CONNECTICUT REPORTS:

BEING REPORTS OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ERRORS

OF THE

STATE OF CONNECTICUT.

VOL. XLIV.

By JOHN HOOKER.

HARTFORD:
PRESS OF THE CASE, LOCKWOOD & BRAINARD CO.
1878.

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JUDGES

OF THE

SUPREME COURT OF ERRORS

DURING THE TIME OF THE WITHIN DECISIONS.

HON. JOHN DUANE PARK, CHIEF JUSTICE.

HON. ELISHA CARPENTER.

HON. LA FAYETTE SABINE FOSTER.[1]

HON. DWIGHT WHITEFIELD PARDEE.

HON. DWIGHT LOOMIS.

HON. MILES TOBEY GRANGER.[2]

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[1] Resigned in May, 1876, the resignation to take effect November 12, 1876.

[2] Elected by the General Assembly at its May session, 1876, to fill the vacancy made by the resignation of Judge Foster.

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

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ERRATA.

P. 35, First line of head note—for *ch.* 5 read *ch.* 4.
P. 128, Twenty-first line—for GRANGER read FOSTER.
P. 204, Third line from bottom—for *creditor* read *debtor*.
P. 290, Twentieth line—for 283 read 383.
P. 296, Fourteenth line—insert the word *for* between the words *construction* and *which*.
P. 302, Twelfth line—for *R. S. Welles* read *R. Welles*.
Vol. 40, p. 583, Fifth line from bottom—for *affect* read *effect*.
Vol. 40, p. 584, Twelfth line—for *or* read *of*.
Vol. 39, p. 547, Second line—for *and* read *of*.
Vol. 18, p. 98, Eleventh line—for *reversed* read *recovered*.
Vol. 15, p. 381, Third line of head note—the word *principal*, where it occurs the second time in the line, should be *creditor*.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ERRORS

OF THE

STATE OF CONNECTICUT.

NEW HAVEN COUNTY.

APRIL TERM, 1876.

[*Continued from the last volume.*]

Present,

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

CHRISTOPHER C. POST *vs.* GRISWOLD I. GILBERT.

The defendant for a valuable consideration agreed to convey to the plaintiff a city lot, which was at the time liable to an assessment for a street improvement, the amount of which was not then determined, and agreed to pay the amount when determined to the city and save the property from the assessment lien. He soon after conveyed the property to the plaintiff, who entered into possession. The assessment was afterwards made by the city and notice given to the defendant, who refused to pay the same, and the plaintiff afterwards, to save the property from foreclosure upon the lien, paid the amount to the city. Held that the plaintiff could recover the amount of the defendant in assumpsit for money paid, and that it was not necessary for him to sue upon the contract.

It was not essential to the plaintiff's recovery in this form of action that the defendant should have been legally liable to the city for the amount of the assessment and thus should have been relieved by the plaintiff's payment of an obligation legally resting upon him.

It is enough in any such case that the plaintiff has paid the money at the request of the defendant, express or implied.

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And the necessity of making the payment on the part of the plaintiff, and the defendant's leaving him to pay when he had agreed to make the payment himself, constituted such an implied request.

And held that the defendant's agreement to pay the assessment might be proved by parol.

The purpose for which an ordinary deed is made is not to state the contract between the parties in regard to the terms of the purchase, but simply to convey the title, and the real contract in pursuance of which the deed was given may be shown by parol.

ASSUMPSIT for money paid; brought to the Court of Common Pleas of New Haven County, and tried to the court, on the general issue, before *Robinson, J.*

Upon the trial it appeared that the defendant was the owner of certain land on Whalley Avenue in the city of New Haven, and exchanged the same with the plaintiff for certain other real estate; that at the date of the exchange the avenue had been recently repaired, but no assessment had been laid therefor upon the defendant's property; that at the time and as a part of the transaction it was orally agreed by the defendant that if an assessment was laid therefor by the city on the land, he would pay the same himself; that such an assessment was laid upon the land and became a lien thereon on the 11th day of July, 1872, to the amount of $387.81, of which the defendant had notice from the city; that the defendant neglected and refused to pay the assessment, and that the plaintiff, then the owner of the land, being notified by the city that the assessment was laid upon the land, finally himself paid the same with interest, on the 8th day of April, 1874, the whole amount paid being $397.07; which payment was made to save the land from foreclosure and to discharge the lien; and that the defendant has never paid the amount, or any part of it, either to the city or to the plaintiff.

To the evidence offered to show the parol agreement the defendant objected; but the court overruled the objection and admitted the evidence.

Upon these facts the defendant claimed: 1. That the agreement proved did not support the allegations contained in the common count for money paid. 2. That the agreement could not be made a ground of action except in a special

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count. 3. That the contract was a contract of indemnity, and did not support the common counts. 4. That the agreement to be valid must be in writing, either as a contract of indemnity, or as concerning an interest in lands. 5. That the payment by the plaintiff was officious on his part, and not binding on the plaintiff.

These claims the court overruled and rendered judgment for the plaintiff. The defendant moved for a new trial.

L. E. Munson, in support of the motion.

1. The action of assumpsit is either general or special, and is based upon a promise express or implied. If the promise is special, that is, distinct from what the law implies as growing out of the relation of parties to a given transaction, then the action must be special, and it cannot be sustained upon the common counts. General assumpsit is based upon a promise implied by law growing out of the relation of debtor and creditor, and where that relation does not exist the law implies no obligation that the common counts will sustain.

2. The transaction out of which this suit grew was a completed transaction in writing under seal; and whatever related thereto was merged in the deed, and evidence of a parol agreement should not have been received to create or enlarge obligations not merged in, or growing out of, the deed itself. It is conceded that no obligation rests upon the defendant, except what grows out of a special parol agreement, made concurrent with the deed in question, and but for such agreement no action could be maintained.

3. The agreement, as found by the court, was to pay an assessment, if one was already laid, and was to discharge an existing obligation, not a contingent uncertain obligation, which might or might not be created in the future. The court finds that no assessment had then been laid. Consequently there was no consideration for the agreement and no existing obligation to which it could attach. If it was an agreement to pay an assessment which might thereafter be laid upon land of the plaintiff, then it was an agreement con-

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cerning an interest in land, and the statute of frauds required it to be in writing. *Sears* v. *Brink*, 3 Johns., 214.

4. The agreement was in its nature a special contract of indemnity, against a future contingent, uncertain liability, and the common counts will not support such a claim. *Winton* v. *Meeker*, 25 Conn., 456.

5. The plaintiff paid the amount to the city without the knowledge, consent, or request of the defendant, and such payment was officious on the part of the plaintiff. 2 Greenl. Ev., § 107; *Bailey* v. *Bussing*, 28 Conn., 455. To sustain an action on the common counts for money paid, a request by the defendant to pay, or his subsequent assent to the payment, is material to be proved. A moral obligation is not sufficient. 2 Greenl. Ev., § 113. A person paying such a claim without prior request or subsequent assent, cannot by so doing make himself a creditor and the defendant his debtor, so as to lay the foundation of a recovery in assumpsit.

W. L. Bennett, contra, cited, as to assumpsit for money paid being the proper form of action, *Berlin* v. *New Britain*, 9 Conn., 175, 179; *Bailey* v. *Bussing*, 28 id., 455, 462; *Lewis* v. *Campbell*, 8 Man., Gr. & Scott, 541; *Westropp* v. *Solomon*, id., 369; *Brittain* v. *Lloyd*, 14 Mees. & Wels., 762. And as to parol evidence being admissible to prove the agreement, *Collins* v. *Tillou*, 26 Conn., 368; *Baxter* v. *Gay*, 14 id., 122; *Weld* v. *Nichols*, 17 Pick., 538; *Brackett* v. *Evans*, 1 Cush., 79; *Preble* v. *Baldwin*, 6 id., 549; *Jeakes* v. *White*, 6 Exch., 873.

PARDEE, J. In February, 1872, the plaintiff was the owner of a certain piece of real estate which he wished to sell and which the defendant wished to buy. The defendant was then the owner of a piece of land situated on the north side of Whalley Avenue in the city of New Haven, upon which avenue certain public improvements had just been completed, the cost of which the city proposed to assess upon abutting proprietors; but the schedule of assessments not having been completed, the defendant did not then know the precise amount

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of his tax. The parties agreed upon terms; the plaintiff promised to convey his land to the defendant; for this the defendant promised to convey his lot upon Whalley Avenue to the plaintiff, and in addition thereto to pay such sum of money to the city of New Haven as should become necessary to protect this lot from any assessment lien, and to pay it when the city determined the amount. In execution of this agreement deeds of the lots were made, each to the other, by the respective owners, and each took possession under his deed. Five months later the city determined the amount of the assessment, and gave the defendant notice thereof and opportunity to pay it; but he refused to pay any part of it. The city thereupon had recourse to its statutory lien upon the lot and proceeded to enforce it by process of foreclosure; the defendant's refusal to pay compelled the plaintiff to rescue his land from the law by payment of the tax, and now he seeks to recover the amount so paid from the defendant upon the general counts in assumpsit. The defendant denies his right to recover in this form of action.

When the plaintiff had made full performance of his duty under the agreement, and the defendant had accepted the deed and had entered into possession under it, it became his duty to convey his lot and make the money payment to the amount, at the time, and to the person specified in his contract. If his neglect forces the plaintiff to extinguish the lien, then the payment is to be made to him; the law implies a promise on the part of the defendant to do this. He had himself fixed the time, amount and purpose of the payment; his promise was precisely the consideration which induced the plaintiff to part with his land; which induced him to accept a deed of land upon which was the shadow of a coming assessment; by the promise the defendant obtained and retains possession and use of the plaintiff's property for which he has never paid. The law knows no higher form of contract obligation than that which rested upon him to make payment, first to the city, neglecting that, then to the plaintiff.

In *Jenkins* v. *Tucker*, 1 H. Bla., 90, the plaintiff paid money to relieve the defendant's goods from legal distraint in his

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absence and without his knowledge; in *Fisher* v. *Fallows*, 5 Esp., 171, the plaintiff gave a bond for the appearance of the defendant and expended money in pursuing and surrendering him to the court; in *Exall* v. *Partridge*, 8 T. Rep., 308, the plaintiff relieved the defendant's goods from restraint; in *Brown* v. *Hodgson*, 4 Taunton, 189, the plaintiff paid money to indemnify the owner for the loss of goods which the plaintiff, an auctioneer, had by mistake delivered to the defendant, who had appropriated them to his own use; in *Pownal* v. *Ferrand*, 6 Barn. & Cress., 439, the plaintiff being sued as indorsee of a bill of exchange, paid part of the amount to the holder who had recovered judgment against the acceptor, and recovered the amount paid against the defendant, the acceptor, who had paid the remainder of the bill; in *Bleaden* v. *Charles*, 7 Bing., 246, the plaintiff accepted a bill of exchange for the accommodation of one *H*, who deposited it with the defendant as security for goods bought of him, and *H* afterwards paid for the goods, but the defendant refused to restore the bill and indorsed it for value to a third person, who compelled the plaintiff to pay it; the latter recovered the amount of the bill from the defendant on a count for money paid; in *Dawson* v. *Morgan*, 9 Barn. & Cress., 618, the plaintiff had indorsed a note without value for the accommodation of the defendant, and upon payment of the note recovered the amount from the latter for whose benefit he became responsible; in *Bailey* v. *Bussing*, 28 Conn., 455, the plaintiff paid the whole of a joint judgment against himself and two others for the negligence of one and recovered a part of the amount thus paid.

In all these instances the plaintiff recovered the money paid or expended upon the common count.

Mr. Chitty says, (1 Pleading, 350:) "To sustain the common count for money paid by the plaintiff for the defendant's use and at his request, it is essential, *first*, that the plaintiff should have paid money for the defendant, and, *secondly*, that the payment should have been made at the defendant's request, express or implied. * * It is clear however that if money be paid by a person in consequence of a legal liability to which he is subject, but from which a third person ought to

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have relieved him by himself paying the amount, a request will be implied." Mr. Chitty, Jr., in his work on Contracts, p. 594, says: "Thus, where the plaintiff is compelled to make payment of the defendant's legal debt, in consequence of his neglect or omission to discharge it, the law infers that the defendant requested the plaintiff to make the payment for him, and gives the action for money paid." In *Pownal* v. *Ferrand*, supra, Lord Tenterden, C. J., said: "The plaintiff was entitled to recover upon the general principle that one man who is compelled to pay money which another is bound by law to pay is entitled to be reimbursed by the latter; and I think that money paid under such circumstances may be considered as money paid to the use of the person who is so bound to pay it." In the case of *Bleaden* v. *Charles*, supra, the court said that the indorsement was wrongful, and the payment by the plaintiff compulsory, and occasioned by the defendant, and was serviceable to him. In *Jenkins* v. *Tucker*, supra, Lord Loughborough said: "There are many cases of this sort, where a person having paid money which another was under legal obligation to pay, though without his knowledge or consent, may maintain an action to recover back the money so paid." In *Bailey* v. *Bussing*, supra, the court said: "Let us look at some of the cases of assumpsit for money paid and the principle settled by them. Generally, it is sufficient if the money is paid for a reasonable cause and not officiously. * * The views of Chitty in his treatise on Contracts, and of Greenleaf in his treatise on Evidence, are in harmony with this principle, that where the plaintiff shows that either by compulsion of law, or to relieve himself from liability, or to save himself from damage, he has paid money, not officiously, which the defendant ought to have paid, a count in assumpsit for money paid will be supported." In *Berlin* v. *New Britain*, 9 Conn., 179, the court says: "The defendant's assent is always implied where the plaintiff is under a legal obligation to pay money through his default. Such are the cases of sureties, who satisfy a debt; of a person who pays money on a bond or judgment, for the use of a joint obligor; of one who in consequence of the defendant's default has been

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compelled to pay money to relieve his goods from distress; and generally where, from the beneficial nature of the consideration and the circumstances of the case, a request may be implied."

The defendant urges that, inasmuch as between the time when his lot actually received benefits from the completed street improvements and the making up of the schedule of assessments for such benefits by the city, he induced the plaintiff by his promise to take the legal title to the lot and expose himself to the assessment, there was no legal liability from the defendant to the city, and that his liability rested wholly upon his agreement with the plaintiff; and that therefore the payment by the plaintiff was officious and not to his use, and cannot be recovered in this action. This doctrine is supposed to rest, in part at least, upon the case of *Spencer* v. *Parry*, infra.

In *Brittain* v. *Lloyd*, 14 Mees. & Wels., 762, which was an action of assumpsit for money paid for the use of the defendant, the head note is as follows: "That action is maintainable in every case in which the plaintiff has paid money to a third party at the request, express or implied, of the defendant, with an undertaking, express or implied, to repay it; and it is not necessary that the defendant should have been relieved from a liability by the payment." In giving the opinion Pollock, C. B., said: "It was argued by Mr. Humphrey that this form of action could not be maintained, unless the effect of the payment was to relieve the defendant from some liability for the amount to the party to whom payment was made, and that otherwise it could not be paid for the defendant's use; and he relied on the case of *Spencer* v. *Parry*, 3 Adol. & Ell., 331, as an authority for that proposition, and contended that, as the defendant in this case was not made liable to the crown by the act of Parliament, the money was paid to one who had no claim upon her, and therefore not to her use. This proposition however is not warranted by the decision of *Spencer* v. *Parry*, though some expressions in the report of the judgment give a countenance to the argument of the learned counsel; nor can the proposition be maintained; for it is clear

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that if one requests another to pay money for him to a stranger, with an express or implied undertaking to repay it, the amount when paid is a debt due to the party paying from him at whose request it is paid, and may be recovered in a count for money paid; and it is wholly immaterial whether the money is paid in discharge of a debt due to the stranger, or as a loan or gift to him; on which two latter suppositions the defendant is relieved from no liability by the payment. The request to pay, and the payment according to it, constitute the debt; and whether the request be direct, as where the party is expressly desired by the defendant to pay, or indirect, where he is placed by him under a liability to pay, and does pay, makes no difference. If one asks another, instead of paying money for him, to lend him his acceptance for his accommodation, and the acceptor is obliged to pay it, the amount is money paid for the borrower, although the borrower be no party to the bill, nor in any way liable to the person who ultimately receives the amount. The borrower by requesting the acceptor to assume that character which ultimately obliges him to pay, impliedly requests him to pay, and is as much liable to repay as he would be on a direct request to pay money for him with a promise to repay it." In *Hassinger* v. *Solms*, 5 Serg. & Rawle, 9, Tilghman, C. J., said: "Where one man at the request of another becomes responsible to a third person for the payment of money, he may upon making payment recover against the person who requested as for money paid for his use, and that too although the person making the request be not benefited by the payment. In *Harris* v. *Hartback*, 1 Burr., 373, the defendant requested the plaintiff to pay a sum of money to some laborers who were working in the garden of another person; and it was held that the plaintiff might recover as for money *paid for the use of the defendant.*" And another member of the court added that all things necessarily incident to the plaintiff's situation, in which he was placed at the defendant's request, would in contemplation of law be considered as done at his request, and consequently the payment as made at his request.

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The principle established by the foregoing authorities seems to include the defendant's case. By his promise to stand debtor to the city for the tax he obtained a valuable consideration from the plaintiff and induced him to put his property in jeopardy for his, the defendant's, advantage. By the violation of the promise the plaintiff was compelled to redeem that property from the law. As between themselves the defendant is estopped from saying that he was under no obligation to the city; and from saying that the plaintiff's payment was officious and unnecessary.

The defendant also insists that his agreement to stand indebted to the city was one which concerned an interest in lands, and therefore cannot be proved by parol.

But we think the objection is not well taken. The execution, delivery and acceptance of the deeds by the parties in pursuance of the contract, followed by actual possession of the lands under them, satisfy the demands of the statute of frauds; and the recitals of the deeds do not preclude the plaintiff from showing by parol what in fact the contract for payment was; nor from showing non-fulfillment on the part of the defendant. In *Linsley* v. *Lovely*, 26 Vermont, 123, the court says: "The purpose for which a deed is made is not to state the contract between the parties in regard to the terms of the purchase, but to pass the title to the land. The deed is not strictly speaking an agreement between the grantor and grantee. It is executed by the grantor alone, and is a declaration by him addressed to all mankind informing them that he conveys thereby to the grantee the land therein described. The object is to pass the title, not to describe the terms upon which the land had been sold and the mode in which payment was to be made." And in *Collins* v. *Tillou*, 26 Conn., 368, this court held that, notwithstanding the formal statement of consideration and of the receipt thereof contained in the deed, the grantor is at liberty to prove by parol evidence the real contract in pursuance of which the deed was given.

A new trial is not advised.

In this opinion the other judges concurred.

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MATTHEW G. ELLIOTT *vs.* JOSIAH A. WEED.

The defendant conveyed to the plaintiff by warranty deed a tract of land described as bounded "North on F. Street 189 feet, East on land of *P* 147 feet, South on lands of *W* and *P*, in all 189 feet, and West on land of *W* 147 feet." The distance between the land of *P* on the east and that of *W* on the west was only 184 feet. In an action for breach of the defendant's covenant that he was seized of the land described, it was held—

1. That parol evidence was not admissible on the part of the plaintiff, that the defendant, at the time the deed was executed, proposed to describe the north and south lines as "190 feet more or less," and that the plaintiff refused to accept a deed so drawn and told the defendant to fix on such a number of feet as he was willing to warrant, and that the defendant then drew the deed as above.
2. That the description of the land as bounding on *P* on the east and on *W* on the west was to be regarded as one of greater certainty than the description of the north and south lines by their length, and that therefore the former description controlled the latter.
3. That the deed therefore did not show a clear intent to convey exactly 189 feet of land, and that consequently the covenant of seizin was not to be taken as applying to that quantity.

COVENANT, for a breach of the covenant of seizin; brought to the Court of Common Pleas of New Haven County, and tried to the court on the general issue before *Stoddard, J.* The court found the following facts:

One Hitchcock was the owner in 1871 of a large tract of land in the city of New Haven bounding north on Foote street, four hundred and eighty-three feet, and embracing the parcel in question in the present suit. He afterwards sold and conveyed a part of this tract, to the extent of one hundred and ninety-four feet on Foote street; and still later another part, one hundred and four feet and eight inches on Foote street; and finally sold and conveyed all the remainder to the defendant, this conveyance being made prior to August, 1873. On the 6th of August, 1873, the defendant exchanged the part of this tract purchased by him, with the plaintiff, for another tract of land, and executed and delivered to the plaintiff a warranty deed, with the usual covenants of seizin, of the Foote street lot. This deed described the land conveyed as follows: "A certain piece of land situate in the city of New

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Haven, and bounded as follows, viz: northerly on Foote street, one hundred and eighty-nine feet; westerly on land of George W. Goodsell, one hundred and forty-seven feet; southerly, in part by land of F. Wagner, and in part by land of H. P. Hoadley, and now of Edwin Potter, in all one hundred and eighty-nine feet; easterly by land now or formerly of William T. Porter, one hundred and forty-seven feet."

