a sufficient number of justices of the peace, with such jurisdiction in civil and criminal cases as the General Assembly may prescribe." Here a free hand is given the legislature to confer on justices any jurisdiction whatever. Can the legislature appoint one or more justices in each county with supreme appellate jurisdiction in all causes civil and criminal tried within the county? This certainly cannot be; and cannot be because the phrase in section 2, as well as the phrase in section 1, is used in subordination to the jurisdiction of the Supreme Court of Errors and the Superior Court as granted and described.

If confirmation were needed of the views now expressed, it will be found in a contemporaneous construction by the legislature in establishing this court after the Constitution was adopted—a construction which has been unquestioned by court or legislature to the present time. The duty of maintaining the jurisdiction thus described was imposed upon the judges of this court; and such jurisdiction has been maintained and its character stated in an unbroken line of decision for seventy-five years.

The judicial power committed to the court was intended to secure the people against a mixed jurisdiction they deemed unwise and unsafe; that power has come to us undiminished; and, inasmuch as it is again challenged in this case, we have deemed it proper to restate fully and clearly as we can the reasons for the view which has heretofore influenced our decisions, and which in *Dudley* v. *Deming* was treated as too plain for argument.

The force given to a description of jurisdiction in a Constitution is illustrated in the opinion prepared by Chief Justice TANEY in the case of *Gordon* v. *United States*, and published after his death with the approval of the court: "Its jurisdiction and powers and duties being defined in the organic law of the government, and being all strictly judicial, Congress cannot require or authorize the court to ex-

ercise any other jurisdiction or power, or perform any other duty." 117 U. S., 700; *State* v. *Cunningham*, 83 Wis., 125, 126; *Klein* v. *Valerius*, (Wis.) 57 N. W. Rep., 1112.

It should be remembered, however, that "errors in law," when applied to constitutional jurisdiction, has a far wider scope than when used merely in reference to the effect of particular forms of procedure. While the errors in law which comprise the field of jurisdiction include "questions of law" as distinguished from "questions of fact," yet the distinction is not limited to the one in use in connection with the procedure adopted at the first organization of the court, or the one appropriate to give effect to any particular form of procedure; but extends to the true distinction as drawn under our system of jurisprudence, in connection with this provision of the Constitution, between facts that the trial court must find from the testimony, and the application of the principles of law in reaching a judgment based upon such facts. The description of jurisdiction contained in the Constitution determines only the essential characteristics of that jurisdiction, and does not deal with the procedure by means of which the jurisdiction is called into exercise, and does not involve constitutional legislation on such principles of law as are the proper subject, both by judicial and legislative action, of those modifications which inhere in the growth and development of any system of jurisprudence. These essential characteristics are: the court is one of last resort for the correction of errors, and not for the full trial of causes, either directly by means of original process, or indirectly by means of process for the removal of a cause from the jurisdiction of another court and its retrial on the evidence and complete adjudication upon the facts and law involved; the jurisdiction for correction of errors is co-extensive with the judical power of the State in all matters wherein legal principles, that is, rules of law or principles of equity, appear to have been erroneously or mistakenly determined by a trial court.

The exercise of this jurisdiction may be modified by the forms of procedure provided by the legislature; and the

legal principles which in their application by trial courts form the subject-matter of the jurisdiction, may be modified by the growth and development of the body of the law. To illustrate: After the adoption of the Constitution the legislature enacted a law providing a procedure for bringing before this court the question whether a new trial should be granted for a verdict against evidence. The decision of such a question involves no retrial of the case by this court, no adjudication of facts, but only the legal question whether the rules of law as determined by this court entitle the party to another trial of his cause. And this court held that the law did not call for a judgment inconsistent with its jurisdiction, but merely provided a procedure whereby the court could exercise its jurisdiction in determining whether the rules of law had been mistakenly adjudged in the trial court.

Again, the vexed question of what conclusions are conclusions of law and what are conclusions of fact, is clearly a matter within the jurisdiction of this court; and such jurisdiction can be exercised whenever the procedure is adapted to bring before the court the action of the trial court in the decision of such question. The legal principles involved in this question have heretofore been much obscured by the habit of calling every conclusion which must be left to a jury a "question of fact," and confining a "question of law" to such conclusions as the court may decide and withdraw from the consideration of the jury. It is obvious that such phraseology grew out of the exigencies of jury trials and defines the practice regulating the sometimes arbitrary division of the function of court and jury in such a trial, and does not necessarily define the distinctions between questions of fact and law when the jurisdiction described in the Constitution is considered in the light of legal principles controlling a logical and intelligent system of jurisprudence; when, therefore, a trial court errs in treating as a question of fact conclusions which the legal principles established in the growth of our jurisprudence require to be treated as a question of law, this court, when the question is properly before it, has

jurisdiction to correct such error and to determine the true conclusion of law.

In short, the essential characteristics of the jurisdiction vested in this court are described in the Constitution; but the exercise of that jurisdiction may practically be limited or extended in consequence of changes of procedure not inconsistent with such characteristics; and the legal principles which are the subject-matter of that jurisdiction are such as belong to our system of jurisprudence, with which the Constitution did not interfere, but left to its natural growth and development.

In describing the jurisdiction of this court, the Constitution sought to avoid specific and well understood evils; but the jurisdiction actually conferred is conferred broadly and must be construed, both as to its limitations and its breadth, with a view to give full effect to a law which is fundamental and not temporary, and which is dealing not with the forms of procedure or the details of particular cases, but with the essential character of a court to which is committed for an indefinite future the exclusive administration of an important part of the power vested in an independent department of government. In the nature of things, questions of doubt may from time to time arise in the administration of such a jurisdiction; there can, however, be no doubt but that the determination by this court, upon the evidence, of questions of pure fact, for the mere purpose of rendering its own judgment upon issues of fact, is inconsistent with such a jurisdiction, and clearly obnoxious to that underlying principle which holds the security of the citizen and the certainty of the law as best served by confining the supreme and uncontrolled power vested in a court of last resort for the correction of errors to the determination of principles of law.

In examining the Act of 1893 we must assume that the legislature had in mind the description of the jurisdiction of the Supreme Court of Errors contained in the Constitution, and the view of that jurisdiction which had generally prevailed and had been clearly expressed by this court in *Dud-*

ley v. *Deming*, and did not intend to require any action of the court inconsistent with such jurisdiction. It is claimed that some provisions of the Act, especially in § 9, indicate that the legislature did intend such a result. But we can impute to the legislature an intention of that nature only under constraint of language perfectly clear, consistent with other provisions of the Act, and insusceptible of any other meaning. *Gough* v. *Dorsey*, 27 Wis., 131. The language of § 9 is far from clear, is apparently inconsistent with other portions of the Act, and raises doubts, at least, whether the object imputed to it could be made effective, aside from constitutional objections. We must therefore discard the construction claimed by the plaintiff, if we can give effect to the Act by any other reasonable construction. The suggestion that the Act may be treated as providing a motion for a new trial on the same grounds as support such a motion when the facts are found by a jury is too inconsistent with the express language and all the details of the Act to be entertained. But we think the Act, as a whole, fairly expresses a purpose, consistent with the jurisdiction of this court, in language not so interwoven with the uncertain and defective language as to make it impossible to give effect to that purpose.

Most of the provisions of the Act relate not to jurisdiction but to procedure, and prescribe what proceedings in the trial courts shall be spread upon the record; its significant and controlling feature is that it authorizes no appeal whatever from the judgment of the court below, nor does it attempt to alter the legal definition of the word appeal. In this State "appeal" has heretofore been used by court and legislature with two meanings only; one as applicable to the superior and inferior courts when it means the transfer of the case to another jurisdiction for trial, and one as applicable to the Supreme Court of Errors when it means an application to this court to reverse or set aside a judgment of a trial court for errors in law. In the latter sense it was never used until the Act of 1882 authorized all errors previously corrected by means of a writ of error, a motion in error, or

a motion for a new trial, to be included in one application and called that application an appeal. The name in no way altered the nature of the application. *Morse* v. *Rankin*, 51 Conn., 326; *Schlesinger* v. *Chapman*, 52 Conn., 271.

Section 1 of the Act provides that "upon the trial of any civil action to the court without a jury, in which an appeal to the supreme court of errors may now be taken, each party may request the judge to incorporate in the finding such facts as he claims to be proven by the evidence;" and § 10 says that the rights of appeal under the Act, whatever they may be, are in addition to those now provided by law. It is evident that the word "appeal" in § 1 is used with the same meaning it bears in existing statutes, and that meaning this court has decided, in the cases cited, to be a process which is a mere substitute for a writ of error, motion in error, and motion for a new trial, for the review of questions of law. This section, therefore, controls the whole Act, whose provisions are put in force only when there is an appeal from a judgment for errors in law; and so the Act itself makes no provision for any appeal from the judgment of the court below. This view is consistent with § 7, which provides that "either party may appeal, from any finding or refusal to find any fact, to the supreme court of errors in the manner now provided by law;" here "appeal" is used with its common and not its legal meaning; an appeal in the legal sense of the word from the finding or refusal to find a single fact is unknown to the law, and the only "manner now provided by law" for such "appeal" or application, is to be found in General Statutes, § 1141, which provides that if any appeal shall not present the questions of law decided by the court below, the party aggrieved may apply to the Supreme Court of Errors to rectify the same, and if upon inquiry it shall appear to the court that the appeal does not present such questions, the court shall correct it, and it shall then be proceeded with as corrected.

In 1880 the legislature first provided by statute for revising errors in law by means of a motion for a new trial; as such motion required a statement of the facts found by the

court for the purpose of presenting the questions of law to be decided, a means was provided at the same time by way of application to the Supreme Court of Errors to correct the finding in case the action of the judge required such correction. The appeal or application first authorized by the statute of 1880, and further defined and extended by § 7, is from the action of the judge and not from the judgment of the court.

It being clear that the Act authorizes no appeal from the judgment of the trial court, that it relates to procedure and not to jurisdiction, that its provisions become operative only when an appeal is taken from the judgment of a court on account of errors in law as now provided, and that it furnishes additional facilities for the application to this court for a correction of the appeal as authorized by General Statutes, § 1141,—it is evident that one, if not the only, purpose of the Act was to modify a defect which has occasionally been felt as an evil, a defect inherent in every judicial system because the infirmities of human nature and the fallibility of human judgment cannot be eliminated.

Among the questions of law belonging to the jurisdiction of this court, and which it is important should be authoritatively determined as they arise under modified forms in changed circumstances and conditions, are, questions of legal conclusion when law and fact are so intermingled that the main fact is not a pure question of fact but a question of the legal conclusion to be drawn from subordinate facts; and also questions whether particular subordinate facts constitute the basis for a conclusion of fact or a conclusion of law; such questions may arise either during the course of trial, as upon findings affecting the admissibility of evidence, or may be involved in the final judgment of the trial court. The procedure by which such questions have generally been brought before us for review is a motion for a new trial now incorporated into the proceedings called appeal, in which the court below is required to find the facts sufficient to present the questions of law; such a procedure is amply adapted for its purpose provided all practicable security is given

against mistake or error on the part of the trial judge—mistake in overlooking a material fact admittedly proved, error in misjudging the necessity of including in the finding any fact or series of subordinate facts for the purpose of presenting the question of law decided.

The Act of 1880 was passed to perfect such procedure and to provide such security against mistake or error, but it has proved inadequate; the Act of 1893 was evidently passed to provide a further and additional remedy; the remedy consists in compelling the trial court to so make up its record that this court can see upon the inspection of the record whether the trial court has included in its finding all the facts actually found by such court necessary to fully and fairly present the questions of law raised and decided; and if the finding does not so present the questions of law, to correct the finding by treating as a part of the finding those facts which the record shows have been found and should have been included. The Act thus enables this court, without any independent and preliminary inquiry as required by the Act of 1880, and without remanding the case for a fuller statement of facts found, to exercise its full jurisdiction and upon a review of the questions of law raised in connection with the facts found necessary to present those questions, to render a final judgment.

We think the Act of 1893 must be construed in accordance with this evident purpose, because the other construction claimed is inconsistent with the apparent intention of the Constitution in the establishment of this court, and because the construction given is a reasonable one and gives effect to every part of the Act as fully as can be done. The fact that a meaning and effect certain and unquestionable is not given to all the language of the Act is due to difficulties inherent in the language used. It was suggested at the bar that in accomplishing the main and legitimate purpose above set forth, this Act was framed with the idea of assimilating to some extent the practice of this State and the jurisdiction of this court to that of a State whose Constitution does not give to its people the protection of that

independent and peculiar jurisdiction vested by our own in the Supreme Court of Errors. If this is so, it is certainly not strange that such an attempt, even when intrusted to the ablest hands, to assimilate our own to the practice of another State,—a practice developed under widely different circumstances and "opposed to all the analogies of our system,"— should result in uncertain and inconsistent legislation.

We conclude that the Act of 1893 does not require this court to determine, upon evidence spread upon the record, questions of pure fact settled by the trial court, and therefore we cannot consider the plaintiff's claim that the conclusions of the court below upon the pure issues of fact are clearly against the weight of evidence.

Second: Does the Act of 1893 authorize this court to correct the finding of the trial court by taking into consideration such facts as the record shows to have been found by the court and to be necessary for the proper presentation of questions of law arising in the case?

This question has of necessity been substantially answered in the consideration of the first question, and it is unnecessary to repeat the reasons already given, with their qualifications. The Act so regulates the procedure in the trial courts that the parties to each case may have the record disclose the facts they deem essential to be incorporated in the finding, when a finding is necessary to present questions of law actually raised and decided, as well as the action of the court upon requests of the parties to find such facts to be proven or not proven, and the exceptions of the parties to such action; and so extends and enlarges the operation of § 1141 of the General Statutes that the application authorized by that statute for the correction of the appeal may be contained in the appeal itself, and may be determined on argument of the appeal, upon inspection of the record, as well as upon any other "inquiry" which the provisions of § 1141 may authorize. It must be remembered, however, that while the prescription of the contents of the record is a matter of procedure, and may be wholly within the legislative discretion, yet the

mere incorporation in the record of matters not pertinent to the correction of errors in law cannot affect the judgments of this court in the exercises of its jurisdiction.

The plaintiff in this case claims that the finding of the court below does not present the question of law raised and decided, and that it should be corrected by treating as incorporated in the finding the subordinate facts found by the court, and the rules of law which the court followed in reaching its main conclusion of fact as above set forth.

The record shows that the plaintiff requested the court to incorporate these facts in its finding; the court declined to do so, not because they were not true, for the court does not state that they are not proven, but presumedly because the court did not deem them material to the presentation of any question of law.

We think they were material. The record shows that the rule of burden of proof which the court disregarded, was claimed in the presentation of the evidence, and must have been claimed in the argument, and that the question of the correctness of that rule was in fact decided by the court.

The defendant claims that the request of the plaintiff to the judge to incorporate into the finding the facts stated to be proven by the court in the opinion filed as the grounds of its judgment was informal, and that no redress can be had under such a request. There is no practice under this Act. If it remains in its present form it will be difficult for counsel to be sure what is matter of form and what of substance, unless the practice is regulated by rules of court. In these first cases we are not justified in refusing redress for any informality that does not clearly violate a substantial and essential requirement, and we cannot sustain the objection made in this case.

The defendant further claims that inasmuch as the court below declined to note upon the request of the plaintiff that the facts were proven, the facts do not appear by the record to have been found, and therefore cannot now be incorporated into the finding. The unexplained failure of the court to make any note upon the request of the plaintiff asking

the court to find as proven the particular facts which the court states in its opinion were proven and formed the grounds of its judgment, must be taken as equivalent to a formal note that such facts were proven, when upon an application to correct the finding by incorporating in it such facts, that opinion, certified by the judge, is before us and printed in the record under a rule of this court for the purpose of advising us of the judge's own statements of his official acts. We must therefore treat the finding as if a statement of the particular facts found by the court and the rule of burden of proof adopted by the court had been incorporated in the finding as requested by the plaintiff.

Did the court err in holding that the burden of proof was on the plaintiff to show that he did treat the case with ordinary skill and care, instead of holding that the burden of proof was upon the defendant to show that ordinary and reasonable skill and care were not used by the defendant?

The plaintiff's action is brought to recover the value of services rendered as a physician to the defendant at his request. The plaintiff must prove by testimony that he is a physician, that he was employed as such by the defendant, that he rendered the services alleged, and the value of such services. He is not bound to prove the value of the services to the defendant; they may save the defendant's life or they may effect no cure, or a cure may follow without aid from the services. In the first case the value of the services to the defendant can hardly be measured; in the others they are of no value. The value to be proved by the plaintiff is the ordinary and reasonable price for services of that nature; the contract of employment, unless special conditions are made, does not include an insurance of actual benefit to the patient; in this respect the employment of a physician differs essentially from the employment of a builder or of any person whose employment involves an insurance that the services shall answer the purposes for which they are rendered.

The obligation of a physician to exercise ordinary care and skill arises not so directly from the contract of employ-

ment as from the duty imposed upon him by law, which requires him in the exercise of a skilled and privileged profession to use at his peril that degree of skill and care which the law says shall be requisite for the practice of such profession. The violation of that duty is a wrong which entitles the person who suffers from that wrong to legal redress. This duty, and the right of action consequent on its violation, existed before the law recognized any contract of employment, and when the only compensation a physician could receive for his services was the honorarium paid at the option of the patient. There is oftentimes a narrow line of distinction between the duty thus imposed by law and an implied contract, and the distinction has been further obscured by the use of a legal fiction for the purposes of pleading, so as to enable a favorite form of action to be adopted which otherwise might be inapplicable to the case. The Practice Act, in providing a single form for every cause of action, has destroyed this legal fiction and removed the reason for the use of some loose expressions it naturally caused.

The defendant claims that the use of ordinary skill and care is not merely a duty imposed by law upon the physician, but is required by an agreement implied from the fact of the contract of employment; and that, therefore, the burden of proof is on the plaintiff to prove the use of ordinary care and skill in order to establish his case. It is unnecessary now to consider how far the theory of implied contract in such case may have been affected by the Practice Act, because in this case it does not affect the result. Whatever may be the true reason of the physician's obligation to exercise ordinary skill, the violation of that obligation to the injury of the patient is ground for an independent action, and may also be set up as a defense to the suit of the physician to recover his compensation; but such defense is essentially in the nature of a bar.

The theory of law which holds the physician to a contract to use ordinary skill implied as an incident to the contract of employment, does not make the performance of such im-

plied contract such an element of his right of action that it must be alleged in his complaint; and the burden of proof imposed upon the physician for the purpose of making out his case is fully satisfied by another theory of law which presumes from the evidence of his right to exercise his profession, that he has not violated his duty to exercise it with the requisite care and skill.

The disproof of the actual acts and omissions necessary to show that ordinary skill has not in fact been exercised in a particular case, is not a part of the physician's case in chief; unless such acts and omissions are established by a preponderance of evidence the physicians' right of action remains proved. Such acts and omissions are set up by the defendant not as disproving the allegations of the complaint, but as establishing an independent series of facts that are a bar to the right of action. The defendant thus becomes an actor, and *quo ad* the facts he has undertaken to establish, the burden of proof is on him. Whart. on Ev., § 857.

In the present case the defendant claims that the error of the court as to the burden of proof is a mere theoretical error, and could not have practically affected the result. We think it was a substantial error. The defendant not only relied in evidence upon these independent facts, but also set them up as a special defense in his answer. So far as any contradictory evidence is concerned the case turned wholly on this special defense. An inspection of the record makes it very clear that the adoption of the incorrect rule as to burden of proof may have been the effective cause of the judgment.

There is error in the judgment of the Court of Common Pleas and a new trial is ordered.

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

FENN, J., (dissenting). I concur in the opinion of the court to the extent to which the dissenting opinion of Judge BALDWIN agrees; that is to say, that a new trial should be grant-

ed for error in the ruling of the Court of Common Pleas with respect to the burden of proof, and that this error can be made to appear by our action in enlarging the finding of facts, by reference to the statements in the memorandum of decision.

I also think that the terms of the Act of 1893 do not require this court to determine, upon evidence spread upon the record, questions of pure fact settled by the trial court, not connected with questions of law, as to the decision of which error is assigned.

I concur with Judge BALDWIN to the extent that it was not necessary, in order to justify the decision of the case by this court, or the construction of the statute arrived at, that the inquiry and determination, in the opinion of the court, as to the constitutional limits of the jurisdiction of the Supreme Court of Errors, should have been made. I think, therefore, this part of the opinion is "but an *obiter dictum*," which I regret that the court should have felt called upon to express, and in which for the reason stated, I feel justified in declining to participate. I desire to be understood as intimating no view whatever upon the subject, as one not properly before us; the decision reached resting, soundly, I think, on other grounds; which being the case I prefer not to abridge my full liberty for judicial action upon the question, if "some future statute should present it."

BALDWIN, J., (dissenting). I concur in the opinion of the court that a new trial should be granted for error in the ruling of the Court of Common Pleas with respect to the burden of proof, and that, under the Act of 1893, this error can be made to appear by our action in enlarging the finding of facts, by reference to the statements in the memorandum of decision. I also concur in the position that the terms of that Act are not such as to require this court to determine, upon evidence spread upon the record, questions of pure fact settled by the trial court, which are not connected with any questions of law, as to the decision of which error is assigned.

But I do not think it necessary to justify such a construction of the statute, that we should enter into any inquiry as to the constitutional limits of the jurisdiction of the Supreme Court of Errors; still less that we should hold that those limits are unalterably defined by its very name, in such a manner as to exclude it from ever taking cognizance of errors of fact, except in aid of its power to remedy errors of law.

The original draft of the first section of the judiciary article of our Constitution (article V.), as reported to the Convention of 1818, read thus:—

"The Judicial power of the State shall be vested in a Supreme Court of Errors, a superior Court, and such inferior Courts as the General Assembly shall from time to time, ordain and establish. The powers and jurisdiction of which Courts shall be defined by law." Journal of the Constitution, as printed by the State, Hartford, 1873, p. 89.

The first sentence of this was manifestly taken from article III. of the U. S. Constitution, § 1, *i. e.*, "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

This section of our Constitution was approved in the form reported. Journal of Convention, p. 39. The whole Constitution was afterwards referred to an engrossing committee "for the purpose of correcting verbal inaccuracies and errors in phraseology." Journal, p. 67. Upon their report, it was adopted section by section (ibid., p. 68), that in question being changed only by the substitution of a colon, for a full period, after the words "ordain and establish," so that it now appears in the following form:—

"The judicial power of the State shall be vested in a Supreme Court of Errors, a Superiour Court, and such inferiour courts as the General Assembly shall, from time to time, ordain and establish: the powers and jurisdiction of which courts shall be defined by law."

Undoubtedly this provision requires that there shall always be in this State two courts, one known as a Supreme

Court of Errors, and one as a Superior Court. Undoubtedly, also, the Supreme Court of Errors must always be the court of last resort for the correction of the errors of inferior judicial tribunals, and the Superior Court must be a court of superior jurisdiction to such inferior courts as may, from time to time, be established. But the words used do not seem to me necessarily to confine the Supreme Court of Errors to the business of passing upon errors of law only; nor to invest the Superior Court with "a supreme jurisdiction, original and appellate, over the trial of all causes not committed to the jurisdiction of inferior courts." Such a meaning can only be read into them, by assuming that, in giving to these courts the names of courts then existing, it was meant to give them also substantially the same jurisdiction. This seems to me to be pressing the historical argument too far.

The Supreme Court of Errors had then only existed for thirty-four years. It was not much more venerable for antiquity than the Court of Common Pleas is now. Its judges were not to continue in office beyond June 1st, 1819. They consisted of the nine judges of the Superior Court. The Supreme Court of Errors had jurisdiction to review no judgments except those of the Superior Court. Statutes, Ed. 1808, p. 219.

The Superior Court had exclusive "jurisdiction of all writs of error, brought for reversal of any judgment of the county court, or any inferior court, or of an assistant or justice of the peace, in civil or criminal causes." Statutes, Ed. 1808, p. 260. It had had this jurisdiction from early Colonial times. Ibid., p. 260, note 1. Such writs of error lay both for errors in law and errors in fact. 1 Swift's Dig., (side page) 790.

It had also a large original jurisdiction over questions of fact; trying cases with or without a jury. Appeals lay to it from judgments of City Courts for a re-trial of questions of fact, as well as writs of error, assigning errors in law. Statutes, Ed. 1808, p. 127.

Each Superior Court was to be held by three judges. Ap-

peals lay to it from judgments of the county courts in law actions, for a re-trial of matters of fact, except in matters (not affecting title to land) involving not over $70, or bonds or notes vouched by two witnesses. Statutes, Ed. 1808, p. 37. No appeal ordinarily lay to it in equity cases. Id., p. 225, § 1.

Immediately after the adoption of the Constitution, the General Assembly passed an "Act constituting and regulating Courts." Statute Laws, Book II., 1819; Acts of 1818, p. 311. This provides that after June 1st, 1819, the Superior Court should consist of one chief judge and four assistant judges, to be appointed for that purpose, and that they "shall constitute the Supreme Court of Errors, and shall have and possess, all the powers and authorities now by law vested in the Supreme Court of Errors." It further provided that the Superior Court should be thereafter held by one judge.

This Act of 1818 established the two courts specially called for by the Constitution of 1818.

The Constitution did not execute itself. It was for the legislature to constitute each court and define its powers and jurisdiction; and by this Act, it was done. If the ordinary rules of grammar are to be respected, the last clause in § 1 of article V. both as originally punctuated, and as finally engrossed and adopted, qualifies each member of the preceding clause. Its construction must be the same as if it read thus: "The judicial power of the State shall be vested in a Supreme Court of Errors, the powers and jurisdiction of which shall be defined by law; a Superior Court, the powers and jurisdiction of which shall be defined by law; and such inferior courts as the General Assembly shall, from time to time, ordain and establish, the powers and jurisdiction of which shall be defined by law."

And so, it seems to me, the General Assembly of 1818 understood it and executed it. The constitution of each of the two courts named was made quite different from that of the court of the same name previously existing. The judges of each were to be still the same, but their number was reduced from nine to five, and in place of the three

judges who theretofore sat at each term of the Superior Court, it was henceforth to be held by one, alone.

The jurisdiction of each court was defined and made the same that it had been; but the power that made it the same might, at its discretion, have made it different, save only so far as the constitutional name of each court established its character.

Subsequent legislation has radically changed the jurisdiction of the Superior Court. It has abolished the right of re-trial there, on appeal, of cases once tried in inferior courts. It has abolished most of its jurisdiction by proceedings in error, to review the judgments of inferior courts. It has taken away a large part of its original civil and criminal jurisdiction, in favor of the Courts of Common Pleas and City Courts, some of the latter of which have jurisdiction over cases involving any amount in value, where the parties reside in the city.

In respect to the Supreme Court of Errors, the ancient statute which was relied on in *Dudley* v. *Deming*, restricting its jurisdiction to writs of error or analogous proceedings for errors in law, has been replaced by General Statutes, § 815, which is broad enough to include any errors of fact. The court has repeatedly taken cognizance of writs of error for an error of fact, similar to a writ of error *coram nobis* at common law. *Burgess* v. *Tweedy*, 16 Conn., 89, 43; *Nugent* v. *Wrinn*, 44 Conn., 273.

The legislature gave this court, for the first time, in 1821, the power to grant (not, as before, to advise) new trials for verdicts against evidence. The disposition of such motions is, in substance, a re-trial of questions of pure fact. The common law gave the power to set aside such verdicts to the trial court, upon its own minutes or recollection of the evidence. Our statute of 1821 gave it to the Supreme Court of Errors, on a finding by the trial court, in which the evidence was stated; and gave it as a discretionary power. Statutes, Ed. 1821, p. 54, § 68. How does this differ in principle from a jurisdiction to review findings of a trial judge because clearly against the weight of evidence? Each

finding, that of the jury, and that of the court sitting without a jury, is a step in a judicial proceeding, and errors in either seem therefore to me to be a proper subject of correction by the supreme judicial power of the State, if the legislature so wills. Neither, however, in strictness, presents any question of law. *Fuller* v. *Bailey*, 58 N. H., 71; *Little* v. *Upham*, 64 N. H., 279, 6 Atlantic Rep., 220; *Young* v. *Davis*, 30 N. Y., 134. If this court can grant new trials in the Superior Court, because a jury of twelve men came to wrong conclusions of fact, I believe the legislature could also authorize it to grant new trials there, because one man, the judge, sitting instead of a jury, came to wrong conclusions of fact.

It is asserted in the opinion of the court that the creation of a Supreme Court of Errors in 1784 "was the deliberate adoption into our system of judicature of the fundamental principle, which has ever since characterized it, that the certainty of our jurisprudence as well as the security of parties litigant depends upon confining the jurisdiction of a court of last resort to the settlement of rules of law;" or, as it is elsewhere phrased, "the underlying principle involved was that the administration of justice is not safe when the court of last resort for the settlement of the law, in the exercise of an absolute and final power, can render judgment on facts and law so intermingled that its decision is not simply the declaration of the law but may become the arbitration of the case." This principle, it is affirmed, was incorporated in our Constitution by force of the name given to this court, because it "expressed the conviction of the people that a jurisdiction of mixed law and fact vested in any court of last resort, exercising a supreme and uncontrolled power, was inconsistent with a sound system of jurisprudence and was dangerous to the administration of justice." But the framers of our Constitution were familiar with the practice of English chancery, as well as with that in the courts of the United States. A party aggrieved by a decree of the Lord Chancellor could always appeal, and have his case reheard on the same evidence in the House of

Lords. 2 Madd. Ch., 435. In chancery only were the facts determined by the court, and while England was content to make the verdict of a jury final, in ordinary cases, it refused from the first to accord similar respect to the findings of any single judge. The Judiciary Act of the United States, adopted by Congress in 1789, and which was largely the work of one of the greatest lawyers and judges of Connecticut, Oliver Ellsworth, followed in the same lines, by restricting the appellate jurisdiction of the Supreme Court, in actions at law, to the remedy by writ of error, while giving a general appeal from final decrees in equity or admiralty. In 1796, Ellsworth, as Chief Justice of the Supreme Court of the United States, referred to this distinction as to the right of review, in these words: "An appeal is a process of civil law origin, and removes a cause entirely: subjecting the fact as well as the law, to a review and re-trial: but a writ of error is a process of common law origin, and it removes nothing for re-examination but the law." *Wiscart* v. *Dauchy*, 3 Dallas, 327.

Pierpont Edwards, the chairman of the committee appointed by the Convention of 1818 to report a draft of a Constitution, and who, as such, reported this article as to the judiciary, was, at the time, the judge of the District Court of the United States for this district. Stephen Mix Mitchell, William Bristol, Nathan Smith, Alexander Wolcott, (who had been nominated by President Madison, a few years before, as an associate justice of the Supreme Court of the United States,) William Hungerford, John S. Peters, and others familiar with the practice in the Federal courts, were members of the convention. Then, as now, this mode of rehearing equity causes in those courts, on appeal, upon both fact and law, was familiar and acceptable to the bar. It was seldom that the appellate court differed from the trial court in its conclusions of fact, and only when they were deemed to be clearly against the weight of evidence. For over a century the Supreme Court of the United States has exercised this "jurisdiction of mixed law and fact," in a large and important class of causes, with "supreme and uncon-

trolled power," and Congress has recently given similar powers to the Circuit Courts of Appeals. I cannot believe that the Convention of 1818 was convinced that the existence of such a jurisdiction " was inconsistent with a sound system of jurisprudence, and was dangerous to the administration of justice."

Similar legislation to that of the United States has been had (following the English chancery practice) in many of our States, and has occasioned no inconvenience which has not been thought to be outweighed by the advantages gained. *Reed* v. *Reed*, 114 Mass., 372; *Baird* v. *Mayor*, 96 N. Y., 567; *Worrall's Appeal*, 110 Pa. State, 349, 1 Atlantic Rep., 380; *Deacon* v. *Van Nuys*, 129 Ind., 580, 28 Northeastern Rep., 865; *Baker* v. *Rockabrand*, 118 Ills., 365, 8 Northeastern Rep., 456; Code of Iowa, § 2472; see also Public Statutes of R. I., Rev. of 1882, p. 526, § 8.

The opinion of the court declares that " the Supreme Court of Errors is not a supreme court for all purposes, but a supreme court only for the correction of errors in law; if its jurisdiction also included the determination of facts, it would then be supreme for all purposes, and its name a misnomer." This seems to me to confuse a jurisdiction for the determination of facts with a jurisdiction for the determination of errors of fact. If a trial court comes to erroneous conclusions of fact, the revision of its action, by correcting the errors in its conclusions, is a determination of the facts, only as a mode of the redress of errors. In many cases, indeed, a finding of fact may be, of itself, an error of law. It is so when it is made without any evidence of the fact, as to matters not the subject of judicial notice. *The E. A. Packer*, 140 U. S., 360; *Mason* v. *Lord*, 40 N. Y., 476. And to refuse to find a material fact which was in issue and was proved by uncontradicted evidence, is also an error of law. *U. S.* v. *Adams*, 9 Wall., 661; *Commercial Union Assurance Co.* v. *Scammon*, 126 Ills., 355, 18 Northeastern Rep., 562; *Whitman* v. *Winchester Repeating Arms Co.*, 55 Conn., 247; *Kennedy* v. *Porter*, 109 N. Y., 526, 17 Northeastern Rep., 426

Bedlow v. *N. Y. Floating Dry Dock Co.*, 112 N. Y., 263, 19 Northeastern Rep., 800; *Fernald* v. *Bush*, 131 Mass., 591.

The word "errors" certainly includes such errors of fact as were, at common law, grounds for a writ of error *coram nobis*. It seems to me a sticking in the bark to say that it can include no others. In the Dartmouth College case, a similar claim was pressed. There were, it was argued, few corporations in existence when the Constitution of the United States was adopted, and the theory that the charter of a corporation was a contract with the State was unknown. But, Chief Justice MARSHALL replied, "it is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception." *Dartmouth College* v. *Woodward*, 4 Wheat., 518.

The Act of 1893, it is decided in this case, is an enlargement of the jurisdiction of this court, by which it can now, to a greater extent or with more facility than formerly, redress errors in the finding of a trial court, as to conclusions of fact. Whether the General Assembly can hereafter, should it deem proper, extend our powers in this direction still farther, is a question which, it seems to me, is beyond the issues now presented for our determination. It is one that may never arise; but, if some future statute should present it, the rule of construction announced in the opinion of the court, although, if I am right in my view of this case, it is but an *obiter dictum*, would certainly be appealed to as an authority by those who might then contend that the legislature had transcended its powers. It is for this reason that I have expressed at length the grounds of my dissent from it.

ALBERT DUBUQUE *vs.* GEORGE COMAN.

First Judicial District, Hartford, March Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

The deposit of materials and erection of a shed by one on land of another, followed by their abandonment for years, is not necessarily inconsistent with the continued possession of the owner of the soil.

It is the right of all triers of issues of fact to infer what a man has done and what he intends to do, from his conduct and situation, beyond the positive testimony in the case.

To characterize and define a grantee's possession of land subsequent to the delivery of the deed, the deed itself is admissible in evidence. If apparently made pursuant to a power conferred by will, it would give color of title at least, and tend to show that the claimed possession was commensurate with the estate which it purported to convey.

The maxim *Falsus in uno, falsus in omnibus*, applied.

The defendant had a warranty deed from the heirs of *A* which called for 84 acres, but the land as actually bounded and described in the deed contained two acres less. *Held* that this deed could not give the defendant any colorable claim of title to the *locus in quo*, an adjoining tract, containing two acres, which belonged to one of the grantors in severalty, who had acquired it before the death of *A*.

The refusal of the trial court to grant a nonsuit after the plaintiff has rested his case, furnishes no ground of appeal to the defendant.

The discretion of a trial court as to the time and order of admitting evidence is not subject to review.

In cases where, under chapter 174 of the Public Acts of 1893, findings of fact are subject to correction by this court, in aid of an appeal, the conclusions of the trial court will not be disturbed, unless they are clearly and manifestly against the weight of evidence.

[Argued March 6th—decided April 25th, opinion filed July 9th, 1894.]

ACTION in the nature of trespass *quare clausum fregit*, brought before a justice of the peace, who gave the plaintiff judgment for $1.00 damages. An appeal was taken to the Superior Court for Windham County, by which, upon a trial to the court, *Ralph Wheeler, J.*, judgment was rendered in the plaintiff's favor for the same sum. The defendant appealed to this court, alleging errors in sundry rulings upon the trial, and also in the findings of fact, and in the refusal to find certain facts as claimed by him. *No error.*

The case is sufficiently stated in the opinion.

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

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

BALDWIN, J. The judgment appealed from was one rendered for one dollar, damages, in an action for the disturbance of the plaintiff's possession of a small pasture lot, containing about two acres, and worth from $60 to $70.

The *locus in quo* was originally part of a farm of over 170 acres belonging to Hale Jacobs. He conveyed it, together with another part of the farm, to Salem Jacobs, in 1862. In 1874, the heirs of Hale Jacobs, among whom was Salem Jacobs, conveyed to the defendant another part of the farm, described as containing 83¾ acres, and particularly bounded by courses, distances, and monuments. The land within these bounds in fact only amounted to 81¾ acres, and adjoined the lot in question.

In 1876, Salem Jacobs died, testate, devising his residuary estate, including the *locus in quo*, to William Joslin, "in trust, for the following purposes and uses, to wit, to sell all my real estate at his discretion, after consulting and advising in relation thereto with my wife Mary Jane Jacobs, and to invest the avails of such sale safely, as he may think best, and to change such investments at his discretion, to sell after consultation with my said wife, any or all of the personal property belonging to my estate, and to invest, change and re-invest the avails thereof as he may think best, and to invest and re-invest any and all funds coming into his hands and belonging to my estate, at his discretion, at all times, and to pay over to my said wife Mary Jane Jacobs, the income, interest and dividends for her support and maintenance during the whole period of her natural life, and so long as she remains my widow and unmarried, and so long as in his opinion she conducts herself discreetly, at such times and in such sums as her needs may require. And I direct and enjoin upon said trustee to furnish to my said wife, as aforesaid, a

comfortable and liberal support, as aforesaid, according to her and my circumstances in life; and should the income from said trust estate prove inadequate to such support, I direct my said trustee to apply any or all the principal to said purpose, as the wants of my said wife may require."

Upon the death or marriage of the widow, the residue of the trust estate was to be divided between the brothers and sisters of the testator. Mr. Joslin subsequently resigned the trust, and the court of probate appointed Lawson Aldrich as his successor. In 1879, Mr. Aldrich, as such trustee, by a deed professing to be in execution of the power of sale granted to him in the will of Salem Jacobs, sold and conveyed to the plaintiff all the right and title which Salem Jacobs had at the time of his decease to certain lands particularly bounded and described, among other things, as containing in all 89 acres and two quarters, and lying north of land of the defendant. These lands were near the *locus in quo* but did not comprehend it.

Soon after this conveyance, the defendant and the plaintiff had a conversation as to the ownership of the *locus in quo*, in the course of which the defendant said that he thought it belonged to the plaintiff.

In 1880, the defendant sold and conveyed to his sister, by warranty deed, all the lands he had bought of the heirs of Hale Jacobs, and he has never since had title to any of them, though he remained in possession of the whole.

Up to 1885, the *locus in quo* was occupied by the trustees of the estate of Salem Jacobs. Soon afterwards the defendant notified the plaintiff that he claimed title to the lot, and plaintiff asserted that the title was in himself. In each of the years 1885, 1886, and 1887, the defendant, on several occasions put some cattle on the ground, and took away some fruit and wood. In 1888, he leased it to a third party, who used it for pasturage during that season.

In 1889, the defendant put up a small tool shed upon it, in which he placed some tools and boards, and moved some wagons and lumber there, where they have all ever since re-

mained. The plaintiff forbade these acts. Soon afterwards, the defendant removed from the State.

In 1890, the plaintiff, under a claim of title, by reason of the Aldrich deed, pastured his cattle on the lot throughout the entire season, without permission or objection from any one, and did the same in 1891 until July, and throughout the season of 1892. He also gathered some apples there, and took away some wood, during these years. In June, 1891, he procured a deed from Marcus M. Towne, the successor of Aldrich, as trustee, of the right and title which Salem Jacobs had at the time of his decease to the *locus in quo*. This deed purported to be given by virtue of authority granted in the will of Salem Jacobs.

In August, 1891, the defendant entered on the lot, and a year later this action was brought. On July 11th, 1892, shortly before the suit was begun, the defendant sent a letter to the heirs of Hale Jacobs, stating that the plaintiff had turned his stock into the lot in question, under a claim of title, and that he wanted them to get him out, and give the defendant possession, at once.

The finding of the court below, after setting forth these facts, states that from the delivery of the Towne deed to the bringing of the suit, the plaintiff had the actual, adverse, and exclusive enjoyment and possession of the premises.

The defendant urges that this conclusion cannot be true, in view of the acts of ownership and possession on his part which have been mentioned; and that the plaintiff's stock certainly cannot have pastured under the shed, or under the pile of lumber which the defendant left near it.

In our opinion, the trial court was warranted in the result to which it came, in this particular. The deposit of materials, and erection of a shed, on the land of another, followed by their abandonment for years, is not necessarily inconsistent with his continued possession. A study of the evidence has satisfied us that the testimony of the defendant as to these matters upon which his counsel particularly relies, was entitled to little weight, especially when considered in the light of his letter of July, 1892, the demands in which are

plainly based on his being then out of possession. He was a swift witness, when he thought it would serve his interests, and a most reluctant one where he thought a true answer would make against him. On his direct examination he testified that his sister had reconveyed some of the Jacobs land back to him, so that he now owned part of the *locus in quo*; but on cross-examination he was forced to admit that her only conveyance had been made to a third party. He also, on cross-examination, when shown the letter of July 11th, 1892, to the Jacob heirs, signed with his name, denied writing it, or any knowledge of it, or having had any correspondence with them; but finally, on being closely pushed, said that he sent it, but another man wrote it, and that he had heard from the heirs. We think the trial court was fully justified in applying the maxim *falsus in uno, falsus in omnibus*, and rejecting the defendant's testimony, if not altogether, then certainly when it was in conflict with that of other witnesses.

It is found by the Superior Court that the plaintiff put up the walls around the lot in 1890 or 1891, and it is assigned for error that there was no evidence of this, but that, on the contrary, there was evidence from the defendant that he, at one time, put up the walls. The court may well have believed so much of his testimony as went to show that the walls had been repaired, and have given no credit to his assertion that such repairs were made by him, in view of the evidence which had been produced on the other side that the plaintiff had occupied the lot for fourteen years, without interference from the defendant. If the walls needed repairs during that period, the party in possession would naturally be the one to make them. It is the right of all triers of issues of fact to infer what a man intends to do and has done from his conduct, beyond the positive testimony in the case. *Union Bank* v. *Middlebrook*, 33 Conn. 100. The same considerations seem to us sufficient to support the finding, of which the defendant complains, that the acts claimed by him to show possession on his part, were done for the purpose of

maintaining such a claim, and of asserting a title, which was not set up in good faith.

There are many other points on which there was a conflict of testimony, the plaintiff being the principal witness upon one side, and the defendant on the other. It is enough to say, in reference to these, that we think none of the assignments of error are supported by the evidence. The statute upon which they rest (Public Acts of 1893, p. 318, chapter CLXXIV.) allows in certain cases exceptions to the conclusions of fact of a trial court to be brought before this court, by appeal, on a report of the evidence from which such conclusions were drawn, and requires us to determine whether they are justified by such evidence. It is, however, provided that "in passing upon said questions of fact, said Supreme Court shall not reverse the finding of the trial court upon any question of fact, unless it find the conclusions of such trial court upon such question clearly against the weight of evidence."

The proceeding thus authorized is analogous to that upon a motion for a new trial on the ground that a verdict is against evidence, and the same considerations which have established the rule that every reasonable presumption is to be made in support of a verdict thus attacked, dictated, no doubt, the provision of the statute thus quoted, as to the weight to be attached to the findings of a court. *Farrell* v. *Waterbury Horse R. R. Co.*, 60 Conn., 239, 253.

It is also assigned for error, that the court admitted the deed from Towne, trustee, to the plaintiff, given in June, 1891, in proof of the latter's possession. The trespass complained of occurred after this conveyance was made. The terms of the deed include the *locus in quo*, and the plaintiff claimed title under it. Whether, therefore, it was a proper execution of the power granted in the will of Salem Jacobs, or not, it was admissible to characterize and define the possession subsequently held by the plaintiff. It gave at least color of title, and tended to show that a possession claimed under it was commensurate with the estate which it purported to convey. 2 Greenleaf on Evidence, §§ 618, 619.

The defendant urges that, when offered, there was no proof that the land ever belonged to the trust estate; but if there was anything to this objection, it was disposed of by the subsequent introduction of such evidence; so that no injustice can have been done by the ruling.

The refusal of the court to grant a nonsuit when the plaintiff rested his case, furnished no ground of exception to the defendant. *Bennett* v. *Agricultural Insurance Co.*, 51 Conn., 504.

The admission by the court, after the defendant had rested, of the probate record of the appointment of the successors to Wm. Joslin, as trustee under the will of Salem Jacobs, and of sundry deeds of the Jacobs lands, as evidence in rebuttal and also in chief, can constitute no ground of error. The discretion of a trial court, as to the time and order of admitting evidence, is not subject to review.

The court held that the defendant's acts upon the premises from 1885 to 1891, inclusive, did not prove or constitute actual possession on his part, but that he was an intruder without color of title, and the actual possession was either in Towne, trustee, as the legal owner, or in the plaintiff. The acts of the defendant were of an equivocal character. The lot was of trifling value, and belonged to a trust estate. Up to 1885, it had been occupied by tenants under the trustee. Whether, after that time, the defendant, from the use he made of it, was to be regarded as in possession, or a mere trespasser, was a question of fact, the solution of which depended mainly on the credit to be attached to his own testimony. For the reasons already given, we think the court was justified in giving this very little credit, and, so, that the finding complained of is not clearly against the weight of evidence.

The court also held as matter of law, that the deed from Towne, trustee, of June, 1891, gave the plaintiff title, or if not title, then a claim or color of title which characterized his possession. It is enough to support the judgment that it gave color of title, and this, in our opinion, it clearly did. If it be so that the power to sell was personal to the trustee

named in the will, and its exercise dependent on conditions precedent, as to the fulfillment of which there was no evidence, yet the legal title to the lot was vested in his successor in the trust, and that title (described by reference to the date of the testator's decease) his deed purported to convey, with a covenant of good right to convey.

The defendant's claim of title, on the other hand, was not even colorable. It rested simply on the fact that he held a warranty deed which called for 83¾ acres, and that the bounds within which the granted premises were described, contained only 81¾, while the *locus in quo* was an adjoining parcel, and, if included, would make up the two acres lacking. But while an adjoining parcel, it was not owned by the heirs of Hale Jacobs who were the grantors in the conveyance. One of them, Salem Jacobs, owned it in severalty, by a title which accrued to him before the death of Hale Jacobs. Under such circumstances, it cannot be said that the defendant ever had color of title by his deed of 1874; and in addition to this, in 1880, long before he claimed to have taken possession of the lot in controversy, he conveyed to his sister, with full covenants of warranty, the entire tract covered by that deed, describing it as containing 83¾ acres.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

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

First Judicial District, Hartford, May Term, 1894. ANDREWS, C. J., TORRANCE, FENN, HAMERSLEY and ROBINSON, Js.

A notice of an intention to suffer a default, under chapter 157 of the Public Acts of 1889, is not itself a default, and does not prevent the defendant from thereafter attacking the complaint according to the usual rules of pleading.

A paragraph of a complaint which does not allege any fact essential to the plaintiff's cause of action should be struck out upon written motion.

Pitkin et al., Admrs., v. New York & New Eng. R. R. Co.

In an action by the personal representatives of a decedent to recover damages for an injury resulting in his death, if there is no widow, or husband, or lineal descendants, it will, in the absence of averments to the contrary, always be presumed that there are heirs to whom a distribution of the amount recovered can be made in accordance with § 1008 of the General Statutes.

A judgment must accord with the facts alleged as well as with the facts proved; otherwise it is erroneous on the face of the record.

After a hearing in damages upon demurrer overruled, on a complaint charging a negligent injury only, the court permitted the plaintiffs, against the defendant's objection, to amend the complaint by charging a willful and malicious injury, and thereupon rendered judgment for the plaintiffs and assessed damages for the latter injury. *Held* that the allowance of such amendment was error, as the cause of action therein alleged was essentially variant from the one originally set out in the complaint, was one of which the defendant had no notice and no opportunity to answer or defend, and one in respect to which it had not suffered a default, or moved for a hearing in damages.

[Argued May 2d—decided July 9th, 1894.]

ACTION to recover damages for the alleged negligence of the defendant in causing the death of the plaintiff's intestate; brought to the Superior Court in Hartford County and heard in damages to the court, *George W. Wheeler, J.*; facts found and judgment rendered for the plaintiffs to recover $4,000 damages, and appeal by the defendant for alleged errors in the rulings of the court. *Error and new trial granted.*

The case is sufficiently stated in the opinion.

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

I. The conduct of Pitkin in continuing, after the approaching locomotive came within his full view, to urge his horse forward up the hill and over the railroad in front of the locomotive, constituted contributory negligence. On the facts of this case as found by the court, it is evident either that Pitkin did not look for a train after his view along the track opened up so as to make it possible to see approaching trains, or that if he did look, he rashly thought he could get over ahead of the train. This state of facts has been held in hundreds of cases to constitute contributory negligence as a matter of law. The rule is so well settled that it seems only

necessary to cite a few of the cases that come first to hand. *Peck* v. *N. Y., N. H. & H. R. R. Co.*, 50 Conn., 379, 392; *Railroad Co.* v. *Houston*, 95 U. S., 697; *Schofield* v. *Chicago R. R. Co.*, 114 U. S., 615; *Tully* v. *Fitchburg R. R. Co.*, 134 Mass., 499; *Aiken* v. *Penn. R. R. Co.*, 130 Penn. St., 380; *Turner* v. *N. Y. C. & H. R. R. Co.*, 124 N. Y., 308.

II. The court erred in holding that Pitkin's contributory negligence was not a defense to this action. In this State even the grossest negligence will not render a defendant liable if the plaintiff's negligence contributed to cause his injury. *Birge* v. *Gardiner*, 19 Conn., 507; *Neal* v. *Gillett*, 23 Conn., 443; *Rowen* v. *N. Y., N. H. & H. R. R. Co.*, 59 Conn., 364.

The complaint did not allege any intent to injure Pitkin or any willful misconduct on the part of the defendant or any of its employees. No such claim was made on the trial. The defendant had no opportunity to adduce evidence upon that issue. On a hearing in damages upon a default or demurrer overruled, if the plaintiff claims more than nominal damages, his proof must follow the allegations in the complaint. *Shephard* v. *N. H. & N. Co.*, 45 Conn., 58; *Rowland* v. *P. W. & B. R. R. Co.*, 63 Conn., 415.

III. The court erred in permitting the plaintiffs to amend their complaint after final judgment.

After the judge had rendered final judgment he had no further jurisdiction of the case.

The new issue raised by this amendment was one on which the defendant had never suffered a default, and upon which the defendant had not been heard and had had no opportunity to introduce evidence. It is not due process of law to decide a case against a party on issues upon which he has had no day in court. It is contrary to both the Constitution of Connecticut and the Constitution of the United States.

The statute permitting amendments of pleadings (Gen. Stat. § 1027) is very liberal, but it provides that the "other party shall have a reasonable time to answer the new pleading." This, of course, implies that the other party is to have a fair opportunity to meet any new issue in the trial. It

would be mockery to say that a party might answer, when the judgment on the issue to be raised by his answer has already been rendered against him.

IV. At common law the present action could not be sustained. It is brought solely by virtue of § 1008 of the General Statutes. This section does not give the administrator any right to bring the action for the benefit of creditors or of the estate generally. He can only bring it for heirs. In order to sustain the action, it must appear in the complaint that there exist heirs for whose benefit the action can be maintained. The last paragraph of the demurrer should have been sustained.

V. The defendant asks this court to determine the questions of fact and of law raised by this appeal, and to render final judgment against it for nominal damages only. If this prayer should not be granted, defendant asks for a new trial.

George G. Sill and *John A. Stoughton*, for the appellees (plaintiffs).

I. The demurrer is to the whole complaint, on the ground that it does not appear that there is any person "to whose benefit any damages if recovered would inure."

Two decisions of this court have fixed the law and established the rule governing this class of cases. These decisions hold that "the ground of the damages was not the loss to such relatives by the death, but the injury to the deceased." *Goodsell, Executor*, v. *Hartford & New Haven R. R. Co.*, 33 Conn., 51; *McElligott, Admrx.*, v. *Randolph*, 61 Conn., 159.

II. The question raised in the twelfth assignment of error is fully answered in *Palmer* v. *R. R.*, 112 Ind., 225, and other cases, in which the doctrine is stated generally that: "The authorities from the earliest years of the common law recognize the rule that there may be willful wrong without a direct design to do harm."

The court having found on the testimony of the defendant's witnesses that defendant had been guilty of gross, reckless and criminal disregard for human life, it desired a

paragraph added to the complaint stating such facts as showed it. It had no effect on the judgment, for all the facts had been found and amount of damages had been decided upon. In no way has the defendant been injured. It might be struck out as surplusage, and yet the court would have been warranted in finding defendant guilty of gross carelessness.

The Act of 1893 concerning appeals in civil cases was not intended to enlarge the right of appeal, but simply to compel the trial judge to make such a finding as will fairly present the legal questions raised and claimed by the appellant.

ANDREWS, C. J. This was an appeal from a judgment awarding four thousand dollars and costs to the plaintiffs on a hearing in damages after a default.

The plaintiffs are the administrators on the estate of Evelyn R. Pitkin, late of South Windsor, deceased. This suit was brought to recover damages for injuries done to the said deceased by the defendant. The complaint avers that on the 14th day of September, 1889, a train of the defendant came into collision with a horse and wagon driven by and in the possession of the said Evelyn R. Pitkin, at a grade crossing in the town of East Hartford; that by reason of such collision the vehicle was entirely destroyed, the said Evelyn was thrown a great distance, and received injuries from which, on said day, he died. As the complaint originally stood the only paragraph which set forth any conduct for which damages were claimed was the fifth one, as follows:—

"Said collision occurred by reason of the negligence of the defendant corporation in failing to sound the whistle or ring the bell on said engine while approaching said crossing, and by reason of the great rate of speed at which they were running their train while approaching said crossing, and wholly by reason of the negligence and fault of the said railroad corporation, and without any negligence or fault on the part of the deceased Evelyn R. Pitkin."

The complaint was returned to the Superior Court in Hartford county on the first Tuesday of October, 1890. On the 29th day of November following, the defendant gave notice

of its intention to suffer a default according to the provision of chapter 157 of the Public Acts of 1889. There was afterwards a motion to strike out paragraph four of the complaint, and certain words of the fifth paragraph. There was also a demurrer to the fourth paragraph and to the same words of the fifth paragraph, and to the whole complaint. The motion to strike out was denied and the demurrers were overruled.

It was suggested in the argument before this court that the notice of intention to suffer a default has the same effect upon the pleadings as an actual default, and that the motion to strike out and the demurrers came too late. We cannot agree with this argument. The only effect of the Act of 1889, above cited, is that in a case where a default is suffered and no such notice has been given, the hearing in damages must be by a jury and not by the court. The notice is not itself a default. *Falken* v. *Housatonic R. R.*, 63 Conn., 258.

The motion to strike out the fourth paragraph should have been allowed. That paragraph as it stands does not allege any fact which forms a part of the plaintiffs' cause of action. As there was afterwards a default in the case, this error has become immaterial and may be disregarded. *Vail* v. *Hammond*, 60 Conn., 374. The motion to strike out, so far as it applied to parts of the fifth paragraph, was properly denied. The same may be said in respect to the demurrer to these parts of the complaint.

The demurrer to the whole complaint was properly overruled. In the absence of averments to the contrary it will always be presumed that if there is no widow or husband or lineal descendants, there are heirs to whom a distribution of personal estate can be made according to § 1008 of the General Statutes.

Subsequent to the hearing and argument of the case and, indeed, after the judgment had been rendered, an amendment to the complaint was made and allowed against the objection of the defendant, under circumstances stated in the finding, as follows:—

"After the hearing in damages was concluded and before the judgment was rendered, the court instructed the clerk of the court to notify the plaintiffs that if they desired they would be permitted to amend their complaint as by amendment on file. Immediately after so instructing the clerk the court rendered judgment as on file. The plaintiffs immediately thereafter amended their complaint as on file. The defendant objected to the allowance of this amendment and duly objected to said ruling of the court as on file." The amendment so made was this:—

"Paragraph 6. The defendant, without right or authority, changed said highway crossing from one passing under said railroad to a grade crossing; it constructed the approaches by an incline on each side of said railroad by narrow embankments of nine feet on the surface thereof, and left the same unprotected by railings; the incline on the south side was irregular in its grade, in part five feet in one hundred, and in part eleven feet in one hundred; the defendant erected no warning posts at said crossing, nor did it place planks between the rails or between the tracks, nor did it erect any whistling posts for said crossing; the engineer and fireman on said train saw the deceased before he reached the track and saw the danger which threatened him but no effort was made to warn him of said danger, and did not whistle until within fifty feet of said crossing and of said Evelyn R. Pitkin; and plaintiffs say that by reason of the facts aforesaid the defendant was guilty of willful and intentional neglect and disregard of human life, and that by its recklessness and intentional negligence it caused the death of the said Evelyn R. Pitkin."

The action of the trial court in respect to this amendment, as well as the amendment itself, call attention to other parts of the finding, where the court says: "I find that the engineer was willfully and intentionally careless in not stopping his train when he first saw Pitkin, or taking any means to warn him of the danger or to prevent a collision. * * * I find that the injury resulted from the said negligence of the defendant road, to which the plaintiff did

not contribute in anyway, and I find that the injury was the result of the defendant's willful and intentional disregard of its duty, and its gross, reckless and criminal disregard of human life; and I so find whether the foregoing facts constitute such crossing a highway crossing or not." In its memorandum of decision the court had said: "I have found that the injury complained of resulted from the willful and intentional negligence of the defendant. If this is a proper deduction to make from the facts in this case, then contributory negligence of the deceased, if in fact it existed, has no place in the case and the plaintiffs are entitled to recover."

These expressions pretty clearly indicate that the trial court perceived that its finding included facts not averred in the complaint, and that as its judgment rested upon such facts the judgment could not be supported unless such other facts should be set forth in the complaint. Hence the suggestion to the counsel for the plaintiffs that the complaint be amended.

The term negligence is used by courts and by text writers with some indefiniteness of meaning. Sometimes it is applied to an act, and sometimes to the consequences of an act, and at other times to an act and its consequences taken together. In the first of these instances the word is correlative to diligence; in the second to intention. In this sense it is practically synonymous to heedlessness or carelessness—the not taking notice of matters relevant to the business in hand of which notice might and ought to have been taken. Stephen, Criminal Law, Vol. 2, page 123; Austin's Jur., Vol. 1, page 440. In civil proceedings, acts—including omissions—apart from their consequences, are indifferent. It is only when an act occasions injury to another that the person doing the act becomes liable in damages to the person injured by the act. In such cases the act and its consequences are blended together and the term negligent injury, or simply negligence, is applied.