The land was worth at this time about $6,500. The entire tract within the boundaries given was owned by the defendant and legally passed by the deed to the plaintiff, but the north and south lines were in fact only one hundred and eighty-four feet between the adjoining owners on the east and west, and the defendant owned only to the extent of that number of feet.

The plaintiff claimed to recover for the number of feet that the land was deficient upon Foote street, on the ground that the defendant covenanted by his deed that he had good title to the exact quantity of land mentioned in the deed; but the court overruled the claim, and held that, as the defendant had conveyed to the plaintiff a good title to all the land within the boundaries mentioned in the deed, he was not liable for any deficiency of the line upon Foote street.

In the course of the trial the plaintiff offered to show, as explanatory of the intent of the parties, that the defendant at the time of the sale of the land represented to the plaintiff that he had measured and owned in the tract of land one hundred and ninety feet, less two or three inches, and that he proposed to insert in his deed "one hundred and ninety feet more or less on Foote street and on the rear," but that the plaintiff refused to accept a deed with such a clause in it, and told the defendant to embrace definitely in his deed as much land in feet and inches as he was willing to warrant title to and defend, whereupon the defendant fixed the number of front feet at one hundred and eighty-nine, and the plaintiff took the conveyance upon that basis and that alone. The defendant objected to the proof offered, and the court excluded it.

The court having rendered judgment for the defendant, the

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plaintiff moved for a new trial for error in the exclusion of the parol evidence offered, and also brought the record before this court by a motion in error, assigning as error the ruling of the court that the defendant did not covenant in his deed that he was seized of the entire one hundred and eighty-nine feet of land in front and rear.

L. E. Munson, for the plaintiff.

The question before the court was, which description in the deed should control—the quantity definitely fixed at 189 feet, or the invisible and imaginary boundary lines of adjoining proprietors. The rule that known, visible and fixed monuments will control courses and distances, has no application to the case at bar, for none such were referred to in the deed, and none in fact existed on the land. There being, then, no fixed visible monuments to control the quantity, as expressed in the deed, the court must give it effect according to the intent of the parties.

1. The parol evidence offered and excluded by the court, was admissible for the purposes for which it was offered. It was not offered to contradict or vary, but to make certain the terms of the deed according to the intent of the parties, and to show that that intent was consistent with the quantity as expressed in the deed. *Baldwin* v. *Brown*, 16 N. York, 361.

2. A deed is to be so interpreted and construed as to give it effect according to the intent of the parties, and the rule to find the intent is to give effect to those things about which men are least liable to mistake. *Benedict* v. *Gaylord*, 11 Conn., 333; *Nichols* v. *Turney*, 15 id., 101; *Worthington* v. *Hylyer*, 4 Mass., 196; *Davis* v. *Rainsford*, 17 id., 210; *McIver* v. *Walker*, 9 Cranch, 178; *Jackson* v. *Marsh*, 6 Cowen, 282; *Lush* v. *Druse*, 4 Wend., 319; *Clark* v. *Wethey*, 19 id., 320; 1 Greenl. Ev., § 301 and note. The general rule that known and visible monuments will control courses and distances is a rule founded in good sense and is in harmony with the claims of the plaintiff in this suit. Why control? Because they are fixed, visible, certain, as contradistinguished from uncertain, invisible, imaginary lines of adjoining propri-

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ctors. In *Benedict* v. *Gaylord*, 11 Conn., 334, the court say: "The courses and distances and fixed monuments, as described and contained in the deeds, ought to control the more general and indefinite description of the land, viz: that which describes the land as bounding upon the adjoining proprietors. The limits of another's land, referred to generally, without particular description or known and certain boundaries, are descriptions of great uncertainty." The greatest certainty in this deed is the certainty of quantity, definitely fixed at 189 feet, and the least certainty is the uncertain lines of adjoining proprietors resting in vacant land, and undefined by either natural or artificial metes or bounds.

3. A deed should be construed, other things being equal, most strongly against the grantor. *Marshall* v. *Niles*, 8 Conn., 369, 374. The defendant, by inserting in his deed 189 feet as a definite, fixed quantity, front and rear, should be held to have warranted that quantity, and to answer for the deficiency. Judge Bronson, in giving the opinion of the court in *Greenvault* v. *Davis*, 4 Hill, 648, uses this language: "When he inserted the consideration and covenant in his deed, he virtually said that he would stand bound to that extent that the title should not fail. The plaintiff acted upon that assurance and parted with his money; and the defendant should not now be heard to gainsay the admission. It is against good conscience and honest dealing to set up this defense, and the defendant is estopped from doing it."

J. D. Ballou, for the defendant.

1. There being no latent ambiguity in the deed, and this not being a suit to reform the instrument, the plaintiff can not show that the contract was, or should have been, different from its expressed terms.

2. It is well settled, in this state at least, that the covenants in a deed extend only to land embraced within such terms of the description as are of the greater, and therefore controlling certainty, and that the degrees of certainty are as follows, beginning with the highest, viz: 1st. Known and fixed monuments; 2d. Metes and bounds, (nearly synony-

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mous with the first); 3d. Courses and distances; 4th. Expressed quantity. Bouvier Law Dict., *Boundary;* 3 Washb. R. Prop., book 3, ch. 5, sec. 4, arts. 39, 40; *Belden* v. *Seymour*, 8 Conn., 19; *Higley* v. *Bidwell*, 9 id., 451; *Chatham* v. *Brainerd*, 11 id., 85; *Nichols* v. *Turney*, 15 id., 108.

3. One parcel of land itself may be a monument to determine the boundary and limit of another. 3 Washb. R. Prop., book 3, ch. 5, sec. 4, arts. 40, 44; *Belden* v. *Seymour*, 8 Conn., 27, 30; *Nichols* v. *Turney*, 15 id., 104, 109.

CARPENTER, J. The first question in this case arises on the motion for a new trial. The plaintiff, for the purpose of showing that the defendant intended by his deed to warrant that the premises conveyed should measure one hundred and eighty-nine feet on Foote street, offered parol evidence to prove a conversation between the parties at the time of the sale. This evidence was rejected and the plaintiff excepted.

It does not appear that this evidence was offered for the purpose of explaining any latent ambiguity, nor for the purpose of applying the description in the deed to the premises. On the contrary it does appear that it is a bald case of offering parol evidence the only effect of which is to control the legal construction of the deed. For that purpose it was obnoxious to the familiar rule that parol evidence is inadmissible to vary or explain a written instrument. *Benedict* v. *Gaylord*, 11 Conn., 332.

The remaining question arises on the motion in error.

The defendant conveyed to the plaintiff a piece of land describing it as follows: bounding "northerly on Foote street, one hundred and eighty-nine feet; westerly on land of George W. Goodsell, one hundred and forty-seven feet; southerly, in part by land of F. Wagner, and in part by land of H. P. Hoadly, and now of Edwin Potter, in all one hundred and eighty-nine feet; easterly by land now or formerly of William T. Porter, one hundred and forty-seven feet."

The court found that the defendant, at the time he gave the deed, owned one hundred and eighty-four feet only on Foote

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street; and held that, inasmuch as his title to that was good, and was conveyed to the plaintiff, the fact that he did not own and convey to the plaintiff one hundred and eighty-nine feet constituted no breach of his covenants.

The court manifestly regarded that part of the description referring to the adjoining proprietors as controlling the length of lines and the quantity of land. In this we are inclined to think there was no error. The principle that governs this class of cases is that the greater certainty must prevail. Consequently where there are two or more conflicting descriptions in a deed, preference is given to that which is most certain. Hence known and fixed monuments will control courses and distances, and metes and bounds will control quantity, unless the deed shows a clear intent to give a definite quantity. *Nichols* v. *Turney*, 15 Conn., 101.

In the case before us the boundaries are given by naming the street and the owners of the land on the different sides. Then the length of line on each of the four sides is given, and it turns out that within the given boundaries the length of line on Foote street falls short five feet. The only element of certainty about that line is its length. The two ends of the line are uncertain and can only be determined by ascertaining the line of the adjoining proprietors on the east and on the west. When that is done the line on Foote street can be definitely located. Its places of beginning and ending are fixed and certain, and must control the length of the line. It is manifest that the defendant intended to convey all the land he owned within those boundaries *and no more;* so that if the quantity of land had exceeded that indicated by the deed the plaintiff would have taken the whole.

The deed therefore does not show a clear intent to sell exactly one hundred and eighty-nine feet of land.

There is no error in the judgment and the plaintiff is not entitled to a new trial.

In this opinion the other judges concurred.

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JOHN P. PHILLIPS *vs.* THE TOWN OF EAST HAVEN AND CITY OF NEW HAVEN.

By an act of the legislature the city of *N. H.* and town of *E. H.* were required at their joint expense to build and maintain a bridge over a river that was the boundary between them, the location and manner of construction to be determined by a board of commissioners, each to pay all damages for land taken on its own side for the bridge or for highways connected with it, and each to provide all necessary and convenient highways within its own limits to connect the bridge with existing highways; the bridge to be suitable and convenient for public travel and to be a public highway. A high embankment was necessary to make the bridge accessible, but a much longer one on the side of the city than on that of the town. Held that the bridge, as intended by the act, did not include the embankments necessary for access to it, but that each corporation was to make the embankment on its own side.

BILL IN EQUITY, praying for the appointment of commissioners to complete a bridge which by an act of the General Assembly the respondent city and town were required to build; brought to the Superior Court in New Haven County. The following facts were found by the court:

The General Assembly, at its session in 1872, passed an act, the parts of which material to the present case, are as follows:

"SEC. 1. The city of New Haven and the town of East Haven are hereby authorized and directed to build and maintain a bridge over the Quinnipiac River, suitable and convenient for the accommodation of public travel, having therein a draw not less than seventy feet in width, from some point between a point at or near the southerly end of Blatchley Avenue in the city of New Haven and a point at or near the easterly line of South Front street, one hundred feet northerly from the wharf of Alfred Thomas in said city, to some convenient point on the opposite or easterly bank of said river, in the town of East Haven, which bridge when completed shall be a public highway. The expense of building and maintaining said bridge shall be borne and paid by said city and town in equal parts. * * * *

"SEC. 2. For the purpose of aiding in carrying this act

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into effect there shall be appointed a board of seven bridge commissioners. * * * * * *

"SEC. 3. It shall be the duty of said commissioners to locate said bridge, and to direct in regard to the materials and manner of its construction and to superintend the same. * * * * * * * *

"SEC. 5. If said city and town, or either of them, shall, without good and sufficient cause, neglect to begin the construction of said bridge on or before the first Monday of August, 1873, or to reasonably prosecute the same to its completion, or to lay out and construct highways as hereinafter provided, the Superior Court for New Haven County shall, upon the application of any citizen or tax-payer therein, and after reasonable notice is given to such negligent city or town, appoint not less than three competent and disinterested commissioners to build or complete said bridge and to lay out and construct said highways; * * * *

"SEC. 6. Said city and town shall each, upon the completion of said bridge, and without unnecessary delay thereafter, cause to be laid out and constructed and opened for public travel, necessary or convenient highways, within its limits respectively, from said bridge to highways now existing, and to highways, if any, which have been laid out, but which are not yet opened for public travel."

An act passed in 1874 gave the city certain further powers with regard to the laying out of the highways required by the foregoing act.

Pursuant to the first mentioned act a board of seven bridge commissioners was duly chosen and qualified, and still hold office. This board, in 1873, located a bridge within the limits prescribed in the act, and under their direction and superintendence a bridge has been constructed across the Quinnipiac River. The bridge is four hundred and forty feet long, resting on five piers, each rising fifteen feet above high-water mark. The pier nearest the New Haven side of the river is on the edge of Maltby's wharf, and rises twelve feet above the same; the pier nearest the East Haven side of the river was located in the river, fifteen feet above high-water mark.

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The southerly end of Blatchley Avenue is the water line of the Quinnipiac River, and the easterly line of South Front street is within one hundred feet of the river, at a point a hundred feet northerly of Thomas's wharf. The bridge, so constructed, was substantially finished on or about September 1st, 1875. The board did not construct, or take any steps to construct, nor does it propose to construct, any approaches to the bridge, but has left it inaccessible to travel for want of any highway connections with either bank of the river, because they deem their duty to extend only to the location and superintendence of the construction of the bridge proper.

The town of East Haven construed these acts as imposing upon it the duty of constructing suitable highway approaches to the bridge on the East Haven side, at its own exclusive cost, and as imposing a similar duty on the city of New Haven as respects the New Haven side; and in conformity to such construction went forward in the month of June, 1875, purchased land for approaches, and built approaches to the bridge of a suitable and convenient character. These approaches connect with the bridge by means of an embankment fifteen feet high at the point of connection above the river, and sloping down by a suitable grade for a distance of a hundred and seventy-seven feet to a highway leading to the village centre. This approach cost about $10,000, of which $9,000 has been paid by East Haven, and about $1,000 more is due from the town on the same account.

East Haven did not consult New Haven in reference to the construction of this approach, and no communication has ever passed between the town and city relative to the duty of either as respects the construction of approaches to the bridge, nor did New Haven object to the construction by East Haven of its approach.

East Haven claims that New Haven ought to go forward and construct proper approaches on the New Haven side, at the sole expense of the city, and the city is ready to do its duty in the matter, whenever the same is judicially declared, but has declined to build any approach until the matter is so determined. The necessary approaches on the New Haven side

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would involve an embankment twelve feet high at the point of connection with the bridge proper, and three hundred and twenty-five feet long, at a grade of three and a half feet to the hundred feet, which is the grade adopted on the East Haven side, and a suitable one for the purpose.

The allegations in the petition respecting the petitioner's ownership of land, and the damages thereto by reason of the present inaccessibility of the bridge, and that he is a citizen and tax-payer of New Haven, are true.

The city of New Haven claims that the word "bridge," as used in the act, means the superstructure, with proper and suitable approaches connecting the same with either bank, and the petitioner thereupon claims that, inasmuch as the board of bridge commissioners and the city and town neglect and do not propose to build these approaches, they do not reasonably prosecute the bridge to its completion with good and sufficient cause, within the meaning and intent of the act. There has been no neglect "to reasonably prosecute the construction of said bridge," or "to lay out and construct highways" for use in connection therewith, on the part of either the town or the city, unless such neglect is disclosed by the facts above stated.

The city is willing to reimburse East Haven for half the expense of constructing the East Haven approach (exclusive of cost of land,) provided East Haven will join the city in paying for the New Haven approach (exclusive of cost of land,) and provided the same is built under the direction of the board of bridge commissioners.

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

J. P. Phillips and *S. L. Bronson*, for the petitioner and for the City of New Haven, contended that the term "bridge," as used in the act, included the embankments on both sides necessary to make the bridge accessible; citing Wharton's Lex., *Bridge;* Angell on Highw., §§ 40, 65, 67; *Tolland* v. *Willington*, 26 Conn., 582; *Burritt* v. *City of New Haven*, 42 Conn., 174; *The King* v. *West Riding of York*, 7 East,

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588, 599; *West Riding of York* v. *The King*, 5 Taunt., 284; *Freeholders of Sussex* v. *Strader*, 3 Harrison, 108; *Bardwell* v. *Town of Jamaica*, 15 Verm., 438; *Parker* v. *Boston & Maine R. R. Co.*, 3 Cush., 116.

S. E. Baldwin, for the Town of East Haven, contended that the embankments were not included as a part of the bridge, and that the city of New Haven was bound to make the embankment on its side of the river at its sole expense; citing *Tolland* v. *Willington*, 26 Conn., 578, and *City of New Haven* v. *N. York & N. Haven R. R. Co.*, 39 id., 128.

LOOMIS, J. The legislature by a special act passed in 1872, authorized and directed the City of New Haven and the Town of East Haven to build and maintain a bridge over the Quinnipiac River at their joint and equal expense; but the land damages and the expense of constructing and maintaining necessary highways to connect with the bridge within the limits of each were to be paid for by each severally. Special Acts of 1872, page 209.

The board of bridge commissioners, appointed pursuant to the act, located the bridge within the prescribed limits, and under their direction and superintendence a bridge has been constructed over said river; but the board deeming their duty to extend only to the location and construction of the bridge proper, left the same inaccessible to travel for want of highway connections with the same at either bank of the river. East Haven has however at its own expense built a suitable and convenient approach to the bridge at its east end by means of an embankment fifteen feet high at the point of connection with the bridge, and sloping down by a suitable grade for a distance of one hundred and seventy-seven feet, to a highway leading to the village centre, and claims that New Haven ought to go forward and construct, at its own expense, proper approaches on its side, which it is found would require an embankment twelve feet high at the point of connection with the bridge proper, and three hundred and twenty-five feet long, at a grade of three and a half feet to

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the hundred feet, which is the grade adopted on the East Haven side and is a suitable one for the purpose. But the City of New Haven refuses to do so, claiming that the word "bridge" as used in the act means the superstructure together with proper and suitable approaches to make the bridge accessible, and that the board of bridge commissioners ought to have caused the same to be built at the joint expense of the city and town.

The question therefore is, whether the approaches above described are component parts of the bridge itself, to be built jointly, or whether they belong to the highway connections, to be built by the city and town respectively within their own limits.

The word "bridge," when used in a statute, may or may not include its approaches, according to the context and the circumstances of each case.

The case of *Tolland* v. *Willington*, 26 Conn., 578, cited in behalf of the petitioner as sustaining the proposition "that the work of a bridge under the statute requiring towns to make necessary bridges includes whatever is necessary to make it accessible," fails to sustain the claim of the petitioner in that unqualified manner; on the contrary, ELLSWORTH, J., in giving the opinion on page 582, says: "The judge has drawn an inference that Willington is jointly bound with Tolland to maintain this railing. We are not satisfied that he has therein committed an error, for it may be that this abutment is part of the bridge. We cannot say, as matter of law, how this is. We cannot decide, as matter of law, what is bridge or what is abutment—where one begins and the other ends, or what is mere highway. It is more a question of fact than of law, and may be sometimes a very nice and difficult one. If a bridge is considered to be a pathway for travelling over a stream of water, or if the work of a bridge includes whatever is necessary to make it accessible, as we think is intended by the statute respecting bridges, when it requires towns to maintain necessary bridges, the abutments may be part of a bridge. At any rate, these towns have so treated this structure, whether of earth, wood or stone, which

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occupies this space of a hundred and fifty feet. At first it was all wood; it may become so again, for the stream is unchanged, except that the abutments confine it to a narower and deeper channel. The towns could well agree to fill out the work in a permanent form from the shores, if they thought it wise and best." It is quite obvious that this case was mainly controlled by the fact that the town of Willington had repeatedly and for many years recognized its joint obligation with Tolland, as covering the identical place where the injury occurred.

It is found that the space of a hundred and fifty feet occupied by the river was at first spanned by a superstructure of wood, which was afterwards carried away by a flood, and the bridge was then rebuilt by the joint action of both towns, and in rebuilding it was thought best to fill a portion of this space covered by the first bridge, solid with earth, gravel and stone, which was done, and afterwards the space was still further reduced by the towns in the same manner, until at the time in question it was only sixty-five feet, instead of a hundred and fifty feet.

In the case of *City of New Haven* v. *New York & New Haven R. R. Co.*, 39 Conn., 128, the question was as to the meaning of the word "bridge" as used in the thirty-third section of the city charter, where it is provided that the court of common council shall have supervision over all bridges crossing railroads in said city," and the court, SEYMOUR, J., giving the opinion, said: "The word 'bridge' may in certain connections be so used as to include embankments and approaches, but in this thirty-third section of the city charter we think the word is restricted to the bridge proper, to the exclusion of embankments, filling and approaches, unless indeed perhaps the immediate approaches may be included as part of the bridge proper itself."

These authorities will suffice to show that this 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.

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On the part of the petitioner, the argument upon the construction of the act drawn from the language used, seems to be based upon the following expressions:—that the bridge to be built shall be "suitable and convenient for public travel;" that it shall be "when completed a public highway;" and that "the commissioners shall hold their office until the bridge is completed and opened for public travel;" all going to show, as the petitioner claims, that an accessible bridge, and not merely a superstructure, was contemplated.

Undoubtedly the act contemplates an accessible structure. The object was to accommodate public travel between the city and the town over this bridge. All this must be at once conceded, and yet the argument falls short of its object, because it fails to discriminate as to the means provided in the act whereby the bridge becomes or may become accessible. It assumes that it must be by the joint action or at the joint expense of the city and town, or not at all.

The act we are construing is not one prescribing a joint duty only, but a several duty in addition. The joint duty is to build a bridge over the Quinnipiac River. The several duty is that each must pay the land damages and provide connecting highways within its own limits. And it requires the fulfilment of both these duties to accomplish the object contemplated by the act, to wit, the accommodation of public travel.