It is an essential ingredient of actionable negligence that the injury be the result of inadvertence, or inattention.

Negligence signifies a want of care in the performance of an act, by one having no positive intention to injure the person complaining of it. Where such an intention exists the injury ceases to be merely a negligent one, and becomes one of violence or fraud, *i. e.* a malicious one.

It needs hardly to be stated that a complaint charging a negligent injury is, in its legal sense, a very different thing from one charging a malicious injury. The proof by which the complaint in a case of malicious injury must be sustained must go further than is required in the other. And the defenses by which the charge may be met and repelled are quite different. In a case for negligent injury proof of contributory negligence is a perfect defense; but in a case for a malicious injury that defense cannot be made. Up to the time the judgment was rendered and until the amendment was made the complaint in this case charged only a negligent injury. After the amendment it charged also a malicious one. A judgment must be according to the facts alleged as well as according to the facts proved; otherwise it is erroneous on the face of the record. It was necessary that the charge of a malicious injury be in the complaint, lest the facts which the court had found to be proved and upon which the assessment of damages was predicated, should not be supported by any averments therein contained. The amendment alleged a new and different cause of action from the one that was before charged in the complaint; one of which the defendant had had no notice, to which it had had no opportunity to make answer, upon which it had not been heard, and in respect to which it had not been in default. As this cause of action was considered by the court in the assessment of damages there was error, and a new trial must be had. *Shepard* v. *N. H. & N. Co.*, 45 Conn., 58; *Rowland* v. *P. W. and B. R. R.*, 63 Conn., 415.

It is certainly irregular, and we believe it to be unprecedented, for a court to do what was done in this case, *i. e.* grant authority to a plaintiff to amend his complaint in a material matter after the judgment is rendered. To do so against the objection of the defendant was, as we think,

manifestly erroneous. The reasons given by this court in *Bennett v. Collins*, 52 Conn., 1, why the amendment in that case was erroneous, apply with added force to the amendment made in this case.

There is error and a new trial is granted.

In this opinion the other judges concurred.

LOREN A. GALLUP, TRUSTEE, *vs.* ALBERT N. FOX.

Second Judicial District, Norwich, May Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

It is not within the province of a jury "to find" what appears on a record, or what a record discloses. When a record is offered in evidence and laid before the jury, it is the duty of the court to state to the jury what such record proves, and what their duty is in respect to the facts so proved.

While the record of a court of probate is only *prima facie* evidence of jurisdictional facts, its judgment of any material fact upon which it adjudicates imports absolute verity, as fully as does the judgment of a court of general jurisdiction.

The retention by a trustee in insolvency of a note given by the vendee of personal property claimed to have been purchased by him in good faith of the insolvent prior to the commencement of insolvency proceedings, is not, as matter of law, a ratification of such sale operating to estop the trustee from maintaining a suit for the recovery of the property, or its value, for the benefit of the creditors. Such retention, unexplained, might be evidence upon which a jury would be justified in finding an intent to ratify, but it would not of itself be a ratification.

Whether a trustee in insolvency has power to ratify a contract made by the insolvent, in such a way as to bind creditors, *quære*.

[Argued May 29th—decided July 9th, 1894.]

ACTION to recover damages for the wrongful taking and conversion of a horse, wagon and harness, by the defendant, brought to the Court of Common Pleas for New London County and tried to the jury before *Crump, J.*; verdict and judgment for the defendant, and appeal by the plaintiff for alleged errors in the rulings and charge of the court. The

plaintiff also filed a written motion for a new trial upon the ground that the verdict was against the evidence, and requested the court to report the evidence to the Supreme Court of Errors and make it a part of the record. With this request the trial court complied. *Error and new trial granted.*

The case is sufficiently stated in the opinion.

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

Solomon Lucas, with whom was *Charles W. Comstock*, for the appellee (defendant).

ANDREWS, C. J. This was a complaint in the nature of an action of trover, brought to the Court of Common Pleas in New London County by the plaintiff describing himself to be the trustee in insolvency on the estate of one Almon Bartlett, and claiming to recover the value of a horse, wagon and harness which had belonged to said Bartlett.

There were two defenses: the general issue, and a denial that the plaintiff was at the time the suit was commenced, or ever since had been, the trustee of the said insolvent estate; and had as such no right to bring or maintain this action. The case was tried to the jury and the defendant had a verdict.

To prove his appointment as trustee the plaintiff laid in the record of the court of probate in the district of Montville, where the said Bartlett resided, and claimed that it appeared thereon that said Bartlett had been by that court decreed to be an insolvent debtor and that he, the plaintiff, had been appointed the trustee of his estate; and that he had come into said court, accepted the trust, and given bond for the faithful performance of his duty. This record showed that there had been some amendments made in it, and the defendant objected to its admission in evidence, but the court admitted it and it was read to the jury.

Under the general issue the defendant offered evidence and claimed to have proved that he purchased said personal property *bona fide* of the said Bartlett through one Pen-

harlow, his agent, before the proceedings in the court of probate were commenced upon which the said decree of insolvency was made and the plaintiff appointed trustee, and in payment therefor surrendered a note which he held against the said Bartlett; and also evidence to show that the plaintiff had, subsequent to his said appointment, ratified said sale by Penharlow to him, the defendant. The main fact, and substantially the only one upon which this claim was made, was that the plaintiff had not returned to the defendant the note of said Bartlett.

In the instructions to the jury upon each of these points we think the trial court erred. In respect to the record of the court of probate the jury was instructed as follows:—

"In the case at bar justice Gallup testifies that the amendments to the record were made in accordance with the facts actually found; so if you shall find that upon the records of July 30th and March 17th, amended as they are, it appears that Almon F. Bartlett was decreed to be an insolvent, and that Loren A. Gallup was appointed trustee of his insolvent estate; and further, by the records of said court in said case, that he gave bonds and duly qualified as trustee, you have nothing further to consider about the legality of his appointment. If these records disclose that he was appointed such trustee, he was entitled to the custody of Bartlett's estate for the purpose of distributing it among his creditors in accordance with the intention of the statutes, and so far qualified to maintain this suit."

The record of the Montville court of probate is set out at length in the record before us, and it appears therefrom by an inspection that the plaintiff had been appointed trustee on the insolvent estate of said Bartlett. It is true that the record of a court of probate or of any other inferior court, is only *prima facie* evidence of jurisdictional facts; but of any material facts upon which it adjudicates, its judgment imports absolute verity, as fully as does the judgment of a court of general jurisdiction. *Bell* v. *Raymond*, 18 Conn., 100; *Holcomb* v. *Cornish*, 8 Conn., 375. The material fact adjudicated by the court of probate, as shown by its record, was

that the plaintiff had been appointed the trustee on the insolvent estate of said Bartlett. That fact appeared on the face of the record and the Court of Common Pleas should have told the jury that they must take that fact as proved. *Commercial National Bank's Appeal from Probate*, 59 Conn., 25. It is not within the province of a jury "to find" what appears on a record, or what a record discloses. When a record is offered in evidence and admitted and laid before the jury it is the duty of the court to state to them what it proves and their duty in respect to the facts so proved.

On the claim of ratification the judge said to the jury:—

"It is evident, I think, that the plaintiff could not both retain the note and sue for the recovery of the value of the property. He must make his election, or, at least, must tender back the note before he begins suit. If he chose to retain the note and not to offer to return it to the defendant, he so far ratified the transfer as to be estopped from denying its validity now. So, that, if you should find that the note which Bartlett gave to the defendant as evidence of his indebtedness, and which he claims to have given to Penharlow in consideration for the transfer of the property in question, was given as such consideration, and came into the hands of the plaintiff as trustee of Bartlett's estate, and was not offered to be surrendered to the defendant before this suit was begun, then you should render your verdict for the defendant."

After considering the case for a short time the jury returned into court and asked for further instructions on this part of the case, as it was not clear to them, and the judge further instructed them in this way:—

"As to the question of ratification and the offer to return the note, my charge to you was, that if the plaintiff retained the consideration for this alleged contract; in other words, if he kept the note and made no offer to return it whatever before this suit was brought, and then went on to bring the suit, that, as a matter of law, would so far operate as an estoppel as to prevent him from maintaining the suit. I may say this to you, however, that if there is any evidence—and you

will remember the conversation testified to by Mr. Perkins as to the demand for the return of the property and also Mr. Gallup's conversation with the plaintiff about the return of the property—by which it appears to your minds that there was any offer to return this note at the same time that the property was demanded—the horse, wagon and harness—and there was a refusal on the part of the defendant to give up the property, then you should bring in a verdict for the plaintiff. That, of course, gentlemen, is a fact for you to find from the evidence before you, whether there was any such ratification or not. If, however, it appears to your minds that there was no offer to return the note—that the demand for the property was not accompanied by an offer to return the note—then as a matter of law I charge you that the trustee had so far ratified the transfer as to be unable in law to maintain the suit."

This we think was error because it took from the jury a question which clearly it was for them to decide. It is a very serious question whether a trustee in insolvency, acting not in his own right but in behalf of the creditors of the estate, has power to ratify a contract made by the insolvent, in such a way that the creditors will be bound. But assuming that the plaintiff in this case had the fullest power to ratify, the retention of the note was not as a *matter of law* a ratification of the sale for which the note was given up. Ordinarily, ratification like a contract, includes within it an intention. An indispensable element of a contract is a meeting of the minds upon the subject of the contract. A ratification is the adoption of a previously formed contract. *Stanton* v. *Eastern R. R. Co.*, 59 Conn., 284. The retention of the note unexplained might be evidence from which the jury would be justified in finding the intent to ratify. But it would be no more than evidence. It would not of itself be a ratification. It would be open to explanation. In this case there were circumstances of explanation. The plaintiff claimed that instead of ratifying the sale he had expressly repudiated it. The jury should have been told to consider the fact of the retention of the note in connection with the

other circumstances of the case and from all the facts taken together to find whether or not the plaintiff had ratified the sale.

There is error and a new trial must be granted.

In this opinion the other judges concurred.

SAMUEL S. HURD, TRUSTEE, *vs.* DANIEL B. SHELTON ET AL.

Third Judicial District, New Haven, June Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

In construing wills inartificially drawn, the context may give to certain words a meaning which they do not ordinarily or properly possess.

A testator by his will gave to his son *B* all his property, but placed it in the hands of trustees until he should perform certain specified "stipulations to his brother *J*," when "the will" was to become absolute in *B*. *Held* that by "stipulations" the testator intended the obligations imposed upon *B* for the benefit of *J*, and that by "the will" he intended the devise and bequest to *B*. *Held* also, that so long as *B* regularly discharged these obligations towards *J* the whole net income of the estate should be paid over annually by the trustees to him, *B*, and to his executors and administrators; that should default of such obligations ever be made, *J* would have an equitable lien upon the trust estate to secure the benefits intended by the testator; and that should such default continue until *J*'s decease, the trust fund would then become intestate estate of the testator, *B*'s estate being defeated by breach of the condition subsequent.

If a testator devises real estate owned by *B* to *J* and gives *B* a legacy, this casts upon *B* the necessity of electing whether to accept or reject the legacy with its attendant burden. *B* cannot claim the legacy unless he allows *J* the benefit of the devise.

A bequest conditioned on payment of an annuity may be claimed although no money was paid, where necessaries of equal or greater value are annually furnished and accepted by the annuitant in lieu of the money.

The general scheme of a will is not to be defeated by a concluding clause indicating a different and inconsistent intention, but expressed in such vague and dubious terms that its meaning cannot be gathered with reasonable certainty.

[Submitted on briefs June 5th—decided July 9th, 1894.]

SUIT for the construction of the will of Elisha Shelton,

brought by the trustee thereunder to the Superior Court for Fairfield County; facts agreed upon and case reserved by the court, *Thayer*, *J.*, for the advice of this court.

William H. Williams, for the plaintiff.

No counsel appeared for the defendants.

BALDWIN, J. In 1868, Elisha Shelton died, and his will was admitted to probate. The disposing portion of it reads as follows: "To my son, Beach Shelton, I give all my estate, both real and personal, which is to go into the hands of trustees, viz: Ambrose Shelton and David N. Lane until he performs certain stipulations to his brother James Shelton, accepted as portion in full the will to be absolute in my son Beach Shelton, my wish is that my son Beach pay my son James one hundred and fifty dollars ($150.00) a year for life and give him the best bed I leave his yearly wood standing all my apparel and a life lease of one quarter of the dwelling house, where I now live including one quarter of the well the old garden and land for a wood pile and all the necessary passages there connected a settlement to be made between the said brothers without going through a court of law let the property which is or ought to be about twenty-four hundred dollars remain in the hands of the said trustees be paid out to my most needy heirs."

His sons Beach and James were his sole heirs at law. He also left a widow who died many years since. The dwelling-house in which he lived, and the well and old garden mentioned in the will, belonged to his son Beach. His property consisted of a few acres of land worth $176, and personal estate (after payment of debts and charges) of the value of about $2,700, all of which, upon the settlement of the estate, in 1869, went into the possession of one of the trustees, the other renouncing the trust, and is now in the possession of the plaintiff. He and his predecessor in the trust, being in doubt as to their rights and duties, have accumulated the

entire net income of the estate, and the trust fund now amounts to over $8,000.

Beach Shelton died intestate in 1893. As long as he lived, he furnished his brother, James, every year, apparel and support amounting in value to over $150, and allowed him to occupy and use such part of the dwelling-house mentioned in the will as he desired, together with the well, old garden, land for a wood pile, and all necessary passages connected with them. He always claimed that the trustee was bound to pay over $150 a year to his brother, James. The administrator of the estate of Beach Shelton has made no payments to James Shelton, and claims that the trustee should pay said annuity to the latter, and turn over all accumulations of the trust fund to the estate or representatives of his intestate.

The will in question begins by making an unqualified gift of all the testator's estate to Beach Shelton. It then adds that this is to go into the hands of certain designated trustees, "until he performs certain stipulations to his brother James Shelton, accepted as portion in full the will to be absolute in my son Beach Shelton." The testator's intent by this language, though confusedly and inaptly expressed, is reasonably clear. He contemplated the acceptance by his son and heir, James Shelton, of the provision he was about to make for him, as in full of his portion of the estate. This provision he refers to as "stipulations" to be performed by Beach Shelton, and until they are performed, the property left to Beach is to be held by the trustees. When performed, the devise and bequest to Beach, which he describes as "the will," are to be "absolute in" him.

The "stipulations" in favor of James are then thus set forth: "my wish is that my son Beach pay my son James one hundred and fifty dollars ($150.00) a year for life and give him the best bed I leave his yearly wood standing all my apparel and a life lease of one quarter of the dwelling-house, where I now live including one quarter of the well the old garden and land for a wood pile and all the necessary passages there connected a settlement to be made be-

tween the said brothers without going through a court of law."

It would appear from the agreed statement, upon which this reservation is based, that the two brothers must have come to such an amicable settlement as to the meaning and effect to be given, as between them, to this expression of their father's wishes, as he desired. Beach did not pay James the stipulated annuity, but, instead of that, supplied him with apparel and support, every year, to an amount exceeding $150 in value, and also gave him the use of so much of his own house and its appurtenances, as met the terms of the will to James' satisfaction.

This course of conduct on the part of the two brothers is equivalent to an acceptance by each of the provisions of the will, and to due performance by Beach, as long as he lived, of all the obligations imposed upon him by the testator. The will, in effect, disposed of real estate belonging to Beach in favor of James, and it also gave a benefit to Beach. This cast upon him the necessity of electing whether or not to accept the benefit with its attendant burden. His election to accept, manifested by the parting with his own property for his brother's use, gave the dispositions of the will in his own favor full and immediate effect. It follows that the trustees should have paid over to Beach, at the close of each year, the net income for the year derived from the trust estate. The principal was to remain in their hands during the life of James, for until his decease the obligations assumed by Beach could not be fully performed; but not the income, since they were to make no payments to James, nor was there any direction for accumulation, or any object to be gained by it, except an increase of a fund which was to come ultimately to Beach. The obligations which he assumed devolved upon his estate at his decease, as the condition upon which, on the decease of James, it can claim the principal fund. He had an absolute title to the accumulations of income, and a title to the principal which is defeasible, upon breach of a condition subsequent. Both these rights passed to his administrator, and, with them, the

corresponding duty to pay the annuity to James during his life, and allow him the use of the real estate described in the will, including the right to cut his necessary firewood.

It is not improbable that the concluding words of the will, having reference to a trust for the most needy of the testator's heirs, were intended to come into force, should the two brothers fail to agree to carry out the provisions previously made for their benefit. If so, as they did agree, the trust has become inoperative. We think, however, that if it was meant to be contingent upon some future event, such contingency is not stated with sufficient certainty; and, on the other hand, that it cannot fairly be construed as an absolute and independent disposition of the estate, since this would defeat the entire scheme of the will, the main intent of which plainly was to make suitable and definite provision for each of the sons.

The Superior Court is advised that the plaintiff is bound to pay to the administrator of the estate of Beach Shelton the entire net accumulations of income which were in the plaintiff's hands at the date of the decease of Beach Shelton, and that the net income thereafter accrued and to accrue will belong and be annually payable to such administrator, provided he and the widow and heirs of Beach Shelton continue to fulfill the obligations imposed upon said Beach Shelton in said will, as hereinbefore described; and that of the principal of said trust fund, the real estate is equitably vested in the widow and heirs of Beach Shelton, subject to said trust, and upon a condition subsequent for the performance of said obligations; and the personal estate is equitably vested in said administrator, subject to said trust, and upon a condition subsequent, for the performance of said obligations; and that upon the decease of James Shelton, if said conditions have been duly kept, said trust will cease, and said trust estate should by said trustee be paid and delivered to the widow and heirs or administrator of Beach Shelton, as above specified; but, if said conditions, in any year have been or shall be broken, then said James Shelton will have an equitable lien upon said trust fund remaining in the hands

of the plaintiff to the extent of his loss by such breach of condition; and that should said breach continue until the death of said James Shelton, then the trust fund remaining at such time in the hands of the plaintiff or his successors, will be intestate estate of said Elisha Shelton.

In this opinion the other judges concurred.

In re Curtis and Castle Arbitration.

Third Judicial District, New Haven, June Term, 1894. Andrews, C. J., Torrance, Fenn, Baldwin and Hamersley, Js.

Under our practice a party who seeks to impeach an award rendered upon a submission under rule of court, for any cause, whether apparent upon the face of the award or otherwise, should do so by way of remonstrance against its acceptance by the court.

Where an award is within the submission, and there is no claim that the arbitrators failed to act on all matters submitted to them, or that they undertook to act on any matters not submitted, a court of equity will not set aside the award except for partiality and corruption in the arbitrators, mistake on their own principles, or fraud or misbehavior in the parties.

A submission provided that the arbitrators should proceed upon the principles of equity to the end that each party might receive all that was justly due him from the other. *Held* that this authority could not be regarded as a limitation upon the arbitrators, but rather as a liberal and highly creditable grant of power.

There is no rule of law that requires arbitrators to make a finding of facts in the case upon which they decide.

Arbitrators cannot be held to have acted improperly in a legal sense, merely because they omitted some detail in their award which neither the law nor the submission made it their duty to observe.

The parties had entered into a written contract which provided, among other things, that one of them should "work" a certain street, and the alleged breach of this agreement formed one of the claims submitted to the arbitrators. *Held* that parol evidence was admissible to show the special meaning of this term as understood by the parties at the time of making the contract; and that such evidence was not limited to expert testimony.

It is ordinarily within the province of arbitrators to determine whether certain damages claimed by one of the parties are proximate or remote.

In re Curtis—Castle Arbitration.

Where the submission to arbitration is made a rule of court under § 1203 of the General Statutes, the arbitrators do not thereby become officers of the court, but are the appointees of the parties as in cases where there is no rule of court.

The power to accept an award, given by statute to a court, implies the power to reject.

[Argued June 5th—decided July 9th, 1894.]

SUBMISSION to arbitration under a rule of court passed at the request of the parties by the Superior Court for Fairfield County. Lewis F. Curtis, one of the parties, remonstrated against the acceptance of the award of the arbitrators. To the allegations of the remonstrance, Samuel D. Castle demurred, and the court, *Shumway J.*, sustained the demurrer, accepted the award and rendered judgment accordingly, and the said Curtis appealed for alleged errors of the court in its rulings. *No error.*

Prior to the 5th day of April, 1893, the above named parties had claims each against the other, amounting on each side to more than five hundred dollars. On that day each of them prepared a schedule of his own claims, and they united in a submission of the same to arbitrators to which they prefixed the said schedules. The submission was in these words:—

"Now, therefore, we, the said Curtis and Castle, agree to submit said claims to arbitration under a rule to be made to that effect by the Superior Court for Fairfield County; and we agree that the arbitrators shall be chosen as follows:—

"Each of us to choose one layman as arbitrator, and they two are to choose a third and presiding arbitrator, who shall be a lawyer, and the said Curtis hereby chooses Howard H. Scribner, of said Bridgeport, as his arbitrator under this agreement, and the said Castle hereby chooses Charles F. Granniss, of said Bridgeport, as his arbitrator under this agreement.

"It is further mutually agreed by and between the parties that the arbitrators under this agreement shall proceed upon the principle of equity, in hearing the matters in dispute and making their award, it being the desire of both parties that

the matters in dispute between them shall be equitably settled and adjusted so that each may have all that is equitably due to him from the other.

"It is further agreed that said arbitrators shall award to said Curtis or to the said Castle, as the case may be, such sum as they shall find to be due to him in excess of the sum owing from him, and that said sum shall be paid within thirty days from the date of said award, and that if it shall be decided that said Curtis is to pay said Castle any sum, then said arbitrators shall award that upon the payment to said Castle by said Curtis of said sum, said Castle shall thereupon deliver up to said Curtis the possession of said Main street property; and that if the award shall be that the said Castle is to pay said Curtis any money, then said arbitrators shall also award (that) said Castle shall furthermore deliver up to said Curtis possession of said Main street property within said thirty days.

"It is further mutually agreed that said arbitrators, or a majority of them, shall have power and authority to make and sign an award which shall be binding upon both parties hereto, and the costs shall be awarded in favor of the successful party."

This submission was signed, sealed, witnessed and sworn to by both the said parties.

The arbitrators so appointed in said submission selected and appointed George E. Hill, an attorney at law of Stamford, Connecticut, to be the third and presiding arbitrator, and signified such choice to the parties. Thereafter the matter was presented to the Superior Court in Fairfield County with proper affidavits, and on the 12th day of April, 1893, a rule and order was made by said court as follows:—

"Ordered, That said agreement be entered of record and that the said Lewis F. Curtis and Samuel D. Castle shall submit to and be finally concluded by such arbitration under the terms of said agreement, so signed and sworn to by them, and to such award as may be made by the arbitrators appointed in and by said agreement, upon such award being returned to and accepted by this court."

On the 16th day of November following, the said arbitrators published and returned into said court their award, viz:—

"In the matter of the arbitration between Lewis F. Curtis of New Milford, in Litchfield County, and Samuel D. Castle, of Bridgeport, Fairfield County, both in the State of Conn., the undersigned arbitrators appointed under an order of the Superior Court for Fairfield County, dated April 12th, 1893, having been duly sworn and having heard the evidence, hereby publish and declare the following award: The majority of said arbitrators award that said Curtis, upon the principles of equity, ought to and shall pay to the said Castle, in accordance with the submission of said Curtis and Castle, within thirty (30) days from the date hereof, the sum of five hundred and fifteen ($515) dollars and nine (9c) cents, together with the costs referred to in said submission, including the fees of the arbitrators, (which fees amount to the sum of six hundred and three ($603) dollars and thirty (30) cents,) unless said fees shall have been theretofore paid by said Curtis; and that the said Castle shall upon the payment of said sums thereupon deliver up to said Curtis the possession of the property on Main street in Bridgeport, now occupied by him and belonging to said Curtis."

The award was signed by all three of the said arbitrators.

On the 6th day of December, 1893, the said Curtis filed in court an extended remonstrance against the acceptance of the said award. This remonstrance was subsequently amended until it set forth seventeen reasons of two or more paragraphs each, in which it was averred and claimed that the arbitrators had erred and acted improperly in a legal sense; and prayed the court, (1) that the said award be not accepted, (2) that the matter be recommitted to the same or other arbitrators to be proceeded with, and for the making of another award; and (3) that he be given such relief as to justice and equity doth appertain.

The first reason for the remonstrance was as follows:—

"1. At the times and places appointed by the arbitrators, the parties in support of and in opposition to the claims referred to in the agreement of arbitration, dated April 5th,

1893, and on file, without written pleadings other than the statement of claims contained in said agreement, presented their evidence by means of witnesses duly sworn, objected and took exceptions in numerous instances to the admission and rejection of certain evidence as in the ordinary trial of actions; and in their arguments, after the evidence was all in, claimed that certain facts had been proven or disproven, and that if so proven or disproven, the law was so and that the arbitrators should decide and report accordingly.

"2. Said Curtis, after said arbitrators had announced that they had made an award in favor of said Castle, viz: in July, 1893, requested said arbitrators to report to this court the facts found by them and upon which they based their conclusions that said Castle was entitled to a judgment and for such an amount as they might have found, in order that this court might know whether to render judgment for said Castle or not; but said arbitrators refused so to do.

"3. As a matter of fact, said arbitrators allowed said Curtis something on all his claims, except the sixth, amounting to $1,602.16 in all, and to said Castle nothing, except on his first and second claims, which they allowed to the amount of $2,117.25."

This reason of remonstrance was, by reference direct or secondary, made a part of each one of the succeeding reasons excepting the seventh and the tenth; and in substance contains the matters upon which the said Curtis claimed that the award should not be accepted. So far as the other reasons differ from this one they are noticed in the opinion.

There were sundry motions and rulings in the Superior Court which are now wholly unimportant. Afterwards said Castle filed a demurrer to the whole remonstrance, and alleged very many reasons for his demurrer. The court sustained the demurrer, overruled the remonstrance, accepted the award, and rendered judgment accordingly. From that judgment the said Curtis appealed to this court.

Allan W. Paige and *George P. Carroll*, for Lewis F. Curtis, appellant.

I. This was not a general submission to arbitration. There was no provision that all controversies between the parties should be arbitrated upon. And it was carefully provided by way of limitation that the arbitrators should be governed and controlled in their proceedings and decision by the principles of equity rather than of law. *Prescott* v. *Fellows*, 41 N. H., 1; *Greenough* v. *Rolfe*, 4 id., 357; *Mussina* v. *Hertzog*, 5 Binney, 387; *Estes* v. *Mansfield*, 6 Allen, 69; 6 Lawson's Rights and Remedies, § 5342; Morse on Arbitration, pp. 300–303; Anderson's Law Dictionary, "Principle," *in verbum.*

II. The stipulation that the arbitrators should have power to make an award binding upon the parties, does not preclude a remonstrance to their award. *Mussina* v. *Hertzog*, 5 Binney, 387; *McCahan* v. *Reamer*, 33 Pa. St. 535; *Buckwalter* v. *Russell*, 119 id., 493; *Muldrow* v. *Norris*, 2 Cal. 74; *United States* v. *Farragut*, 22 Wall. 406.

Even at common law arbitrators are not irresponsible tribunals. Still less are they such under submissions to arbitrations, pursuant to General Statutes, §§ 1203, 1204.

III. It is a general principle in our jurisprudence that where power to accept a report of any kind is given to a court by statute, this carries with it power, for sufficient reasons, to review the report for the discovery of any errors of law. *In re Application of Clinton Oyster Ground Committee*, 52 Conn., 5, 8; *In re Application of Darien Oyster Ground Committee*, 52 id., 61; General Statutes, §§ 2715, 2975, 184, 1034, 1036, 1037, 1044; *Harris* v. *Town of Woodstock*, 27 Conn., 567; *Pond* v. *Town of Milford*, 35 id., 32; *Perry* v. *Platt*, 31 id., 433; *Town of Suffield* v. *Town of East Granby*, 52 id., 175; *State* v. *Worthington*, 1 Root, 137; *Howard* v. *Lyon*, 1 id., 268; *Spaulding* v. *Dunlap*, 1 id., 413; *Smith* v. *Brush*, 11 Conn., 359, 368; *Day* v. *Lockwood*, 24 id., 185; *Spalding* v. *Day*, 37 id., 427.

IV. There was no ambiguity in the expression "to work a street," which justified the admission of parol evidence. Bishop on Contracts (enlarged ed.), § 377; *Glendale Mfg. Co.* v. *Protection Ins. Co.*, 21 Conn., 19; *Bennett* v. *Agricul-*

tural Ins. Co., 51 id., 504; *Collender* v. *Dinsmore*, 55 N. Y., 200.

The simple question before the arbitrators was, what is meant by the expression "to work" said Palm street and Rose street. At best only expert evidence was admissible. Certainly all previous parol agreements had been merged in the written contract of September 24th, 1890. The conversation of the previous July could not be considered by the arbitrators. *Averill* v. *Sawyer*, 62 Conn., 560; *Benedict* v. *Gaylord*, 11 id., 333; *Elliot* v. *Weed*, 44 id., 19; *West Haven Water Co.* v. *Redfield*, 58 id., 39; *Beard* v. *Boylan*, 59 id., 181, 186; *Stanton* v. *N. Y. & Eastern R. R. Co.*, 59 id., 288; *Excelsior Needle Co.* v. *Smith*, 61 id., 56; *Bailey* v. *Hannibal & St. Joseph R. R. Co.*, 17 Wall., 96; *Maryland* v. *Baltimore & Ohio R. R. Co.*, 22 id., 105.

V. All arbitrators must hear the case and participate in the decisions and rulings. For the theory is, that the opinions and arguments of one arbitrator may influence the judgment of one or both of the others, and produce a different result. 6 Lawson's Rights and Remedies, § 3349; *Short* v. *Pratt*, 6 Mass., 497; *Doherty* v. *Doherty*, 148 id., 367; *State ex rel. Harty* v. *Kirk*, 46 Conn., 395.

Alfred B. Beers, for Samuel D. Castle, appellee.

I. A submission to arbitration under a rule of court is the same as common law arbitration, with the exception that by proceeding under the statute the successful party is entitled to have a judgment entered in his favor upon the acceptance of the award. Commissioners and committees are officers of the court and all their acts are within its power and control; but arbitrators appointed in the manner these arbitrators were appointed, are not officers of the court; they are the agents of the parties and stand upon the same ground as arbitrators appointed without a rule of the court. *Fisher* v. *Towner*, 14 Conn., 30, 31.

The court cannot take cognizance of the remonstrance and the appellant must seek his relief, if entitled to any, in a court of equity. *Brown* v. *Green*, 7 Conn., 536; *Eisenman*

v. *Bridgeport*, 47 id., 34–37; *Todd* v. *Barlow*, 2 Johns. Ch. (N. Y.), 551.

II. The first five classes of objections in the remonstrance are to the form of the award, in that the facts are not found, and also that certain evidence was presented to the arbitrators and certain facts proven which they did not find. We do not understand the law to be that arbitrators are to find the facts. Arbitrators are to make an award, not to find the facts upon which the award is made. Morse on Arbitration and Award, pp. 265, 266; *Shirley* v. *Shattuck*, 4 Cush., 470; *Strong* v. *Strong*, 9 id., 560; *Spofford* v. *Spofford*, 10 N. H., 254; *Boston Water Power Co.* v. *Gray*, 6 Met., 131–166. If arbitrators have acted in good faith neither party will be allowed to avoid the award by showing that they erred in judgment regarding the facts. *Hall* v. *Norwalk Fire Ins. Co.*, 57 Conn., 106.

III. The principal error claimed to have been committed by the arbitrators was in the admission of a conversation between the parties in relation to the working of streets described in the written contract of September 24th, 1893, as to how the streets were to be worked. This was proper: First, to show the surrounding circumstances when the contract was made. *Excelsior Needle Co.* v. *Smith*, 61 Conn., 57. Second, to show what sense the parties attached to the term or phrase as used in their contract. Brown on Parol Evidence, pp. 5, 9, 119, 120, 184–199.

IV. The provision in the submission that the arbitrators shall proceed upon the principles of equity in their hearing and award, is certainly not a limitation upon their powers. They are silent as to the rules of law they followed and the court has no power to inquire into that question. Morse on Arbitration and Award, p. 299 and note 2.

Courts will interfere in case of a mistake in the law only if it be apparent upon the submission or award that the arbitrators were bound or intended to decide according to law. Statements as to the course pursued by the arbitrators, or the evidence placed before them, cannot be received to show how the arbitrators proceeded, or what particular charges

were allowed. Morse on Arbitration and Award, 298, and notes 3 and 4; Am. and Eng. Ency. of Law, Vol. 1, p. 707, note; *Jackson* v. *Bull*, 10 Johnson, Ch. (N. Y.), 147. Therefore the statements in the remonstrances of what the arbitrators allowed or disallowed upon the respective claims of the parties cannot be considered.

V. The remonstrant also claims that a majority of the arbitrators came to a decision and made rulings on the question of the admissibility of testimony without consulting with, or conferring with the other arbitrator. This reason as stated, is insufficient: First, because it does not show that it was in his absence. Second, because it does not show that he dissented from their ruling, and not dissenting, he is to be held as concurring with them. *Somers* v. *Bridgeport*, 60 Conn., 529. Third, because it appears that he concurred with them in their judgment by signing the award. Fourth, because if such was the case it was the duty of the remonstrant, if he believed such action to be irregular, to withdraw from the proceedings, or take legal proceedings to prevent the award. By continuing, he waived the irregularity, if one had been committed. So far as the remonstrance discloses he did not even remonstrate. Morse on Arbitration and Award, pp. 170–173 and note 1, 199; Am. and Eng. Ency. of Law, Vol. 1, p. 707; *Gates* v. *Treat*, 25 Conn., 71; *Rundell* v. *Lafluer*, 6 Allen, 480; *Farrell* v. *Eastern Countries R. R.*, 2 Exch., 244. Instead of withdrawing, the remonstrant continued in the hearing, and only remonstrates after he finds that the award is not in his favor.

ANDREWS, C. J. Section 1203 of the General Statutes provides that when any persons have submitted any controversy existing between them to the arbitrament of certain persons by them named, on their desiring such submission to be made a rule of court, the same may be entered of record, and a rule made that the parties shall submit to and be finally bound by such arbitration. And it is further provided that "the award of the arbitrators being returned to and accepted by the court, judgment shall be rendered thereon for

the party in whose favor the award is made, to recover the sum awarded to be paid to him, with costs; and execution shall be granted," etc.

The acceptance of an award by the court to which it is returned, in order that it may become the basis of a judgment, undoubtedly requires an exercise of the judicial will of the court in its favor. To accept, means to receive with approval, to adopt, to agree to. Unless the award does receive such favorable action from the court, no judgment upon it can be rendered and no execution can issue. In cases where there is no objection such favorable action would be given almost as a matter of course. The duty imposed on a court in the acceptance of the award of arbitrators is closely similar to the duty in the acceptance of the report of a committee, or of an auditor, or of a referee. The same word is used by the statutes, and the duties imposed must be substantially the same. That arbitrators are not officers of the court as are committees, does not change the power or the duty of the court in this respect. The purpose of the acceptance in either case is the same—to establish the award in the one case and the report in the other, as the judgment of the court. In most of the cases where courts are authorized to accept the report of a committee, or other like board, the power is expressly given to reject it for cause —as in the case of a highway committee, § 2715. But the power to accept would seem to carry with it the power to refuse to accept. The former implies the latter. *In re Clinton Oyster Ground Committee*, 52 Conn., 8; *Stebbins* v. *Waterhouse*, 58 id., 370. "Where a submission is made by rule of court, it is competent for the party aggrieved by it, when it is returned to court, and before acceptance, to impeach it, not only for apparent defects, but extrinsic causes. In the case of defects apparent on the award, he can only question it before the acceptance; but if he should not object to it for extrinsic causes before acceptance, especially if he had no knowledge of their existence, he may, after acceptance, file his bill in equity to be relieved against it, on the same ground as where the submission is not by rule of court." 1

Swift's Dig., top p. 480. The rule so stated has been followed in this State for many years. *Parker* v. *Avery*, Kirby, 353; *Lewis* v. *Wildman*, 1 Day, 153; *Halsey* v. *Fanning*, 2 Root, 101; *Belton* v. *Halsey*, 1 id., 221; *Bray* v. *English*, 1 Conn., 498; *Fisher* v. *Towner*, 14 id., 26.

This rule requires that for defects apparent on the award the parties can obtain relief only before the acceptance, unless they are such as absolutely to deprive the court of jurisdiction. But for extrinsic causes it permitted a party to obtain relief after the acceptance. As, since the Practice Act, parties are enabled to obtain equitable and legal relief in the same action, there is no reason why a party who seeks to impeach an award for any cause, whether it be apparent on the award or not, should not do so by way of remonstrance to the acceptance. We think this is the better practice and the one which now ought to be followed.

Arbitration is an arrangement for taking and abiding by the judgment of selected persons in some disputed matter, instead of carrying it to the established tribunals of justice; and is intended to avoid the formalities, the delay, the expense and vexation of ordinary litigation. When the submission is made a rule of court, the arbitrators are not officers of the court, but are the appointees of the parties, as in cases where there is no rule of court. In either case the submission names the disputed matter upon which the arbitrators are to adjudge, and often prescribes the principles according to which they are to proceed, and the rules they are to follow in their decision. The submission in the present case does this in an ample manner. It provides that the arbitrators "shall proceed upon the principle of equity, in hearing the matters in dispute and making their award, it being the desire of both parties that the matters in dispute between them shall be equitably settled and adjusted so each may have all that is equitably due to him from the other." Counsel for the appellant, in their brief, speak of this designation of the authority given to the arbitrators as a limitation. We do not so read it. To us it seems rather a liberal and highly creditable grant of power. In hearing

the matter committed to them and in making their award, the arbitrators are commanded to act upon the principles of equity to the end that each of the parties may have from the other all that he is equitably entitled to. This is not equity in any narrow or limited meaning. It is equity in its broadest and most generous sense. It means good conscience, fair dealing, justice. It is in the spirit of the precept "to live honestly, to injure no man, and to render to every man his due." It is the golden rule, to do by others as we would that others should do by us. It is in the light of this direction to the arbitrators that we are to inquire whether their award should have been set aside for any of the reasons alleged in the remonstrance.

It is to be observed that in the remonstrance the appellant does not charge any willful or intentional misconduct to the arbitrators. Nothing in the nature of fraud, or corruption, or of partiality. He seems rather to have studiously avoided any such charge. He asks the court not to accept the award for the reasons stated "in respect to which said arbitrators erred and acted improperly in a legal sense." The reasons of remonstrance are not entirely harmonious. In some respects, indeed, they are inconsistent. And they do not admit of any very accurate classification. But in a general way they may all be brought into these three classes:—

First: That the arbitrators did not make—and refused to make—a finding of the facts on which they based their judgment. If within the term "finding of facts" is included a statement of the amounts found due on each of the several claims of the parties, then to this class may be referred the first, second, third, fourth, fifth, sixth, seventh, tenth and eleventh reasons of the remonstrance.

Second: That the arbitrators erred in admitting parol testimony to vary a writing. To this class may be referred the eighth, ninth, twelfth, thirteenth and fifteenth reasons.

Third: That the majority of the arbitrators did not consult with the minority in coming to their conclusion as to some parts of the award. Under this head fall the sixteenth

and seventeenth reasons. The fourteenth reason does not come into either of these classes.

There is no rule of law that requires arbitrators to make a finding of facts in the case on which they decide; nor does the submission in this case require them to do so. It seems to indicate the contrary. It directs the arbitrators to award to either party the amount that shall be found due to him in excess of the amount that shall be found owing from him; not the several sums due to, or owing from each on the separate claims. The court certainly ought not to hold that the arbitrators had acted improperly in a legal sense, and refuse to accept their award, if nothing more was charged against them than that they had omitted some detail which neither the law nor the submission had made it their duty to observe. The award must of course contain that actual decision of the arbitrators which is the result of their consideration of the various matters submitted to them. But it need contain nothing else. The means by which they have come to this conclusion, the reasoning or the principles on which they base it are, unless the submission otherwise requires, needless and superfluous. Morse on Arbitration and Award, 266.

The largest claim, measured by the amount of money, that existed between these parties, was the one made by Castle against Curtis for damages because, as Castle insisted, Curtis had not worked certain new streets, just laid out in Bridgeport, in the manner he had agreed to work them. There was a written contract between them. The controversy turned on the meaning to be given to the expression "to work a street," as used in that contract. Curtis claimed that it was a business or a trade term, and that the arbitrators should take judicial notice of its meaning; or, if they were not able to do so, that only expert testimony was admissible to inform them of its meaning. Castle, on the other hand, claimed that the expression was not a trade or business term, but was an expression used by them in the contract with a special meaning, perfectly understood by the parties, and agreed upon by them at the time the contract

was made; and offered parol testimony of what that special meaning was. To this Curtis objected, but the arbitrators admitted it.

We understand that there are cases in which parol testimony is admissible to show the contemporaneous understanding of the parties to a contract, of the meaning of the terms used by them in the contract. Thus in *Thorington* v. *Smith*, 8 Wallace, 1, it was held competent to show that the parties to a written contract by the word "dollars" intended Confederate dollars and not lawful dollars of the United States. This decision was applied and extended in "*The Confederate Note Case*," 19 Wall. 548. In *Excelsior Needle Co.* v. *Smith*, 61 Conn., 56–64, it is clearly implied that if the term "needle business" had been used in a special sense by the parties in their contract, such sense might have been shown by parol. In *Macdonald* v. *Longbottom*, 1 Ellis & Ellis, (102 E. C. L.), 978, the defendant by a written contract had purchased of the plaintiffs, who were farmers, a quantity of wool which was described in the contract simply as "your wool." Some time previously a conversation had taken place in which the plaintiffs stated that they had a quantity of wool consisting partly of their own clip and partly of wool they had contracted to buy of other farmers. In an action for not accepting the wool, this conversation was held admissible in evidence for the purpose of explaining what the parties meant by the term "your wool." In *Shore* v. *Wilson*, 9 Cl. & Fin., 566, the Chief Justice, TINDAL, in giving the opinion says:— "The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception, or perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated, that where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common

sense agree that by no other means can the language of the instrument be made to speak the real mind of the party." See also *Hotchkiss* v. *Barnes*, 34 Conn., 27; *Avery* v. *Stewart*, 2 Conn., 69. Cases of this kind are analogous to latent ambiguities. But they are something more than such ambiguities. In these cases the parol testimony is used not only to explain the surrounding circumstances, but also to enable the court to look in upon the mind of the contracting parties and to read the written words of their contract in that very sense in which they wrote them.

In the sixteenth and seventeenth reasons of remonstrance it is alleged that a majority of the arbitrators did not consult with the minority in coming to some of the conclusions reached. If these reasons are compared with the eighth, the eleventh, the twelfth and the fifteenth reasons, to all of which reference is made in one or both of them, and with the award which is signed by all three of the arbitrators, it will appear not only that the majority did consult with the minority, but that the minority had a large share of success in shaping the award.

The fourteenth reason avers only that the arbitrators held certain damages claimed by Castle as not too remote. This was a matter clearly within their province to decide.

In considering all these reasons of remonstrance, we have not failed to be impressed with the fact that the real grounds of objection are several times repeated, with changed circumstances and with varying language, and that they are urged with a minute and technical insistence which differs widely from the confident and liberal tone used by the parties when they committed the controversy to their own chosen tribunal. If we have not given attention to all of them and in detail, it is because we think that so far as they are not answered by what we have said they fall clearly within the authority conferred by the submission on the arbitrators, and that the decision of the arbitrators is final.

None of the reasons of the remonstrance assert that the award is not within the submission. It is not pretended that the arbitrators failed to act on all the claims submitted to

them, or that they undertook to act on any matter not submitted. The uniform rule of decision has been in this State that in such cases a court of equity will not set aside an award except for partiality and corruption in the arbitrators, mistakes on their own principles, or fraud or misbehavior in the parties. *Allen* v. *Ranney*, 1 Conn., 569; *Brown* v. *Green*, 7 Conn., 536; *Fisher* v. *Towner*, 14 Conn., 30; *Bridgeport* v. *Eisenman*, 47 Conn., 37.

"In general, arbitrators have full power to decide upon questions of law and fact, which directly or incidentally arise in considering and deciding the questions embraced in the submission. As incident to the decision of the questions of fact, they have power to decide all questions as to the admission and rejection of evidence, as well as the credit due to evidence, and the inferences of fact to be drawn from it. So, when not limited by the terms of the submission, they have authority to decide questions of law, necessary to the decision of the matter submitted; because they are judges of the parties' own choosing. Their decision upon matters of fact and law, thus acting within the scope of their authority, is conclusive, upon the same principle that a final judgment of a court of last resort is conclusive; which is, that the party against whom it is rendered can no longer be heard to question it. It is within the principle of *res judicata;* it is the *final judgment* for that case, and between those parties. It is amongst the rudiments of the law, that a party cannot, when a judgment is relied on to support or to bar an action, avoid the effect of it by proving, even if he could prove to perfect demonstration, that there was a mistake of the facts or of the law. * * * But when parties have, expressly or by reasonable implication, submitted the questions of law, as well as the questions of fact, arising out of the matter of controversy, the decision of the arbitrators on both subjects is final. It is upon the principle of *res judicata*, on the ground that the matter has been adjudged by a tribunal which the parties have agreed to make final, and a tribunal of last resort for that controversy; and therefore it would be as contrary to principle, for a court of law or equity to re-judge

the same question, as for an inferior court to re-judge the decisions of a superior, or for one court to overrule the judgment of another, where the law has not given an appellate jurisdiction, or a revising power acting directly upon the judgment alleged to be erroneous." SHAW, Ch. J., in *Boston Water Power Co.* v. *Gray*, 6 Met., 165, 166.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

STATE OF CONNECTICUT EX REL. JOHN P. PINKERMAN *vs.* JOHN A. RUSLING ET AL., POLICE COMMISSIONERS.

Third Judicial District, New Haven, June Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

The police commissioners of the city of Bridgeport were authorized by the city charter to remove any officer or member of the police department "for cause," of which they were made the "sole judges." *Held* that their discretion in the matter of removals was supreme and not subject to control by mandamus.

The relator, a captain of police in said city, was charged with disobedience to his superior officer, and with conduct prejudicial to the harmony of the force, and was, after notice and hearing, found guilty and removed from his office by the board of police commissioners. *Held* that the board acted not only within its authority, but also with a due regard to the rights of the relator.

[Argued June 7th—decided July 9th, 1894.]

APPLICATION for a writ of mandamus requiring the respondents, as the board of police commissioners of the city of Bridgeport, to restore the relator to the office of captain of police, from which office it was alleged he had been wrongfully dismissed by said board; brought to the Superior Court in Fairfield County and tried by the court, *Thayer*, *J.*, upon the respondents' motion to quash the application; the court granted the motion, dismissed the application and rendered judgment for the respondents, and the

relator appealed for alleged errors of the court in its rulings on said motion. *No error.*

The case is fully stated in the opinion.

Goodwin Stoddard, with whom was *Jacob B. Klein*, for the appellant (the relator).

I. Where an intention on the part of a municipal board not to perform a public duty is manifested, no previous demand is necessary in order to entitle the plaintiff to a peremptory writ. *Palmer* v. *Stacy*, 44 Iowa, 340; *State* v. *Rahway, etc.*, 33 N. J. L., 111; *Atty. Gen.* v. *Boston, etc.*, 123 Mass., 477; *Cleveland* v. *The Board, etc.*, 38 N. J. L., 259; *Northern R. R. Co.* v. *Duston*, 142 U. S., 508; *Commonwealth* v. *Commissioners, etc.*, 37 Pa. St., 237; *King* v. *Brecknock, etc.*, 8 A. & E., 217–222, 30 E. C. L. R., 170.

II. Where one has been deprived of an office by the illegal appointment of another, mandamus will issue to effect his restoration, even though such appointee be in possession *de facto*. Spelling on Extraordinary Relief, § 1576; High on Extraordinary Remedies, § 67; Angell & Ames on Corporations, p. 750; *Metsker* v. *Neally*, 41 Kan., 122; *State* v. *Common Council*, 9 Wis., 254; *Rex* v. *Barker*, 3 Burr., 1256; *Howard* v. *Gage*, 6 Mass., 461; *In re Strong*, 37 Mass., 484; *St. Louis, etc.*, v. *Park*, 10 Mo., 118; *Commonwealth* v. *Guardian, etc.*, 6 Serg. & R., 468; *Milligan* v. *City Council*, 54 Tex., 388; *Ex parte Wylly*, 54 Ala., 226; Dillon, Municipal Corporations, 248; *Fuller* v. *Trustees, etc.*, 6 Conn., 582.

III. Section 58 of the city charter provides that officers and members of the police department shall hold their positions until removed or expelled by the board of police commissioners "for cause." These words, "for cause," distinguish this case from those of unrestrained and uncontrolled discretion. Police officers were to remain in office until they had been fairly and judicially determined to be unsuitable persons. This is the true meaning of the limitation placed upon the general power of removal by the use of "for cause." *People, etc.*, v. *Fire Commissioners*, 72 N. Y., 444; *Ex parte*

Ramshay, 18 A. & E. (N. S.), 173; *State* v. *McGarry*, 21 Wis., 503. See also Spelling, Extraordinary Relief, § 1557; High on Extraordinary Remedies, § 69; Dillon, Municipal Corporations, § 255; *Fuller* v. *Plainfield*, 6 Conn., 532.

Howard H. Knapp, for the appellees (respondents).

I. This proceeding must fail because the board of police commissioners of the city of Bridgeport are, by the charter, made the sole and exclusive judges of the times and occasions when members of the police department of the city of Bridgeport should be removed; and whenever in their judgment it is for the best interests of the city, then it is their duty to remove any officer or member of the department; and whenever that judgment and discretion is exercised it cannot be required to be exercised in a different way by the court. Throop on Public Officers, § 822, p. 786. See also §§ 394, 396, 398. Spelling on Extraordinary Relief, Vol. 2, pp. 1134, 1189; High on Extraordinary Remedies, § 24, § 42, § 325; Beach on Public Corporations, Vol. 2, Chap. 37; Dillon on Municipal Corporations, Vol. 1, p. 333, Vol. 2, p. 1014; Meachem on Public Officers, § 454; Paine on Elections, § 721. In the late case of *State* v. *Staub*, 61 Conn., 553, the court said: "Whenever any public officer, however humble, is intrusted with power, in the exercise of which he may use discretion, in respect to such exercise he cannot be controlled by mandamus." See also *Insurance Co.* v. *Tyler*, 60 Conn., 459; *Seymour* v. *Ely*, 37 id., 107; *Pond* v. *Parrott*, 42 id., 16; *Sweeney* v. *Stevens*, 46 N. J. L., 344; *State* v. *Board Fire Commissioners*, 26 Ohio, 24; *Attorney General* v. *Brown*, 1 Wis., 442; *Smith* v. *Brown*, 59 Cal., 672; *State ex rel. O'Neil* v. *Fire Commissioners*, 59 Md., 283; *State* v. *Doherty*, 28 La., 119; *Kennedy* v. *McGarry*, 21 Wis., 496; *People* v. *Stout*, 11 Abb. Pr. (N. Y.), 17; *People ex rel. Westray* v. *Mayor of New York*, 16 Hun, 309, and 82 N. Y., 491; *People* v. *Robb*, 126 N. Y., 180; *People* v. *Whitlock*, 92 id., 191; *People ex rel. Masterson* v. *French*, 110 id., 499; *People ex rel. Weston* v. *McClave*, 123 id., 512; *People* v. *Baerfield*, 35 Barb., 254; *People ex rel. Sims* v. *Fire Com-*

missioners, 73 N. Y., 437; *Williams* v. *City of Gloucester*, 148 Mass., 256; *O'Dowd* v. *Boston*, 149 id., 448; *McAuliffe* v. *New Bedford*, 155 id., 216; *Carter* v. *City Council*, 16 Colo., 534; *State ex rel. Capen* v. *Somers*, (Neb.) 39 Amer. and Eng. Corp. Cases, p. 466; *People* v. *Hill*, 9 Cal., 97; *Keenan* v. *Perry*, 24 Texas, 253; *In re Hennen*, 13 Peters, 230; *People ex rel. Wooster* v. *Maher*, 141 N. Y., 337.

II. But assuming that it were possible to give such a construction to the city charter as to authorize the trial court to review the action of the board of police commissioners, the record shows that the relator was charged with, and after due hearing was found guilty of, such a violation of duty as fully justified his removal. In the case of *Ackerly* v. *Jersey City*, 54 N. J. Law, 310, it is said that even where "an officer may not be discharged without good cause shown," yet the court on proceedings to restore him, "will not weigh the evidence, and if there can be conceived a reasonable theory which might have led the commissioners to a different conclusion, they cannot reverse the finding." See also *Poe* v. *State*, (Texas) 10 S. W. Rep., 737.

III. It does not appear from the allegations of the application that the relator was entitled by right to the office to which he claims to be restored, or that the office was vacant. High on Extraordinary Remedies, § 10; Beach on Public Corporations, Vol. 2, § 1559; *Peck* v. *Booth*, 42 Conn., 274; *Toby* v. *Hakes*, 54 id., 274; *Cheesboro* v. *Babcock*, 59 id., 218; *Holley* v. *Torrington*, 63 id., 432; *Frey* v. *Moody*, 68 Mich., 323. Mandamus will not lie to determine the title of an incumbent to an office the functions of which he is exercising as an officer *de facto*. *Duane* v. *McDonald*, 41 Conn., 517; *Harrison* v. *Simonds*, 44 id., 318; *Hinckley* v. *Breen*, 55 id., 120; *State ex rel. Morris* v. *Bulkeley*, 61 id., 376; *Sargent* v. *Gorman*, 131 N. Y., 191; *State* v. *Atlantic City*, 52 N. J. Law, 332; *French* v. *Cowan*, 79 Me., 426, citing with approval case of *Duane* v. *McDonald*, *supra*; *Delahanty* v. *Warner*, 75 Ill., 186; *Swartz* v. *Large*, 47 Kan., 304; *Bonner* v. *State*, 7 Ga., 473.

IV. The first reason alleged in the motion to quash, to

wit: that the application did not show any demand by the relator and refusal by the respondents, was sufficient. High on Extraordinary Remedies, § 13; *United States* v. *Boutwell*, 17 Wall., 607; Tapping on Mandamus, p. 283; Short on Mandamus, p. 267.

ANDREWS, C. J. This was an application to the Superior Court in Fairfield County, praying that a writ of peremptory mandamus be issued commanding the defendants, the board of police commissioners for the city of Bridgeport, to restore the relator to the office of captain of police in the said city.

The application was, by the consent of all parties, treated as the alternative writ. Service was made, the parties appeared in court, and the defendants moved that the writ be quashed. That motion was granted and the relator appealed.

The facts are these:—

Prior to the 25th day of June, 1892, the relator was captain of police in the said city. On that day he was removed from that office by the defendant board after due hearing with witnesses and counsel, by a notice in writing to the city clerk of said city, the record of which is as follows:

"Whereas, John P. Pinkerman, captain of the police force of the city of Bridgeport, did on the 12th day of June, 1891, neglect and refuse to obey orders of his superior officer, John Rylands, chief of police, by assigning officer John Murphy to duty as a policeman, contrary to the explicit orders of said Rylands; and

"Whereas, said Pinkerman, captain of the police force of the city of Bridgeport, since the 6th day of April, 1892, has continued to keep alive the litigation in the courts against the chief of police, and is now maintaining and urging said litigation and threatens to continue said litigation in the future, in spite of decisions of the Superior Court adverse to his claim; and

"Whereas, the conduct of the said Pinkerman in waging legal warfare with his superior officer has stirred up strife

and contention, and interfered with the harmonious working of the police force; and

"Whereas, it is necessary and desirable that the entire force should act in unison for the best interests of the city; now therefore,

"Resolved, that inasmuch as the conduct of the said Pinkerman has been prejudicial to the best interests of the city and the cause of much strife and contention among the force, it is unwise and inexpedient that he should be retained in his present office.

"Resolved, that the said John P. Pinkerman be and he is hereby dismissed from the police force of the city of Bridgeport.

"Attest, Charles C. Wilson,

"Clerk of the Board of Police Commissioners."

The charter of the city of Bridgeport contains the following section:—

"Sec. 58. The police commissioners of said city of Bridgeport shall have the sole power of appointment and removal of officers and members of the police department of said city of Bridgeport; and it shall be the duty of the said board of police commissioners to appoint suitable persons to fill the offices of said police department, and other suitable persons as members of said police department, and to suspend, remove, or expel any officer or member from office or membership in said department whenever, in the judgment of said commissioners, such suspension, removal, or expulsion shall be for the best interests of the city; and whenever any person shall be appointed an officer or member of said police department, or whenever any officer or member of said police department shall be suspended, removed, or expelled from his office or membership in said department, it shall be the duty of the said board of police commissioners to give a written notice, within a reasonable time, to the city clerk of said city of Bridgeport of such appointment, suspension, removal, or expulsion. The present police force of said city of Bridgeport shall hold their respective offices, unless previously suspended, removed, or expelled, until others are appointed

in their stead; and every officer or member of said police department shall hold his office and membership in said department until removed or expelled by said board of police commissioners for cause, of which said board of police commissioners shall be the sole judges. Nothing contained in this section shall be so construed as to prevent the common council of said city of Bridgeport from increasing or reducing the members of the police force of said city, or creating new offices in said police department; and in case the common council of said city shall vote to reduce the police force of said city, the board of police commissioners shall remove a sufficient number of the officers and members of said police force to conform to the vote of said common council."

Several reasons are assigned by the defendants why their motion to quash the writ should be granted, the third of which is this:—

"Third. Because it appears from the allegations of said application and by the charter of said city of Bridgeport, to which reference is therein made, that these respondents, police commissioners of said city of Bridgeport, are vested with the sole power of appointment and removal of officers and members of the police department of said city, and that it is their duty, whenever in their judgment, it shall be for the best interests of said city, that any officer or member of said police department shall be removed, to remove him, and that said police commissioners shall be the sole judges of the cause for which any officer or member of said department may be removed; and it appears from the allegations of said application, that these respondents, police commissioners, as aforesaid, in the exercise of the judgment and discretion thus vested in them, have, after hearing said relator, together with his witnesses and counsel, removed this relator from the office of captain of police of said city, which discretion, so vested in these respondents, this relator seeks to control by said alternative writ of mandamus."

The defendants insist that the board of police commissioners of the city of Bridgeport, of which they are the members, is vested with a supreme and uncontrolled discretion in the

matter of removals from the police force of that city. The relator concedes that if they have such supreme discretion their action cannot be controlled by a writ of mandamus. That such is the law would seem to be beyond controversy. It is so stated by the text writers and in the decisions of courts, so far as we are informed, with entire uniformity. *American Casualty Ins. Co.* v. *Flyer*, 60 Conn., 448; *State* v. *Staub*, 61 Conn., 567; *Freeman* v. *Selectmen of New Haven*, 34 Conn., 406.