Taking into view these two features of the act, and considering its whole tenor, we hold that it was only the bridge proper, irrespective of its highway approaches, that was to be built at the joint expense of the town and city.

Other considerations also confirm this view. In the first place, the limits fixed by the act for the termini of the bridge seem to border too closely on the river to allow as a part of the bridge such very extended approaches as is claimed. Section first refers to the structure as "a bridge *over* the Quinnipiac River," and requires it to be built "from some point between, at or near, the southerly end of Blatchley Avenue in the city of New Haven, and some point at or near a point in the easterly line of South Front street, one hundred feet northerly of the wharf of Alfred Thomas in said city, to some

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convenient point on the opposite or easterly bank of said river, in the town of East Haven." As to the terminus on the New Haven side, it is found that the southerly end of Blatchley Avenue is the water line of the Quinnipiac River, and the easterly line of South Front street is within a hundred feet of the river, at a point a hundred feet northerly of Thomas's wharf. Then as to the terminus on the East Haven side, it is "the bank of the river," not a point a hundred and seventy feet from the river. If the approaches were contemplated as a part of the bridge it could not have been located wholly within the limits prescribed.

And if these approaches were to be a part of the bridge, it is difficult to account for the prominence given in the original act, and also in another special act passed in 1874, (see Special Acts of that year, page 156,) to the duty of the towns severally to provide connecting highways with the bridge. There was no highway needed on the East Haven side, for the approach terminated in an existing highway; and in the city at the end of three hundred and twenty-five feet it would seem there could scarcely be any need of one. And yet it was so important that, after the bridge was located, and the building of it had been commenced, the duty was further enforced by the act of 1874.

Again, it seems to us that if it was contemplated that the bridge should be considered as including these overland approaches, the land damages would naturally have been included in the joint expense, as well as any part. It is said however by the petitioner, that this provision for land damages indicates that the legislature contemplated that the bridge must be connected with the land in some way, otherwise there would have been no land damage in constructing or on account of the bridge; but the landward abutments would naturally be expected to touch the shore at some point above the water line, so as to call for land damages, and hence the act provided that it should be paid by the town within whose limits it might be occasioned. And it would seem quite significant that the same rule was prescribed in this respect as in case of

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connecting highways, and that the two things are in such immediate connection in the act.

The superstructure over the river, and the landward abutments at either terminus, must be paid for jointly, but the instant the land is reached within the limits of the city or town, the rule changes, and the act imposes all such expenses on such city or town exclusively. It seems far more just and natural that these long highway approaches should be owned and controlled by the municipality that owns the land. On the part of the city what is thus expended can, under its charter and the act of 1874, be assessed as benefits on its citizens. It will also be far better to have these approaches under the same custody and control that the contiguous territory is under. Many practical inconveniences would result from a joint jurisdiction to be continued forever.

If the city could, so to speak, reach its arm over into the town, and the town into the city, the desires and wishes of each in regard to the mode and style of repairs would be likely to be thwarted. The long approach of three hundred and twenty-five feet, on the New Haven side, will doubtless soon become a city street. It would be very annoying if it could not be made homogeneous with connecting streets as to appearance and improvements. Questions as to paving, sewering, lighting, and laying side-walks, will surely arise, which the city and town authorities respectively would hardly be able to agree upon, and yet the act provides no umpire to settle such questions. The board of bridge commissioners will have become *functi officio* as soon as the bridge is completed and open to public travel.

For these reasons we accept as correct the construction of the act adopted by the bridge commissioners and the town of East Haven, and reject that urged in behalf of the petitioner and the city of New Haven, and we advise that the petition be dismissed.

In this opinion the other judges concurred.

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JOSEPH BELL *vs.* CHAUNCEY AYRES.

The statute (Gen. Statutes, tit. 19, ch. 5, sec. 13,) provides that any judge holding the Superior Court or a Court of Common Pleas, may, if in his opinion justice requires it, order any civil cause which has been put to the jury, to be transferred to the same court in any other county. Held—

1. That such a cause could be transferred after a trial by jury and a disagreement.
2. That it is not necessary that issue should be joined to the jury of the county to which the case is transferred, but it is sufficient if the issue has once been joined to the jury generally.
3. That the record need not show the reasons why the case is transferred.

By the act of 1875, in a suit upon a contract in a court whose jurisdiction is limited in amount, judgment may be rendered for interest accruing after the commencement of the suit, although the judgment shall be made thereby to exceed the limit of the jurisdiction and the demand in the writ. A cause had been pending for three years in a court whose jurisdiction was limited to $500, and judgment was rendered for $527.75. Held that the excess being manifestly less than the interest would have been, this court would regard it as made up of accrued interest.

ASSUMPSIT for goods sold; brought to the Court of Common Pleas of Fairfield County, and by order of the court transferred, under the provisions of the statute, (Gen. Statutes, p. 415, sec. 13,) to the Court of Common Pleas of New Haven County, and tried to the jury in that court before *Robinson, J.* Verdict for the plaintiff and motion in error by the defendant. The case is sufficiently stated in the opinion.

J. H. Olmstead, for the plaintiff in error.

H. Stoddard, for the defendant in error.

CARPENTER, J. This case was tried three times before a jury of Fairfield County, and on each trial the jury failed to agree. Subsequently, on motion of the plaintiff, the case was transferred to the Court of Common Pleas for New Haven County, where a trial was had and a verdict obtained. Before verdict the defendant moved that the cause be erased from the docket. That motion was denied; and the question thereby raised, with the other questions stated on the record, is brought before this court by a motion in error.

1. It is objected that the proceedings in this county are

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void, for the reason that under the circumstances the statute did not authorize the removal of the cause from Fairfield County. The claim is that it could not be legally removed after the parties had joined issue, and especially after a trial to the jury. We do not perceive the force of this objection. The statute authorizes "any civil cause which has been put to the jury" to be removed. The language of the statute clearly contemplates cases in which the issue has been joined. There is no limitation in respect to time. At any time while the suit is pending, if, in the opinion of the court, the cause of justice requires it, it may be removed.

2. The next error assigned is, that the issue was not joined to the jury of New Haven County. The issue was joined to the jury generally, and the case properly stood to the jury in any court which had jurisdiction of the cause.

3. The third error assigned is, that the record does not show the reasons why the cause of justice required the transfer from Fairfield to New Haven County. The law does not contemplate a statement of facts, a traverse, a hearing, and a finding. The motion to a great extent is based upon facts which are open and notorious. The statute authorizes the judge to remove the cause, "if, *in his opinion*, the cause of justice requires it." It is therefore left to the sound discretion of the court, and is not the subject of revision by this court.

4. The last error assigned is that the verdict and judgment were for a sum greater than $500, while that is the limit of the jurisdiction of the Court of Common Pleas in Fairfield County. The statute of 1875, (Session Laws, page 28,) authorized the court to render judgment for interest accruing after the commencement of the suit, in addition to the amount to which their jurisdiction would be otherwise limited, and in excess of the amount demanded in the writ. That statute clearly covers this case. The cause had been pending about three years. The excess is $27.75, manifestly much less than the interest accruing during the pendency of the suit.

There is no error in the judgment.

In this opinion the other judges concurred.

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CHARLES BALDWIN'S APPEAL FROM PROBATE.

Upon an appeal from a probate decree disallowing a will, the question being whether the testatrix was of sound mind, the party upholding the will was allowed by the court, against objection taken, to read to the jury from books cases decided in other states and in England, for the purpose of showing that the facts set forth in such cases were not inconsistent with the soundness of mind necessary to the making of a valid will. Held to be error, and a ground for granting a new trial.

APPEAL from a decree of a probate court disallowing the will of Sarah Baldwin; taken to the Superior Court in New Haven County. The appellant was a devisee and legatee under the will. The case was tried to the jury, on the issue of the soundness or unsoundness of the mind of the testatrix, before *Sanford, J.*

After the evidence on both sides had been introduced, one of the counsel for the appellant, while making the opening argument, proposed to read to the jury from the decisions of courts in this country and in England, where wills had been sustained notwithstanding the objections which had been made to them, founded upon the alleged testamentary incapacity of their makers, for the purpose of showing that the facts set forth in such cases were not inconsistent with the legal signification of soundness of mind, as applied to the making of wills. The counsel for the appellee objected to such reading, on the ground that it would divert the attention of the jury from the case on trial, and that the jury had no right to be influenced by what other courts or juries had done or decided in any other case. The court overruled the objection, and allowed the cases to be read.

The jury having returned a verdict for the appellant, sustaining the will, the appellee moved for a new trial for error in the above ruling of the court. Other questions were made, which it is not necessary to state, as they were not considered by the court.

C. Ives, in support of the motion.

1. These cases were allowed to be read to the jury, (so

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far as counsel for the appellant deemed it expedient or beneficial to his client to read them,) for the purpose of informing the jury what our law is in regard to testamentary capacity, and of assuring them by means of these cases, and especially by the aid of *Lee* v. *Lee*, 4 McCord, 183, that in Connecticut the law is so that one of more unsound mind than most of the patients in our asylums for the insane may make a valid disposition of his estate by will. Such cases, and the question of law in regard to testamentary capacity, are exclusively for the court. The jury have nothing to do with them.

2. But if it shall be claimed that the appellant's counsel read from these cases for the purpose of aiding the jury in coming to a conclusion in regard to the fact in issue, the objection to the reading will apply with increased force, for the jury had no right to consider any facts not proved and established by the testimony of sworn witnesses legitimately introduced before them. They had no right to be influenced by what other courts and juries may have decided in other cases in other jurisdictions.

3. If it shall be claimed that the question of mental capacity was one of law and fact combined, the objection to reading books to the jury still remains, for the jury should get all their law from the court, and all the facts from sworn testimony produced upon the trial. *Commonwealth* v. *Wilson*, 1 Gray, 337; *Washburn* v. *Cuddihy*, 8 id., 430; *Ashworth* v. *Kittridge*, 12 Cush., 194; *Phœnix Ins. Co.* v. *Allen*, 11 Mich., 501; *People* v. *Anderson*, 44 Cal., 65; *Carter* v. *The State*, 2 Carter (Ind.), 617; *Darby* v. *Ouseley*, 36 Eng. L. & Eq. R., 526; 1 Redf. on Wills, 141; 2 Greenl. Ev., § 440.

T. E. Doolittle and *W. C. Robinson*, contra.

There was no error in permitting counsel to read in his argument to the jury from decided cases. The question was —Was the testatrix of sound and disposing mind? This was a question partly of law, partly of fact. What mental capacity constitutes a sound and disposing mind is a question of law. Whether the testatrix had that mental capacity is a question of fact. It was claimed by the appellee that the

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testatrix was peculiar in her speech and habits, and that this peculiarity proved such want of mental capacity as was inconsistent with a sound and disposing mind. The appellant admitted the existence of some of these peculiarities and denied others, and claimed that whatever mental incapacity they indicated was not inconsistent with a sound and disposing mind. In arguing the cause in the presence of the court and jury, upon the question as to what degree of mental capacity is legally sufficient to constitute a sound mind, counsel cited several cases, among which were *Dunham's Appeal from Probate*, 27 Conn., 192, *Banks* v. *Goodfellow*, Law Reps. 5 Queen's Bench Cases, 549, and *Lee* v. *Lee*, 4 McCord, 183. From the two latter cases counsel read at length. These were both motions for a new trial for a verdict against evidence, on the ground that the mental incapacity shown by the evidence was inconsistent with a sound and disposing mind. In the first case, the Court of Queen's Bench held that insane delusions, if not connected with the subject of testamentary disposition, are not inconsistent with a sound mind. In the South Carolina case, the court held that an eccentric disposition and a belief in witchcraft, were not inconsistent with a sound and disposing mind. It was as proper and necessary to read authorities of this kind upon a question of insanity as upon any other question of mixed law and fact, such as negligence. This very case in McCord, is cited in Redfield's Leading Cases on Wills, 271, as a decisive authority on the legal question as to the compatibility of great eccentricity with a sound mind. The objection of the appellee was taken, not to what was actually read, or to the reading of the cases in the presence of the jury, but to the reading of any cases whatever, for the purpose aforesaid. He must stand on his objection as made, and unless he has been wrongfully injured by the diverting of the attention of the jury, or by the jury being illegally influenced by what other courts or juries had done, he has no ground of error.

CARPENTER, J. On one point in this case we feel constrained to grant a new trial. Some of the other questions

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discussed are not free from doubt; but in respect to them we express no opinion, as they will not necessarily arise upon another trial.

The counsel for the appellant were permitted, against the objection of the appellee, to read to the jury, from books, cases decided in other states and in England, "for the purpose," as it is stated in the motion, "of showing that the facts as set forth in such cases were not inconsistent with the legal signification of 'soundness of mind,' as applied to the making of wills."

The duties of the court and of the jury in the trial of civil causes are distinct and clearly defined. It is the duty of the court to declare the law to the jury; and that carries with it a corresponding obligation on the part of the jury to receive the law only from the court. They have no right to receive the law from books, nor from counsel, nor are they permitted to act upon their own notions of law, but the law as laid down by the court is to be the law of the case for them.

It is also the duty of the court to decide what evidence may and what may not go to the jury; and the law declares that all evidence submitted to the jury shall be under the sanction of an oath. It is the duty of the jury therefore to hear and consider only such evidence as the court permits to be given, and such only as is under oath.

Whether the matter read to the jury be regarded as matter of law, as a statement of facts, or as a mixture of law and fact, it is equally objectionable. If as matter of law, then the jury were receiving the law, which was to guide their deliberations, from an unauthorized and dangerous source. If as matter of fact, then the jury were listening to evidence which was not only irrelevant, and could have no legitimate bearing upon the question before them, but it was admitted after the evidence was closed and the argument commenced, and without any legal sanction whatever, not even being subjected to the test of a cross-examination. If regarded as a mixture of law and fact, then all the objections which may be urged against it when viewed as law or fact, apply in full force. In whatever aspect viewed its tendency was bad, diverting the

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minds of the jury from the real question they were to try, and the legitimate and proper evidence in the case.

This is not the ordinary case of reading an authority to the court upon a question of law in the presence of the jury, as the counsel for the appellant seems to intimate. The motion shows that it was proposed to read the cases *to the jury*. The reading was objected to "on the ground that it would divert the attention of the jury from the case on trial, and that the jury had no right to be influenced by what other courts or juries had done or decided in any other case." The court, in overruling this objection, must have caused the jury to understand that it was proper for them to consider the facts stated in those cases, and the action of the courts and juries thereon, in connection with the evidence in this case in making up their verdict, and they may have been, and probably were, influenced thereby. Whatever effect they had, whether much or little, was improper and tended to prejudice the appellee.

The view we take of this question is in harmony with the law as laid down elsewhere. *Ashworth* v. *Kittridge*, 12 Cush., 193; *Commonwealth* v. *Wilson*, 3 Gray, 337; *Washburn* v. *Cuddihy*, 8 Gray, 430; *Phœnix Ins. Co.* v. *Allen*, 11 Mich., 501; *People* v. *Anderson*, 44 Cal., 65; *Carter* v. *The State*, 2 Carter's Ind. R., 617.

We advise a new trial.

In this opinion the other judges concurred.

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EDWARD MALLEY *vs.* MAX THALHEIMER.

M gave *B* a power of attorney to lease his real estate, collect rents, and institute all legal proceedings that he should think necessary. Under this power *B* had the care of certain premises leased by *M* to *T*, the lease limiting the use to the keeping of a lager beer saloon, and the lessee covenanting to use the premises for no other purpose. During the term *T* at considerable expense built a small kitchen in the rear, and fitted up a restaurant on the premises. *B* knew of his expending money in the alteration and made no objection until

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two months afterwards. *M* afterwards brought a petition for an injunction to stop the use of the premises by *T* for a restaurant. Held—1. That if *M* personally had known of the outlay being made by *T* and had made no objection, he would be held to have assented to the new use of the premises. 2. That *B* under the power of attorney so far represented *M* that his knowledge and acquiescence were the knowledge and acquiescence of *M*.

PETITION for an injunction, to restrain the respondent from making certain use of leased premises in violation of the terms of the lease; brought to the Superior Court in New Haven County. Facts found by a committee and petition dismissed by *Sanford, J.* Motion in error by the petitioner. The case is sufficiently stated in the opinion.

S. L. Bronson, for the petitioner.

J. T. Platt and *C. R. Whedon*, for the respondent.

PARK, C. J. The plaintiff gave to one Brown a power of attorney, in which, among other things, authority was given "to lease any and all my real estate, to collect rents, to institute and prosecute to final judgment and execution all process in law or in equity that may in his judgment be necessary; * * and generally to do and perform all such acts, matters and things as my said attorney shall deem necessary or expedient for the complete and effectual execution of the authority before granted, as fully as I might and could if I were personally present."

It appears that two adjoining stores belonging to the plaintiff, and of which Brown, as the plaintiff's agent, had under this power of attorney the care, had been leased by the plaintiff to the respondent, to be used as a beer bottling establishment and lager beer saloon, and for no other purpose, and that in the summer of 1875, during the term of the lease, the respondent fitted up a small kitchen in the rear of one of the stores, and opened a restaurant upon the premises, advertising that he would furnish game and oysters to his customers. The work was completed on the 18th of September, and in it he had expended from four to five hundred dollars. The case finds that Brown knew of the alterations and expenditure

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while they were being made, and that the place was being fitted up for a restaurant on a small scale; and that he knew also of the advertisement and of the carrying on the business, but it was not till the month of November following that he made any objection. It is clear that if the plaintiff had been present all this time, as Brown was, and had seen and known all that Brown saw and knew, and had made no objection to the respondent's new business till so late a time, he would be regarded as having waived all objection to the business. This is too plain for argument, and the only question is, whether Brown represented the plaintiff, so that in contemplation of law the plaintiff was present, and saw and knew what was transpiring, on the principle *qui facit per alium, facit per se.* The power of attorney must settle this question.

We think it is clear that Brown had ample authority to act for the plaintiff in the matter. He was entrusted with the bringing of all suits in law or equity regarding these premises, which he should deem necessary for the interest of the plaintiff. As applied to this case he was to act, or refrain from acting, as he should deem it expedient, if the respondent should forfeit his lease by doing the acts complained of in this case. We think the remarks of Kerr, in his work on Injunctions, peculiarly applicable to the case. He says (page 496): "A covenantee who, seeing a covenantor spend money upon property in doing acts which are inconsistent with the terms of the covenant, but upon the faith that no obstacles will be afterwards thrown in the way of his enjoyment, stands by and makes no objection while moneys are being expended, or whose acts have been inconsistent with the covenant, or who has acquiesced in the doing of acts which are inconsistent with it, cannot come to a court of equity to have the contract or covenant enforced."

There is no error in the judgment complained of.

In this opinion the other judges concurred.

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DAVID ARMSTRONG AND ANOTHER *vs.* RUEL P. COWLES AND OTHERS.

The statute with regard to joint stock corporations (Gen. Statutes, tit. 17, ch. 2, part 8, art. 4, sec. 3,) provides that the officers of such a corporation who shall intentionally neglect to perform any of the duties required by the act, shall be jointly and severally liable for all its debts contracted during the time of such neglect. The defendants were directors of such a corporation and had made themselves liable to its creditors under this act. The plaintiffs had a claim against a creditor of the corporation, on which they brought suit and factorized the corporation, and afterwards obtained judgment against the corporation upon a scire facias. The judgment not being paid, they brought an action under the statute against the defendants, upon their personal liability for the debt attached. Held—

1. That the indebtedness of the corporation upon the judgment in scire facias was not a "debt contracted" by the corporation within the meaning of the statute.
2. That the rights of the plaintiffs' original debtor against the defendants did not constitute a claim which the plaintiffs could enforce by an action at law.
3. That if those rights constituted a "security" for the debt attached, to the benefit of which the plaintiffs became entitled under the provisions of the act of 1850, (Gen. Statutes, tit. 19, ch. 2, sec. 37,) yet that the benefit of this security could be obtained only by a proceeding in which all the equities between the original debtor and the defendants could be adjusted.