But the relator claims that the defendant board does not possess such supreme and uncontrolled discretion in the matter of removals. He claims that the board can remove only for "cause" and that "cause" means "sufficient cause;" and that to warrant his removal the cause must be something personal to himself, which renders him an unsuitable person to retain the position.

We cannot agree with the relator in his argument. The cases cited by his counsel, and the only ones on which they seem to rely, do not support his claim. These cases are *People* v. *The Fire Commissioners*, 72 N. Y., 445, and *State* v. *McGarry*, 21 Wisconsin, 496. These cases were on charters containing quite different provisions from the charter of Bridgeport. In the first case the relator Joseph H. Munday, was a regular clerk in the fire department in the city of New York, and had been removed from that position by the fire commissioners, without giving him any notice of the cause of his removal. The charter of that city gave the general power of removal of clerks and employees of the fire department to the board of fire commissioners. But that power was limited by declaring that it "cannot be exercised in respect to any regular clerk * * * until he had been informed of the cause of the proposed removal, and has had an opportunity of making an explanation;" and it was held that the board of fire commissioners had exceeded their authority. The case from Wisconsin was this: The law of that State empowered the board of supervisors of a county to remove certain officers for "incompetency, improper conduct, or other cause *satisfactory* to the board." All that was decided was that "other cause" must be "other kindred

cause." *Ex parte Ramshay*, 18 A. & E. (N. S.), 175, is not applicable, because in this case the defendants did give the relator notice and an opportunity to be heard with witnesses and by connsel.

Besides, we are clearly of the opinion that the legislature has given to this board of police commissioners the supreme and absolute power of removals from, as well as appointments to, the police force of the city of Bridgeport as fully as language can be used to confer such power, and to be used at discretion. In the first place, in the section of the charter above recited, this board is given the sole power of appointment and removal of officers and members of the police force of that city. Then it is made the duty of the defendant board to suspend, remove, or expel any officer or member of the police, whenever in the judgment of said commissioners, such suspension, removal, or expulsion shall be for the best interests of the city; and finally that the members of the police force shall remain in office until removed or expelled by the defendant board for cause, of which cause the said board *shall be the sole judges*. *State ex rel. N. Y. & N. E. R. R. Co.* v. *The Asylum Street Bridge Commission*, 63 Conn., 91.

But the case does not require the application of any extreme or rigorous rule. It comes fairly within the very rule invoked by the relator. The statement shows that the defendant board did give notice to the relator of the charges against him, and appointed a time for him to appear and be heard. He appeared and was heard with his witnesses and by counsel. The board after that hearing found him guilty of disobedience to his superior officer, and of such conduct as caused strife and a want of harmony among the police force, and that it was for the best interest of the city that he be removed from the office which he held. Then they did remove him. It seems to the court that they acted not only within their authority but with a due regard to the rights of the relator.

There is no error.

In this opinion the other judges concurred.

GERALD H. BEARD'S APPEAL FROM COUNTY COMMISSIONERS.

Third Judicial District, New Haven, June Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN, and HAMERSLEY, Js.

Under chapter 175 of the Public Acts of 1893, any resident taxpayer of a town who feels aggrived by the decision of the county commissioners in granting a license for the sale of liquors therein, has the right of appeal to the Superior Court.

Neither in his motion for an appeal, nor in the reasons of appeal filed in the Superior Court, is such appellant bound to show any grievance or interest in the matter peculiar to himself.

A judgment of the Superior Court in an appeal of this nature is as much open to review by this court for error in law, as a judgment in any other proceeding.

Sections 1130 and 1131 of the General Statutes provide that notice of an appeal shall be filed within one week, and the appeal itself within ten days, after the rendition of the judgment; but that the judge may, for due cause shown, extend the time. *Held* that the judge, after the expiration of the one week, had the power to extend the time for filing the notice of appeal.

A written motion to restore to the docket, a cause which had been erased by order of court, is in the nature of a petition for a rehearing and, when entertained by the court, operates of itself to defer, until it is finally disposed of, the time for appealing from the order of erasure.

[Argued June 7th—decided July 9th, 1894.]

APPEAL from the decision of the County Commissioners for Fairfield County, granting a license to John H. and William McNamara to sell spirituous and intoxicating liquors in the town of Norwalk; taken to the Superior Court in said county and erased from the docket by the court, *Thayer, J.*, upon motion of the appellees. Thereupon the appellant filed a motion to restore the cause to the docket which was denied, and the appellant appealed for alleged errors of the court in erasing the cause and in refusing to restore it to the docket. *Error and judgment reversed.*

In this court the appellees filed a plea in abatement. *Overruled.*

The appellant described himself in his appeal as "of said

Norwalk" and "a taxpayer of said town," and alleged that he was aggrieved by the decision of the commissioners.

In the Superior Court he filed reasons of appeal, to the effect that the place for sales at which the license was granted was within two hundred feet of a church edifice, and in a part of the city devoted largely to private residences, churches and public schools, and that to keep a liquor saloon there would injure the property in that locality.

On motion of the appellees, the cause was erased from the docket for want of any sufficient allegation in the appeal, or in the reasons of appeal, that the appellant had suffered or could suffer any injury, cognizable by law, by which he could claim to be "aggrieved" by the decision of the commissioners. Six days after this order was made, the appellant filed a written motion for the restoration of the cause upon the docket, stating therein, among other things, that he was the pastor and teacher of the Congregational church mentioned in his reasons of appeal, and one of its financial supporters, and that to have a saloon so near it would injure the value of the church property, and annoy those using the building for the purposes for which it had been erected. Two days later, this motion was heard and denied, and at the same time the following order was entered by the court:

"Time extended one week for filing notice of appeal from the order granting motion to erase appeal from the docket."

On the following day, the appellant filed a notice of appeal to this court "from the judgments of the court in said action," and four days later an appeal was filed, conformably to the notice. No other notice of appeal was ever filed. The appellees filed a plea in abatement in this court, on the following grounds:—

1. There is no right of appeal to this court from the action of the Superior Court in appeals from decisions of county commissioners, as to granting licenses for selling liquor.

2. No notice of appeal was given within one week from the entry of the order to erase the cause from the docket, nor any extension of time granted within said week.

3. This appeal was not filed within ten days from the date

of the judgment erasing the cause from the docket, although no finding of facts by the court was required.

4. The appeal professes to embrace two judgments, one of which—that of refusal to restore the cause to the docket—was in the nature of the denial of a motion for a new trial, and was not a proper subject of appeal.

The appellant denied all the allegations of this plea except that which set up that the appeal was taken from the judgment refusing to restore the cause to the docket, as well as from the order for its erasure.

By order of the court, the plea in abatement and the appeal were argued together.

Russell Frost and *John H. Light*, for the appellant.

I. The record shows that the Superior Court had jurisdiction of the appellant; of the appellees, by service of the appeal and by their appearance; of the subject-matter of the appeal, by statute; and full power and jurisdiction to render the final judgment sought for by the appellant. That being true, the cause could not be legally erased from the docket. *Bishop* v. *Vose*, 27 Conn., 7; *Wickwire* v. *The State*, 19 Conn., 484; *Saunders* v. *Denison*, 20 Conn., 525; *Smith* v. *The State*, 19 Conn., 497; *State* v. *Prichard*, 35 Conn. 325; *Woodruff* v. *Bacon*, 34 Conn., 182; *Deming's Appeal from Probate*, 34 Conn., 201; *James* v. *Morgan*, 36 Conn., 351.

But these appeals from county commissioners should not be judged by the high standard of appeals from probate. In the latter the appellant must have an actual property interest in the estate, and as heirs at law, next of kin, devisee, legatee, or creditor, be entitled to some part of it, and must be aggrieved with reference to that property right before he can appeal. In appeals such as the one at bar, the appellant has no property right in the subject-matter of the appeal, viz: whether a certain place or a certain person is suitable to be licensed to sell intoxicating liquors. His grievance cannot be presumed to be a pecuniary one, and he should not be held to formalities and technicalities. Proceedings before county commissioners in these cases are

necessarily informal, and so long as sufficient is done to fairly get the question of suitability of place or of person before the Superior Court, nothing more is to be required.

II. This appeal is sufficient. Not only is it not void; it is not even defective. The only question to be determined by the trial of the appeal on its merits is whether a certain place is suitable for the sale of intoxicating liquors. The county commissioners decided that it was suitable. The statute says that any taxpayer of the town who is aggrieved may appeal from that decision. Appellant went before them and alleged that he was a taxpayer of the town and was aggrieved. The county commissioners made a record that he appeared before them and, by his motion in writing, alleged that he was a taxpayer of the town and was aggrieved, and upon his giving the required bond, they allowed his appeal. This is a police regulation and not to be crushed and smothered by technicalities. The appellant made every allegation required by the statute, and in the precise words of the statute. The particulars of his grievance, the nature of it, the extent and character of it, are no part of the allegations of his motion for appeal. They are the subject of subsequent pleadings, if indeed any pleadings are required at all in such an informal proceeding under the police power of the State. *Saunders* v. *Denison*, 20 Conn., 520; *Dickerson's Appeal from Probate*, 55 Conn., 223; *Deming's Appeal*, *supra*; *Swan* v. *Wheeler*, 4 Day, 137.

Norton's Appeal, 46 Conn., 527, and *Campbell's Appeal*, 64 Conn., 277, do not conflict with our position. If an appellant does set forth all the grounds of his interest in his appeal and the averments show that he has no interest and cannot be aggrieved, the cause may properly be erased; but that is not this case.

III. The appellees should have filed a plea in abatement in the Superior Court and not relied on a motion to erase. The appellant alleged that he was aggrieved. If he was not aggrieved he had no capacity to take the appeal, and could give the court no jurisdiction of the cause. The appellees should have alleged that the appellant was not

aggrieved and this would have presented an issue preliminary in its nature. A motion to erase is based wholly upon the record, and relates to defects thereon, which make the proceedings void and prevent the court taking further action. Sometimes it is made orally. It cannot be replied to, and no issue can be raised on it, except whether it appears from the record that the case and the parties should be put out of court, for a fault, so vital, that it cannot be cured by amendment, and the party can do nothing further to enable the court to retain him or his cause before it. *Orcutt's Appeal*, 61 Conn., 381; *Bishop* v. *Vose*, *supra*; *State* v. *Prichard*, *supra*; *James* v. *Morgan*, *supra*.

IV. If the proper remedy for the appellees was by a plea in abatement in the Superior Court, they waived their right to such a plea by first demurring to the reasons of the appeal. In *Prosser* v. *Chapman*, 39 Conn., 521, the court says: "A plea to the action is a tacit admission that the mode in which the plaintiff's remedy is pursued is correct." In *Fowler* v. *Bishop*, 32 Conn., 199, in a suit brought to a City Court, defendant went to trial upon a general denial merely. He was held to thereby admit that he resided within the city. In *Ives* v. *Finch*, 22 Conn., 101, a year after the return of an appeal, a motion to erase was granted because the bond was without surety. That was held error, because the proper course was a plea in abatement, which should have been filed in time.

In *Deming's Appeal*, *supra*, the court says: "A defect in the record of such a character that the Superior Court would have dismissed the case upon a proper plea filed for the purpose, would not necessarily be sufficient to quash the proceeding in this stage of the case. The time has elapsed for the appellee to take advantage of any defects upon the record of less importance than those sufficient to render the proceeding void."

In *Trinity Church* v. *Hall*, 22 Conn., 124, the appellees answered to the reasons of appeal and averred that the appellants had not any interest in the estate, and therefore no right to prosecute the appeal; the court held that that was

in the nature of a plea in abatement denying the capacity of the appellants to take and prosecute the appeal, and was a preliminary objection, that should have been made before issue on the reasons of appeal.

V. This court has full power to review the judgment of the Superior Court in so far as it is claimed to rest on errors of law. The action of the trial court is not final upon points of law.

J. Belden Hurlbutt, for the appellees.

I. In order that the Superior Court should have had jurisdiction of the appeal from the county commissioners, the grievance alleged must be, (1) to a taxpayer; (2) it must be one affecting him peculiarly; and (3) the interest affected must be a pecuniary one.

The law *says* the appellant must be a taxpayer.

The law also seems to imply that there are *two* classes of taxpayers,—an aggrieved class, and a class without grievance; and we assume this to be so, from the general principle of construction of statutes, that the intent is to be gathered from the language, and that all the words of the statute are to be given meaning to, if they can be, consistent with the intent and purpose of the law in all its parts. Sutherland on Statutory Construction, § 240.

The fact that the legislature intentionally limited appeals to those *taxpayers who are aggrieved*, clearly implies that some right or pecuniary interest of the taxpayer was contemplated, different in character from a remonstrant, or from taxpayers in general. The only grievance affecting a taxpayer as such, would clearly be one of a pecuniary nature only. *Norton's Appeal*, 46 Conn., 528; *Buckingham's Appeal*, 57 id., 545.

II. If the grievance required is one of special character, it ought to be stated in the appeal. *Swan* v. *Wheeler*, 4 Day, 137; *Saunders* v. *Denison*, 20 Conn., 524; *Church* v. *Hall*, 22 id., 131; *Deming's Appeal*, 34 id., 201; *Norton's Appeal*, 46 id., 527; *Elderkin's Appeal*, 49 id., 71; *Dickerson's Appeal*, 55 id., 229; *Buckingham's Appeal*, 57 id., 544; *Camp-*

bell's Appeal, 64 id., 277. The allegation that he is aggrieved, is a mere averment of a legal conclusion, predicated upon no alleged facts. *Campbell's Appeal*, *supra*. No facts are alleged to justify the conclusion, and this fatal omission cannot be remedied by any statement in the reasons of appeal. *Norton's Appeal*, 46 id., 527, and other authorities cited, *supra*.

III. The motion to erase was properly received and disposed of by the court. *Wickwire* v. *State*, 19 Conn., 488; *Olmstead's Appeal*, 43 id., 214.

The jurisdiction of the court must appear upon the face of the proceedings, as our courts are, to a certain extent, at least, of limited jurisdiction, as distinguished from English courts of general jurisdiction. *Raymond* v. *Bell*, 18 Conn., 88.

The motion to erase being predicated, as it must be, upon what appears upon the face of the record, was a proper method to reach the defect. Where the defect is one which involves no issue to be made to the court, it effects precisely the same office that a plea in abatement could effect; while a plea in abatement is necessary to reach matters *dehors* the record. This principle is sustained by the practice in Connecticut. *Saunders* v. *Denison*, 20 Conn., 525; *Wickwire* v. *State*, 19 id., 485; *Trinity Church* v. *Hall*, 22 id., 130; *Deming's Appeal*, 34 id., 201; *Norton's Appeal*, 46 id. 527; *Elderkin's Appeal*, 49 id., 71; *Dickerson's Appeal*, 55 id., 229; *Buckingham's Appeal*, 57 id., 544; *Orcutt's Appeal*, 61 id., 378; *Campbell's Appeal*, 64 id., 277; *Bishop v. Vose*, 27 id., 1; *Camp* v. *Stevens*, 45 id., 92.

The defect was not amendable, being no part of the proceedings in this court, or over which this court had any control. A court will not amend proceedings to give it jurisdiction. *Hoxie* v. *Paine*, 41 Conn., 540.

IV. The motion to restore the case to the docket, is one addressed entirely to the discretion of the court; is not reviewable, and is only here introduced with the view of putting something into the record, which by right ought not to be there, to create a sympathy or feeling that an injustice

might be done. It is no part of the record, nor any part of the proceedings in this case. *Dauchy* v. *Salisbury*, 29 Conn., 124; *Parsons* v. *Platt*, 37 id., 566.

BALDWIN, J. Chapter CLXXV. of the Public Acts of 1893, (p. 319,) gives an appeal to the Superior Court from a decision of county commissioners granting a license to sell spirituous and intoxicating liquors, to "any tax-payer of the town in which the business carried on under such license is to be transacted, who shall be aggrieved."

Section 3063 of the General Statutes provides that all applications for such a license must be indorsed in writing by five electors and taxpayers of the town. Such taxpayers must, by § 3049, be residents in the town, owning property assessed on its grand list. Any citizen of the town, by § 3063, may file with the commissioners objections to granting such a license, upon which a hearing, on due notice, must be had before them.

These statutes contemplate three classes of persons in every town as having a special interest in the proper administration therein of the system of licensing liquor-sellers: the taxpayers who are electors, the taxpayers who are not electors, and the citizens generally without distinction of sex. Without the consent of five who belong to the first class, no application for a license can be considered. Any member of the third class may be heard in opposition to such an application, and, should the commissioners decide to grant it, any taxpayer, whether an elector or not, "who shall be aggrieved," can appeal from their decision to the Superior Court.

The term "aggrieved," as used in our statute as to appeals from probate, applies only to those who can show a direct pecuniary interest in the matter in controversy. Had it been intended that it should receive the same construction, as used in the Act of 1893, the class, in whose favor the right of appeal was granted, would naturally have been restricted to those having some interest in landed property in the immediate vicinity of the place where the liquors were to be

sold. But the proof of pecuniary damage to such an interest even, would necessarily be difficult, and, since the appeal must be taken to the next return day after the grant of the license, must always rest largely on the opinion of witnesses as to future probabilities. On the other hand, every owner of property, assessed in the grand list of the town in which he resides, has a substantial interest in the prosperity and good order of that town. The expense of the local police of any town, as well as of criminal proceedings before its local tribunals, is largely dependent on the number of the liquor saloons and bar rooms within its limits, and the character of those who keep them. If licenses are granted with too free a hand, or without proper discrimination, the burdens of taxation are likely to be increased. Every taxpayer therefore has a certain, though it may be a small, pecuniary interest in having the license law well administered; and if he is also a resident in the town where he pays his taxes, he has an additional interest, common to every citizen, in promoting the general welfare of the community.

In view of these considerations, we think that any resident taxpayer of a town who feels aggrieved at the granting of a license for the sale of liquors therein, has the right of appeal under the Act of 1893, and that he is not bound to show any grievance or interest in the matter peculiar to himself, either in his own motion for an appeal before the county commissioners, or by reasons of appeal in the Superior Court. It follows that there was error in erasing the cause from the docket.

The plea in abatement challenges the jurisdiction of this court to review any action of the Superior Court upon appeals of this nature. We perceive no foundation for this objection. The cause became one of a judicial nature, when it was brought before the Superior Court, and as the judgment there rendered was founded on a misconception of the law, it was as much the subject of review as a judgment in any other proceeding.

It is also set up, as matter of abatement, that the appeal is taken from two judgments, and that from one of these,

the order denying the motion to restore the cause to the docket, there was no right of appeal. This is true; but the appeal was well taken from the original order erasing the cause from the docket, and it is not invalidated by the nugatory attempt to review the action, subsequently had.

The order extending for a week the time "for filing notice of appeal" from the order of erasure, was not made until a day after the ordinary period fixed for that purpose had elapsed; and it is contended that it was then too late for the court to grant an extension. The statute under the provisions of which this action was had, General Statutes, § 1131, does not provide that the time must be extended, if at all, before it expires, nor do we think any such limitation is or ought to be implied.

But the extension was granted on the same day that the motion to restore the cause to the docket was heard and denied. Such a motion is in the nature of a petition for a rehearing, and when both made and entertained by the court, operates of itself to defer, until it is finally disposed of, the time for appealing from the original order. This is the settled construction of the statute of the United States (U. S. Rev. Stat., § 1008) denying any right of review in the Supreme Court of the United States of judgments, decrees, or orders in civil actions, "unless the writ of error is brought, or the appeal is taken, within two years after the entry of such judgment, decree, or order;" and of the similar provision in the Act of 1891, creating the Circuit Courts of Appeals; 26 U. S. Stat. at Large, 829. *Brockett* v. *Brockett*, 2 How., 238; *Brown* v. *Evans*, 18 Fed. Rep., 56; *Aspen Mining & Smelting Co.* v. *Billings*, 150 U. S., 31. Our own statute of appeals requires the party aggrieved to file his notice of appeal "within one week after the rendition of the judgment or the passage of the decree," and his appeal "within ten days from the rendition of such judgment," unless the time is enlarged by the court, "for due cause shown." The considerations which have determined the construction of the statutes of the United States, in this particular, are equally applicable to that of this State. Where a motion

or petition for a rehearing is deemed by the court, to which it is presented, of sufficient importance to be reserved for future argument, and is not disposed of within ten days from the rendition of the original judgment, it would be unreasonable to require the moving party to proceed meanwhile to file a notice of appeal, or an appeal, in ordinary course. An appeal, so filed, would remove the cause into this court, and, unless it should be afterwards remanded to the court below, would deprive it of any further jurisdiction as to granting a rehearing. *Roemer* v. *Simon*, 91 U. S., 149.

The order of the Superior Court extending the time for filing a notice of appeal, must therefore be regarded as simply declaratory of the purpose to suspend the operation of the original judgment which the law would otherwise have implied.

The plea in abatement is overruled, and the judgment of the Superior Court is reversed.

In this opinion the other judges concurred.

THE TOWN OF ANSONIA *vs.* ALFRED COOPER ET AL.

Third Judicial District, New Haven, June Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

A tenant who owned but a life interest in certain land sold and conveyed the same by warranty deed in fee, and the vendee, who at once took and retained possession, paid for, and believed he had acquired, an absolute title in fee. Upon the death of the life tenant some years later, the remainderman, with full knowledge of all the facts and with an intent to confirm the sale as made, accepted and appropriated to his own use that portion of the consideration money which had not been expended by the life tenant. *Held* that he had thereby ratified the unauthorized sale made by the life tenant and thereafter had no interest in the land or in the money awarded for its condemnation to public uses. *Held* also that an assignment of his interest pending the condemnation proceedings gave his assignee no other or greater right than he himself had.

[Submitted on briefs June 8th—decided July 9th, 1894.]

PETITION for the appointment of a committee to determine the compensation to be paid for certain real estate taken for school purposes; brought to the Superior Court in New Haven County and tried to the court, *Prentice, J.* The committee was duly appointed and the amount determined upon by them as just compensation for the land taken was paid into court, and thereupon the defendants, who claimed the fund, interpleaded their respective rights. The defendant Alfred Cooper disclaimed all interest in the fund. To the answer and claim of Henry G. Alling, the claimant Elizabeth Downs demurred; the court sustained the demurrer and rendered judgment in favor of Elizabeth Downs, and the claimant Alling appealed for alleged errors in the rulings of the court in sustaining the demurrer. *Error and judgment sustaining demurrer reversed.*

The case is sufficiently stated in the opinion.

V. Munger, for the appellant, Henry G. Alling.

I. Alfred Cooper, under whom the appellee claims, is estopped from questioning the legality of the sale of the land made by his mother. He "stood by" in the language of the cases, permitted the real estate to be sold, and knew that purchasers were spending their money in the full belief that they were getting a title in fee simple. And subsequently when he accepted and appropriated to his own use the unexpended portion of the consideration money he ratified and confirmed the sale as made by his mother, the life tenant. *Cairncross* v. *Lorimer*, 3 Macq. H. L. Cases, 839; *Anderson* v. *Hubbel*, 93 Ind., 570; 2 Smith's Leading Cases, 7th Amer. Ed., p. 737; *Griggs* v. *Von Phul*, 1 Wall., 274; *Morgan* v. *Chicago & Alton R. R. Co.*, 96 U. S. 716; *Continental National Bank* v. *National Bank of The Commonwealth*, 50 N. Y., 575. It is not necessary to an estoppel that there should be an intent to deceive. *Winton* v. *Hart*, 39 Conn., 20; *Roe* v. *Jerome*, 18 id., 153; *Taylor* v. *Ely*, 25 id., 258; 2 Pom. Eq. Juris., § 807. In the following cases the owners have been estopped from asserting their title. *Storrs* v. *Barker*, 6 Johns. Ch., 166; *Gill* v. *Harding*, 48 Ark., 409;

Stone v. *Tyree*, 30 W. Va., 687; *Forbes* v. *McCoy*, 24 Neb., 702; *Marnies* v. *Goblett*, 31 S. C., 158, 17 Am. St. Rep., 24; *Bryan* v. *Romirez*, 8 Cal., 461; *Workman* v. *Guthrie*, 29 Pa. St., 495.

II. The agreement by the heirs to distribute the property among themselves was binding. They were of full age and there were no creditors. The will gave them the property absolutely. It was competent for the heirs to confirm the sale of the real estate and divide the proceeds, together with the personal property, thereby making a complete distribution and final settlement of the estate of Charles Cooper. Woerner, Am. Law of Adm., Vol. 2, § 566, pp. 1241, 1242; *Foot* v. *Foot*, 61 Mich., 190; *Taylor* v. *Phillips*, 30 Vt., 238; *Clark* v. *Clay*, 31 N. H., 402; *Walworth* v. *Abel*, 52 Pa. St., 370; 2 Beach, Mod. Eq., § 1003; *Brown* v. *Wheeler*, 17 Conn., 346; *Baxter* v. *Gray et ux.*, 14 id., 119; *Dickinson's Appeal from Probate*, 54 id., 226.

III. The acceptance of the $250 by Alfred Cooper was in itself a confirmation of the sale made by his mother. The facts are undisputed. *McPherson* v. *Cunliff*, 11 Serg. & R., 492; *Spragg* v. *Shriever*, 25 Pa. St., 282; *Maple* v *Kussart*, 58 id., 349; *Cox* v. *Rogers*, 77 id., 160; *Karns* v. *Olney*, 80 Cal., 90; *France* v. *Haynes*, 67 Iowa, 139; *Schenck* v. *Sauttem*, 73 Mo., 46; *Field* v. *Doyon*, 64 Wis., 560; *Booth* v. *Wiley*, 102 Ill., 84, 107; *Woodstock Iron Mine* v. *Fullenwider*, 87 Ala., 584, 13 Am. St. Rep., 73.

Allan W. Paige and *George P. Carroll* for the appellee, Elizabeth Downs.

I. No false representation was made to Henry G. Alling, nor was there any concealment from him of material facts. Thus an indispensable element of estoppel is lacking. Bigelow on Estoppel, pp. 552 *et seq.*; *Morgan* v. *Farrell*, 58 Conn, 413; *Whittaker* v. *Williams*, 20 id. 98; *Giddings* v. *Emerson*, 24 id., 549.

II. There was no such ratification by the sons of their mother's sale as would bar them from asserting their title on her death. A ratification to be effectual must contain

all the elements of a valid contract or of an estoppel. But here there was no consideration, except as between the parties to the agreement, and no outsider can claim any credit therefrom. *Hamlin* v. *Sears*, 82 N. Y., 327; *Wakeman* v. *Wright*, 33 Ohio St., 405; Mechem on Agency, §§ 146–165.

Elizabeth Downs, as assignee of Alfred Cooper, is not estopped from claiming this money. It was perfectly competent for Alfred Cooper to make any contract he chose to make with his brothers in reference to the real estate which this money represents, and yet to assert all rights of title thereto as against those with whom he was in no privity of contract or of estoppel. *Marlborough* v. *Sisson*, 23 Conn., 55; *Kinney* v. *Whiton*, 44 Conn., 262; *Townsend Savings Bank* v. *Todd*, 47 Conn., 217; *Mayonberg* v. *Haynes*, 50 N. Y., 675.

III. The alleged agreement between Alfred Cooper and his brothers was not made with Henry G. Alling, nor for his benefit; nor was it contemplated therein that he should do any act in reference to the subject-matter of the agreement. As it was not made for his benefit and as it was not intended he should have any rights thereunder, even if he had as an outsider learned of the agreement and acted upon it, he would acquire no rights thereunder. *Simson* v. *Brown*, 68 N. Y., 355; *Playford* v. *U. K. Electric Tel. Co.*, L. R., 4 Q. B., 706; *Dickson* v. *Reuter's Tel. Co.*, 2 C. P. D., 62, and 3 C. P. D., 1.

IV. Even if § 2966 of the General Statutes, which makes void all deeds of land by persons who are ousted, prevented Elizabeth Downs from taking this money, it would not avail Henry G. Alling. The only consequence would be that Alfred Cooper would take it, for the reason that the assignment by him was invalid.

But the statute does not apply. *Harral* v. *Leverty*, 50 Conn., 46. This assignment of Alfred Cooper was neither within the letter nor spirit of the statute. He neither leased nor sold real estate. Property that he owned was sought by condemnation proceedings. After the suit was brought, he assigned the money possibly coming therefrom to further secure an antecedent debt.

ANDREWS, C. J. In September, 1891, the town of Ansonia preferred its application to the Superior Court in New Haven county for the appointment of a committee to appraise certain lands in that town, taken for the site of a school-house. The application was duly served and returned to that court, a committee was appointed who appraised the said land at the value of $625, and made report of their doings to the court. The report was accepted and the money paid into court, and is now in the hands of the clerk of the court.

Since the commencement of the proceedings other parties have been cited in, viz: Henry G. Alling and Lewis E. Cooper of Ansonia, and Elizabeth Downs of Huntington, each of whom claimed or appeared to have some interest in the said sum of money.

The court, in its order accepting the report of the appraisers, decreed that the said Henry G. Alling, Louis E. Cooper and Elizabeth Downs, interplead with each other as to which of them is legally or equitably entitled to said sum of money. The only controversy in respect to the money is now between Elizabeth Downs on the one side and Henry G. Alling on the other. Pursuant to the order of the court requiring the parties to interplead, the said Elizabeth Downs set forth her claims at large; and the said Henry G. Alling made answer thereto and set forth his claims, and later an amended and substituted answer and claims, to which said Downs demurred. The court sustained that demurrer and Alling has appealed.