ACTION upon the statute (Gen. Statutes, p. 314, sec. 3,) to enforce a personal liability of the defendants as directors of a joint-stock corporation for a debt of the company; brought to the Court of Common Pleas of New Haven County, and tried to the court upon the general issue before *Robinson, J.*

Upon the trial the plaintiffs claimed, and offered evidence to prove, that the New England Gas Carbonizing Company was organized under the provisions of the act in reference to joint stock companies, on the 19th of November, 1872, and commenced business on the 9th of December, 1872; that the defendants were directors from the time of the organization of the company, and still continued such; that they intentionally failed to file their certificate of the organization of the company, as required by statute, with the secretary of the state, and with the town clerk of the town within which the company was located, from the 19th day of November, 1872,

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to the 22d day of June, 1874; that on the 15th day of January, 1873, the company became indebted to one Samuel Whitney in the sum of $1,000 for a patent-right bought of him by the company, and for services rendered by him to the company; that at that time Whitney was indebted to the plaintiffs in the sum of $400, and that, on the 26th of March, 1873, the plaintiffs, in order to secure the same, brought an action of assumpsit against Whitney, in which suit they caused the debt from the company to Whitney to be attached by process of foreign attachment, and on the 28th of April, 1873, recovered judgment by default against Whitney, for the sum of $404 damages and $22.58 costs; that execution was issued, and demand made upon Whitney and the garnishees in all respects as provided by law; and that the plaintiffs on the 22d of May, 1873, commenced suit by process of *scire facias* against the company, alleging the facts above mentioned, which suit was brought to the June term, 1873, of the Court of Common Pleas of New Haven County, in which suit the company appeared by their attorney, and the suit came by regular continuances to the next October term, when the plaintiffs recovered judgment by default against the company for the sum of $437.24 debt and $32.78 costs, which is the judgment set forth in the present suit.

And the plaintiffs claimed, and requested the court to rule, that the judgment so obtained was a "debt contracted" within the meaning of section 3, title 17, article 14 of the General Statutes of 1875, and of title 7, section 416 of the Revision of 1866, and that the defendants were liable therefor by virtue of their failure to file the required certificate; also that, by virtue of the proceedings by foreign attachment and *scire facias*, the plaintiffs had become vested with the rights of Whitney, the original creditor of the company, and were therefore entitled to recover against the defendants. But the court overruled these claims, and ruled that the judgment was not a debt contracted within the meaning of the statute, and that the plaintiffs were not so vested with the rights of the original creditor that they could recover against the defendants, and rendered judgment for the defendants.

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The plaintiff moved for a new trial for error in this ruling of the court.

The statute above referred to is recited in the opinion.

T. H. Russell, in support of the motion.

1. A judgment comes within the strict, literal and ordinary meaning of a "debt contracted." The word *contracted* has no necessary connection with the noun *contract*, either in derivation or in common use. In the common and legal usage of the word, it means simply a debt to which a party becomes legally subjected. A judgment, however, is a debt contracted, in the sense that it arises out of a contract of the very highest nature known to the law. Freeman on Judgments, § 1; Chitty on Cont., 2; 2 Black. Comm., 465; *Morse* v. *Toppan*, 3 Gray, 411. The judgment debt is not the old debt in a new form, but a new debt coming into existence at the time of the judgment. It differs essentially from the original ground of action in its nature and amount, confers different rights, and is enforced by different remedies. Freeman on Judgments, § 215. The old ground of action, or claim, is merged and destroyed in the most absolute and complete sense, and can no longer form the basis of any legal proceedings. Freeman on Judgments, §§ 217, 228. A claim against stockholders is merged by a judgment against a corporation. *Bangs* v. *Watson*, 9 Gray, 211; *Handrahan* v. *Cheshire Iron Works*, 4 Allen, 396. A judgment on an unliquidated claim for damages is a debt. *Mill Dam Foundry* v. *Hovey*, 21 Pick., 454.

2. Even if the judgment is not in itself a debt, enforcible under the act, yet the *scire facias* judgment is such an appropriation of the original debt, with all its incidents, that the plaintiffs can bring this action. *Norfolk* v. *American Steam Gas Co.*, 103 Mass., 163, and 108 Mass., 404. It is the object of the statutes in reference to foreign attachment, to subject the debtor's rights of action to the payment of his debts, in the same manner and to the same extent that his tangible property now is subject, and the *scire facias* creditor is entitled to all the securities and remedies incident to the debt. Gen. Statutes, p. 408, sec. 37; *Candee* v. *Pennimann*, 32

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Conn., 238. The proceedings by foreign attachment constitute a lien not merely on the amount due, but on the debt itself, which, by the *scire facias* proceedings, is finally vested in the plaintiff, as by a foreclosure of an ordinary lien, or in other words, the proceedings constitute an assignment, by act of law, of the debt with all its incidents. The attaching creditor is subrogated to the rights of the original creditor. *Perkins* v. *Parker*, 1 Mass., 117; *Wallace* v. *McConnell*, 13 Pet., 151.

3. The statute, though penal, is remedial in the largest sense of the word, and based upon important reasons of public policy. It ought, therefore, to be liberally construed to effect its object, not defeated by technicalities.

W. W. Stone, contra.

LOOMIS, J. The New England Gas Carbonizing Company was formed and organized under the statute relating to joint-stock corporations in November, 1872, and transacted business as such until June, 1874, and the defendants, being officers and directors of the company during all that time, intentionally neglected to file certificates of organization with the secretary of the state and the town clerk, as required by section 401, title 7, page 171, of the General Statutes of 1866.

In January, 1873, the company became indebted to one Samuel Whitney in the sum of one thousand dollars, and Whitney about the same time became indebted to the plaintiffs in the sum of four hundred dollars. In March, 1873, the plaintiffs brought a suit against Whitney, in which, by process of foreign attachment, they attached the debt due from the corporation to Whitney, and having obtained judgment thereon, execution issued and demand was made of Whitney and the garnishee in due form of law. Afterwards scire facias was brought by the plaintiffs against the corporation and judgment was obtained thereon in October, 1873, which judgment has never been paid or satisfied. The present action is brought to recover the amount of such judgment from the defendants, pursuant to the provisions of section 416, title 7,

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page 174, of the General Statutes of 1866, which provides that, "if the president, directors or secretary of any such corporation shall intentionally neglect or refuse to comply with the provisions of this act, and to perform the duties therein required of them respectively, such of them as so neglect or refuse shall be jointly and severally liable, in an action founded on this statute, for all debts of such corporation contracted during the period of any such neglect or refusal."

The first question is, whether the plaintiffs' judgment in the scire facias can be regarded as "a debt contracted" within the meaning of the above statute.

We think not. There cannot be a "debt contracted" without two or more contracting parties, one of whom in this case must be the corporation. The phrase therefore necessarily implies some act on the part of the corporation with some party dealing with it, whereby an obligation is incurred, the company receiving and the other party giving credit on the faith of their solvency and proper organization as a corporation; and if the directors intentionally withhold a knowledge of the condition of the corporation, persons dealing with them and giving them credit may have protection by resorting to the personal responsibility of the directors for the debts so contracted.

A further reason for giving this construction to the statute may be found in the absurd and unjust result to which the construction claimed by the plaintiffs would directly lead. The liability of the defendants, it is conceded, can be only for debts contracted during the time of the neglect referred to. If then the plaintiffs' judgment on the scire facias was a "debt contracted," as the plaintiffs claim, the time when it was so contracted was when the judgment was rendered and the corporation became liable to pay it. Now suppose that when Whitney's debt against the corporation was contracted the officers had not been in default, but they were in default at the time the judgment was obtained, the result would be that while the corporation alone would be liable to Whitney for his debt against them, yet the plaintiffs, having sued

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Whitney and attached the same debt due from the corporation to him, could make the directors liable to them, when there would have been no liability whatever to Whitney.

It is not claimed that the facts of the case bring it within the statute thus construed. The corporation never had dealings with the plaintiffs, never invited them into their confidence, and never sought or received any credit from them.

There is also a like want of privity between the plaintiffs and defendants. It was a matter of entire indifference to the plaintiffs whether the directors complied with the statute or not. They were neither damaged by non-compliance with the statute, nor benefited by compliance. It seems clear that the plaintiffs cannot stand on any merits of their own, or upon any thing in their own relation to the corporation or the defendants.

And this brings us to the second inquiry: whether the plaintiffs can stand in the shoes of Whitney and enforce by an action at law in their own names such rights as he had against these defendants?

We do not say that the plaintiffs have no remedy through Whitney; on the other hand we incline to think there is one. But we hold that the present suit is inadequate for the purpose. We do not regard this action as predicated at all upon Whitney's right to recover his debt from the defendants. In all the counts the action is brought expressly upon one and the same provision of the statute to which we have already referred. All the counts except the last are based on the statute, minutely referred to as title 17, part 8, art. 4, sec. 8, of the Revision of 1875, and the other count is based on title 7, sect. 416, of the Revision of 1866; and in all the counts it is the plaintiffs' own debt (to wit, the judgment in their favor on scire facias,) against the corporation that they attempt to bring within the statute as a debt contracted while the defendants as directors were in default. It is true that incidentally in setting forth the process of foreign attachment and the steps by which they obtained judgment, they refer to the debt from the corporation to Whitney, which they factorized, but it is obvious that they claim the benefit of the statute on their

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own account; in other words they stand in their own shoes and not in Whitney's. They nowhere claim to be subrogated to the rights of Whitney, they neither count upon nor refer to the act of 1850 as giving them Whitney's right to sue the defendants, nor do they by any averment claim to be the assignees and equitable bonâ fide owners of any chose in action in favor of Whitney and against the defendants.

Independently of the aid which the statute passed in 1850 may furnish, we suppose on the authority of *Judah* v. *Judd*, 1 Conn., 309, that the plaintiffs by virtue of their process of foreign attachment and the judgment in the action of scire facias acquired no right except to collect their debt against Whitney out of the property of the corporation; and that the proceedings did not operate as an assignment or transfer to them of Whitney's right to sue the defendants. But by the act of 1850 it was provided "that the plaintiff in foreign attachment shall be entitled to all the security which his debtor has for the debt attached." General Statutes, Revision of 1866, p. 74, sect. 322. In *Candee* v. *Penniman*, 32 Conn., 228, the benefit of the statute was given to an attaching creditor, who upon a bill in equity was protected in his right to the funds holden as security for the debt attached.

Assuming for the present purpose that Whitney's right to sue the defendants and collect of them his debt against the corporation, was a "security" within the meaning of the statute, and that by means of the premises and by force of the statute the plaintiffs became subrogated to the rights of Whitney, the remedy instituted ought to be in such form as that all the equitable rights as between the defendants and Whitney could be shown, adjusted and settled. As the plaintiffs have no independent claim against the defendants, if, before the attachment of this debt, Whitney had sold or discharged his right of action against the defendants, or the defendants had any other superior equities against the plaintiffs, it would prevent the plaintiffs from recovering.

A new trial is not advised.

In this opinion the other judges concurred.

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DANIEL O'CONNELL AND ANOTHER *vs.* HOBART L. HOTCHKISS.

The same exactness that is required in making up a record of a judgment in the higher courts can not reasonably be required in the case of judgments rendered by justices of the peace.

A record of a judgment of a justice of the peace, endorsed on the writ, stated the names of the parties, their appearance, the time of holding the court, an adjournment to a certain day and hour, that the court then sat and the plaintiff appeared, that the defendant being publicly called made default of appearance, and that the court then rendered judgment for the plaintiff for a certain sum, and adjourned. It was then signed by the justice in his official capacity. Held to be sufficient, though it did not state the place where the court was holden, nor that the magistrate signing it was the justice holding the court, except so far as that fact was to be inferred from the signature.

As a justice of the peace has no clerk, his official attesting signature at the end of such a record is equivalent to a declaration at the opening that it is the court of a justice of the peace, and that the signer is the magistrate who holds it.

It will be presumed in favor of such a court that it sat in a legal place, where there is nothing to indicate the contrary.

A justice's attestation to a copy of his record is legally equivalent to an attestation by a clerk of a higher court to a copy of a record of such court, with the seal affixed, and the certificate of the judge of the genuineness of the seal and signature.

SCIRE FACIAS, against the defendant as a garnishee; brought before a justice of the peace, and appealed by the plaintiffs to the Court of Common Pleas of New Haven County, and tried in that court on the general issue, closed to the court, before *Peck, J.* Judgment rendered for the defendant and motion for a new trial by the plaintiffs. The case is fully stated in the opinion.

H. F. Hall, in support of the motion.

H. Stoddard, contra.

PARDEE, J. The plaintiffs brought their action of assumpsit by writ of attachment dated and served on the 22d day of June, 1874, returnable before John L. Ives, Esq., a justice of the peace for the county of New Haven, at the court-room in the town of Wallingford, on the 15th day of July, 1874, at 10 o'clock A. M., against Sanford A. Briggs, in which was

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incorporated the factorizing process, naming the defendant as garnishee. On the 8th day of September, 1875, the plaintiffs brought their writ of *scire facias* returnable before the said Ives as justice of the peace at his office in Wallingford on the 29th day of September, 1875, against the defendant. Judgment was rendered in this case for the defendant, and the plaintiffs took an appeal to the Court of Common Pleas. Upon the trial before that court, for the purpose of proving the allegation in their declaration that a judgment had been rendered in their suit against Briggs, the plaintiffs offered in evidence a writing in words and figures following:

"*O'Connell Bros.* v. *Sanford A. Briggs.*

"July 15th, 1874. Case called, and continued to October 20th, 1874.—October 20th, 1874. Plaintiffs and defendant appeared in court. Garnishee did not appear in court, when the attorney for the defendant, Sanford A. Briggs, pleaded in abatement. Plea overruled, and continuance agreed upon by counsel for plaintiffs and defendant until October 31st, 1874, 4 h. P. M.—October 31st, 4 h. P. M. A full hour's time was given, and appearance by plaintiffs. No appearance by defendant, and no appearance or disclosure by garnishee. Defendant and garnishee three times publicly called, made no appearance, and judgment was rendered by default, that the plaintiffs recover the amount of the within described note ($40.28,) and interest ($1.23), and their costs, taxed at $9.58, and that execution issue therefor. Judgment rendered against the garnishee, of the goods and effects in his hands. Court adjourned. Attest:

JOHN L. IVES, *Justice of the Peace.*

"State of Connecticut, County of New Haven, ss. Wallingford, February 3d, 1876. *O'Connell Bros.* v. *Sanford A. Briggs.* I hereby certify that the within and foregoing is a true copy of the files and records of court in my hands, and my doings thereon indorsed. Attest:

JOHN L. IVES, *Justice of the Peace.*"

No evidence was offered to prove the signature or handwriting of John L. Ives, and there was no evidence to prove that the writing was what it purported to be, unless the writ-

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ing proves itself. The defendant objected to the admission of the paper, and the court ruled it inadmissible for the purpose offered, to which ruling the plaintiffs take exception.

In *Davidson* v. *Murphy*, 13 Conn., 217, the court said: "A record in judicial proceedings is a precise history of the suit from its commencement to its termination, including the conclusion of law thereon, drawn up by the proper officer, for the purpose of perpetuating the exact state of facts; or, in the language of Lord Coke, 'records are memorials or remembrances in rolls of parchment of the proceedings and acts of a court of justice which hath power to hold plea according to the course of the common law' and are of 'such incontroulable credit and verity as that they admit no averment, plea or proof to the contrary; and if such record be alleged, and it be pleaded that there is no such record, it shall be tried only by itself.'" Herein is a statement of the office of a record; the precise form which it shall be made to assume is of course left undetermined. In practice we have the full, exact and orderly history of a cause written by clerks of superior courts, of long experience, in accordance with ancient precedents, and preserved in a long series of volumes; and we have the narrative necessarily made for himself by the justice of the peace,-who may be briefly in office, unlearned in forms, and of little skill in framing them. While we demand from this latter all necessary statements, we shall, in view of the circumstances under which he is usually called to the discharge of the duties of his office, overlook some informalities in setting them forth. Upon inspection of the record offered we find that, one particular excepted, it meets the strict requirements of this court in the case referred to; and of HOSMER, C. J., in *Wales* v. *Smith*, cited in a note to that case. It is made upon the original writ and opens with a statement of the names of the parties whose cause is to be determined. As a justice of the peace has no clerk, his official attesting signature at the end is equivalent to a declaration at the opening that it is the court of a justice, and that the signer is the magistrate who holds it. It states the time of holding the court; the appearance of the parties; the adjournment to a

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day certain; the appearance of both parties upon that day; that a plea in abatement was overruled; that by the agreement of both parties there was a second adjournment to a day and hour certain; that the court then sat, the plaintiffs being present; that the defendant Briggs and the garnishee made default of appearance after having been three times publicly called; that the court then rendered a judgment against Briggs upon default for $40.28 principal of debt, $1.23 interest, and $9.58 costs, ordered execution to issue therefor, and adjourned. The court then gave his official attestation to the whole. Judge HOSMER required of a record that it should state the *time* when the cause was defaulted; the *court;* that the defendant *was called and failed to appear;* and the conclusion of law, that is, the *judgment.* All these we have in the writing offered. He required in addition the *place* where the court sat; but this loses its importance in the present case, inasmuch as the judgment was rendered at a continuance agreed upon by the parties, which includes place as well as time; and we have a right to presume in favor of the court a session in a legal place. The history is full, and proceeds step by step, in due order of events, from the return day to the legal conclusion. We can mark every step in the progress of the court unless we wilfully close our eyes. Having all the legal requisites, coupled with the official declaration of the magistrate that he made it, and allowed it to stand as a record, and that it is a record with his formal attestation and not a mere memorandum, we find no occasion for saying that it is not a sufficient record.

A justice of the peace is his own clerk, and he has no seal; his attestation as magistrate establishes his act as clerk. His official attestation placed upon a copy of a record made by himself is legally equivalent to the attestation placed upon a copy of a record of a judgment rendered by the Superior Court by the clerk thereof, with its seal affixed, and the certificate of the judge to the genuineness of the seal and of the clerk's signature. There is no source from whence additional strength is to be derived.

There should be a new trial.

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

NATHANIEL JOCELYN, TRUSTEE, *vs.* GEORGE R. NOTT AND OTHERS.

A testatrix, expressing her desire that two pieces of land owned by her should be used, the one for a congregational church of the order and faith of the churches connected with the General Association of Connecticut, and the other, which had a dwelling-house upon it, for a parsonage in connection with such church, devised the land to trustees, directing them, if any congregational church and society of such order and faith should desire to erect a church upon the piece of land first mentioned and should in the judgment of the trustees be able to erect and maintain such a church without getting in debt, to allow them to erect the same, and on its being completed to convey such piece of land to such church and society for such purpose, and also to convey to them the second piece as a parsonage. Held that, as there was no limitation as to the time within which the application was to be made and the property conveyed, and no certainty that such an event would occur, and the property was inalienable until then, the devise was void as tending to create a perpetuity.

PETITION for advice as to the construction and effect of certain provisions in the will of Susan Trowbridge, and as to the duties of the petitioner as surviving trustee of certain property under the will; brought to the Superior Court in New Haven County, and reserved on facts found for the advice of this court. The respondents were heirs at law of the testatrix. The case is fully stated in the opinion.

L. H. Bristol, for the petitioner.

C. R. Ingersoll, for the respondents, contended that the devise to the trustees was void as tending to create a perpetuity; citing Lewis on Perpetuities, 478, 481; 1 Jarman on Wills, 219, 265; Perry on Trusts, §§ 379, 381, 382; *White* v. *Fisk*, 22 Conn., 31; *Brattle Square Church* v. *Grant*, 3 Gray, 153; *Fosdick* v. *Fosdick*, 6 Allen, 41; *Odell* v. *Odell*,

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10 id., 1; *Beekman* v. *Bonsor*, 23 N. York, 298; *Phelps* v. *Pond*, id., 69; *Levy* v. *Levy*, 33 id., 97; *Bascom* v. *Albertson*, 34 id., 584; *Holmes* v. *Mead*, 52 id., 338; *Martin* v. *Margham*, 14 Sim., 230; *Commissioners of Charity Donations* v. *De Clifford*, 1 Dru. & War., 254.

CARPENTER, J. The testatrix gave, devised and bequeathed to the petitioner and two others, two pieces of land, which are particularly described in the will, and also all the rest, residue and remainder of her estate, in trust and confidence to hold the same upon the following trusts, namely—

"First: To invest and keep invested all said rest and residue and remainder of my estate and the income accruing therefrom, after paying therefrom the necessary expenses of said trust, to invest and so to allow said rest, residue and remainder of my estate to accumulate until such time as such trustees shall dispose of the same in the manner hereinafter directed.

"Second: And whereas it is my wish that a congregational church, orthodox, according to the faith, order and discipline of the congregational churches in Connecticut, connected with the General Association of Connecticut, shall be permanently located upon and occupy with their meeting-house the first of said pieces of land in this sixteenth paragraph of my will devised to said trustees, now therefore I direct that whenever any such congregational church, orthodox as aforesaid, and the ecclesiastical society connected therewith, shall desire to erect upon said first described lot of land a meeting-house, for the worship of God, according to the usage of the congregational churches of Connecticut, connected with the General Association of Connecticut, and said trustees shall be satisfied that said church is permanently established, and that said church and society have the ability with the aid of the rest and residue of my estate, hereinafter directed to be given to them, to build and complete upon said first described piece of land a substantial and convenient meeting-house, and to pay for said meeting-house in full and be free from debt, then to allow such church and society to erect such a meeting-house

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upon said first described lot of land; and when said meeting-house is completed, to convey and transfer all the rest and residue of my property and estate in this sixteenth paragraph of my will devised and bequeathed to said trustees, and all accumulations thereof, except said above described two lots of land, to said society, and also to convey to said society or to the legal corporation connected with said church, said lot of land first in this sixteenth paragraph of my will devised to said trustees, subject to such conditions, if any, as said trustees shall deem expedient."