The facts, somewhat condensed from the record, are as follows:—

Charles Cooper, the elder, was in his lifetime and at his death the owner in fee and in possession of the land described in the said application and of other adjacent land, all of the value of $2,500. He was also the possessor of personal property to the value of $10,000. By his will he devised the residue of his estate, real and personal, to his wife Elizabeth Cooper, for her life, and the remainder to his four sons, Alfred Cooper, Charles Cooper, William Cooper and

Henry Cooper, to be theirs absolutely in equal shares. The land in question came to said Elizabeth Cooper by virtue of said will. The said Charles Cooper died about March 20th, 1876. On the 31st day of July, 1880, the said Elizabeth Cooper conveyed all said lands by a warranty deed to Henry and Augusta Rolf, and received therefor the sum of $2,500, which was its full value including the fee as well as the life estate. That deed was immediately put on record, the grantees entered into possession, and they and their grantees have ever since kept the possession thereof to the time the condemnation proceedings were completed. By sundry conveyances the title and interest conveyed by the said deed of Mrs. Elizabeth Cooper has come to and is now vested in Henry G. Alling who purchased in 1886, subsequent to the agreement between the four sons of Mrs. Cooper below stated. Mrs. Cooper died in 1885 leaving no property of her own of any kind. Of the $2,500 which she received for the said land, she had expended $1,300 in her necessary support. The balance, $1,200, she had in her possession at her death. After the commencement of the condemnation proceedings Alfred Cooper assigned to the said Elizabeth Downs all his interest in the money that might be awarded thereby. She has no other title thereto than by said assignment.

Upon the decease of the said Elizabeth Cooper it was verbally agreed by and between Alfred Cooper, Charles Cooper, William Cooper and Henry Cooper, they being of full age, and being the only parties entitled to the property and estate devised to them under the will of the said Charles Cooper, deceased, that they would pay all the debts and funeral expenses from and out of the said $1,200, and would thereupon divide among themselves in equal portions the balance of said sum of $1,200, and would divide among themselves in equal portions the personal property owned by the said Charles Cooper at the time of his decease, and valued at the sum of $10,000; and upon such payment and such division being made that they would consider the amount so divided and received as a full, final and complete distribution and settlement of any and all rights, titles and

interests, claims and demands which they, or either of them were entitled to receive under and by virtue of the provisions of the last will of the said Charles Cooper.

The money that was thus agreed to be divided among said parties was the property, or the proceeds of property, which was owned by the said Charles Cooper at the time of his decease; and no part thereof was the property or estate, or interest therein, of the said Elizabeth Cooper. Pursuant to their said agreement the said Alfred Cooper, Charles Cooper, William Cooper and Henry Cooper, paid all the debts of the said Elizabeth Cooper, and all her funeral expenses, which amounted to the sum of $200; and after making such payment they thereupon divided among themselves in equal portions the sum of $1,000, in cash, that being the balance of the money received by the said Elizabeth Cooper upon the sale of the fee of the said real estate, as above described, and which remained in her hands at the time of her decease, after paying the said debts and funeral expenses; and they also divided among themselves at said time, in equal portions, said personal property amounting to the sum of $10,000; and each and all of said parties received said money and said personal property as and for the portion or share which they were entitled to receive under the said will of the said Charles Cooper; and all of said parties have ever since retained said money and said property, and have ever since considered the same as a full, final and complete settlement of all rights or interests which were devised to them under the last will of the said Charles Cooper; and they especially received said sum of $1,000 in cash, in lieu and in place of the real estate, the fee of which had been devised to them by the said Charles Cooper, but which had been sold by the said Elizabeth Cooper in the manner before described; and said parties intended by this division of said money among themselves to ratify and confirm the sale of said real estate by the said Elizabeth Cooper; and in pursuance of such intention and agreement the said William Cooper, Charles Cooper and Henry Cooper, have each executed and delivered to the said Henry G. Alling, deeds of

all their rights, titles and interests in and to the premises herein described, without the payment of any money therefor.

The said Alfred Cooper knew when he made said agreement and received said money that the amount he received under and pursuant to the said agreement was the money which the said Elizabeth Cooper received from the sale of the said real estate conveyed by her, the said Elizabeth Cooper, as aforesaid, and he had full knowledge that the said real estate had been sold and conveyed by full warranty deed, and that the said Henry G. Alling was then in the possession of said land claiming title thereto by virtue of the deed which had been given by the said Elizabeth Cooper as aforesaid.

These facts, being admitted by the demurrer, must for the purposes of the present discussion be taken as proved and found by the court. Charles Cooper, William Cooper and Henry Cooper, may be laid out of the case. They have each released to Mr. Alling. The rights of Elizabeth Downs are just the same as, and no greater than, the rights of Alfred Cooper. Her assignment from him was since the commencement of the condemnation proceedings.

Before the Superior Court the parties seemed to have discussed only the question of estoppel. The court, in its memorandum of decision, placed its conclusion on the ground that there was no estoppel. The briefs in this court are largely made up of the same discussion. If that was the only question in the case we might be led to agree with the Superior Court.

But estoppel is not the doctrine of the case. There is another ground clearly set forth in the answer of Mr. Alling, on which it seems to us the answer should have been held sufficient and the demurrer overruled. And that ground is that Alfred Cooper has ratified the sale of his land made by his mother. The language of the answer is explicit: That Alfred Cooper and his brothers received said sum of money in lieu and in place of the real estate which had been devised to them by their father, but had been sold by their

mother; and said parties intended by the division of said money among them to ratify and confirm the sale of said real estate by the said Elizabeth Cooper. And the said Alfred Cooper knew when he received said money that the amount which he received was the money which the said Elizabeth Cooper had received from the sale of the said real estate, and he had full knowledge that the said real estate had been sold and conveyed by a full warranty deed. This is then the condition of things: Mrs. Elizabeth Cooper without authority to do so, sold and undertook to convey land which belonged to Alfred Cooper. She received the full value of the land in money. Her grantee entered into possession of the land conveyed, and claims to have a complete title thereto. Alfred Cooper knowing all these facts and intending to ratify and confirm the sale of his said land, has received that money and applied it to his own use, and still keeps it.

Ratification means the adoption by a person, as binding upon himself, of an act done in such relations that he may claim it as done for his benefit, although done under such circumstances as would not bind him except for his subsequent assent; as where an act was done by a stranger having at the time no authority to act as his agent, or by an agent not having adequate authority. The acceptance of the results of the act with an intent to ratify, and with full knowledge of all the material circumstances, is a ratification. Ratification makes the contract in all respects what it would have been if the requisite power had existed when it was entered into. It relates back to the execution of the contract, and renders it obligatory from the outset. The party ratifying becomes a party to the contract and is, on the one hand entitled to all its benefits, and on the other is bound by its terms. *Negley* v. *Lindsay*, 67 Penn. St., 217; *Edwards* v. *Grand Junction R. R. Co.*, 1 Mylne & Craig, 650–672; Anderson's Law Dict., *in verb.*; *Stanton* v. *Eastern R. R. Co.*, 59 Conn., 285.

Alfred Cooper, having ratified the sale of his land by his mother, and now through his assignee seeking to obtain the

money in the hands of this court, is in the position of one who has verbally contracted to convey his land to another, has put that other into possession, has received his pay in full in money, and, while keeping the money, is trying to get the price of his land the second time. It needs no argument, or rather the statement of the case is the strongest possible argument, to show that he ought not to succeed. And as he cannot succeed so also his assignee, Elizabeth Downs, cannot.

There is error. The demurrer should be overruled. The judgment sustaining the demurrer is reversed.

In this opinion the other judges concurred.

MARIA W. PINNEY, EXECUTRIX, *vs.* EMILY JONES ET AL.

Third Judicial District, New Haven, June Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

The exceptions to the general rule excluding statements made by a party in his own favor ought not to be extended.

In order that a declaration made by a party in his own favor may be admissible in evidence as part of the *res gestæ*, it is essential that the act which such declaration characterizes or explains should itself be admissible.

If such act is not admissible in evidence, its actual admission, without objection, does not render the accompanying declaration competent.

[Submitted on briefs June 8th—decided July 9th, 1894.]

SUIT for the foreclosure and possession of certain real estate, brought to the Superior Court in New Haven County where the case was referred to the Hon. Elisha Carpenter, State Referee, to hear and report the facts. The report of the State Referee in favor of the plaintiff was accepted by the court, *Prentice, J.*, and the remonstrance of the defendants overruled, and the defendants appealed, for an alleged error of the court in excluding certain testimony. *No error.*

The case is sufficiently stated in the opinion.

V. Munger, for the appellants (defendants).

I. The declarations made by Mrs. Jones to her daughter were admissible to corroborate her claim to the possession of the money in question in 1892. The question was, did Mrs. Jones pay Dr. Pinney $1,500, in April, 1893? Mrs. Jones claimed to have had this money for over fifteen years, and that she brought it with her to Ansonia in 1890. The plaintiff claimed that the entire story of the defendants was false. This was a serious charge and the defendants should have been permitted to meet it in every legitimate way. Thompson on Trials, Vol. I., § 574; *Card* v. *Foot*, 56 Conn., 307.

II. The conversation was admissible also as part of the *res gestæ*. Greenl. on Evidence, Vol. I., § 108; *Hermes* v. *Chicago & Northwestern R. R. Co.*, 80 Wis., 490; *Russell* v. *Frisbie*, 19 Conn., 505; *Avery* v. *Clemons*, 18 Conn., 306; Wharton, Crim. Ev., § 263; Rice, Civil Evidence, Vol. I., § 377; *Insurance Co.* v. *Mosely*, 8 Wall., 397; *Johnson* v. *Sherwin*, 3 Gray, 374; *Hunter* v. *State*, 40 N. J. Law, 536; *Garber* v. *State*, 4 Cold. (Tenn.), 161; *Hall* v. *Young*, 37 N. H., 137; *Bank* v. *Kennedy*, 17 Wall., 19; *Potts* v. *Everhart*, 26 Pa. St., 493; *Conville* v. *Brighton*, 39 Me., 337; *Baker* v. *Kelly*, 93 Amer. Dec., 279; *People* v. *Vernon*, 95 id., 50.

A new trial should be granted unless it affirmatively appears that no harm was done by the ruling complained of. *Mead* v. *Husted*, 49 Conn., 346; *Skidmore* v. *Clark*, 47 id., 20; Buckingham's Appeal, 60 id., 148.

William H. Williams, for the appellee (plaintiff).

TORRANCE, J. This is an action brought to foreclose a mortgage made to secure a note for sixteen hundred dollars by the defendant, Emily Jones, to Charles H. Pinney, now deceased.

The defendant claimed to have paid upon said note to Pinney during his lifetime, the sum of fifteen hundred dol-

lars, and whether this was true or not was the main fact in dispute between the parties.

The case was tried before the Hon. Elisha Carpenter as State Referee.

For the purpose of showing her ability to make such payment, the defendant offered evidence to prove and claimed she had proved, that at the time when she bought the mortgaged premises in March, 1892, she had in her possession the sum of fifteen hundred dollars, in addition to the sum of five hundred dollars which she had paid on account of said purchase; that this sum of fifteen hundred dollars was in a package in her house; that she moved into the house upon the mortgaged premises in April, 1892, and two or three weeks thereafter, in the presence of her daughter Cora, who was produced as a witness, she counted said fifteen hundred dollars, and after counting the same, deducted fifteen dollars therefrom, and placed the remainder in a tin box and placed the box, with the money in it, in a jar and sealed up the jar with putty; and that after leaving the jar upon a shelf to dry for two or three days, she and her husband, who was produced as a witness, buried this jar in the cellar near the bottom of the stairs, covered it over and placed a paint barrel over the spot where the jar was buried.

While Mrs. Jones was upon the witness stand, her counsel offered to prove by her that some time within two months after the money had been counted as aforesaid, Mrs. Jones requested her daughter Cora to go with her to the said place where the money was then buried, and that thereupon Cora and she went to the spot from the sitting-room above; that Mrs. Jones then and there removed the paint barrel and told Cora that the money was in a pot in the ground, and that she wanted her to know where it was, "for if she should die she wanted her to know about it."

The finding states: "It was not claimed that the earth was removed from over the jar in which the money was claimed to have been placed, or that the jar or other thing, in which it is now claimed the money then was, was so exposed or attempted to be exposed to view. The plaintiff's

counsel objected to the admission in evidence of the conversation between the said Emily Jones and her daughter Cora upon this occasion, and it was excluded; to which ruling the defendant duly excepted."

Mrs. Jones thereafter upon this point testified without objection as follows: "Cora went with me down cellar; went down the cellar steps to the left hand of the stairs just as you go down. I showed her the money; I took the paint barrel and moved it around like this (illustrating) and pointed out to her where the money was concealed; then I set the barrel back on the same spot I had removed it from; then we went upstairs; that she, Cora, was the only person so far as she knew besides her husband that ever knew or was shown where the money was."

The daughter Cora also testified without objection, to her going down in the cellar with her mother and being shown where the money was concealed, substantially as her mother had done.

The referee found that said claimed payment of fifteen hundred dollars had not been made.

To the report made by the referee the defendant filed a remonstrance, setting up as the ground of it, the action of the referee in excluding the conversation aforesaid between Cora and her mother. He further set up therein that the plaintiff claimed that Mrs. Jones did not have said sum of fifteen hundred dollars at any time after 1891, and that her entire story with reference to the possession of said sum was false. The plaintiff demurred to the remonstrance, the court sustained the demurrer, judgment was rendered for the plaintiff, and the defendant appealed.

This appeal presents but a single question, and that is whether the statement made by Mrs. Jones to her daughter was admissible. It is apparent that the defendant obtained the benefit of everything else claimed by her except this statement. She was allowed to testify fully to her acts and conduct in going into the cellar and pointing out the place where she claimed the money was concealed, and from all this Cora understood that the money was there buried. She

says indeed that she there showed Cora the money, but from her own testimony and from other parts of the record it is clear that all she meant by this was that she showed her the place where the money was concealed. Essentially then, in this view of the matter, all that was excluded was her statement of her reason for having Cora know where the money was concealed; and it is perhaps questionable whether even on the defendant's view of the case the exclusion of that was error. *Russell* v. *Frisbie*, 19 Conn., 205–211. And if it was, the case might perhaps be disposed of on the ground that the error did not harm the defendant. But as we think the evidence was rightly excluded, we prefer to rest the decision upon that ground rather than upon the one suggested.

As we have said, what was done in the cellar was, without objection, fully testified to by both Mrs. Jones and Cora. What was said was excluded; and that was, in substance, a statement by Mrs. Jones that the money was buried there in a jar, and that she wanted to have Cora know, for a reason then stated, where it lay. The defendant strenuously insisted that this statement characterized the act of Mrs. Jones in going to the cellar and doing what she did there, and was admissible in corroboration of her claim to the possession of the money, and as part of the *res gestæ;* and in support of these claims he relies mainly upon the case of *Card* v. *Foot*, 56 Conn., 369.

The general rule is that a party cannot give in evidence his own declarations in his own favor, made in the absence of the other party; but there is one well recognized exception to this rule, where such declaration is part of, what for want of a better name, is called the *res gestæ*. *Kilburn* v. *Bennett*, 3 Met., 199; *Stirling* v. *Buckingham*, 46 Conn., 461. The nature and limits of this exception are tolerably well defined, although the application of the rule embodied in the exception in particular cases, is sometimes attended with difficulty. That rule is thus stated in Starkie on Evidence (10th Ed.), 466–687: "In the first place, an entry or declaration accompanying an act seems, on principles already announced, to be admissible evidence in all cases where a

question arises as to the nature or quality of that act. Indeed, whenever an entry or declaration reflects light upon, or qualifies, an act which is relevant to the matter in issue and is evidence in itself, it becomes admissible as part of the *res gestæ*, if it be contemporaneous with the act."

According to this writer, before a written declaration made by a party in his own favor can be admissible as part of the *res gestæ*, the act which it characterizes and of which it forms a part must be itself admissible in evidence in the case; and so are the authorities. "Where an act done is evidence *per se*, a declaration accompanying that act may well be evidence if it reflects light upon or qualifies the act. But I am not aware of any case, where the act done is, in its own nature, irrelevant to the issue, and where the declaration *per se* is inadmissible, in which it has been held that the union of the two has rendered them admissible." COLTMAN, J., in *Wright & Doe* v. *Tatham*, 7 A. & E. 361; *Gresham Hotel Co.* v. *Manning*, 1 Irish Rep. C. L., 125. "*Res gestæ* are the circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character." *Stirling* v. *Buckingham*, 46 Conn., 461. "When the act of a party may be given in evidence, his declarations, made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence. There must be a main or principal fact or transaction, and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are contemporary with it, and derive some degree of credit from it." *Lund* v. *Tyngsborough*, 9 Cush., 36.

It follows that if the act of Mrs. Jones, irrespective of the accompanying statement, was not in itself admissible in evidence, then the statement was inadmissible; and the fact that the act was admitted without objection does not make the accompanying statement legal evidence. The question then is whether what Mrs. Jones did upon the occasion in question, was *per se* admissible as evidence in the case, and

we are clearly of the opinion that it was not. It was offered and received as an act tending to show that she then had this money in her possession; but rightly considered it was not in any proper sense, within the meaning of the rule in question, an act or transaction at all. It is true there were the physical acts of going downstairs, and over to where it was supposed the money was buried, and the moving of the paint barrel, and the pointing to or otherwise indicating a certain spot of earth, but that was all. There is nothing in all this tending in the least to show that the money, or the receptacle which had contained it, were then in the spot pointed out. For aught that appears all that Mrs. Jones could then know or say about the money was —not that it was then there—but that she had put it there some time before, and believed it was there then; and neither she nor Cora then knew, or could know that the money was then in the possession of Mrs. Jones, or even in existence at all. Nothing whatever was done by either of them with, or with reference to, the money or the jar; they were not seen, handled, nor dealt with in any manner whatsoever. Essentially the so-called act or acts of Mrs. Jones are but statements or declarations that she had buried the money there some time before, and believed it was there then.

Suppose Mrs. Jones and her daughter had remained upstairs, and Mrs. Jones had said to Cora: "I put the money you saw me count the other day into a tin box and the box into a jar, and buried the jar in the cellar to the left hand of the stairs just as you go down, and put a paint barrel over the spot where they now are; I tell you this so that in case of my death you will know where to find the money" —could any one successfully contend that such a statement was admissible? Clearly not. It would be a mere naked statement or declaration of a past transaction in the party's own favor, and would clearly fall within the general rule of exclusion. But the supposed case does not differ essentially from the real case; for in the one Mrs. Jones indicates and describes the place where she buried the money by words, and in the other she indicates and describes it by acts; and

the result of both is but a statement or declaration to Cora that the money had been buried there, and that Mrs. Jones believed it was there at that time. That in the one case this information is conveyed to Cora by words, and in the other by acts, can make no difference; in both the result is only and solely information conveyed.

The difference between an act of the kind here claimed, and the acts done in *Russell* v. *Frisbie*, 19 Conn., and *Card* v. *Foot*, 56 Conn., is quite obvious. In the former case the defendant was allowed to prove what he said to one Hempstead, when he handed to him for safe keeping the ship's papers, which defendant had taken from a vessel of his in order to revoke the authority of her captain; in the latter the plaintiff was allowed to prove what she said to Miss Lyon when she delivered to her for safe keeping the package containing the plaintiff's bonds. In both of these cases the declarations allowed accompanied, grew out of, formed part of, and of course qualified and characterized, acts which themselves were clearly admissible to prove the then possession and disposition of the ship's papers in the one case, and the bonds in the other. The acts were not in effect mere declarations, but acts of possession and disposition in a real and true sense.

In the case at bar this is not so. There the so-called act is itself, in effect, but a statement or declaration. Nothing was transacted, nothing was done, nothing was transpiring, evident to any witness, which could confirm the declarations excluded, or by which upon cross-examination, or otherwise, the truth of those declarations could be tested. "Declarations accompaning acts are a wide field of evidence, and to be carefully watched," said WILLIAMS, J., in *Queen* v. *Bliss*, 7 A. & E., 556, a good many years ago; and we think this "field" should still be carefully watched.

The exceptions to the general rule excluding statements made by one in his own favor, ought to be strictly limited; certainly the scope of the exception in question ought not to be extended to a case like the one at bar. For the reasons given the claimed act or acts of Mrs. Jones were not

admissible, and should, and on objection probably would, have been excluded. They were however admitted and of this the defendant does not, and cannot justly, complain; but, on objection, the statement accompanying the claimed act was excluded, and we think was rightfully excluded.

There is no error.

In this opinion the other judges concurred.

THE MERIDEN SAVINGS BANK *vs.* HIRAM B. WELLINGTON, ADMINISTRATOR, ET AL.

Third Judicial District, New Haven, June Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

When the issue is whether a decedent had in fact made, shortly before his death, a considerable gift to one of the parties, evidence of his declarations showing a disposition and intention to give largely to such party is relevant and material.

The fact that such declarations were made two or three years before the alleged donor's death, does not render them incompetent, but goes merely to their weight.

Chapter 174 of the Public Acts of 1893 does not authorize this court to review findings of fact made by a trial court, except upon and in aid of an appeal for errors of law; and where the testimony is conflicting, an appeal cannot be maintained on an assignment of error that the court found the issue contrary to the weight of evidence.

[Argued June 12th—decided July 9th, 1894.]

ACTION in the nature of interpleader to determine the ownership of certain deposits in the plaintiff bank; brought to the Superior Court in New Haven County and tried to the court, *F. B. Hall, J.*; facts found and judgment rendered in favor of Harriet B. Wolcott, and appeal by Hiram B. Wellington, administrator, mainly for alleged erroneous conclusions of the court as to the facts. *No error.*

The defendants were the administrators with the will annexed of the estate of Harriet B. Clark, who made the de-

posits in the plaintiff bank, and Mrs. Harriet B. Wolcott. They interpleaded, and upon the trial the following facts were found :—

Mrs. Wolcott was a niece of Mrs. Clark, who was a widow in advanced years and without any lineal descendants. Her aunt had for years intended that Mrs. Wolcott should ultimately have more of her estate than any other of her nephews and nieces. Mrs. Clark made a will in May, 1891, in which she left legacies to different persons, amounting in all to $4,850, giving to one niece $1,000, and to Mrs. Wolcott and certain other of her nieces $350 apiece. The residue of her estate was left to all her nephews and nieces, equally. At this time she owned stock in a Meriden bank worth about $5,000, the deposits in question amounting to about $4,100, and other property worth about $4,850. It had been her intention for years, both before and after making her will, to give, during her lifetime, this bank stock to Mrs. Wolcott, and the savings bank deposits to other relatives. Early in June, finding herself in failing health, she arranged with Mrs. Wolcott, at whose house in Wethersfield she was then living, to drive over to Meriden on June 17th, in order that she might make the transfer and gift of the bank stock. On June 10th, fearing that she should not be well enough to make this journey, and that death was near, she decided to give Mrs. Wolcott the two savings bank books, and handed her a satchel, in which they were together with a small sum of money, saying : " This is yours. I give it to you, and all there is in it ; take it and carry it upstairs ; then if anything happens and I do not go to Meriden, you will be all right." Mrs. Wolcott thereupon took the satchel, and has ever since retained it with its contents in her possession. It was Mrs. Clark's intention, in this transaction, to make an absolute gift of the money represented by the deposit books, to take effect immediately ; and it was also her intention, should she find herself able to go to Meriden, to transfer the bank stock to Mrs. Wolcott, in substitution for such savings bank books, and thus to increase the amount of the gift. Mrs. Wolcott understood that such was her intention, but there was no

agreement or understanding that she should be bound to exchange the deposits for the stock, if such an exchange were offered. On June 17th Mrs. Clark died.

Evidence was received on the trial, against the objection of the administrator that it was too remote in point of time, that two or three years previous to her death, Mrs. Clark had said that Mrs. Wolcott was nearer to her than any other relative, and that she intended to do better by her than by any of the rest. Evidence was also received of statements made by her, some months later, that she expected Mrs. Wolcott to have most of what little she might have left.

The court held that there was a valid gift to Mrs. Wolcott, and the administrator appealed, alleging error in the admission of the evidence of Mrs. Clark's declarations above mentioned, and also (under the statute of 1893) in finding certain facts and refusing to find certain facts, upon the evidence in the cause.

John W. Alling and *Frank S. Fay*, for the appellant, Hiram B. Wellington, admr.

George A. Fay and *William L. Bennett*, for the appellee, Harriet B. Wolcott.

BALDWIN, J. The evidence of Mrs. Clark's declarations of her attachment to Mrs. Wolcott, and her intention, in the disposition of her property, to do more for her than for any of her other relatives, was relevant, and material. The fact of giving being in dispute, proof of an intention to give, and to give largely, tended directly to support Mrs. Wolcott's claim, and whether the expression of such an intention was three years or three days before the donor's death was unimportant as respects the competency of the evidence, however it might bear upon the weight to which it was entitled.

The other grounds of appeal are that the court erred in certain of its conclusions of fact. It is not contended that on the finding as it stands, the judgment could have been other than it is; but the administrator complains that the controlling

facts are found contrary to the weight of evidence, and that he can ask this court to examine the testimony, which has been made a part of the record, and reverse the finding as to certain material points.

It is not claimed that there was not some evidence tending to support the conclusions embodied in the finding, nor that the court refused to find any fact which was established by undisputed evidence. Only with respect to the admission of Mrs. Clark's declarations, is any error of law raised by the reasons of appeal. None of the exceptions to the finding of the court, or to its refusal to find as requested by the appellant, relate to matters affecting the admissibility of those declarations. It follows that none of them are exceptions which, under the construction of the Act of 1893 adopted by this court (*Styles* v. *Tyler*, 64 Conn., 432), we can consider, as grounds of appeal.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

HENRY S. GULLIVER *vs.* JULIA M. FOWLER ET AL.

Third Judicial District, New Haven, June Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

A counterclaim places a defendant, as to the proof of its material allegations and resulting damage, upon the same footing as if he were the plaintiff in an independent action.

Where the cause of damage set up by counterclaim is of a continuing nature, the defendant may prove the damages sustained by him up to the time of trial.

Where the lessee of a house, which was hired for the purpose of subletting rooms, when sued for rent, set up by answer and counterclaim that he was unable to sublet them owing to inadequate heating facilities, which the lessor had falsely represented and warranted to be capable of heating the entire house thoroughly and well, it was *held:*—

1. That the measure of the lessee's damages would be the fair rental value of the rooms which could not be let on account of the lack of proper heat.

2. That the proof of such damages was not to be limited to evidence of applications actually made and withdrawn on account of the cold condition of the rooms.

3. But that any errors of the trial court in respect to the question of damages only, could not have prejudiced the defendant since it appeared from the verdict, (which was for the plaintiff for the full amount of his claim), that he had totally failed to establish the facts upon which his right to recover any damages depended.

Section 2969 of the General Statutes which relieves a tenant from the payment of rent if the tenement becomes so injured as to be untenantable, does not apply to the case of an injury occurring from the want of ordinary repairs.

An amendment of the pleadings, after the evidence is partly in, is never a matter of absolute right, but is one resting in the discretion of the trial court.

Evidence of a want of consideration in the execution of a written agreement is not admissible upon the part of a defendant who in his answer expressly admits the truth of the averments of the complaint which alleges a valuable consideration; although the defendant sets up such want of consideration in one of several defenses in avoidance, for such defense is void for repugnancy.

A written lease contained no express agreement to repair by the lessor, but did provide that the premises should "be at all times open to the inspection of said lessor or his agents, to applicants for purchase or lease, and for necessary repairs." In an action for rent it was *held* that this clause did not authorize the jury to infer that the lessor had orally agreed to make all necessary repairs; and that such an alleged oral agreement and its breach, set up as a defense and by way of counterclaim, was demurrable, since no oral agreement made at the time of signing the lease could enlarge its stipulations.

An exception cannot be sustained unless the record shows that what is claimed as error did in fact occur during the trial of the cause.

[Argued June 14th—decided July 9th, 1894.]

ACTION to recover rent on a lease of a house, "with the privilege of renting rooms," against lessee and a surety, brought to the Court of Common Pleas in New Haven County and tried to the jury before *Hotchkiss, J.*; verdict and judgment for the plaintiff and appeal by the defendants for alleged errors of the court in its rulings on evidence and in its charge to the jury. *No error.*

The complaint alleged that the guaranty of the surety (which was recited) was given for value received. The answer admitted the truth of the matters alleged in the complaint, and set up in avoidance, as a first defense, that the

lessee, being a boarding-house keeper, was induced to execute the lease by false and fraudulent representations that the heating apparatus in the house was capable of heating it well, yet that it was incapable of so doing, whereby she was unable to rent the rooms in it, and suffered $500 damages; as a second defense, that there was a false warranty to the same effect; as a third defense, in behalf of the surety, that his guaranty was without consideration; and as a fourth defense, that the plaintiff, knowing the nature of the lessee's business, as an inducement to the lease, agreed to make all repairs necessary to make the house suitable for her business; but that, though duly requested, he had neglected to make necessary repairs in the heating apparatus, whereby the house became unsuitable for her business, and she lost the rent of rooms in it, to her damage in the sum of $500. The lessee also filed with her answer, a counterclaim for $1,000 damages, upon the same grounds as those set up in her first, second, and fourth defenses.

A demurrer to the fourth defense was filed and overruled, and the cause was tried on a reply amounting to a general denial, except that it was admitted that the lessee hired the house with a view of letting rooms in it.

The defendants, under the pleadings, assumed the burden of proof, opening and closing the case both as to evidence and argument.

The case was tried in May, 1894, and the lessee offered evidence that she had lost the rent of several rooms in the house for the entire winter, because they were so cold as to be untenantable, owing to defects and want of repair in the heating apparatus.

The court declined to admit such evidence as to the loss of rents after January 1st, 1894, (the action being brought for rent accrued prior to that date,) and afterwards instructed the jury that, if they found that the plaintiff had been guilty of fraud, as alleged, they could allow the lessee for such damages as had resulted therefrom, to the extent of the rents which, had the rooms been properly heated, the lessee could have let them for, up to January 1st, 1894, as shown by the

actual applications to her for them and the occupation of them; but that she could not recover for any estimate of what she might have rented rooms for, if they had been properly heated, and if she had had applications, but only on proof of what actual applicants refused to take rooms on the sole ground of lack of heat.