The third clause in the sixteenth paragraph directs that the second lot of land therein described shall be conveyed to said corporation, upon such conditions and limitations, if any, as said trustees shall deem expedient. The testatrix then adds: "It being my wish and intention that said dwelling-house and lot of land should be occupied and used by said church and society for a parsonage, for the use of the pastor of said church. And until such time as said dwelling-house and lot of land on which said house stands, shall be conveyed by said trustees to said society, I direct said trustees to allow Sally Howell and Betsey Howell, or either of them, to occupy one-half of said dwelling-house on Martin Street, free of rent, and to allow Charles Nott to occupy the other half of said dwelling-house for himself and his family free of rent, and in case neither said Sally and Betsey Howell nor said Charles Nott should desire to occupy said dwelling-house, or any part thereof, then to rent the same, or such unoccupied part thereof, from time to time, until the same shall be conveyed to said society as aforesaid, and the income arising therefrom to use and appropriate in the manner in this sixteenth paragraph directed for the rest, residue and remainder of my estate."

The fourth, fifth and sixth clauses give certain directions to the trustees which are unimportant.

All the estate so devised, except the two pieces of land, was exhausted in the payment of debts and legacies and the expenses of settling the estate. Sally and Betsey Howell are dead, and the part of the house occupied by them is not in a condition to rent. George R. Nott, the person intended by

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Charles Nott, still occupies the other part of the house. The trustee has no funds with which to repair or pay taxes, and taxes amounting to more than fifteen hundred dollars are now overdue. No application has ever been made for the benefit of said sixteenth section, and it is not probable that any such application will ever be made.

In this state of things the petitioner, the only acting trustee, brought his petition to the Superior Court for a construction of the will; and the question whether all or any part of said sixteenth section is or is not void, and whether any portion of the scheme contemplated by said section can be made legally operative, is reserved for the advice of this court.

It is obvious that the principal object of the testatrix's bounty was some congregational church and society that would comply with the conditions imposed and such other conditions as might be imposed by the trustees. No particular church is designated, but it is given to any one of a large class that may apply. Should there be more applications than one, there is no one whose duty it is to make selection; and there is no limit in respect to time. The church intended to be benefited may be one now existing, or it may be one hereafter to be organized. Application may be made and the conditions complied with at any time, and may not be for a thousand years to come. Whether made at one time or another the applications would be equally within the terms of the will. The property intended to be devised therefore may, according to the terms of the will, vest in a short time, and it may never vest.

This provision of the will therefore directly contravenes our statute against perpetuities, which provides that no estate "shall be given by deed or will to any persons but such as are, at the time of making such deed or will, in being, or to their immediate issue or descendants." All estates therefore must vest during the life time of some person in being, or the life time of the issue of some person in being. As this devise may not take effect until long after the prescribed time, and may in fact never take effect, we must hold that it is wholly void.

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This will also contravenes the well settled rule of the common law, that a limitation by way of executory devise, which may not take effect within the term of a life or lives in being at the death of the testator and twenty-one years afterwards, adding in the case of a child unborn about nine months more, is void as too remote and tending to create a perpetuity. "This rule," says the Supreme Court of Massachusetts, in *Fosdick* v. *Fosdick*, 6 Allen, 41, "is imperative and perfectly well established. * * But the limitation, in order to be valid, must be so made that the estate, or whatever is devised or bequeathed, not only may, but must necessarily, vest within the prescribed period. If by any possibility the vesting may be postponed beyond this period, the limitation over will be void." The same principle applies to estates which may not vest within the period prescribed by our statute.

The fact that this may be regarded as a charitable devise does not exempt it from the operation of the rule. The common law rule and our own statute are without exception. All devises or grants, whether for charitable uses, or otherwise, must vest, if they vest at all, within the time limited. The devise in the present case is vested only in the trustees, and no interest whatever has as yet vested in the party intended to be benefited; and, as such an interest may never vest, the devise tends to create a perpetuity in the trustees, and vest in them property which is, and for all time to come may remain, inalienable. This the law will not allow.

It was manifestly not the intention of the testatrix that the property devised should vest in the trustees as their own proper estate, or that the parties who were permitted to occupy the premises should have any permanent interest therein. The interest of all these parties was temporary and incidental to the principal scheme of benefiting some congregational church. As the principal thing fails, that which is merely incidental thereto must fail with it.

It follows therefore that the property attempted to be disposed of by this section of the will is intestate estate and must be distributed to the heirs at law.

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Another question reserved is, who are the heirs at law? The property in question is real estate. The testatrix inherited one-half of it from her mother, Sybil Atwater, and the other half from her sister, Harriet Trowbridge. Under our statute requiring ancestral estate to be distributed to the blood of the ancestor from whom the estate was inherited, we think that one half the estate should be distributed to Isaac Trowbridge or his assigns, he being the next of kin to Harriet Trowbridge, and also to the testatrix, and the other half to the next of kin to the mother of the testatrix, Sybil Atwater.

In this opinion the other judges concurred.

ELIZABETH ADYE AND OTHERS *vs.* GEORGE F. SMITH, EXECUTOR.

A will, having created a trust, and given sundry legacies under the trust, made the following provision with regard to the residue: "It is my will that said trustee shall dispose of such remainder for any and all benevolent purposes that he may see fit." Held to be void for uncertainty.

It does not help the will in such a case for the trustee to designate certain charitable purposes to which he proposes to apply the property. The question is not whether the trustee may apply the estate to such purposes, but whether he is bound to do so.

AMICABLE SUBMISSION upon an agreed statement of facts; made to the Superior Court in New Haven County.

Anna M. Adye of New Haven died on the first day of November, 1874, leaving a will, duly executed on the 31st day of August, 1859, which contained the following clauses:

"After the payment of my just debts, my funeral expenses, and the expenses of settling my estate, and the expenses of a suitable grave stone or monument to be erected to my memory, I give, devise and bequeath, to George F. Smith, of said New Haven, all the rest, residue and remainder of my estate of every description whatsoever, and wheresoever the same may be situated, to him the said George F. Smith and his

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heirs in fee simple; in trust, however, for the uses and purposes hereinafter mentioned, namely, upon the trust to invest the principal of said trust estate, and to pay from the rents, profits and income thereof, to my brother, Nathan Stoddard Adye, or for his benefit, such sum or sums, and at such time or times, as the said trustee shall deem expedient or necessary for the comfortable maintenance and support of my said brother. * * * Upon the decease of my said brother, if there shall remain any of the estate hereinbefore given, devised and bequeathed in trust for his benefit, it is my will that the said trustee shall dispose of such remainder for any and all benevolent purposes that he may see fit, and at his option."

The will was duly proved after the death of the testatrix, and George F. Smith, the trustee, who was appointed executor by it, accepted the trust and proceeded to settle the estate. Nathan S. Adye, named in the will as the brother of the testatrix, died before her death. Four nephews and nieces, who were parties to the submission, are her heirs at law. There remains in the possession of the executor, after payment of all just debts and charges, property, both real and personal, to the value of, in all, about ten thousand dollars. The heirs at law claim that the estate so remaining belongs legally, and if not legally, then equitably, absolutely and in fee simple, to them; and that the executor, if he holds the same in trust, holds it in trust for them. The executor denies the validity of this claim, and claims that the estate is vested in him in trust to dispose of it "for any and all benevolent purposes that he may see fit, and at his option," and is ready and desirous to dispose of it for certain benevolent purposes, selected by him, as soon as the case is decided.

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

H. B. Harrison and *J. O'Neil*, for the plaintiffs, cited *Morice* v. *Bishop of Durham*, 9 Ves., 404; *Same* v. *Same*, 10 id., 522; *James* v. *Allen*, 3 Mer., 16; *Vezey* v. *Johnson*, 1 Sim. & Stu., 69; *Ellis* v. *Selby*, 1 Mylne & Cr., 286; *Williams* v.

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Kershaw, 5 Clark & Fin., 111; *Kendall* v. *Granger*, 5 Beav., 300; *Ommany* v. *Butcher*, 1 Turn. & Russ., 261; *Chamberlin* v. *Stearns*, 111 Mass., 267; *Norris* v. *Thompson*, 19 N. Jersey Eq., 307; *Thompson* v. *Norris*, 20 id., 489; *Grimes* v. *Harman*, 35 Ind., 198; *Lepage* v. *Macnamara*, 5 Iowa, 124; *Needles* v. *Martin*, 33 Maryl., 609; *Attorney Gen.* v. *Soule*, 28 Mich., 153; *Bridges* v. *Pleasants*, 4 Ired. Eq., 26; *Gallego* v. *Attorney Gen.*, 3 Leigh, 450; *Carpenter* v. *Miller*, 3 W. Virg., 174; *Wheeler* v. *Smith*, 9 How., 55; *Phelps* v. *Phelps*, 28 Barb., 121; *Goddard* v. *Pomeroy*, 36 id., 546; *Levy* v. *Levy*, 33 N. York, 97; *Bascomb* v. *Albertson*, 34 id., 584; Perry on Trusts, §§ 692, 708 to 713; Tiff. & Bullard on Trusts, 237; 2 Story Eq. Jur., §§ 1183, 1155 to 1158; 2 Redf. on Wills, ch. 15, §§ 10, 16, 18, 81; *White* v. *Fisk*, 22 Conn., 31, 54; *Treat's Appeal from Probate*, 30 id., 111, 116.

S. E. Baldwin, for the defendant.

1. Considered as a charitable trust, the bequest is valid by the law of this state. It is now settled that the jurisdiction of chancery over cases of charitable uses existed long before the statute of 43 Elizabeth, and that this statute, instead of enlarging, has had the tendency to restrict the equitable powers of the courts. Although enacted simply to give a new remedy for enforcing certain charitable trusts in cases of misappropriation, the English courts have construed it as limiting them to the recognition only of such trusts as are mentioned in the statute, or as are plainly germane to those. *Vidal* v. *Girard's Exrs.*, 2 How., 192, 196; *Miller* v. *Rowan*, 5 Clark & Fin., 99, 109; *Hamden* v. *Rice*, 24 Conn., 355; 2 Story Eq. Jur., §§ 1155, 1164. These trusts are the following only: "for relief of aged and impotent and poor people; for maintenance of sick and maimed soldiers, schools of learning, free schools, scholars in universities, houses of correction; for repairs of bridges, of ports and havens, of causeways, of churches, of sea banks, of highways; for education and preferment of orphans, for marriage of poor maids, for support and help of young tradesmen, of handicraftsmen, of persons decayed; for redemption or relief of prisoners or captives,

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for ease and aid of poor inhabitants; concerning payment of fifteenths, setting out of soldiers and other taxes." In a later part of the act the commissioners whom it authorizes to inquire into misappropriations of trust funds are referred to this enumeration of objects, by limiting their inquiries to "any of the charitable and godly uses therein rehearsed." It is *in pari materiâ* with the other statute of the same year, 43 Eliz., c. xii, creating a commission to decide all claims on policies of marine insurance. The object of both was limited to enforcing specified and existing rights. The statute of Elizabeth was never recognized in Connecticut, nor any of the English mortmain statutes which have had so great an effect in fettering charitable dispositions by will in Great Britain. Our own ancient statute of charitable uses provides, in much more generous terms, that "all estates that have been or shall be granted for the maintenance of the ministry of the gospel, or of schools of learning, or for the relief of the poor, or for *any other* public and charitable use, shall forever remain to the uses to which they have been or shall be granted, according to the *true intent and meaning of the grantor*, and to no other use whatever." Gen. Stat., p. 352, sec. 2. In the construction of this statute, therefore, the court cannot limit itself to any specified classes of uses, such as are enumerated in the statute of Elizabeth. Any use which is public *or* charitable, (for such seems to be the true construction of the act,) is entitled to recognition. *Fuller* v. *Plainfield Academic School*, 6 Conn., 544; *Hamden* v. *Rice*, 24 id., 355; *Proprietors of White School House* v. *Post*, 31 id., 255. If the word *charitable* had been used by the testatrix, instead of the word *benevolent*, no question could have been raised. But, whatever may be the case in England, these words are in Connecticut used in common parlance as nearly, if not quite, synonymous. Among the meanings given in Webster's dictionary to the word "benevolence," are "charitableness," "good done," "charity given." So under "benevolent," Webster says: "By degrees the word benevolent has been widened to include not only feelings but actions. Thus we speak of benevolent operations, benevolent labor for the public good,

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benevolent societies." *Saltonstall* v. *Sanders*, 11 Allen, 446, 468. *Benevolent* is constantly used as the synonym of *charitable* in our statutes. There are numerous instances of this in our private acts, and we refer to a few of them. 3 Private Laws, 301, 306, 307, 317, 318; 5 id., 268, 457, 682, 688, 747; 6 id., 10, 71, 98, 149, 224, 365, 633. And see title "Benevolent Societies" in the index of Vol. 6 of the Private Laws. See also Private Acts of 1871, p. 73; Private Acts of 1872, pp. 235, 236, 315; Private Acts of 1873, pp. 12, 93; Private Acts of 1874, p. 209. See also the use of the word *benevolent*, by HOSMER, C. J., in *American Asylum* v. *Phœnix Bank*, 4 Conn., 177, 178. It cannot be doubted that "the true intent and meaning" of the testatrix was that this property should go to charitable uses, and the executor is ready so to apply it. To follow any English precedents, in denying effect to her bounty, because it might enure to the benefit of objects not specified as "charitable and godly" in a certain statute passed in another country at the close of the middle ages, would be to deny the power of language to expand, or of social needs and sympathies to widen their scope, in the progress of human advancement. The prevention of cruelty to animals, the establishment of public parks, bathing-houses, fountains, cemeteries, libraries, historical collections, art galleries and museums, the foundation of inebriate asylums, and many other objects, might be mentioned, which are not within the purview of the statute of Elizabeth nor of the civilization of that day. "Benevolent purposes," if not always "charitable," are certainly generally such, and the phrase should be construed to mean that which will support the will rather than defeat it. *Rotch* v. *Emerson*, 105 Mass., 431, 434; *Bruce* v. *Presbytery of Deer*, L. Reps., 1 H. L., Scotch & Div. Appeal Cas., 96. "Not professing to found our jurisdiction on the statute of Elizabeth, we are not bound, like the English courts, to restrain it to cases especially enumerated in the preamble; and there is, therefore, little hazard in affirming that a bequest such as in *Morice* v. *Bishop of Durham*, 9 Ves., 399, in trust to pay debts and legacies, and to dispose of the residue to such objects of benevolence and liberality as the

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legatee may approve, would be sustained here." *Witman* v. *Lex*, 17 Serg. & R., 93. The more recent English decisions also show a tendency to disapprove the doctrine of *Morice* v. *Bishop of Durham*, and refuse to recognize it, in any cases not controlled by English law. *Whicker* v. *Hume*, 14 Beav., 509; *S. C.* on appeal, 7 Clark H. L. Cas., 124. And it will be presumed, in support of the will, that the executor will apply the fund to such benevolent purposes as are strictly charitable, rather than to such, if any, as are not such. *Lewis* v. *Allenby*, L. Reps., 10 Eq. Cas., 668. It must be borne in mind that the objection is not, that the will creates a *perpetuity* for a purpose not charitable, since the disposition of the fund may be immediate; nor that the objects to be benefited are not specified, for a full power of appointment is given, and *id certum est, quod certum reddi potest;* but only that if the executor should apply the money to purposes not benevolent, no court could restrain the misappropriation. Our answer to this is, first, that a misappropriation will not be presumed, and is negated by the record; and, secondly, that as the term *benevolent purposes* is used and understood in Connecticut, it has a meaning sufficiently clear to justify a court of equity in restraining any appropriation of the fund for other purposes. If a provision for charitable purposes "can by possibility be upheld, then it can never be pronounced void for uncertainty." *Bull* v. *Bull*, 8 Conn., 51; *White* v. *Howard*, 38 id., 366. The testatrix had the right, in her lifetime, to make Mr. Smith the almoner of her bounty, and why could she not as well substitute his judgment for her own, after her decease, with no other restriction than that the objects benefited must be such as they both well understood to be meant by the term *benevolent?* "It is familiar law that a testator may confer on executors and on others, absolute power of appointment and disposition over his property." *Wait* v. *Huntington*, 40 Conn., 9, 11; *Treat's Appeal from Probate*, 30 id., 113, 116; *Birchard* v. *Scott*, 39 id., 63, 68, 69. In *White* v. *Howard*, 38 Conn., 366, the court strongly intimated that a devise to a voluntary association, organized for "the diffusion of gospel truth in the Southern and South-

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western States, to be accomplished under the direction of ecclesiastical bodies, or missionary organizations of an evangelical character, existing within said states," would, if necessary, have been sustained for these purposes, even although no trustee had been named in the will with capacity to take.

2. A resulting trust for the heirs at law can be inferred only when a trust is clearly created, which proves ineffectual, and leaves the trustee a beneficial interest, which the will did not intend to give him. By construing *benevolent* as equivalent to *charitable*, a valid trust would be created; but if necessary to uphold the will, the devise and bequest to Mr. Smith could be regarded as an absolute one. He is not expressly constituted a trustee for these particular "benevolent purposes." The trust was "for the benefit of" the brother, who, had he lived, might have consumed the principal. On his death, the testatrix empowered the trustee to dispose of the residue of the fund left in his hands, "for any and all benevolent purposes that he may see fit, and *at his option*." Mr. Smith, as is shown by the record, has in fact selected various charitable societies among which to distribute it, but it might be claimed, in order to defeat a resulting trust, that he had the absolute right to dispose of the fund "at his option," treating it like the case of a legacy for the purpose of buying a mourning ring, or advancement in marriage, which conveys an absolute title. His designation in the particular clause in question as "said trustee," may be construed as a mere clause of description, and the whole provision as amounting only to a "modus," intended to express the mode of enjoyment which the testatrix thought would probably be most agreeable to the legatee, but not to control his own preferences. *Harper* v. *Phelps*, 21 Conn., 269.

LOOMIS, J. The testatrix by her last will appointed a trustee and attempted to dispose of the remainder of her estate in trust by the use of the following language: "It is my will that said trustee shall dispose of such remainder for any and all benevolent purposes that he may see fit, and at his option."

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The question is, whether this language is sufficiently certain to uphold the trust, and divert the estate from the lawful heirs.

If this disposition is tested by the common law rules it is clearly invalid. By the common law there cannot be a valid bequest to an indefinite object, or a valid use without an ascertained cestui que trust. There must be a beneficiary, indicated in the will, capable of coming into court and claiming the benefit of the bequest. If the language is so indefinite that the court cannot ascertain who the cestui que trust is, it is the same thing as if there was none, and the property goes directly to the next of kin. And such a defect cannot be cured by any action on the part of the trustee, for the testator must for himself define the objects of his bounty and cannot delegate this power to another.

But while such are the established rules of the common law, it is conceded that in England a peculiar system of jurisprudence has grown up in disregard of these rules, whereby certain indefinite charitable gifts have been upheld by the exercise of chancery powers and the royal prerogative of the crown.

This system found its embodiment, if not its origin, in the statute of the 43d of Elizabeth, which specifically mentioned certain trusts to be upheld and executed by the Lord Chancellor, which trusts in the latter part of the act were referred to and characterized as "charitable and godly uses."

Ever since the enactment of this statute the word "charitable," when used in a will conveying property, has had a technical meaning, not only in England, but in this country as well, even in those states where the statute has never been re-enacted, or adopted by usage. And it may be remarked that in general the decisions of the English chancery upon trusts for charity have furnished the general rules of adjudication in the courts of the United States.

It will not therefore be amiss to inquire whether the trust now in question could stand if tested by the statute of Elizabeth and the decisions of the English courts.

Sir William Grant, the Master of the Rolls, in his opinion

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in *Morice* v. *The Bishop of Durham*, 9 Vesey, 399, said: "I am not aware of any case in which a bequest has been held charitable, where the testator has not used that word to denote his general purpose or specified some particular purpose which this court has determined to be charitable." In that case the testatrix by her will directed that the residue of her estate "should be applied to such objects of benevolence and liberality as the Bishop of Durham in his own discretion should most approve." It was held that this language was too indefinite to uphold the trust, upon the ground that benevolence and liberality could find numberless objects not included among the charities mentioned in the statute. This decision was affirmed by the Lord Chancellor on appeal, and is again reported in the 10th of Vesey, 521.

In *Vezey* v. *Jamson*, 1 Simons & Stuart, 69, where the estate was given to the executors in trust to dispose of at their discretion, either for charitable or public purposes, the trust was held too general and indefinite to be executed.