There was indorsed upon the lease a guaranty, "for and in consideration of the letting of the premises within described, and for value received," of the due performance by the lessee of her obligations specified in the lease, which was signed by J. C. Kebabian, one of the defendants, on October 2d, 1893, the lease having been executed August 30th, 1893. The plaintiff claimed and offered evidence to prove that he executed the lease on Mr. Kebabian's agreement to sign such a guaranty, and that such signing was delayed by the latter's absence from town on August 30th. The defendants claimed and offered evidence to prove that Kebabian agreed to sign such a guaranty if the lease did not require the payment of rent in advance; but that, as in fact the rent was made payable in advance, there was no consideration for his undertaking. In support of this contention, the lessee testified that she said to the plaintiff's agent, through whom the lease was negotiated, when he presented her with the lease providing for advance payments: "Then it won't be necessary for Mr. Kebabian to sign the lease for me and give a guaranty, (I believe I used Mr. Kebabian's name,) and he said he rather thought not." This evidence was objected to and stricken out.

The plaintiff had a verdict for the full amount of his claim, and the defendants appealed, assigning error in the rulings above mentioned, and in others which are sufficiently described in the opinion of the court.

Seymour C. Loomis, for the appellants (defendants).

I. The court erred in limiting the defendants to proof of the condition of the house to December 22d, 1893, and to proof of damage to January 1st, 1894, and in not allowing proof of damage subsequent to that time. *Leavenworth* v.

Packer, 52 Barb., 132, 136; *Francis* v. *Edwards*, 77 N. C., 271; Conn. Civil Officer, pp., 36–39; Practice Act, § 5; General Statutes, § 876.

The counterclaim in this case, being for damages arising out of the subject-matter of the transaction sued on in the original complaint, was proper. *Walsh* v. *Hall*, 66 N. C., 233; Pomeroy's Rem. & Rem. Rights, § 737; Bliss on Code Pleading, § 379.

The counterclaim of the lessee is an independent action and in the proof of her damages sustained under it she must exhaust her entire cause of action. In such cases the rule is to allow proof of damage up to the time of trial. *Stratford* v. *Sanford*, 9 Conn., 285; *Pinney* v. *Barnes*, 17 id., 420; *Marlborough* v. *Sisson*, 31 id., 332; *Burritt* v. *Belfy*, 47 id., 323, and cases there cited.

Under our second and third counterclaims we were entitled to prove our damage subsequent to the bringing of the suit. The gist of the action therein set out was the breach of the plaintiff's warranty and agreement to repair, and were actions founded on contract, and, therefore, come within § 1050 of the General Statutes.

II. The court erred in excluding the testimony of Julia M. Fowler.

On the question of consideration of a contract, parol evidence is admissible to rebut the presumption of a legal consideration. *Raymond* v. *Sellick*, 10 Conn., 480; *Camp* v. *Scott*, 47 id., 378.

III. The court erred in refusing to allow the defendants to amend. General Statutes, § 1027; *Bassett* v. *Shares*, 63 Conn., 41.

IV. The court erred in charging the jury that § 2969 of the General Statutes did not apply. The statute has been materially changed since it was first passed in 1869, and since it was interpreted in *Hatch* v. *Stamper*, 42 Conn., 28.

The court should have charged the jury that if they found that the house, without the fault or neglect of the defendant, had become so injured as to be unfit for occupancy, then

the defendant was not liable for the rent so long as said house was untenantable.

The court erred in not charging as requested as to the want of consideration in the guaranty, and in charging as it did on that subject. Parol evidence is admissible to prove want of consideration and to rebut the presumption of a valid consideration. If the agreement was made after the lease was executed and the tenant in possession, then the letting of the premises (the consideration mentioned in the printed guaranty) was no consideration, for that was a past event at that time. And if the only agreement made before the premises were let, was that a guaranty should be given upon certain conditions, which conditions have not been complied with, then that agreement was no consideration for the guaranty. *Raymond* v. *Sellick*, 10 Conn., 488; *Camp* v. *Scott*, 47 id., 378; *Allen* v. *Rundle*, 45 id., 588; *Cook* v. *Bradley*, 7 id., 57; *Sage* v. *Wilcox*, 6 id., 83; *Colburn* v. *Tolles*, 14 id., 342; 2 Parsons on Contracts, p. 6, note *o*.

The court also erred in charging that the lessee must prove her damages by actual applications for the rooms and their withdrawal on account of the cold condition of the house. Wood on Landlord and Tenant, p. 641; *Myers* v. *Burns*, 85 N. Y., 269; *Mack* v. *Patchin*, 42 id., 167; *Hexter* v. *Knox*, 63 id., 561.

Edmund Zacher, for the appellee (plaintiff).

I. The jury having found a verdict for the plaintiff to recover of the defendants the full amount claimed, with interest, it is evident that they must have found that there were no false representations made by the plaintiff in reference to the heating of the house, that the plaintiff made no statements amounting to a warranty, that the house was not out of repair in that the heating apparatus was defective and insufficient to properly heat said house. Therefore, if there were errors by the court below in charging the jury upon the subject of damages to be allowed the defendant, or errors in refusing to admit evidence in reference to the condition

of the house, subsequent to January 1, 1894, these errors were immaterial and harmless to the defendants.

But as matter of law the charge upon the rule of damages was correct. *Myer* v. *Burns*, 35 N. Y., 170; *Stuart* v. *Lenier House Co.*, 75 Geo., 582. The evidence as to the injury to the health of the defendant was too remote. 12 Amer. & Eng. Ency. of Law, p. 748; *Collins* v. *Karatopsky*, 36 Ark., 316.

II. The court did not err in refusing to allow the amendment. The amendment was immaterial. The purpose of § 1028 of the General Statutes must be to prevent a party from exercising a general right to amend when the court clearly sees that the amendment offered is entirely immaterial.

In this case, the court did exercise this discretion and ought to have done so. The amount involved, and the time spent in the trial of the case, justified the action of the court.

III. No error was committed in excluding the testimony of the lessee offered for the purpose of showing what construction she put upon the contract. *Burr* v. *Spencer*, 26 Conn., 162; *North* v. *Nichols*, 37 Conn., 376; *Redfield* v. *West Haven Water Co.*, 58 Conn., 39: *Excelsior Needle Co.* v. *Smith*, 61 Conn., 56.

IV. The charge of the court respecting the want of consideration for the guaranty of the surety was fully justified. The evidence offered by the plaintiff went to show simply that the surety had agreed to sign as such before the lease was executed, and that his subsequent signing was pursuant to that agreement. Of course if the contract of guaranty had been entered into subsequently to the lease, there must be a new and distinct consideration to sustain the guaranty. Amer. & Eng. Ency. of Law, Vol. 9, p. 69; *Hotchkiss* v. *Barnes*, 34 Conn., 35.

The court gave the correct meaning to the word "repairs." 20 Amer. & Eng. Ency. of Law, p. 1039; *Todd* v. *Inhabitants of Rowley*, 8 Allen, 58. The court below correctly held that § 2969 of the General Statutes did not apply to ordinary repairs. *Hatch* v. *Stamper*, 42 Conn., 28.

BALDWIN, J. The plaintiff in this action sued for rent upon a written lease. The defendants, admitting in their answer all the allegations of the complaint to be true, pleaded in avoidance that the plaintiff, by reason of fraud, false warranty, and breach of an agreement to repair, was liable to Mrs. Fowler, the lessee, in damages exceeding the rent accrued; and she added, by way of counterclaim, a demand for a still larger sum, founded on the same grounds. The plaintiff replied by what was substantially a general denial, and the verdict finds the issue in his favor, and gives him the full amount of the rent in arrear.

Several errors are apparent on the record; but we think none of them are such as to require a reversal of the judgment.

The pleadings were such that the burden of proof rested on the defendants, and they accordingly opened and closed the case.

The counterclaim joined claims sounding in tort with claims founded in contract, but all connected with the transaction which was the subject of the plaintiff's action. He had let a house to Mrs. Fowler, knowing that she intended to sublet rooms in it to lodgers, and with the privilege of so doing. She claimed that the heating apparatus was so defective that the rooms could not be properly warmed in cold weather, whereby she had lost their use up to the time of trial, and that for such loss the plaintiff was responsible. Had she proved her charges of fraud, false warranty, and agreement to repair, she would have been entitled to the resulting damages, computed to the time of trial. Her counterclaim placed her on the same footing, in this respect, as if she had been the plaintiff in an independent action. She had a right to prove, and was bound to prove, her entire damages. *Burritt* v. *Belfy*, 47 Conn., 323; General Statutes, § 1050. Nor should she have been restricted in showing the defects in the heating apparatus, to its condition prior to January 1st. As long as it continued defective, and the rooms were thus left insufficiently heated, her cause of damage was a continuing one. The lease was worth less up

to the time of trial than it would have been, had the heating apparatus been adequate, and the amount of this difference between what it was worth for her purposes, with cold rooms, and what it would have been worth, with rooms properly heated, would represent her loss. The Court of Common Pleas therefore erred in restricting her proof of the condition of the house and of loss of rents to the period before January 1st.

It erred also in limiting too narrowly the mode of proof. The measure of damages, assuming her claims to be well founded, would be the rental value of the rooms, for the purpose of letting which she had hired the house, which she could not let, on account of the lack of proper heat in them. *Myers* v. *Burns*, 35 N. Y., 269. Such loss of the use of these rooms arising from her inability to let them, could be shown otherwise than by evidence of applications actually made to her, and withdrawn on this account. If the rooms were untenantable in cold weather, she was not bound to seek for lodgers during the winter, or to show that applicants for lodgings had examined and declined to take them.

But the question of damages became immaterial when she failed to establish the claims upon which her right of recovery depended. The admissions in her pleadings made her the "actor" in the suit, as to her answer as well as her counterclaim. The issue was joined upon her claims, not upon the plaintiff's; and it was found against her. Had the jury found that the plaintiff was guilty of fraud, or chargeable with a false warranty, or breach of an agreement to repair, it would have been their duty to return, and we must assume that they would have returned, a verdict in favor of the lessee, upon the counterclaim, even though they had found only nominal damages. Their verdict, as given, is in favor of the plaintiff both on answer and counterclaim, and as the subject of each was identical, establishes the invalidity of each of the charges made by the lessee. As, therefore, no wrong was done, and no contract broken by the plaintiff, the evidence introduced or offered in support of Mrs. Fowler's claim for damages consequent on such wrong

or breach of contract, was unimportant, and she can have suffered no injury by the exclusion of that in respect to which the Court of Common Pleas was in error. Had the claims been presented simply by an answer, it would have been possible for the jury, though believing them to be well founded, to return a verdict against her, for lack of evidence of damages; but as they were also brought up by her counter-claim, the verdict upon that determines the ground upon which they proceeded, and shows that the decisive facts, upon which her right to damages rested, were found against her.

The court properly instructed the jury that General Statutes, § 2969, which excuses a tenant from paying rent, though continuing his occupation, if the tenement is, without his fault or neglect, so injured as to be unfit for occupancy, did not apply to the case of an injury occurring from the want of ordinary repairs. This was in accordance with the view of this statute taken by this court in *Hatch* v. *Stamper*, 42 Conn., 28, and the change in its phraseology in the Revision of 1875, was evidently made simply for the sake of brevity, and did not affect its legal construction.

The refusal to allow an amendment of the answer upon the trial, in order to let in evidence of inconvenience to Mrs. Fowler personally, by the defects in the heating apparatus, was a matter resting in the discretion of the trial court. Rule III., under the Practice Act, § 6, (Practice Book, p. 14) declaring that "in all cases of any material variance between allegation and proof, an amendment shall be permitted at any stage of the trial," must be read in connection with the provisions of General Statutes, § 1027, that "all courts shall have power to restrain the amendment and alteration of the pleadings, so far as may be necessary to compel the parties to join issue in a reasonable time for trial." An amendment of the pleadings, when the case is on trial, and the evidence partly in, is never a matter of absolute right.

There was no error in striking out the testimony of Mrs. Fowler, as to her conversation with the plaintiff's agent relative to the execution of the guaranty. Not only was the

conversation, as stated, too indefinite, on each side, to affect the obligation which the guaranty, as afterwards executed, imports, but the defence of want of consideration was not open to either of the defendants upon the pleadings in the case. The plaintiff set out the lease and guaranty in his complaint and alleged that the defendant Kebabian signed the latter for value received. The guaranty itself recites that it is given "for and in consideration of the letting of the premises within described, and for value received." The joint answer of the defendants begins thus: "The defendants admit the truth of the matters contained in the plaintiff's complaint, but in avoidance of the same set up the following facts." Four separate defenses are then pleaded, the third of which is that the guaranty was signed without consideration. The complaint, however, had alleged that it was signed for value received, and this and every other of the plaintiff's averments had been admitted to be true, before the third defense was set up. The latter was therefore void for repugnancy, and no evidence was admissible in its support. Gould on Pleading, Chap. III., § 168.

In support of the fourth defense, the court was requested to instruct the jury that they were at liberty to infer that the plaintiff had agreed to make all necessary repairs, from the clause in the lease, "Said premises shall be at all times open to the inspection of said lessor or his agents, to applicants for purchase or lease, and for necessary repairs," taken in connection with the fact that the plaintiff had made all repairs which had been requested, except that he did not repair the steam heater so that it would heat the house, and the further fact that no claim was made that the lessee should make the repairs. The court gave this instruction, adding that the word "repairs" meant ordinary repairs, but would not include the substitution of one system of heating for another, or a new heater unless the old one was worn out. The defendants complain of this addition, but, in our opinion, the charge, upon these points, was much too favorable to them. The lease contained no express agreement to repair, and the jury were not at liberty to read such an

agreement into it by the aid of the reservation to the lessor of a right of entry to make necessary repairs. Such a right is necessary for his protection, should an occasion arise for extraordinary repairs, and reserving it, in words broad enough to cover also the case of ordinary repairs, could not oblige him to exercise it in respect to either. The only other reference to repairs made in the lease is in the clause requiring the lessee "to keep in repair all plumbing, caused by freezing or careless use or misuse of the same." The term was to commence September 1st, 1893, and the lease was executed August 30th. The fourth defense set up that on or about the time of its execution the plaintiff agreed with the lessee that he would make all necessary repairs so that the house would be suitable for the purposes of a lodging-house keeper, and that she signed it in reliance upon this agreement. The demurrer which was interposed to this defense should have been sustained. No parol agreement could be thus set up to enlarge the stipulations in the lease. *Osborne* v. *Taylor*, 58 Conn., 439.

It is claimed by the defendants that the court, in recapitulating the evidence to the jury, did not state correctly the testimony of one of the witnesses. If so, the jury before whom he gave his evidence, can hardly have been misled by it. The duty of recollecting and weighing the evidence belongs to them. It is enough, however, to say, with regard to this exception, that it is not supported by the finding, in which no part of the testimony of the witness in question is given or described.

The Court of Common Pleas committed no errors which have prejudiced the defendants, and a new trial is denied.

In this opinion the other judges concurred.

NEW HAVEN AND FAIRFIELD COUNTIES *vs.* THE TOWN OF MILFORD.

Third Judicial District, New Haven, June Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

Whether the term "bridge" includes the approach or causeway at either end must depend upon the intention with which, in view of all the circumstances, the term was used in each particular case.

Chapter 214 of the Public Acts of 1889 provided that under certain contingencies the counties of New Haven and Fairfield should, at their own equal expense, maintain certain bridges over the Housatonic river. *Held* that in view of the long continued policy of this State to impose upon towns the duty and burden of building and maintaining necessary highways and bridges therein, it could not be presumed that the legislature, by the Act in question, intended to depart from that policy further than the words of the statute required; and that the duty of purchasing land and of constructing necessary approaches to a new bridge built by the counties near and in place of the old one, remained upon the towns respectively within which such approaches were situated.

[Argued June 15th—decided July 9th, 1894.]

AMICABLE suit upon an agreed statement of facts to determine the respective legal obligations of the parties as to building and maintaining an approach or causeway to a bridge over the Housatonic river recently erected by the plaintiffs; brought to the Superior Court in New Haven County and reserved by the court, *Prentice, J.*, for the consideration and advice of this court. *Judgment advised for the plaintiffs.*

William L. Bennett, with whom was *Tilton E. Doolittle*, for the plaintiffs.

This case arises under the Act of 1889 (Pub. Acts, 1889, p. 129).

"The word 'bridge' when used in a statute, may or may not include its approaches, according to the context and the circumstances of the case." *Phillips* v. *East Haven*, 44 Conn., 30; *City of New Haven* v. *N. Y., N. H. & H. R. R.*,

39 id., 128; *Burritt* v. *New Haven*, 42 id., 174; *Tolland* v. *Willington*, 26 id., 578.

The word "bridge" in this Act should be construed to mean the bridge without approaches. The maintenance of the bridge was imposed upon the counties against their will. When they took the property of the bridge company, held by the towns, they also become liable to erect a costly bridge and to thereafter maintain it free, losing the right to exact tolls. The statute should therefore receive a strict construction in favor of the counties. No greater obligation should be cast upon them than the law clearly imposes.

This is not the case of a corporation which, for its own profit, makes both bridge and approaches necessary. *City of New Haven* v. *N. Y. & N. H. R. R.*, 39 Conn., 128; *Burritt* v. *New Haven*, 42 Conn., 200.

The counties should not be held to greater obligation than the bridge company. It has been shown that the bridge company had no interest in the approach to its bridge. Up to the very wood-work of the bridge was public way when the counties took the bridge. When the foot left the public way it stepped upon the draw of the bridge.

The way connecting with the Milford end of the bridge was not, in 1889, the property of the Washington Bridge Company, but was a public highway within the jurisdiction of the town of Milford. The Act should not be so construed as to oust the town of this jurisdiction and give it to counties of Fairfield and New Haven. The practical inconvenience of such joint jurisdiction is to be avoided. Properly and naturally the control of the highway is in the town of Milford. *Phillips* v. *East Haven*, 44 Conn., 34.

The Act provides no means by which the counties can procure the land necessary for the connecting highway and approach. The power to condemn land is not given to the counties by the Act. This consideration seems decisive of the construction. The counties should not be held obliged to do that which they have no power given them to do. The town on the contrary has the power.

William B. Stoddard and *Stiles Judson, Jr.*, for the defendant.

I. The only question between the parties to this suit is, which of the parties should build and maintain the approach to Washington bridge.

The statute provides that towns shall build, and repair all necessary highways and bridges, etc., except where said duty belongs to some particular person. General Statutes, § 2666. Towns have no power to lay out highways except by statute. *Fowler* v. *Savage*, 3 Conn., 96. The first statute authorizing a town to lay out highways was in 1773. *Fowler* v. *Savage*, *supra*. No obligations rest upon territorial or municipal corporations in this State by common law to lay out, construct or repair highways. *Borough of Stonington* v. *States*, 31 Conn., 214; *Reed* v. *Town of Cornwall*, 27 id., 58. We therefore start with the law well settled that the town is by the statute law bound to build and repair only such roads and bridges within its boundaries, as it appears it is not the duty of some other party to build or repair.

II. Section 4 of the Act of 1889 (Pub. Acts, 1889, p. 130) makes it the duty of the counties to keep, maintain, operate and control said bridge as a free public bridge. The intent of the Act is to compel the counties to operate the bridge. The duty is clearly placed upon the counties. Before a bridge can be operated (or used) it must have an approach, and it will be presumed the legislature intended the counties to build such approaches as are necessary to operate the bridge. *Tolland* v. *Willington*, 26 Conn., 582; *Burritt* v. *City of New Haven*, 42 id., 200; *Minus* v. *Boone County*, 66 Iowa, 273; *White* v. *Quincy*, 97 Mass., 432; *Parker* v. *Boston & Maine R. R. Co.*, 3 Cush., 107; *Titcomb* v. *Fitchburg R. R. Co.*, 12 Allen, 254; *Carter* v. *Boston & Prov. R. R. Co.*, 139 Mass., 525; *Whitcher* v. *Somerville*, 138 id., 435; *Cox* v. *Stevens*, 14 Me., 205; *State* v. *Gorham*, 37 id., 461; *The D. V. Turnpike* v. *Board of Comm'rs*, 72 Ind., 237; *Philip* v. *Aurora Lodge*, 87 id., 505; Sherm. & Redf. on Negligence, 3d ed., § 253; *King* v. *West Riding of York*, 7 East, 588; *Bardwell* v. *Town of Jamaica*, 15 Vt., 438; *Weeks* v. *Town*

of Lyndon, 54 id., 638; *North Staffordshire Railway Co.* v. *Dale*, 8 El. & B., 836; *West Riding of York* v. *The King*, 5 Taunt., 284; *Board of Chosen Freeholders* v. *Strader*, 3 Harr. (N. J.), 108.

III. In the charter of the Washington Bridge Co. and all of the acts and resolutions passed by the legislature, we find nothing said about approaches. The word bridge alone is used. Whether the word bridges includes approaches may be an open question in this State. There are many authorities which hold that the word includes approaches. Several cases are cited in *Tolland* v. *Willington*, 26 Conn., 583.

This bridge is a large and expensive structure passing over a State or national waterway and connecting two counties, and used by the inhabitants of the State at large. And past legislation shows that it never has been the policy of this State to cast these large burdens on the towns that are so unfortunate as to have large waterways within their limits. It has never been done to our knowledge, and should not be allowed at this day.

IV. Taking into consideration the several legislative acts relating to said turnpike and bridge company and the mode of operating and repairing the bridge and highway during more than fifty years past, the liability for the construction of this approach is fixed upon the bridge company and therefore upon the counties. *Tolland* v. *Willington*, 26 Conn., 580; *Phillips* v. *East Haven*, 44 id., 80; *Com.* v. *Deerfield*, 6 Allen, 454.

The State of Pennsylvania seems to have laws similar to ours, making it the duty of towns to build and maintain ordinary bridges. But all large and expensive bridges were built and maintained by counties, and when the question arose between a county and town concerning the duty of providing an approach to a county bridge, it was held that the duty belonged to the county. *Com.* v. *Westfield*, 11 Pa. County Court Rep., 369; *Everitt* v. *Bailey*, 150 Pa. 152.

ANDREWS, C. J. This is an amicable suit brought to the Superior Court in New Haven County, and reserved for the

advice of this court. By an Act of the General Assembly —Chap. 214, p. 129, Public Acts of 1889—the owners of all bridges across the Housatonic river between the counties of New Haven and Fairfield were authorized to transfer all their right, title, and interest in and to the stock, property and franchises in the said bridges, to the said counties; the said Act then further provided as follows:—

"Sec. 4. Upon such transfer being made to said counties, it shall be the duty of said counties to take the charge, management, and control of the said bridges, and to keep, maintain, operate, and control them as free public bridges.

"Sec. 5. The expense of maintaining and repairing said bridges shall be paid in equal proportions by each of said counties, by orders drawn by the county commissioners of said counties upon their respective treasurers, and the county commissioners of said counties, acting as a joint board, shall have the control and management of the said bridges."

The matter of the present suit concerns Washington bridge, so-called, a bridge across the Housatonic river between the town of Milford in New Haven county and the town of Stratford in Fairfield county. At the time said Act was passed said bridge belonged to a corporation known as the Washington Bridge Company. Thereafter the owners of all the stock of said corporation conveyed it to said counties pursuant to that Act and the said counties became the sole owners of all the rights, title, and interest in the stock and in the property owned by said corporation, and have since that time maintained the said bridge as a free and public one.

In the year 1892 it became necessary to erect a new bridge over said river, and the said counties have now erected a new iron bridge near the old bridge, but a few feet north of it, at an expense of $90,000. Said new bridge is several feet higher than the old bridge and the adjoining land, and it is now necessary to purchase land for a new approach for said bridge, and to expend a considerable sum of money in building the approach to said new bridge. The approach

east from said new bridge will be entirely within the town of Milford.

The claims of the parties are these: The aforesaid counties claim that said approach in said Milford is no part of said bridge, and that the said counties are not bound to erect or maintain the same; but that it is the duty of said town of Milford to erect and maintain the said approach.

The said town of Milford claims that said approach or causeway is a part of said bridge, and that it should be built and maintained by the said counties. Counsel for the town of Milford rest their argument mainly on the meaning of the word "bridge" as given in the dictionaries, and in the various decided cases which they have cited. We are not disposed to withhold anything from the force of their argument. But we think there is in this case another consideration which must be controlling. And that the case depends "not upon any necessary legal meaning to be given in all cases to the word 'bridge' but upon the meaning of that word as it was used in the Act referred to; upon the intention of the legislature as evidenced by all the words used, and not simply by one word." *Phillips* v. *East Haven*, 44 Conn., 81.

The policy of this State has always been to impose upon towns the duty and the burden of building and maintaining all necessary highways and bridges within their respective limits, except where such duty belonged to some particular person. Necessary bridges between towns are to be built and maintained at their equal expense. The statutes now in force—General Statutes, §§ 2666, 2667, are but the continuance of similar ones which have been in existence from the earliest times. This policy has been pursued because it has been supposed to be the most equitable as well as the most convenient method by which the expense and care of supporting highways and bridges could be distributed. The same policy made it the duty of the selectmen in each town to supervise the highways and bridges in their towns. The statute of 1889 was, in respect to the bridges across the Housatonic river, between the county of New Haven on the

one side and the county of Fairfield on the other, a departure from this ancient policy. It puts the building and maintaining these bridges upon the two counties, and the duty to supervise them upon the county commissioners of the two counties as a joint board. The selectmen of a town have a much more intimate connection with the people of that town than do the county commissioners of a county with the people of that county. The selectmen are elected by the people of their town and are directly responsible to them. The county commissioners are not so elected and have no such responsibility. Long experience has shown that highways and bridges are much better taken care of and at a less expense, where the persons upon whom rests the duty of taking the care are directly accountable to that community which must bear the expense of the care and which is made liable if the proper care is not taken, than in any other way. It cannot be supposed that the legislature, by the Act of 1889, intended to depart from the established policy any further than the words of the statute require. *Pro tanto* that statute is a repeal of the general statute because it is inconsistent with the general one. Such a repeal is never extended further than the inconsistency compels.

The case shows that "it is now necessary to purchase land for a new approach to said bridge." But no authority is given in the Act to the counties, or to the county commissioners, to buy "land." All that the counties took by the transfer to them, all that they had power to take by the Act, was whatever they took under the term "bridge." If that term could be held to include the approach to the old bridge, it certainly could not include the power to acquire other lands for a different approach to another bridge. Nor is any power conferred on them to take land by condemnation for such approach. The approach to a bridge may sometimes be regarded as a part of the bridge itself, and sometimes as a part of the highway leading to the bridge. The circumstances of each case must control. In this case if the approach is regarded as a part of the highway leading to the bridge on the Milford side, there is ample power in that town

to take the land for that purpose. Taking all the circumstances together we think the legislature intended to confer authority on the counties to take charge only of the bridge structure, excluding the approach.

The Superior Court is advised to render judgment sustaining the claim of the counties.

In this opinion the other judges concurred.

THOMAS H. L. TALLCOTT *vs.* THE TOWN OF GLASTONBURY.

Third Judicial District, New Haven, June Term, 1894. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.*

The plaintiff was, on October 1st, 1891, a resident of the defendant town and indebted to *H*, another resident, in the sum of $1,000, for which *H* held his demand note secured by mortgage upon real estate in said town. During the preceding month the plaintiff procured the note from the creditor, took it to the State treasurer, and paid a tax of one per cent upon its face amount, and the note thereby was exempted from all taxation for five years, pursuant to chapter 248 of the Public Acts of 1889. Thereafter the plaintiff, having given in his list to the assessors, requested the board of relief to deduct the amount of said debt from his list, pursuant to § 3854 of the General Statutes. *Held* that the plaintiff was entitled to such deduction.

[Argued June 15th—decided July 9th, 1894.]

APPEAL by the plaintiff from the action of the board of relief of the town of Glastonbury in refusing to deduct a certain item from his tax list; brought to the Superior Court in Hartford County and tried to the court, *Shumway, J.*; facts found and case reserved for the advice of this court. *Judgment advised for the plaintiff (appellant).*

The case is fully stated in the opinion.

William C. Case, for the appellant.

John R. Buck, for the appellee.

---

*Transferred from the first judicial district by consent of the parties and agreement of court.—R.

FENN, J. This is an application in the nature of an appeal, pursuant to General Statutes, § 3860, from the action of the board of relief of the town of Glastonbury, to the Superior Court, which was reserved by that court for our advice. The material facts are these:—

On October 1st, 1891, the plaintiff was a resident of said town, and was indebted to one Hardin, another resident, in the sum of $1,000, evidenced by the plaintiff's note on demand, and secured by mortgage on real estate in said town. On September 15th, 1891, the plaintiff paid into the treasury of this State a tax of one per centum on the face amount of said note for five years, and the treasurer thereupon duly indorsed the fact of such payment and consequent exemption upon said note. The plaintiff having made and delivered to the assessors his list, requested the board of relief to deduct the amount of said debt from such list. This the board of relief refused to do. The sole question is, was the plaintiff entitled to such deduction?

General Statutes, § 3854, provides that: "If any resident in any town shall be indebted to another resident in this State, in such manner that the debt is liable to be assessed and set in the list of the creditor, the board of relief for such town shall, on his request, deduct the amount thereof from the list of such debtor, and add the same to the list of the creditor, if resident in the same town; * * *" Section 9 of chapter 248 of the Public Acts of 1889 provided that: "Any person may take or send to the office of the treasurer of this State, any bond, note, or other chose in action, and may pay to the State a tax of one per centum on the face amount thereof for five years"; that "the treasurer shall thereupon indorse" that "the same is exempted from all taxation for the period of five years," and that the same shall be so exempt.