To the same effect was the decision in *Ellis* v. *Selby*, 1 Mylne & Craig, 286, where the fund was applied "to and for such charitable or other purposes as his trustees should think fit."

In *Williams* v. *Kershaw*, 5 Clark & Finnelly, 111, a direction by a testator to his trustees to apply the estate "to and for such benevolent, charitable and religious purposes as they in their discretion should think most advantageous and beneficial," was held void for uncertainty.

In *James* v. *Allen*, 3 Merivale, 15, it was held that a bequest in trust "for such benevolent purposes as the trustees may unanimously agree upon," could not be sustained, on the ground that there were benevolent purposes which the court could not construe to be charitable; and the trustees being directed to apply the property to benevolent purposes might select objects not charitable within the statute.

To the same effect is the reasoning in *Kenall* v. *Granger*, 5 Beavan, 300, and in other cases that might be cited, but the above will suffice to show that the trust in question must be held void in the light of the English decisions.

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If now we pass to the decisions of the courts of last resort in the United States we shall find that such indefinite trusts as the testatrix here attempted to create have repeatedly been held void for uncertainty. An examination of the numerous cases cited in the brief for the plaintiff will abundantly sustain this position. We will only refer particularly to one of these cases, which is from an adjoining state whose system of jurisprudence relative to trusts for charity is similar to our own, and in which case the testator in attempting to create a trust used words almost literally identical with the language now under consideration. It is the recent case of *Chamberlain and others* v. *Stearns and others*, 111 Mass., 267. Gray, C. J., in delivering the opinion said: "The question presented by this case is, whether a devise in trust to be applied solely for benevolent purposes in the discretion of the trustees creates a public charity. And we are all of opinion that it does not. The word 'benevolent' of itself, without anything in the context to qualify or restrict its ordinary meaning, clearly includes not only purposes which are deemed charitable by a court of equity, but also any acts dictated by kindness, good will, or a disposition to do good, the objects of which have no relation to the promotion of education, learning or religion, the relief of the needy, the sick or the afflicted, the support of public works, or the relief of public burdens, and cannot be deemed charitable in the technical and legal sense. The only difference of opinion in the adjudged cases on this subject has been upon the question how far the word 'benevolent,' when used to describe the purposes of a trust, could be deemed limited in its meaning by being associated with other words more clearly pointing to a strictly charitable disposition of the fund."

Having shown that the trust in question would be held void upon the principles adopted in England and in our sister states, we will next inquire whether there is anything peculiar to our own system relative to trusts for charity that can save and enforce the bequest we are considering.

This state has never adopted the statute of Elizabeth. But we have a substitute statute of our own, first passed in 1684,

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but which did not appear in the printed statutes until 1702, and hence it has been generally called the "statute of 1702." The language of the act is as follows: "All estates that have been or shall be granted for the maintenance of the ministry of the gospel, or of schools of learning, or for the relief of the poor, or for any other public and charitable use, shall forever remain to the uses to which they have been or shall be granted, according to the true intent and meaning of the grantor, and to no other use whatever." Gen. Stat., Revision of 1875, p. 352, sec. 2.

Our law is more strict than the English law in this, that it requires certainty in the persons to be benefited, or at least a certain and definite class of persons with an ascertained mode of selecting them. But the law of England in those cases where the statute applies, or where the doctrine of *cy pres* may be invoked, does not require any such certainty. *Treat's Appeal from Probate*, 30 Conn., 111.

In *White* v. *Fisk*, 22 Conn., 31, the doctrine of *cy pres* was repudiated, as founded originally on kingly prerogative, and as inconsistent with the provisions of our statute. In that case a bequest in trust, "for the support of indigent pious young men preparing for the ministry in New Haven, Connecticut," was held void for uncertainty. CHURCH, C. J., in giving the opinion of the court, after citing the closing part of the statute, which provides that the estates given to charitable uses "shall ever remain to the uses to which they have been or shall be given or granted, according to the *true intent and meaning* of the grantor, and to no other use whatever," says that "to carry out this provision of the law the intention of the donor must be certain, as well as the objects of his bounty reasonably definite, and the charity confined to the very use to which it was destined."

In the case under consideration the words used to express the trust lack every element of certainty heretofore required in this state. There is no certain beneficiary, no definite class, no ascertained mode of selection, and no certainty and no limitation in the purpose of the trust except as found in the world-wide field of benevolence; a realm as broad at least

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as the human race, and which may embrace even the domestic animals, for such even are now justly considered the legitimate objects of human kindness and protection.

It is conceded that there is nothing in the language of the bequest we are considering to bring the case within the provisions of our statute, unless the word "benevolent" as used in the will, is of the same import as the word "charitable" as used in the statute.

While it is true that there is no charitable purpose which is not also a benevolent purpose, yet the converse is not equally true, for there may be a benevolent purpose which is not charitable, in the legal sense of the term. We have already seen that the word "charitable," as used by the English courts and the courts of the United States, has a technical meaning. Our statute was passed nearly a century after the statute of Elizabeth and after the word "charitable" had received a definite meaning from a long line of the highest judicial opinions. When therefore our legislature, in framing an act on the same subject, deliberately used the same word to characterize the trusts they wished to protect and enforce, there can be no doubt that the word "charitable" was used in the same technical sense it had acquired under the famous act of the mother country.

This rule of construction was virtually adopted by this court in the case of *Hamden* v. *Rice*, 24 Conn., 350.

The foregoing considerations have led us to the conclusion that the apparent trust in the will, "for any and all benevolent purposes," is void for uncertainty, and that the estate in question, upon the death of the testatrix, vested in her heirs at law.

The finding shows that the trustee has made a statement of the purposes for which he intends to dispose of said funds, and if such purposes had been specified in the will it would have been valid. But no action or statement on the part of the trustee can avail in the least to cure a radical defect in the will. It is the will of the testatrix, not that of the trustee, which is to stand or fall. And to use the language of Sir William Grant in *Morice* v. *The Bishop of Durham*, "the

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question is not whether the trustee *may* apply the estate upon purposes strictly charitable, but whether he is *bound* so to apply it."

We advise that the property in dispute be distributed to the heirs at law of the testatrix.

In this opinion the other judges concurred.

WILLIAM A. LEWIS AND WIFE *vs.* THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY.

L was insured in a life insurance company by a policy which provided that the annual premium, payable in part in cash and in part by a premium note, should be paid on or before the 9th of May in each year. The company sent him a notice of the premium falling due on the 9th of May, 1874, which he returned for correction, an error being discovered in it, and a new notice was sent him, which reached him on the 9th of May. On that day he delivered a check for the cash part of the premium to *B*, who had conducted the business with the company for him, but was not its agent, and *B* on the 13th of May delivered the check to an agent of the company, who gave him a renewal receipt for *L*. *L* had died suddenly on the 13th, before the agent received the check, but he had no knowledge of the fact when he received it. The premium note that was to have been given at the same time was never given. Held that, upon these facts, as not affected by any question of estoppel, the policy was forfeited.

The failure to make the premium note would have been enough of itself to work a forfeiture of the policy.

In addition to the provision of the policy that the premium must be paid on or before the day it fell due, there was a notice on every renewal certificate issued, that no agent had authority to receive any premium after the day it became due without special permission from the officers of the company. Held that the local and limited agents of the company were not to be regarded as having the power, by a mere course of dealing on their part with the policy-holders, to establish a custom which would nullify these provisions and bind the company without its consent or knowledge.

In the consideration of certain evidence with regard to a custom in this respect, reported in the case, the court was of opinion that all that could be claimed from the custom was, that the company or its agents were in the habit of waiving strict payment at the day in some cases, when there had been no change in the health or condition of the insured.

This being so, there would be nothing that would bind the company to waive

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strict payment in any case, but they would be at liberty in all cases to insist upon strict performance.

The custom manifestly did not extend to a case in which the insured died after the premium fell due and before payment.

The error in the notice sent to the insured was only as to the amount to be paid, and he knew it to be an error and sent it back for correction. There was no intention on the part of the company to mislead him; the day of payment was correctly stated, and the corrected notice reached him the day the premium fell due. The court below charged the jury that if they should find that it was the custom of the company to give notice thirty days before of payments falling due and that the insured knew of the custom and that by the error in the notice he was prevented from making the payment when otherwise he would have made it, then the company would be estopped from claiming that the payment was not made in due time. Held to be error.

The court also charged the jury that, if the agent sent the money to the company, and the company with full knowledge of all the facts kept it, claiming it as their own, then they had waived the forfeiture of the policy. Held that the jury might have been misled by this instruction, and that they should have been instructed to ascertain whether at the time they received the money they knew of the death of the insured, and if not, when they first received the knowledge of it, and whether they afterwards retained the money intending to give validity to the policy or to await the result of the claim made upon the policy.

A waiver is an intentional relinquishment of a known right.

It is the duty of the court to submit to the jury all controverted questions of fact when there is any evidence to support the respective claims of the parties; but if a claim is made which is wholly unsupported by proof, it is error to submit it to the jury as if the evidence justified the claim, as the jury would be in great danger of being misled.

ASSUMPSIT upon a policy of life insurance; brought to the Court of Common Pleas of New Haven County, and tried to the jury, on the general issue, before *Robinson, J.*

The policy was dated May 9th, 1873, and was upon the life of George T. Lillie for the sum of $1,000, payable at the age of thirty-eight, the assured then being twenty-eight years of age; the amount being payable to his mother, one of the plaintiffs, in case of his death before reaching that age. The provision of the policy with regard to the payment of the annual premium was as follows: "This policy of assurance witnesseth that the Phœnix Mutual Life Insurance Company of Hartford, Conn., in consideration of the representations made to them in the application for this policy and of the sum of one hundred and thirty-two dollars and eighty-eight cents to them duly paid by George T. Lillie, and of the annual

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payment of a like amount on or before the ninth day of May in every year during the continuance of this policy, do assure the life of George T. Lillie, &c."

The renewal receipts given by the defendants upon the payment of the annual premiums, contained upon their backs a printed notice that no agent of the company had authority "to receive any premium after date of its being due without special permission from the officers of the company."

The insured died suddenly on the 13th of May, 1874. The only important question in the case was whether the premium due on the 9th of May, 1874, had been paid by the assured and accepted by the company.

Upon this point the plaintiffs offered in evidence the following deposition of Ambrose E. Beardsley:

"I lived in Derby for thirty-five years, except three years, while in the public service; have been agent of the defendants, at one time from December, 1869, up to October, 1873; was located most of the time at Derby and vicinity; my territory embraced New Haven County. Mr. Lillie died May 13th, 1874. Most of the time my business was to solicit applications for insurance, and collect the premiums. I forwarded the premiums the first three or four years to John B. Powell, after that to G. E. Holloway. From the time I ceased connection with the company to the time of the death of Mr. Lillie, Mr. Holloway was general agent for Connecticut and Rhode Island. From the time I ceased connection with the company to the time of Mr. Lillie's death, Mr. Jewett had the agency; at the time of Mr. Lillie's death, C. E. Tillinghast was agent for the company, and had been since January, I think. It was the custom, and the instruction received from the general agent at Hartford to all the sub-agents, to send notice as near thirty days in advance of the time the premium was due as possible. Renewal receipts were forwarded thirty days before the premium was due, and notices were always sent as soon as the receipts were received. Renewal receipts were in the ordinary form of renewal receipts of insurance companies. They were signed by the secretary of the company, and became effective when countersigned by the general

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agent at Hartford, and were ready for delivery when received by the sub-agents. The date of the policy of Lillie was May 9th, 1873, and premiums on his policy were due semi-annually; none of the premiums were paid to me as agent of the company.

"I was in the bar-room of the Bassett House, Birmingham, Friday evening, May 8th, 1874. Mr. Lillie said, 'Beardsley, I would like to have you give me a little information in regard to my insurance in the Phœnix.' I asked him what was the matter; he said the only trouble was he had been called upon for twice as much money as they had before. I saw the notice. I took it to Mr. Tillinghast, the agent from whom it came, at New Haven; I gave it to him and showed him his mistake; can not tell whether I left it with him or not. He was the agent to whom Mr. Lillie was to make the payment of the premium; I showed him the renewal notice, which was incorrect; I told him that he had sent a notice of the premium to be paid annually, when it should have been the semi-annual payment; this was May 9th, 1874. He turned to his books and found that I was correct. He said he would make a correct notice, which he did, and gave it to me and asked me to give it to Mr. Lillie, and explain it; I told him I would do so. Before he gave me the corrected notice, I told him Mr. Lillie was ready to pay his premium, and would pay it as soon as he knew what to pay. I told him it was possible he might be there himself that day. I told Mr. Tillinghast that that premium would be paid, and if not paid on that day it would most certainly in two or three days; and I told him if anything should happen to Lillie I hoped he would not take any advantage of not having actually received the money on the day on which it was due, for the fault did not rest with Lillie, but from the fact that the notice sent was incorrect; he said 'Certainly not.' Mr. Tillinghast said he should consider the policy in force, and hoped he would pay it in a few days, and the quicker he paid it the better it would suit him. I told him as soon as I could see Lillie he would undoubtedly send the money to him. I took the renewal notice with me as Mr. Tillinghast requested. When I got to the Bassett House the

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same evening I inquired for Mr. Lillie; Mr. Wells told me he was not there; do not know that Lillie ever got the renewal notice. Mr. Lillie told me he was ready to pay as soon as he knew what to pay, and should keep his wages due him from Mr. Wells undisturbed in Wells's hands until this premium was paid, and had been keeping it there for that very purpose. I inquired of Mr. Wells for Mr. Lillie; he asked me if I wanted to see him particularly; I told him I wanted to give him his renewal notice, which was now correct, and which I had with me. He said, 'Give it to me and I will give you a check for it, if you know what is to be paid;' and said, farther, that Lillie had left his wages and requested him to pay it as soon as I got home. Mr. Wells drew the check. The premium, as near as I can remember, was forty-two dollars and some odd cents; and the check was for that amount. This was Saturday evening, May 9th, 1874. I put the check in my pocketbook, and the first time I saw Mr. Tillinghast I gave it to him. The check was payable to his order. I made the attempt to give the check to Mr. Tillinghast Monday evening. I came to New Haven Monday afternoon; at 4 or 5 o'clock, before going home, I went to Mr. Tillinghast's office for the purpose of giving him this check, or leaving it at his office; this was the only thing that called me there; no one was at the office, and I took the check back, expecting to be in the next day. I think I gave the check to him Wednesday morning, May 13th; he took it, and gave me a renewal receipt; this I gave to Mr. Wells.

"I have known the company to receive premiums past due six months; and at least twenty-five per cent. of the renewal premiums that I have collected have been collected after they were past due, and accepted by the company without any hesitation, and with knowledge of this fact."

Cross-Ex. "The first I knew of Mr. Lillie's death was about one o'clock of that day; was informed that he died in the morning; cannot tell who first told me; cannot tell where I first heard that he was dead; heard it just after I had returned from New Haven. I believe he died in the Bassett House; I resided in the next house, about forty-two feet from

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the Bassett House; have no other information in regard to his death; think my father told me in the afternoon that he was dead; he said 'He is dead;' that is all he said; I said I knew it; that is all I said that I remember. I saw his remains first the next morning, in the Bassett House.

"I went to see Mr. Tillinghast at Mr. Lillie's request. He asked me if I was going to New Haven the next day. I told him I thought so. He asked me if I would call at Mr. Tillinghast's office and get a correct notice, and find out what he had got to pay, which I did. He asked me nothing in relation to the custom of the company as to failure to pay premiums when due; do not remember that I said anything to him about it; I may have said he had better attend to it. He was employed at the Bassett House as clerk and bar-tender; used to meet him quite often there in the evening; met him at this time on the evening of May 8, 1874, accidentally; had not been there for three or four days; cannot tell who were present, if anybody; think somebody was there. I had an office in New Haven at this time; came to New Haven almost every day; generally came in very early, and stayed late at night; had no stated time for coming or going. Cannot say what has become of the renewal notice which was incorrect. That was all Mr. Lillie requested me to do. No one was present in Mr. Tillinghast's office at the time of my conversation with him in regard to the renewal premium except Miss Lewis; she was clerk there. I think the first time I saw Lillie after Friday, was Monday evening; if I saw him it was at the hotel; think he came home that night; did not see him to speak with him; cannot tell when I next saw him; saw him Tuesday night to speak with him; he was in the bar-room of the hotel; don't think I had any conversation with him Tuesday evening concerning his policy; think this was the last time I saw him in life; am quite sure it was. I conversed with Mr. Lillie on the evening of May 12; it was somewhere between half-past seven and nine o'clock of that evening that I was there; I took nothing from Mr. Tillinghast to him except the renewal notice. I arrived in New Haven on the afternoon of Monday, May 11, 1874, at about half-past four

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o'clock; went to Tillinghast's office about six o'clock; was not familiar with his office hours. My office was in the same building, but not on that floor. Mr. Tillinghast's office was usually open all day and evening; very seldom went there during day or evening when I did not find it open. I was not in New Haven on Tuesday, May 12. Was living in the house with my father at this time. Drove to New Haven on the morning of the 13th of May; left home at six o'clock, got to New Haven about seven o'clock; very often came as early as this; sometimes on my regular business, sometimes not. Went to Mr. Tillinghast's office not far from seven o'clock, between seven and eight o'clock. Mr. Richmond, an agent of Mr. Tillinghast, was there. I told Mr. Richmond that I had a check in my pocket that belonged at that office, for a premium; I told him I would leave it with him; he asked whose premium it was, and I told him; he started to the desk, as I supposed, to get the renewal, and said, 'By the way, I think they are locked in the safe, and I have not the key;' said Miss Lewis would be in in a moment, and then she would attend to it for me; I said 'Very well, I have business to attend to; I will come in again;' I went out; I went to Dr. Jewett's office between eight and nine o'clock; Mr. Richmond came up with the renewal receipt in his hand; he said, 'All right, I have got them.' He said, 'Mr. Tillinghast is down stairs;' I said, 'Very well, I will be down in a few minutes.' He went down; in ten minutes, when I had got through with Dr. Jewett, I went down to Mr. Tillinghast's office; Mr. Tillinghast, Miss Lewis, and Mr. Richmond were there; I gave Mr. Tillinghast the check, and he gave me the renewal receipt; he gave me the blank notes, one called a semi-annual cash note, the other was a premium note; the semi-annual note was for thirty-three dollars, the premium note was for sixty-six dollars. I think I gave those notes to Mr. Wells the same day; I suppose those notes were given to me to have Mr. Lillie sign them; I think Mr. Tillinghast asked me to have the notes signed and to bring them back; I think I told him I would; I did not have them signed or sent back; the reason was that I heard Mr. Lillie was dead.

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Do not think I had any further conversation with Mr. Tillinghast concerning this matter at this interview. I said nothing to Mr. Tillinghast at this time about the health of Mr. Lillie; left for home on the day I made this payment about eleven o'clock, got home about noon. I did not come expressly for the purpose of delivering up the check. Gave Mr. Wells the renewal notice before he gave me the check; he asked for it; the amount of the check was the same as called for in the renewal notice. When I was in the employ of the company the renewal notes and premium receipts were sent to me by Holloway, and I made the returns to him as general agent; had no business with the home office; did all my business through him and Mr. Powell. I have been told time and time again to hold renewal receipts as long as there was any possibility of collecting; I have returned renewals to Hartford for cancellation, and had them returned to me with instruction to collect them if possible. Do not remember having seen the notes after I gave them to Mr. Wells. My relations up to that time with the company were friendly; have had some difficulty with Mr. Holloway; at this time my relations with him were perfectly friendly. I never was instructed to inquire into the party's health before accepting payment of premiums after they became due. I generally knew that there was no imposition being practiced on the company before accepting payment."

Re-direct Ex. "This renewal notice is the one I took on the 9th of May, 1874; I gave the check to Tillinghast between eight and nine o'clock. Had been familiarly acquainted with Mr. Lillie eighteen months; saw him one winter nearly every day; it was winter of 1872–3; was boarding at Tremont House, New Haven, and he was clerk there; I attached the renewal receipt I got on May 13th to the policy; this renewal was dated May 9th; the policy was in the hands of Mrs. Lewis, his mother, when the renewal receipt was attached. I cannot give exact dates or the time, but I have frequently heard Mr. Lillie say that he had a policy on his life in favor of his mother, and that he would sell all his clothes and go hungry before he would let that policy lapse; that he had

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taken it out for his mother, and that he would never change it under any consideration."

Other evidence upon the same point was introduced by the plaintiffs and rebutting evidence by the defendants. The plaintiffs offered the evidence of an agent of the defendants to prove that it was the custom of the defendants to send notices of the amount and time of payment of the premiums thirty days before they became due; that the insured had been informed when he took out his policy that he would be so notified, and that an erroneous notice was sent to him, by which he was misled into the postponement of his payment till the day when it was made. It appeared that the error was merely as to the amount to be paid, and that the time of payment was correctly given. The testimony was given in full in the motion, but the points decided by the court can be sufficiently understood without a further statement of it.