It is the claim of counsel in behalf of the defendant that the note in question was not liable to taxation on and after October 1st, 1891, and hence the debt was not liable to be assessed and set in the list of the creditor, and therefore does not come within the provisions of General Statutes, § 3854; that "it is *taxable* property that the law requires

shall be put into the list, not untaxable or exempted property." It is further said that it does not appear that by the legislation in force in 1891, the legislature intended to exempt real estate mortgaged to secure "bonds, notes, and other choses in action," which had been exempted by the payment of the tax of one per centum; and that the amended Act of 1893 (Public Acts 1893, Chap. 207) "explicitly takes away the privilege of exempting the notes themselves, when secured by mortgage on property in this State."

It appears to us that if any assistance can be afforded by the subsequent and amendatory legislation of 1893, in determining the intention of the legislature as expressed in the Act of 1889, it does not tend to support the defendant's claim. It was only because "bonds and notes secured by mortgage on real estate situated in this State," were within the operation of the provisions of the Act of 1889, that any occasion existed to except them from it by the amendment of 1893. But there would be no necessity to make such exception, provided the payment of the tax to the State, in order to obtain exemption from further taxation of the chose in action, operated to prevent the owner of "the real estate situated in this State," mortgaged as security, from claiming a deduction on account of indebtedness. The State would be the gainer in revenue by the amount, if any, which it received, as the price of exemptions to creditors, which preventing their debtors from claiming deduction, left the aggregate of other taxation the same as if the State tax had not been paid, and the immunity not conferred. It is quite true that the note in question was not liable to taxation on October 1st, 1891, but that was because on September 15th, 1891, the prescribed tax was paid in advance for the period of five years. So if "the debt was not liable to be assessed and set in the list of the creditor," it was for the reason that it had already, in effect, been so assessed and set in his list. If the board of relief could not "add it," it was because the purpose of such addition, the ultimate receipt of a tax upon it, was already accomplished in the summary alternative method provided by law.

The facts in this case show that the plaintiff on September 15th, 1891, was indebted in such manner that the debt was liable to be assessed and set in the list of the creditor. We do not think it changed either the fact or the manner of such indebtedness, when on said day the equivalent of assessment to, and setting in the list of, the creditor was performed. Such performance ought not to be held to divest the plaintiff of the beneficial right of exemption conferred upon him by the statute.

No doubt the legislature could have repealed such exemption if they had so desired. But nothing in the Act of 1889 indicates any such intention, or justifies our finding such repeal by implication. The old and new legislation might well stand together. Presumptively, therefore, it was designed that it should. This presumption is at least not impaired by the fact that when four years later an amendment of the Act of 1889 was found expedient, such amendment, as we have seen, took away the new privilege of the creditor, and made no reference to the old one of the debtor.

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

In this opinion the other judges concurred.

MEMORANDA OF CASES

NOT REPORTED IN FULL.

SECURITY COMPANY, TRUSTEE, *vs.* MATHA M. CONE ET AL.

First Judicial District.

[Argued March 8th—decided April 2d, 1894.]

SUIT to determine the construction of the will of John G. Mix, late of Hartford, deceased; brought to the Superior Court in Hartford County and reserved by the court, *Robinson, J.*, upon the facts stated in the complaint and admitted to be true, for the advice of this court.

George G. Sill, for the Security Company.

John C. Parsons, for Eliza F. Mix.

Daniel A. Markham, for George H. Mix.

Henry S. Robinson, for the Connecticut Trust and Safe Deposit Company, admr.

Charles E. Gross, for Martha I. Cone, Clara M. Cone, Harry F. Cone, and Martha I. Cone, guardian *ad litem* of Lillian C. Cone.

BY THE COURT: The Superior Court is advised as follows:—

First. During the time Eliza F. Mix remains single the net income of two thirds of the trust estate should be divided equally between her and her sister, Mrs. Cone.

Second. During the time George H. Mix remains unmarried, the net income of one third of said trust estate, after

deducting the discretionary payments, should be accumulated by the trustees.

Third. The payments to George H. Mix should be taken from the income of said one third. Such payment is not conditioned otherwise than upon the sound discretion of the trustees, having due regard to the wish of the testator, that the reformation or self support of the beneficiary should be kept in view, and its accomplishment sought. Payments from income may be made, not to exceed six hundred dollars per annum, in the event of sickness or disease of the beneficiary.

Fourth. No distinction between grandchildren born or living, at a certain time or date, and others, was intended to be made by the testator. All grandchildren take, as members of a class, the remainder in fee.

Fifth. All the discretionary powers conferred upon the original trustees exist, and may be exercised by their successor.

Sixth. The claim of the Connecticut Trust and Safe Deposit Company, as administrator of Mrs. Mix, should not be entertained.

Opinion by *Fenn, J.* All concur. Opinion filed with the clerk of the Superior Court, Hartford County.

CHARLES A. CAIN *vs.* JOHN BRACKEN.

Third Judicial District.

[Argued April 17th—decided May 18th, 1894.]

ACTION to recover damages for assault and battery; brought to the Superior Court in New Haven County and tried to the jury before *George W. Wheeler, J.;* verdict and judgment for the plaintiff for $200 damages, and appeal by the defendant upon the ground that the verdict was against the evidence and that the damages awarded were excessive.

William C. Case and *William H. Ely*, for the appellant (defendant).

Charles S. Hamilton, for the appellee (plaintiff), was stopped by the Court.

BY THE COURT: New trial denied. All concur. No opinion filed.

ERNEST E. BALL *vs.* THE AMERICAN OYSTER COMPANY.

Third Judicial District.

[Argued June 12th—decided July 9th, 1894.]

ACTION for damages for unlawfully entering and dredging upon certain oyster ground alleged to be in the possession of the plaintiff, and carrying away oysters; brought to the Superior Court in New Haven County and tried to the jury before *George W. Wheeler, J.;* verdict and judgment for the plaintiff for $200 damages, and appeal by the defendant upon the ground that the verdict was against the evidence.

Rufus S. Pickett, for the appellant (defendant).

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

BY THE COURT: New trial denied. All concur. No opinion filed.

RULES OF PRACTICE.

AMENDMENTS.

Chapter XII. of the General Rules of Practice of the Supreme Court of Errors and Superior Court, 58 Conn., 581, has been amended by substituting in lieu of section 13 the following:—

SEC. 13. Fees will be allowed in the Superior Court to the sheriff and one deputy, and when a jury is in attendance, one constable, for their attendance. On special occasions the judge holding the court may authorize the attendance of a greater number of officers, and when such authority is given prior to the attendance the court may allow fees for the same, if satisfied of the necessity of such extra attendance.

Fees will be allowed in the Supreme Court of Errors to the sheriff or one deputy, and to one messenger or constable; and when that court and the Superior Court, or more than one branch of the Superior Court is in session on the same day, fees will not be taxed for the attendance of the same officer in more than one court. In no case will fees be taxed unless the officer has been actually in attendance during the session of the court; and no fees will be taxed to any officer who has been paid or has any claim for attendance on the same day at the Court of Common Pleas, or District Court.

The sheriff's bill for attendance shall be accompanied by a written statement from each attending officer, signed and sworn to by such officer, showing the days of the week and month such officer was in attendance, and that he has not been paid and has no claim for attendance at any other court on the days mentioned.

No costs shall be taxed for court expenses unless each item of payment of over five dollars shall be accompanied by a proper voucher. No part of the clerk's bill shall be included in the sheriff's bill for taxation.

(Adopted July 9th, 1894.)

Also by the addition of the following sections:—

SEC. 15. To the prevailing party, upon all motions required to be in writing which are determined by the court, shall, unless the court remits the same in whole or in part, be taxed the sum of ten dollars, which shall be paid by the opposing party before he shall be entitled to plead further.

(Adopted February 12th—to go into effect April 2d, 1894.)

SEC. 16. A trial fee shall be taxed to the prevailing party upon each issue of law joined upon demurrer, provided, however, that no more than one trial fee shall be taxed in favor of any party upon issues of law joined at any one stage of the pleading; and also provided, that the court may at its discretion remit either in whole or in part the costs taxable under this rule.

(Adopted June 4th, 1894.)

Certified by

EDWARD A. ANKETELL,
Clerk of the Superior Court for New Haven Co.

At a meeting of the judges of the Supreme Court of Errors, held in New Haven on December 1st, 1894, section one of Rule XXII., 58 Conn., p. 588, was amended by adding the following:—

All records and briefs printed for use in the Supreme Court of Errors, shall be so printed and trimmed as to be of pages of substantially uniform size, nine by six inches.

No part of the files or records of the court below shall be printed, which is not necessary for the proper presentation of the grounds of the reasons of appeal or assignments of error. If the clerk is in doubt what to print and what to omit, under this rule, he shall apply to the trial court for instructions.

The date upon each paper, printed in the record, appears from its endorsement to have been filed, must be printed.

Certified by

CHARLES B. ANDREWS,
Chief Justice.

RULES FOR TAXATION OF COSTS

IN CRIMINAL CASES.

In pursuance of Section 1666 of the General Statutes the Supreme Court of Errors establishes the following Rules for the Taxation of Costs and Expenses in all criminal proceedings:—

SECTION 1. No fees will be taxed in the Superior Court for witnesses called before courts of inquiry only to impeach or support character.

SEC. 2. An officer or indifferent person serving subpœnas in criminal causes will not be allowed fees for returning the same to the court unless he returns them in person or actually pays for their return, and then only the sum paid will be allowed, not exceeding the legal fees for returning civil process. Nor will he be allowed fees for returning more than one subpœna in the same cause at the same term or session unless for special reasons approved by the court.

No fees shall be allowed for constructive travel in the service of any process.

SEC. 3. An officer or other person serving a subpœna or capias in criminal causes on behalf of the State upon witnesses who are poor and unable to procure the means of traveling to the court will be allowed a reasonable compensation for procuring the conveyance of such witnesses to the court, and a reasonable sum will be taxed for the support of such witnesses during their necessary attendance at court, provided a previous order or authority shall be given by said court, if in session, or by the State's Attorney, if said court is not in session, for that purpose.

SEC. 4. Witnesses shall receive fifty cents a day for attendance, and ten cents a mile for travel on the first day of attendance, and for each subsequent day actual traveling expenses, not exceeding ten cents a mile.

Witnesses in attendance in more cases than one at the same time will be allowed fees for travel and attendance in one case only; and the court, at its discretion, may divide the amount taxed as shall seem just between all the cases.

No fees shall be allowed to bystanders called as witnesses.

The travel of non-resident witnesses will be computed and taxed from the State line on the usual course of travel in all cases where the witnesses' fees are not taxed under authority of section 1651 of the General Statutes.

SEC. 5. Upon a requisition for the arrest and delivery of a fugitive from justice, the person appointed by the Governor to receive and convey to this State such fugitive shall be allowed, and there shall be taxed in his favor:

His necessary expenses for travel in procuring and delivering such requisition and in receiving and conveying such fugitive:

The necessary expenses for travel for such fugitive from the time of his surrender until he be committed to prison in this State or be discharged from custody:

Such amounts as have been legally demanded and actually paid to officers of other States, and which were necessary to be paid to secure the arrest and surrender of such fugitive:

And reasonable compensation, not exceeding five dollars a day, for the time actually and necessarily spent in procuring such requisition and in the performance of his duties as agent under the same.

But such taxation shall not be made unless such agent shall furnish a detailed statement of his expenses and time, verified by his affidavit, nor unless the State's Attorney for the county in which the crime charged upon such fugitive is alleged to have been committed shall, before the requisition is issued, officially certify that in his opinion public justice requires that the fugitive be surrendered for trial in this State.

Other expenses necessarily incurred by such agent in the performance of his duties may, in special cases, be taxed upon the application of the State's Attorney.

SEC. 6. The sheriff's fee of one dollar for execution by

service, and return of each warrant for commitment of convicts to State's Prison, shall be taxed in the bill of costs; and the expense of transportation of convicts, including expense for necessary assistance not exceeding three dollars per day for each assistant from jail to State's Prison, cannot be taxed unless accompanied by an itemized bill showing in detail the sums actually necessary for such transportation. When the sheriff in person conducts the conveyance of convicts he shall be allowed in addition to the expense of transportation a sum not exceeding three dollars for each convict delivered at the prison.

SEC. 7. When more than one prosecution shall be pending at the same time against the same person, whether in the same or different courts, for offenses which could have been joined in one prosecution, no more costs shall be taxed than would have been taxable if said offenses had been so joined, unless the court taxing the costs shall be clearly satisfied that public interests were promoted by such separate prosecution.

SEC. 8. When two or more persons are prosecuted separately for an offense committed by them, for which they might have been jointly prosecuted, costs shall be taxed on one complaint only, except in case of an apportionment under the provisions of section 10; but additional costs, otherwise legal, and such as the court taxing the costs may deem proper, may be taxed, if such court is satisfied that good cause existed for bringing more than one complaint.

SEC. 9. When separate prosecutions are brought for different offenses growing out of one transaction, no costs shall be taxed except in one prosecution.

SEC. 10. When two or more persons are prosecuted jointly or severally for a joint offense, all costs taxable against such offenders may, at the discretion of the court taxing the costs, be apportioned between the persons convicted, so that each one may be charged with such portion of the whole costs as the court may deem reasonable and just.

SEC. 11. Only one fee for arraignment or for setting at bar of each prisoner can be taxed in one prosecution.

SEC. 12. The State's Attorney in each county shall care-

fully examine and revise all bills of costs coming to the Superior Court from an inferior court or magistrate for taxation, and shall certify no such costs for taxation unless he is satisfied that the service for each item has been rendered, and that the taxation is lawful and reasonable, and in compliance with these rules; and shall certify no doubtful item for taxation, unless accompanied by some satisfactory explanation or evidence of the lawfulness and propriety of such item, and no bill of costs will be taxed against the State until it has been carefully examined by the State's Attorney, nor unless he certifies that in his opinion the same is reasonable and legal.

A schedule of costs, with instructions for taxation in ordinary cases, will be given by the judges of the Superior Court to the State's Attorneys, who can furnish copies of the same when necessary to magistrates for their instruction in the taxation of costs.

SEC. 13. These rules, so far as applicable, will govern the taxation of costs in all County, Municipal, and other courts exercising criminal jurisdiction.

SCHEDULE OF ORDINARY COSTS

TAXABLE BY JUSTICE COURTS.

GRAND JURORS.

For drawing a complaint which, including the warrant, contains not exceeding one page of 280 words, $1.00.

If the complaint and warrant contain more than 280 words, 50 cents will be taxed for each additional page of not exceeding 280 words.

For travel to court, 6 cents for each mile of travel.
For attendance before court, $1.00 per day.

Fees for game warden are $10.00 in each case when conviction is had; provided, that when more than one case is brought against the same person, the taxation of fees in the additional cases shall be at the discretion of the court.

For prosecuting agents acting instead of grand jurors, for each case of prosecution or search, commenced or conducted by him before any justice of the peace, $10.00; provided, the justice is of the opinion that such case was entered into in good faith, and upon probable cause pursued, so far as the ends of justice required.

NOTE.—When the prosecuting agent brings more than one complaint against one person, the justice may, at his discretion, allow costs to such prosecuting agent on only one, or on any number more than one, of such complaints.

The above fees for prosecuting agent cover his services in drawing the complaint, and all other services performed by him in conducting the prosecution.

JUSTICE OF THE PEACE.

Fee for signing warrant, 10 cents.

For entry of trial and record of case within his jurisdiction, $1.50.

Hearing a case when the accused is bound over or acquitted for want of probable cause, or a case above the jurisdiction of the justice, $1.50.

For each additional day he is necessarily engaged in actual trial or hearing of any case, $1.50.

For each continuance, 25 cents.

NOTE.—No fee of $1.50 can be taxed except for a day when a hearing or trial is actually had; and no continuance fee can be taxed for any day when the trial fee is taxed.

For signing and issuing subpœna, 25 cents.

For signing and issuing capias, 25 cents.

For signing and issuing mittimus, 25 cents.

NOTE.—The fee of 10 cents allowed by statute for taking a bond or recognizance does not apply to bonds taken by a justice in the course of a trial.

For copies of record, 25 cents for each page containing 280 words.

OFFICER.

Service of warrant, travel per mile, 10 cts.
Arrest of one prisoner, 50 cts.
Travel with prisoner to court or jail, per mile, 25 cts.
Service of subpœna, actual travel per mile, 10 cts.
Service on each witness by reading or copy, 12 cts.
Indorsement of service of subpœna, 12 cts.
Service of mittimus per mile from court to jail, 25 cts.

NOTE.—In all cases fees can be taxed only for actual travel (in service of warrants and subpœnas to be computed from place of officer's abode to place of service) and not for construc-

tive travel. For example: the officer committing the prisoner on more than one mittimus is allowed one travel only.

In serving subpœna, the distance actually and necessarily traveled by the officer is taxed. If five miles are traveled to summon five witnesses, five miles only of travel can be taxed. If several warrants are served upon one person, travel of one warrant only can be taxed, etc., etc.

No charge shall be allowed for conveyance or other expense in addition to the fee for mileage, except in exceptional cases authorized by the court.

For necessary assistance in making arrest: a reasonable sum may be taxed for necessary assistant or assistants, but in such case the officer must be placed under oath, and must satisfy the justice by his sworn statement that the assistance was actually rendered and really necessary: unless this is done nothing can be taxed for assistance.

For attending court with prisoner, when necessary, per day, 50 cents.

In exceptional cases, where there is an adjournment of a trial from one day to another, and the court, instead of committing the prisoner to jail, orders the officer to hold him in custody during the adjournment, there may be taxed one dollar per day for holding the prisoner in custody; or one dollar for keepers for every twelve hours, and in that proportion, in lieu of all other expenses, except in special cases to be approved by the court. When fees are taxed for keepers none should be allowed for holding the prisoner in custody during the same time.

WITNESSES.

For attendance, per day, 50 cents.

For travel, per mile, 10 cents.

If the trial last more than one day, the witnesses after that first day are allowed for travel only their actual traveling expenses, not exceeding 10 cents per mile.

NOTE.—Travel is to be computed in the case of

resident witnesses from place of abode to place of trial; and in case of non-resident witnesses, from the State line, on the usual course of travel to the place of trial.

Witnesses in attendance in more cases than one will be taxed fees for travel and attendance in one case only; and the court, at its discretion, may divide the witness fees so taxed as seems just between all the cases.

No fees will be allowed to by-standers called as witnesses.

The special attention of Justice Courts is called to sections 1655, 1656, and 1657 of the General Statutes. These provisions should be strictly enforced.

COMMITMENT TO THE CONNECTICUT SCHOOL FOR BOYS.

Commitments on ordinary criminal proceedings are governed by the rules of taxation in other criminal cases; but under the Act of '93 appeals may come to the Superior Court from commitments upon complaint under section 3628 of the General Statutes, other than for criminal offenses. The costs below to be taxed in such appeals will be:

No fee for complaint.

For a court hearing, $2.00.

Order of notice, 50 cents.

Mittimus, 50 cents.

Copies on appeal, same as in criminal cases.

Subpœnas and witnesses, if specially authorized by the court below, same as in criminal cases.

Officer, service of order of notice, a reasonable sum, not exceeding the lawful fees for service of subpœna.

For service of subpœna, same as in criminal cases.

Service of mittimus, reasonable compensation and actual payment for necessary expenses.

A compensation of over $3.00 would not be considered reasonable, unless in some special case.

COMMITMENT TO THE INDUSTRIAL SCHOOL FOR GIRLS, AND TO TEMPORARY HOMES, WITH REFERENCE TO THE SUPERIOR COURT FOR TAXATION.

No fee for complaint.
Court hearing, $2.00.
Order of notice, 50 cents.
Mittimus, 50 cents.
Taxation of costs and certifying same, 50 cents.
Subpœnas and witnesses, if specially authorized by court below, same as in criminal cases.
Officers, same as mentioned above in commitment to Schools for Boys.

Certified by CHARLES B. ANDREWS,
Chief Justice.

APPENDIX.

OBITUARY SKETCH OF HEUSTED W. R. HOYT.*

HEUSTED WARNER REYNOLDS HOYT was born in Ridgefield in this State on the 1st day of November, 1842. He was the son of the Rev. Warner Hoyt, who was rector of St. Stephen's Episcopal Church in that town, and of Elizabeth Phillipina Reynolds, who was a native of Greenwich. The Rev. Warner Hoyt died when Heusted was but three years of age.

His early death entailed a complete change in the life of his little family, his widow removing from Ridgefield to her father's home in Greenwich where she remained, except for a period of two years spent in New Canaan, and there Heusted Hoyt spent his boyhood days, the whole of his active manhood, and from that home he was carried to his last resting place in the neighboring cemetery of Christ Church.

As a child Heusted Hoyt is remembered as one possessed of a singularly alert mind, so that he was often spoken of as almost precocious, certainly bright, and giving the promise of keen intellectual power when he reached maturity; and these mental traits combined with gentleness, generosity and manly childlike attributes, so to describe them, brought to him even in his early days the great respect of the community, and caused the prediction not infrequently to be made that the career which lay before him was likely to be one of unusual success. He was a faithful student in the Academy of Greenwich, and there he prepared for Columbia College, to which he was admitted in his seventeenth year.

His college days, brief as they were, sustained the repute which he had gained in his own town, and he seemed likely to be graduated among the honor men of his class. But it was while he was in these early preparatory studies that he received his first warning, and the shadow of that disease to which he finally succumbed fell upon him and continued throughout his life. He was obliged, because of this illness, to leave college without taking his degree. He returned to Greenwich, and by careful habits seemed after a time so far restored that he decided to prepare for the law, a vocation to which his ambition had impelled him in his youthful days. He became a student in the office of Henry H. Owen, Esq., in New York, was admitted in due course to the New York bar, and at first proposed to practice in New

* Prepared by a friend at the request of the Reporter.

York City. His brief experience at the bar in that city assured those with whom he was associated that his career would have been successful there, but an opportunity which seemed to him favorable was opened for him to practice in his own town of Greenwich, and there he opened an office just at the time when the country was beginning to recover from the turmoil and distractions of the Civil War. There he remained in practice until his illness compelled him to take to his bed.

Col. Hoyt always took an intense interest in politics, and his personal qualities, combined with a wide acquaintance and respect which he had gained by reason of his association with the military service of the State, early indicated him as a candidate for political honors. He was elected to the State senate in 1869, being at that time the youngest member of that body. But although he was youngest in years he was among the potent influences of that legislature, and gained a repute there which caused his name to become familiar throughout the State. He served a second term in the senate in 1872, was a member of the house of representatives in 1886 and again in 1887, being upon the last occasion so generally indicated as the choice of his party for the speakership that he was elected to that position with practical unanimity.

These were the only political offices that Col. Hoyt ever held. He was, however, elected the first judge of the Borough Court which was established in the town of Greenwich in 1889, and held that office as long as he lived.

Col. Hoyt took a great interest in military matters and he possessed capacities which would, had he been able to serve in the field, have brought him great prominence and success. He earnestly desired to enlist and go to the front with a company in the Connecticut Volunteers, but his family knew better than he that, while he might escape the perils of battle, he certainly could not have immunity from those of the camp and the exposures of the field. A letter written by him on the 17th of July to an old friend then in the field contains these words, and in them there is sufficient indication of the force of his character. He says: "If there is any indication of a draft in Connecticut (and I do not think in this busy season they can get enough without) I am going to volunteer forthwith." It appears from this same letter that Hoyt and ten or twelve others were "studying up on Hardee's tactics," and probably to this discipline and this impulse may be traced the successes of his subsequent career as an officer of the State militia.

Upon his appointment in 1863 as second lieutenant of Company F, 8th Reg. C. N. G., he began a career with the militia which gave him a reputation as one of the most competent and skillful as well as popular men in the service. His abilities brought him rapid promotion until he finally was named Colonel of the 4th Regiment, which he brought to a high state of discipline. That post he held until March 24th, 1877. But his intense interest in all military matters even after his resigna-

tion, was second only to that which his practice created, and his friends many times thought that it was greater than the interest he found in the excitement of politics.

Col. Hoyt's career in the State senate revealed his unusual power and ability as a public speaker, and it perhaps was in that capacity that he became more familiarly known to the people of the State than in his power as a legislator, a quality which is not obvious to the public eye.

From the time of his admission to the Fairfield County bar his abilities as counsel and advocate were recognized, and soon brought to him a profitable, and by no means local, business. His theoretical and practical knowledge of the law, his unyielding will, his capacity for persistent and unfailing devotion to the interests of his clients, and an unconquerable determination of nature, caused him to be greatly sought for. He was true to the cause of his client, and could never be made to acknowledge that defeat was his lot while any hope of victory remained. He was engaged in many notable cases, and as his skill was disclosed, and the cleverness which marked all of his performances appeared, he took strong hold of those who watched him. No lawyer acquainted with him would think of meeting him in a trial without the most careful preparation, for the intricacies of the law were as familiar to Col. Hoyt as the parts of an engine to a master mechanic. And then too, he never had the wrong side of a case; his service once secured he was blind to all opposing claims or principles except so far as they were forced upon him by his adversary, and then he fought them with confidence, skill and tenacity. He was very properly considered a formidable opponent, for when apparently worsted, he would, without an indication of a change of front, commence a legal structure on the opposite side, and while one viewed the situation with wonder he rapidly and very substantially intrenched himself. Dislodge him you might, capture him you could not.

Col. Hoyt was ever ready and anxious to aid all of those plans which were for the benefit of his town. He never refused to give his assistance and endeavors to whatever was proposed for its improvement. His power as an orator, and his personal influence, were often sufficient to avail for the success of proposed measures, when without these influences they probably would have been defeated; and it was the very qualities which made him the able advocate that were of inestimable advantage to the community in his relation to it as a public spirited citizen.

The esteem and affection with which Col. Hoyt was held was tenderly and beautifully manifested upon the occasion of his funeral. In the midst of a blinding April snowstorm, and with all the discomforts and perils attendant thereupon, his body was taken from the home of his childhood and manhood to that narrow home where it will remain until the last great day. And there followed to his grave a great com

pany of his professional associates of the Fairfield bar, of the local bar, of those who had been with him in the days of his triumphs as a public man, of those who had served with him in the militia, and of neighbors and remoter friends, the shops being closed, the emblems of affliction being displayed, and even the houses for the most part deserted, so that the only tributes that then were possible might be paid to him by a community which sincerely mourned.

At a meeting of the bar of Fairfield County on April 15th, 1894, after remarks eulogistic of Col. Hoyt had been made by R. Jay Walsh, James H. Olmstead, Frederick A. Hubbard, Russell Frost, Ernest Staples, and others, the following resolutions were unanimously adopted:—

Whereas, the Fairfield County bar has learned with deep and sincere regret of the death of the Honorable Heusted W. R. Hoyt, one of its members, at his home in Greenwich, on Sunday, the eighth instant,

Resolved, that in the death of Brother Hoyt this bar fully realizes the loss of one of its most respected and talented members, one whose kindly and genial qualities, loyal friendship, amiable, polished and courteous manners, heroic courage, unswerving integrity in the discharge of his professional duties, and superior intellectual attainments has long commanded the admiration of his fellows, and are worthy of emulation.

Resolved, that this bar extends to the family of our deceased friend and brother the assurance of our deep and heartfelt sympathy in their great bereavement.

Resolved, that these resolutions be recorded at length in the records of the bar, and that a copy of the same, suitably engrossed, be transmitted to the family of the deceased.

INDEX.

STATUTES REFERRED TO OR COMMENTED ON—*continued.*

PUBLIC ACTS.

TABLE OF CASES CITED IN THE OPINIONS.

ERRATA.

Vol. 59, p. 107, last line—for "*Cameron*" read *Cannon*.
p. 590, line 16—for "52" read 57.
Vol. 60, p. 12, 9th line from top—for "704" read 784.
p. 27, 6th line from top—for "date" read *data*.
p. 190, 4th line from top—for "section two" read *section eleven*.
p. 429, line 21—for "54 id." read 44 id.
p. 431, 7th line from bottom—for "848" read 888.
Vol. 61, p. 582, 4th line from bottom—for "291" read 292; also, for "*Blackman*" read *Blakeman*, same line.
Vol. 63, p. 560, between lines 10 and 11 from bottom of page, insert the following: A transaction (considered as a past event), is something which has been transacted, something, that is, which has been carried through to its end.
Vol. 64, p. 2, 1st line of opinion, place an *f* after the "o" at the end of line.
p. 8, 13th line from bottom—for "local" read *legal*.
p. 58, 5th line from bottom—strike out the *comma* and second "*and*."
p. 60, 13th line from top—for "on" read *no*.
p. 65, line 2—insert *Court* after the word "particular."
p. 65, line 7—insert *by* between "and" and "what."
p. 67, 14th line from bottom—insert quotation marks after the word *wrong*.
p. 69, 20th line from top—insert the word *on* between "or" and "an."
p. 73, 7th line from top—insert between the words "would" and "have" the following: *in another statute, but a few weeks later in date*.
p. 95, 17th line from top—strike out the word "*such*."
p. 96, 14th line from top—for "such a" read *each*.
p. 179, 16th line from top—for "Treasurer" read *Treasury*.
p. 179, 25th line from top—for "Treasurer" read *Treasury*.
p. 181, 7th line from bottom—for the second "by" read *to*.
p. 192, 9th line from top—for "demanded" read *demand*.
p. 288, 13th line from bottom—insert the words *of the* before the word "blood."
p. 291, 16th line from top—insert the word *as* before the word "capable," including *as* in the quotation.

All errors in Vol. 64, noted above, have been corrected in the plates from which the bound volume is printed, and consequently appear only in the sheets first issued.