The defendants requested the court to charge the jury that if they should find the fact to be that Lillie died before the money came into the hands of Tillinghast or his agent, the verdict must be for the defendants, unless in some way the defendants had waived the forfeiture, or were estopped from claiming it.

That whatever custom may be proved to have existed with reference to the receipt of premiums over due, yet the fact of the death occurring before anything was paid was fatal to the plaintiffs' case.

That the mere payment of the money was not enough to constitute a payment of the premium, but that the notes should also have been given, or the giving of them waived or prevented by the defendants.

That if this were not so, yet as Beardsley agreed to get the notes signed, his failure to comply with that promise puts an end to the plaintiffs' case.

That Tillinghast had no power to bind the company by an agreement to take a part of the premiums in lieu of the whole; and that he had no power to receive the premium if over-due, except when a certificate of health was presented, or the man appeared in person.

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That Tillinghast had no right to make any agreement to keep the policy in force, and if he made one, that it was not binding on the company.

That if he had the right, there was no consideration for the agreement, as there was no agreement on Lillie's part to pay, and the fact of his death before it was carried out put an end to it.

That if it be assumed that the defendants received the $43 paid by Beardsley, yet as they never received the notes to make the full premium, this could not help the plaintiffs.

That there has been no general custom proved in the case, which would make it binding on the company to receive a premium after it became due. That the only custom proved, if any, was a custom of the company to receive premiums after they became due, provided the insured continued in good health. And that this custom to be of any efficacy must have been known to Lillie, and that fact must be proved by the plaintiffs.

That if Lillie or any one in his behalf had a right to complete the payment of the premium, they must have done so within a reasonable time, and that as they had not done so at all or offered to do so, the verdict must be for the defendants.

The court charged the jury as follows:

"Whatever may be the legal effect of the language of the policy in respect to the payment of the premium, it is agreed by the counsel that it amounts to an agreement that unless the premium due May 9th, 1874, was either paid, or its payment waived by the company, the policy became void. Was then this premium paid, or was its payment waived?

"It is claimed by the plaintiffs that on the 9th day of May, 1874, when this premium became due, Lillie was ready and able to pay it, and would have paid it on that day but for an erroneous notice sent him by the company; that on that or the previous day one Beardsley, a former agent of the company, and then claimed by the plaintiffs to have been acting for Tillinghast, procured a correct notice as to the premium, and obtained in payment thereof a check drawn to Tillinghast's order for the amount due; that on the next day but one

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he brought that check to Tillinghast, but being unable to find him, kept it, and brought it in again, in six days after, (Lillie then being dead,) and received the receipt therefor; that Tillinghast took the check, collected the money on it, returned the money to the company, and that the company has kept it ever since, with knowledge of all these facts. The defendants claim that the payment was not thus made to Beardsley, that Beardsley was not acting for Tillinghast, that though Tillinghast took the money and gave the receipt, he was led to do so by fraud, and never returned the money to the company, nor has the company received or retained the same. Upon these questions of fact it is your province to decide.

"If you find the claim of the plaintiffs to be true; if you find that Beardsley was acting for Tillinghast when he took out the corrected notice and received the check on the 9th of May, and that Tillinghast got the money on the check, then the payment to Beardsley was payment to Tillinghast, and through him to the company, and so the cash part of the premium would have been paid in due time.

"If you find that Beardsley was acting for Lillie and not for Tillinghast; that he applied to Tillinghast for a correct notice, and was told by him that the policy should not lapse though there were a few days delay; that Beardsley knew that the company customarily received premiums overdue, and continued the policies alive; and if you find that Beardsley, acting on his knowledge of that custom and the assurances of Tillinghast, did not pay over the money which on the 9th Lillie had paid to him, then, unless you find that he delayed longer than such assurances and such knowledge of that custom warranted, or unless you find that Beardsley or Lillie by some deceit or fraud procured this money to be received, the conduct of Tillinghast in connection with that custom and with his subsequent reception and retention of the money as the agent of the company, would estop the defendants from denying that this money was paid in time, and prevent the forfeiture of this policy on that ground.

"Again, if you find that the payment was not made on the 9th to Beardsley as Tillinghast's agent, and if you find that

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there was no estoppel in the manner just described, and so find that there was no payment on the 9th, and no warrant for Beardsley's delay to pay over the check after he had received it, yet if you find that it was the custom of this company to give notices of the payment thirty days before it came due, and that Lillie knew of such custom, and that by the erroneous notice Lillie was misled and prevented from making this payment, when otherwise he was ready and willing to pay and would have paid it, then also are the company estopped from claiming that this payment was not made in due time, nor was the policy forfeited on that account, provided the payment was made or tendered within a reasonable time after the correct notice had been sent.

"If you find that there was no payment of this premium to the company or any of its agents before the death of Lillie, and that the company are not estopped in either of the ways already mentioned from claiming that the policy was forfeited, yet if you find that Tillinghast received this money after Lillie's death, and sent the money to the company, and that the company, with full knowledge of all the facts, has kept that money, or has exercised such dominion over it as shows that they claimed it as their own, then again they are estopped from denying that they have received such premium in due time, and have waived the forfeiture of this policy so far as that is concerned.

"It is claimed here that this premium was to be paid part in cash and part in notes. The same rules which govern the payment of the cash part of this premium may be taken by you as controlling the giving of the notes, it being the law governing this contract that the premium must be paid or its payment waived by the company, in order to save the policy from forfeiture."

The jury having returned a verdict for the plaintiffs, the defendants moved for a new trial for errors in the charge of the court.

L. M. Hubbard, in support of the motion.

1. The court erred in the first section of the charge in

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submitting to the jury the question whether Beardsley was acting for Tillinghast when he received the check for the premium on the 9th of May. The sole evidence on this subject is the deposition of Beardsley, which shows conclusively that he was acting only as the friend and agent of Lillie. We contend that the court has no right to submit such a claim as this to a jury without any comment upon the fact that the evidence does not furnish any support for such a claim. There must at least be a plausible claim deduced from the evidence in the case. Here there is none. Wells on Questions of Law and Fact, § 408, *et seq.*

2. The second section of the charge is wrong. The court entirely overlooked the fact that Lillie was dead when the money was paid. However correct this might be in an ordinary case where the policy had lapsed in consequence of non-payment of the premium, the cases all say that death puts an end to the right to pay. The case is not one where the agent agrees to keep the policy alive and does so in fact by crediting the company with the amount. *Simpson* v. *Accidental Death Ins. Co.*, 2 Com. Bench, N. S., 257; *Pritchard* v. *Merchants & Tradesmen's Life Assur. Soc.*, 3 id., 622; *Want* v. *Blunt*, 12 East, 183; *Mut. Benefit Life Ins. Co.* v. *Ruse*, 8 Geo., 534; *Ruse* v. *Mut. Benefit Life Ins. Co.*, 26 Barb., 556.

3. The third section of the charge is also incorrect. It is based on the idea that Lillie was misled and prevented from making the payment at the proper time. It appears that a notice was sent to Lillie thirty days before the premium was due, but that the amount of cash called for was incorrect. Instead of a cash note for $33.44, that sum was called for in cash in addition to $43.85, the real amount due. This mistake was known to Lillie, and he kept the notice, without making any attempt to get it corrected until the evening of the day before the premium became due. He then gave the notice to Beardsley to take it to New Haven and get it corrected. This is the only foundation of the claim that Lillie was "misled." The absurdity of a claim of estoppel on this point of the case is too apparent for discussion. Bliss on Life Insurance, § 267.

4. The fourth section of the charge is wrong. There is

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no evidence that the money ever was sent to the company. Nor any that the company has kept the money, or has exercised such dominion over it as shows that they claimed it as their own. We admit that, in a case where the insured is still alive, the receipt from the agent by the company of the premiums, although paid when overdue, would be a waiver of the forfeiture. But this proposition can have no application where the insured is dead when the premium was paid. The company would not have been bound had the money been paid to them directly, the insured being dead, without knowledge of the fact.

5. The fifth point is also incorrect. The first part of the charge also shows an entire misapplication of the facts of the case. It was a conceded fact in the case that the premium notes which went to make up the full premium were never given, never even signed, nor was their equivalent ever tendered to the defendants. Of course there could have been no waiver by the defendants as to the time of receiving them when they were never even tendered.

6. The defendants asked the court to charge the jury, among other things, that Tillinghast had no right to make any agreement to keep the policy in force, and if he made one, that it was not binding on the company; that even if we assume that the defendants had received the $43 paid by Beardsley, yet as they never received the notes to make the full premium, this cannot help the plaintiffs; that if Lillie or any one in his behalf had a right to complete the payment of the premium, they must have done so within a reasonable time, and that as they had not done so at all or offered to do so, the verdict must be for the defendants. None of these propositions were charged by the court, as they ought to have been upon principles already established.

A. H. Robertson, contra.

1. The failure of the company to send a right notice to the insured, who was informed by the agent of the company that he might rely on a notice being sent, by reason whereof the insured failed to pay his premium before May 9th, prevents

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the company from insisting on a forfeiture. *Mayers* v. *Mutual Life Ins. Co.*, 4 Bigelow Ins. Cas., 67; *Home Life Ins. Co.* v. *Pierce*, 5 Ins. Law Jour. (Ap. 1876), p. 290. A wrong notice was no notice at all. The company was responsible for the wrong notice sent by their agent. *Miller* v. *Mutual Benefit Life Ins. Co.*, 2 Bigelow Ins. Cas., 699.

2. The receiving of the premium on the 13th of May by Tillinghast, the general agent of the company, was a waiver of the forfeiture of the policy, and the company was bound by such receipt in accordance with the known custom of the company's agent, acquiesced in by the company, of receiving premiums which were overdue. *Walsh* v. *Ætna Life Ins. Co.*, 30 Iowa, 133; *Thompson* v. *St. Louis Mut. Life Ins. Co.*, 52 Misso., 469; *Currier* v. *Continental Life Ins. Co.*, 53 N. Hamp., 538; *Bouton* v. *Am. Mut. Life Ins. Co.*, 25 Conn., 542; *Buckbee* v. *U. States Ins. Annuity & Trust Co.*, 18 Barb., 541; *Froehlich* v. *Atlas Life Ins. Co.*, 47 Misso., 406; May on Life Ins., § 507.

3. The reception of the premium by the company from their agent, and the keeping of the same, with a full knowledge of all the facts under which the premium was received by the agent, estopped the defendants from claiming that the premium was not paid, and that the policy was forfeited. *Hodsdon* v. *Guardian Life Ins. Co.*, 97 Mass., 144; *Armstrong* v. *Turquand*, 9 Irish Law Reps. N. S., 32; *Supple* v. *Cann*, id., 1265.

4. The fact that the notes were not signed by Lillie is immaterial to the plaintiffs' claim.—1st. The fault, if any, was that of the company in not sending notes by Beardsley to be signed when he received the check.—2d. The notes were not due for six months, and could be signed any time before they were due by Lillie, if living.—3d. The premium was an annual one, divided into two parts or payments, for the benefit of the insured, and therefore the jury was right in deducting them as due from the insured to the company. *Hesterberg* v. *Equitable Life Ins. Co.*, 1 Cincinnati Superior Ct. R., 483; *S. C.*, 2 Bigelow Ins. Cas., 755.

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CARPENTER, J. George T. Lillie, whose life was insured by the defendants, died on the 13th day of May, 1874. By the terms of the policy the semi-annual premium, payable partly in cash and partly in notes, fell due May 9th, 1874. On that day Charles T. Wells drew his check payable to C. E. Tillinghast, an agent of the defendants, for the amount of the cash part of the premium, and delivered it to one Beardsley. Beardsley on the 13th day of May, and after Lillie's death, delivered the check to Tillinghast, who, not knowing of Lillie's death, took it, and gave to him the renewal receipt. The notes were never given. The jury rendered a verdict for the plaintiffs.

The defendants move for a new trial.

We will consider only the alleged errors in the charge of the court to the jury.

The evidence in the case is stated at length in the record. Upon a careful consideration of the evidence in connection with the charge, we are satisfied that the charge was not adapted to the evidence, but on the contrary was so expressed as to be liable to mislead the jury and induce them to come to a wrong result. The simple facts of the case, which are conceded, or established by the proof beyond controversy, that Lillie was dead when the cash premium was paid, that that fact was unknown to Tillinghast or the defendants, and that the premium notes were never given as required by the express terms of the policy, would seem to be conclusive against the plaintiffs. The defendants in substance requested the court so to charge the jury. As the case is presented before us we do not see why they were not entitled to have that request complied with. We do not overlook the fact that there was a claim that the defendants had waived the non-payment of the premium, and that they were estopped from claiming that the policy was thereby forfeited. Those claims will be noticed more fully hereafter.

The court, after stating the claims of the parties, said to the jury:—

"If you find that Beardsley was acting for Tillinghast when he took out the corrected notice and received the check on the

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9th day of May, and that Tillinghast got the money on the check, then the payment to Beardsley was payment to Tillinghast, and through him to the company, and so the cash part of the premium would have been paid in due time."

This charge might have been proper if there had been any evidence that Beardsley was the agent of Tillinghast, or if there had been conflicting evidence upon that point; or if, in connection with it, the court had called the attention of the jury to the evidence, so that the jury could have seen that the plaintiffs' claim was not supported by proof. The case shows that all the evidence upon that point was to the effect that Beardsley was the agent of Lillie, and there was no evidence to show that he was acting as the agent of Tillinghast.

The charge therefore was not such as the case called for. It was a distinct intimation to the jury that they were at liberty to find, notwithstanding there was no evidence to the fact, and notwithstanding the evidence showed the contrary to be true, that Beardsley acted as the agent of Tillinghast. It is the duty of the court to submit to the jury all controverted questions of fact when there is any evidence to support the respective claims of the parties; but if a claim is made against the evidence in the case, and wholly unsupported by proof, it is error to submit it to the jury as if the evidence justified the claim, and without comment, as there is great danger of its leading to an unjust verdict. Under this charge the jury may have found that Beardsley was the agent of Tillinghast. If so, the verdict was manifestly unjust.

The court further said to the jury:—

"If you find that Beardsley was acting for Lillie and not for Tillinghast; that he applied to Tillinghast for a correct notice, and was told by him that the policy should not lapse though there were a few days delay; that Beardsley knew that the company customarily received premiums overdue, and continued the policies alive; and if you find that Beardsley, acting on his knowledge of that custom and the assurances of Tillinghast, did not pay over the money which on the 9th Lillie had paid to him, then, unless you find that he delayed longer than such assurances and such knowledge of that cus-

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tom warranted, or unless you find that Beardsley or Lillie by some deceit or fraud procured this money to be received, the conduct of Tillinghast, in connection with that custom, and with his subsequent reception and retention of the money as the agent of this company, would estop the defendants from denying that this money was paid in time, and prevent the forfeiture of this policy on that ground."

This sentence is long and somewhat involved, and it is doubtful whether the jury understood what the judge meant by it; but assuming that they did, and assuming that we after careful study rightly apprehend its meaning, it would seem that the jury was instructed, provided the facts should be found as therein stated, to apply the doctrine of estoppel. Even if there were no other facts in the case bearing on this question than those stated by the judge in his charge, we should very much doubt whether the doctrine of estoppel would properly apply to this case. We are by no means prepared to sanction the claim that there was any such custom proved as will vary the terms of the written contract. The policy is explicit that the premium must be paid on or before the day it falls due. The renewal receipt given to Beardsley contains on its reverse side a printed notice, in which it is distinctly stated that no agent has authority "to receive any premium after date of its being due without special permission from the officers of the company." It is extraordinary that local and limited agents should have the power, by a course of dealing with the policy-holders, to establish a custom which shall practically nullify these plain provisions, and bind the company without its knowledge or consent. We are inclined to think that all that can be claimed from the custom proved is, that the company or its agents are in the habit of waiving strict payment at the day in some cases, when there is no change in the health or condition of the insured. Hence, it seems from the evidence that when payment has been deferred but a short time, and there is nothing to excite suspicion, the premiums have been received without further inquiry; but if the premium has been delayed a long time, or there are other suspicious circumstances, the usual course seems to have been

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to require a certificate of continued good health. If we are right in our views of the evidence there is nothing that will bind the company to waive strict payment in any case, but they are at liberty to insist in any and all cases upon strict performance. That being so the risk of the delay is with the insured, and if death or sickness occur after the premium is due and before payment, the company would be at liberty to refuse the premium. Now the vice in the charge of the court was, that it did not take into consideration the all-important fact that the insured was dead when the premium was paid, and that Tillinghast was not aware of his death when he received it. It assumed that the assurances of Tillinghast and the custom proved obligated the company, provided the agent actually received the money, without reference to the material facts. Whatever may be the effect of the agent's promise, if he made any such promise, that the policy should be valid notwithstanding the delay of payment, whatever might happen to Lillie in the mean time, it is manifest that the custom proved did not extend to a case in which the insured died after the premium fell due and before payment. We think, therefore, that the court was wrong in charging the jury that, under the circumstances, the company would be estopped from denying that the money was paid in time.

The jury were further instructed that, "if they should find that it was the custom of this company to give notices of the payment thirty days before it came due, and that Lillie knew of such custom, and that by the erroneous notice Lillie was misled and prevented from making this payment, when otherwise he was ready and willing to pay and would have paid it, then also are the company estopped from claiming that this payment was not made in due time, nor was the policy forfeited on that account, provided the payment was made or tendered within a reasonable time after the correct notice had been sent."

We see nothing in this transaction that should operate as an estoppel. There is no evidence that the company or its agents intentionally sent an erroneous notice. There was no intention or motive to mislead or deceive. The error was

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simply a mistake; and Lillie, when he received the notice, knew that it was a mistake. There was no mistake, however, in respect to the time when the premium fell due. It related solely to the amount. There is no evidence that Lillie was, in fact, deceived or misled, and no deception can be inferred from the circumstances. He knew that the amount was erroneously stated, and he knew how to have it corrected when first received, as well as he did when he employed Beardsley. There is no pretense that he had then received any additional information. It was his own folly to wait until the premium was due before taking measures to correct the mistake. The delay therefore was justly attributable to his own want of diligence rather than to the mistake of Tillinghast.

The court next stated to the jury:—"If you find that Tillinghast received this money after Lillie's death, and sent the money to the company, and that the company, with full knowledge of all the facts, has kept the money, or has exercised such dominion over it as shows that they claimed it as their own, then again they are estopped from denying that they have received such premium in due time, and have waived the forfeiture of the policy so far as that is concerned."

There is some doubt from the evidence whether the money was actually received by the company; but as that is purely a question of fact, we do not care to discuss it. If received, whether, under the circumstances, it constituted a waiver or not, is a different question. "A waiver is an intentional relinquishment of a known right." It is incredible that a company or its agents, if rational men, knowing of Lillie's death, and that the premium was overdue and unpaid, should receive the premium, and thereby intentionally give force and validity to the policy, which otherwise was inoperative. It does not appear when the company first knew of Lillie's death, and that the premium was not paid until after his death. If, with full knowledge of that fact, they accepted this premium, they would be bound by it. But if, as is probable, they first knew of it after a claim was made upon them for the sum insured, then the retention of the money while investigating the case, and pending litigation, could not be regarded as any evidence of a waiver or as constituting an estoppel.

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In connection with this charge the attention of the jury should have been called to these circumstances, and they should have been instructed to ascertain when they received the money, if they received it at all, and whether at that time they knew that Lillie was dead, and if not, when they first knew of it, and under what circumstances, and what their conduct then was—whether they retained it intending to give force and validity to the policy, or retained it awaiting the result of the plaintiffs' claim. It seems to us that injustice might have been done to the defendants by this part of the charge.

In conclusion, the court charged the jury as follows:—"It is claimed here that this premium was to be paid, part in cash and part in notes. The same rules which govern the payment of the cash part of this premium may be taken by you as controlling the giving of the notes, it being the law governing this contract that the premium must be paid or its payment waived by the company, in order to save the policy from forfeiture."

This was manifestly erroneous. If the notes had been signed by Lillie, had been given to Tillinghast at the same time the money was paid, and had been treated by him the same as the money was, then the law applicable to the cash premiums would apply equally well to the notes. But the notes were never received by the company or its agent; in fact were never signed by Lillie. The facts were entirely different, and the charge should have had some reference to the facts. We have noticed in detail four several sections or paragraphs of the judge's charge in respect to the cash part of the premium, in every one of which the judge submits to the jury a distinct question. In every instance the actual payment of the cash premium to Tillinghast as an agent of the company is made an *important and material element.* How the same rules which govern the payment of the cash premium may be regarded as controlling the giving of the notes is beyond our comprehension.

The defendants requested the court to charge the jury that these notes should also have been given, or the giving of them

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waived or prevented by the defendants. This request should have been complied with. If it had been, then unless the jury had found a waiver, or that the defendants prevented the giving of the notes, (of which we discover no evidence,) the verdict would probably have been the other way.

For these reasons we advise a new trial.

In this opinion the other judges concurred.

MICHAEL R. ENSCOE *vs.* JOHN DUNN AND ANOTHER.

GEORGE A. STEVENS *vs.* PATRICK DOWLING AND ANOTHER.

It is no objection to the validity of a receipt given to an officer for attached property, that the property was not in fact attached by the officer.

And the receiptor is estopped from denying the value stated in the receipt.

Where three such receipts were given at the same time by the same receiptors for the same property, attached on three different writs against the same defendant, with different values fixed with reference to the demands in the different writs, it was held that they were not to be regarded as one contract but that each receipt stood upon its own ground, as if it were the sole receipt given.

The horses and carts of a person engaged in the business of carting coal, are not protected from attachment as tools of a debtor's trade.

FOUR ACTIONS of covenant upon receipts given to officers for property attached; brought to the City Court of the city of New Haven, and tried to the court upon the general issue before *Stoddard, J.* Facts found and judgment rendered for the plaintiffs, and motions in error by the several defendants. The cases are fully stated in the opinion.

W. C. Robinson, for the plaintiffs in error.

L. N. Blydenburgh, with whom was *S. L. Bronson*, for the defendants in error.

PARDEE, J. The finding of the court discloses that on the

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8th day of April, 1873, a writ of attachment in a case in which Solomon Rosenbluth was plaintiff and Joseph Dunn was defendant, returnable to the Court of Common Pleas of New Haven County, at its May term, was placed in the hands of Michael R. Enscoe, the present plaintiff, then a constable for the town of New Haven, with instructions to serve and return. This writ was legal in form and commanded the officer serving it to attach property to the value of six hundred dollars. On the next day Enscoe went to Dunn's house and told him that he had come to attach his property and that he must give him security. Dunn then owned five horses, six carts, and six harnesses. Some of these horses and carts were upon his premises when Enscoe was there. Upon the same day Joseph Dunn and John Dunn, the present defendants, executed and delivered to Enscoe as constable, a writing under seal, bearing date that day, wherein they acknowledged the receipt of these articles, and promised jointly and severally, for a valuable consideration, to redeliver the same in good order to the officer, or to any officer legally authorized to receive the same on demand; or in default thereof to pay the sum of six hundred dollars; or, if demand was not made before judgment rendered, the amount of damages and costs which should be recovered by the plaintiff in the case, if the same should fall short of the sum of five hundred dollars; and acknowledged themselves estopped from denying that the articles had been attached by the officer, and that they had received the same from him, and further agreed that the value of the articles was five hundred dollars.

The property mentioned in the receipt never in fact came into the possession of Enscoe. It remained in the possession of Joseph Dunn after the execution and delivery of the receipt, and he used it for his own profit, and consumed a part of it in the using. Rosenbluth recovered judgment against Joseph Dunn in the action above mentioned in March, 1875, for the sum of $308.33 debt and $79.91 costs, and took out execution for the same, together with twenty-five cents more for the execution. A constable of the town of New Haven demanded these sums of Joseph Dunn and John Dunn on

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March 23d, 1875, but each refused to pay any part thereof. Upon the same day he made demand upon each for the property specified in the receipt and each refused to deliver any part thereof; and on May 12th, 1875, he duly returned the execution unsatisfied. The present action is based upon the receipt. The Court of Common Pleas rendered judgment therein for the plaintiff for the amount of Rosenbluth's judgment, with interest from the date thereof, and the defendants ask for a reversal of that judgment.

The legality of the contract known as an officer's receipt, even when executed in instances where the property specified therein has neither been taken into possession by the officer nor delivered to the receiptor, has been affirmed by this court; and we do not now accept the suggestion of the defendants that it induces the officer to disobey the precept of his writ and is therefore against public policy. A constable, it is true, is a public officer; he attaches property in the name of the state; but in doing this he is in reality simply obtaining security for a private debt. No arrangement therefore by which that end is attained in a manner satisfactory to both debtor and creditor can give any offence to the public. The public can have no interest in compelling the creditor to seize property when he desires to receive other and better security. In *Jones* v. *Gilbert*, 13 Conn., 521, this court said: "The valuation given in a receipt for property attached has ever been justly considered, upon demand in behalf of the creditor in the execution and a refusal, as conclusive on the parties. So far as the security of the debt is its object it is intended as a stipulation. Even receipts for property which had no existence, have been deemed an estoppel in relation to the rights of the creditor. The officer becomes responsible to the creditor for the amount thus stipulated, if there is no subsequent depreciation; and the receiptor's engagement is to save him harmless. Where, as in this case, the amount of the debt is not controverted and that exceeds the stipulated value, the question as to the actual value is irrelevant. The ratification of such agreements according to their just intent is important to both debtor and creditor. The debtor by pro-

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curing some friend to give a written acknowledgment of the receipt of property which has not been attached at all, estimated at a sufficient sum, with an engagement to redeliver it on demand, shields his goods from seizure, secures the debt and protects the officer. When the debtor is willing to secure whatever judgment may be ultimately rendered, but is desirous in the meantime of disposing of property actually attached, the object of each party may be attained by an estimate acceptable to the creditor or officer. These agreements are voluntary and lawful. To nullify them would divest the parties of the important liberty of making arrangements for their mutual benefit in a crisis deeply interesting to both." In *Stevens* v. *Stevens*, 39 Conn., 481, the court, speaking of this species of contract, said: "It is conceded that such receipts are regarded for many purposes as contracts of indemnity, but not to the extent of nullifying a stipulation of agreed value of the property. The covenant in this case, to pay a stipulated sum not exceeding the amount of the judgment which the plaintiff in the attaching process may recover, is in the nature of an agreed valuation, and in regard to the effect of such a clause we cannot express our view of the law better than in the language of Judge SHERMAN in *Jones* v. *Gilbert*." In *Parks* v. *Sheldon*, 36 Conn., 469, the court said: "The moment the defendant refused to redeliver the property, his liability to the officer became absolute for the amount of the execution and costs, provided it did not exceed the valuation named in the receipt, and if it did then for the sum so named."

In the case before us the amount of the debt due from Joseph Dunn to Rosenbluth, the original plaintiff, has been judicially determined; it remains wholly due and unpaid after legal demand upon both defendants upon the execution and upon the receipt; the liability of the officer to the judgment creditor continues; the property, which by the execution and delivery of the receipt was secured to the use of Joseph Dunn, then belonged to him.

He subsequently used the property for his own profit, and in using destroyed a part of it. Under these circumstances we

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find no occasion for weakening the effect given to the recitals in the contract before us, as estoppels, by the decisions above cited. We think the defendants are barred from denying either the attachment, or the delivery, or the stipulated valuation. We shall thus give effect to their plain intent in executing the instrument.

On the 18th of September, 1873, three other writs of attachment against Joseph Dunn were placed in the hands of George A. Stevens, a deputy sheriff of New Haven County, with instructions to serve and return, one of which commanded the officer to attach to the value of seven hundred dollars, and the other to the value of five hundred dollars. In each of the writs Rosenbluth was also plaintiff, and all were returnable to the Court of Common Pleas for New Haven County, at its October term, 1873, and were directed to the sheriff of New Haven County or his deputy. On the 20th of September Stevens with these three writs went to the house of Joseph Dunn, and informed him that he had three writs of attachment against him, and told him that he must give security. He said that he would, and Stevens returned to his office. Joseph Dunn owned at that time the same property that he owned at the time Enscoe came there, but only one horse and cart was at home when Stevens called. Stevens saw no horses, carts or harnesses, nor did he know how many Joseph Dunn owned at that time, although he believed that he did own some. Some days thereafter the defendants executed and delivered to Stevens three receipts, each containing covenants identical with those in Enscoe's receipt, except that in each the stipulated valuation was adapted to the demand in the writ to which it was made applicable. These receipts were drawn by Stevens without knowledge on his part as to the precise number of horses, carts or harnesses which Dunn then owned or their value; and it was drawn without regard to any specific horses, carts or harnesses; and Dunn thereafter retained possession of and used such horses, carts and harnesses as he then owned. Rosenbluth subsequently recovered judgment in each of the three last named suits against Dunn, took out execution upon each in due form, and on the

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23d day of March, 1875, upon each of these and upon each of the three receipts Stevens made a demand upon the defendants like to that made upon the execution and receipt in the first suit hereinbefore mentioned. They refused to pay the sum named in either execution or any part of it, or to re-deliver any of the property specified in either receipt.

The defendants now urge that these three receipts thus given to Stevens constitute but one bailment and that one judgment only can be rendered upon the three; that they represent but one act of attachment and one act of delivery, and are triplicate instruments containing the same contract.

We think that such an interpretation would do violence alike to the language of the contracts and to the intent of the defendants in signing them. Rosenbluth prayed out three writs, in each of which the officer was directed to attach property. In lieu of such attachment, in each case he accepted the defendants' receipt. He thereby became and still is responsible to Rosenbluth for the amount stipulated for in each. No covenant in either of the three contracts refers to or is made in any manner dependent upon any covenant in either of the others; each stands upon its own basis; the existence of the other two is neither a source of strength nor an occasion of weakness to any one of them; the makers of the three contracts have nowhere said that they shall all constitute but one; they are not to be consolidated by construction simply because each in succession protected Dunn in the possession of the same horses, carts and harnesses; each successive release of the property was presumptively as valuable to him as the first and might well be the consideration for a new contract; and we suppose it to be possible for each valid writ of attachment to support a valid receipt. Moreover, having determined that the stipulations in each of these contracts estop the signer from denying either the attachment or the delivery or the stipulated valuation, we have covered the ground of this objection; for when urged as an answer to each receipt it is simply a denial that there was any attachment in that particular case.

When the receipt was executed and delivered to the officer,

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Dunn, the debtor, owned five horses, six carts and six harnesses, and used them in hoisting and carting coal, one horse being driven by himself and each of the others by a hired man; and thus he obtained his living. He now claims that these horses, carts and harnesses were protected from seizure by the statute which exempts the "implements of the debtor's trade." In *Atwood* v. *De Forest*, 19 Conn., 517, this court said: "By the word *trade*, as used in this statute, we suppose is meant *the business of a mechanic*, strictly speaking, as the business of a carpenter, blacksmith, silversmith, printer, or the like." This definition is also adopted in the recent case of *Seeley* v. *Gwillim*, 40 Conn., 109.

Dunn was engaged in the transportation of merchandise. This cannot be said to be the "business of a mechanic," either by definitions from the books or by the common understanding and speech of men. A special statute has given to the physician exemption for a horse of a value not exceeding $200; and to the fisherman, for one boat owned by one person and used by him. These instances show that the law intends to keep exemptions within narrow limits; and we see no reason for conceding to the transportation of merchandise protection for unlimited investments in horses and carts.

We advise that there be no new trial. In each of the cases of *Stevens* v. *Dunn et al.*, judgment should be rendered for the plaintiff for the amount of the judgment rendered in the Court of Common Pleas, with interest from the date thereof.

In this opinion the other judges concurred.

EDWIN TOMLINSON *vs.* THE OUSATONIC WATER COMPANY.

The plaintiff for a small consideration conveyed to the defendants the right to flow his land by the erection of a dam across a river, and the defendants executed to him a bond in the penal sum of $1,000, with the following condition: "The condition of this obligation is such, that whereas the said *T.* has con-

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veyed to the *O. W. Co.* the right of flowage of his land lying &c., and whereas on the southerly side there is a bank wall on which stands the carriage house of said *T.*; and whereas the flowage of said land may injure said wall and carriage house; *and whereas the O. W. Co. has undertaken, and does hereby undertake and agrees, forever to protect and maintain said wall* against all damage resulting from the water and ice in said river while said dam shall remain standing: Now if the said *O. W. Co.* shall well and truly maintain said wall and repair all injury that may so result, then this bond shall be void; otherwise in force." Held that by this instrument the defendants had, in addition to the obligation of the bond as such, covenanted to protect and maintain the wall in question, so long as the dam remained standing.

COVENANT; brought to the Court of Common Pleas of New Haven County. The obligation upon which the suit was brought was as follows:

"Know all men by these presents, that we, the Ousatonic Water Company, a corporation located in the town of Derby, are holden and firmly bound unto Edwin Tomlinson, of the town of Seymour, in the penal sum of one thousand dollars, to be paid to him or his certain attorney, executor, administrator, or assigns; to which payment, well and truly to be made, we, the said obligors, do bind ourselves, and each of us, our heirs, executors, and administrators, and each and every of them, firmly by these presents. Signed with our hands and sealed with our seals, at Derby, this 15th day of March, 1869. The condition of this obligation is such that, whereas the said Edwin Tomlinson has released and conveyed to the said Ousatonic Water Company the right of flowage of all his land lying between the Ousatonic River and the highway or river road, so called; and whereas, on the southerly side of said highway and near the dwelling house of said Tomlinson, there is a bank wall, on which stands the carriage house of said Tomlinson; and whereas, on the northeasterly side of said road the said Tomlinson has a well and a dwelling house, and cellar under the same; and whereas, the construction of said dam and the consequent flowage of the said land between said river and said river road may endanger or injure said wall or said carriage house and the said well and cellar; and whereas, the Ousatonic Water Company has undertaken, and does hereby undertake and agrees, to forever protect and maintain said wall and said carriage house, and said well and

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cellar, against all injury and damage resulting from the water and ice in said river while said dam shall remain standing: —Now if the said Ousatonic Water Company shall well and truly forever maintain said wall and said carriage house, and said well and cellar, from any and all damage by reason of water and ice from said river, and shall repair all injury that may result by reason of water and ice from said river, and fully protect and save said Tomlinson, his heirs and assigns, from all injury and damage that may result from water and ice from said river, then this bond shall be void; otherwise to remain in full force and effect in law."

The particular breach charged was the neglect of the defendants to protect the wall and carriage house, and the well and cellar, from injury by the water and ice in the river, and to repair the same when so injured. The pleadings resulted in a demurrer by the defendants to a replication of the plaintiff, and on this demurrer the case was reserved for the advice of this court. The facts presented by the pleadings are sufficiently stated in the opinion.

D. Torrance, with whom was *W. B. Wooster*, in support of the demurrer.

H. Stoddard, contra.

PARK, C. J. In view of the claims of the opposing parties in this suit with regard to the construction to be given to the contract which is the subject of the suit, it seems strange that either party could have been satisfied with the contract as it was drawn. The object they were seeking to accomplish was, the providing for a reasonable compensation to the plaintiff for an apprehended injury to his wall, carriage house, well and cellar, from the erection of the defendants' dam. If the agreement was, as the plaintiff claims it to have been, one which created a perpetual liability on the part of the defendants to make good all the damage to his property as it should occur from time to time, a contract could easily have been drawn setting forth this agreement in unmistakable terms.

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So on the other hand, if the agreement limited the responsibility of the defendants to damages not exceeding in the aggregate the sum of one thousand dollars, as the defendants claim, these terms could easily have been so clearly expressed in the contract as to have prevented all controversy as to its meaning. But instead of doing this the parties put their agreement into the written contract which we have before us —a contract of doubtful construction, to say the least, unless it is read in the light of the surrounding circumstances. This we are required to do, and to ascertain as best we can what was the intention of the parties as expressed by their contract.

It appears that the plaintiff was willing to convey to the defendants the right to flow his land for a nominal consideration, but he desired compensation for, or security against, all damage to his bank wall, carriage house, well and cellar, which might be caused, and which there was reason to apprehend would be caused, by water and ice in times of freshet, if the right of flowage should be granted. It appears that the defendants were willing to pay a reasonable sum for such apprehended damage, but there was a difficulty in agreeing as to the amount. How great the injury probably would be was a matter of so much uncertainty, that all opinion in relation to it was but little more than speculation. It is easy to see that the parties entertained great difference of opinion on the subject, and could not agree as to the amount to be paid, else the right to flow would have been conveyed for a definite consideration, each party assuming the risk of the damages being more or less than the amount agreed upon.

In these circumstances the parties finally settled upon the contract now in question, leaving the damages to be determined thereafter as they should occur from time to time. The contract was made in the form of a bond, and a condition annexed, and it is this peculiarity of it which creates whatever uncertainty there is with regard to its construction. But when we consider that the plaintiff was conveying the right to flow for a nominal consideration, so far as the injury arising from the ordinary flowage of his land was concerned—was

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doing an act which would probably bring upon him the apprehended injury to his property, it can hardly be supposed that he would understandingly have granted the right to flow without either full compensation *in presenti*, by the payment of a definite sum as damages, or *in futuro*, as the injury should occur from time to time. It can hardly be supposed that he would have agreed that if the damages in the aggregate should at any time exceed the sum of one thousand dollars, he would lose the excess, but if they should fall short of that sum, he would be satisfied with the actual damages whatever they might be. In such an agreement he would have everything to lose, and nothing to gain in respect to the risk, while the defendants would have everything to gain, and nothing to lose. It can hardly be supposed that the defendants would have asked for such an agreement, much less have expected that one would be made.

In view of these considerations, let us read the contract in question. Omitting the bond, and the recital of the conveyance of the right of flowage, and the description of the property which was to be protected, it proceeds as follows: "And whereas the Ousatonic Water Company has undertaken, and does hereby undertake and agrees, to forever protect and maintain said wall, and said carriage house, and said well and cellar, against all injury and damage resulting from water and ice in said river while said dam shall remain standing; now if the said Ousatonic Water Company shall well and truly forever maintain said wall and said carriage house and said well and cellar from any and all damage by reason of water and ice from said river, and shall repair all injury that may result by reason of water and ice from said river, and fully protect and save said Tomlinson, his heirs and assigns, from all injury and damage that may result from water and ice from said river, then this bond shall be void; otherwise to remain in full force and effect in law."

If we strike out from this language the clause "and does hereby undertake and agree," the remainder manifestly is nothing more nor less than the condition of the bond; and in that case the plaintiff's remedy would be on the bond.

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But does this clause, with the words of the context which must be taken with it, form any part of the condition of the bond? The whole sentence would read as follows: "And the Ousatonic Water Company does hereby undertake and agrees to forever protect and maintain said wall and carriage house, and said well and cellar, against all injury and damage resulting from water and ice in said river while said dam shall remain standing." If this sentence stood alone, following as it does the statement as to the conveyance of the right to flow the plaintiff's land, which forms a part of the consideration for the making of the agreement, there could be no question but that it would be an independent, absolute, original undertaking to make good whatever damages might occur to the plaintiff's property from water and ice in the river, so long as the dam should remain on the stream. But this obligation is found in the instrument constituting the bond, with a condition annexed thereto, and it is said that if it be an original, independent undertaking, then we have the anomaly of two independent contracts in relation to the same subject matter in one instrument. The defendants insist that this clause is qualified by the words, "has undertaken," which immediately precede it, and should be construed in the same sense, as merely recognizing or stating an obligation already existing. It is exceedingly difficult to give it this construction without doing violence to the language. The clause makes no reference to the past, or to anything already existing. It says "does hereby undertake and agrees;" that is, does by this instrument undertake and agree. The expression is a strong one, and one which is commonly used to create an obligation, and not to acknowledge one already created. "You are *hereby* commanded" or "*hereby* directed," is the mandate of an officer to his subordinate when expressed in writing.

We think that, taking into consideration the relation of the parties, and the surrounding circumstances to which we have alluded, this clause was intended to create, and did create, an independent, original obligation on the part of the defendants; that is, independent of the rest of the instrument, and original, inasmuch as an obligation of this character had not been previously entered into in writing.

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This view of the case seems to be in accordance with the view which the defendants themselves entertained of their liability originally, and for some time afterwards, for they on several occasions repaired slight injuries to the property without making any account of the expense, or causing any indorsement to be made on the bond. This action on their part is important, for it shows how they understood the contract at the time it was made.

The conclusion to which we have come may render it difficult to see what object the parties had in view in making the bond. They may have supposed the sum therein named would cover all the damage which would ever be done to the property, but, in order to provide against every possible contingency, may have made the obligation in its present form. Or they may have considered the bond as a continuing one to meet recurring injuries, and hence have designed, for purposes of security or otherwise, the two obligations to be co-extensive.

We express no opinion in regard to the bond, whether it would be satisfied by damages amounting in the aggregate to one thousand dollars; or whether it is a continuing bond, admitting of being broken from time to time, so long as the dam remains on the stream.

We advise the Superior Court that the replication is sufficient.

In this opinion the other judges concurred.

THE CITY OF NEW HAVEN *vs.* THE NEW HAVEN WATER COMPANY.

The legislature incorporated the New Haven Water Company, with power to open the grounds in any streets of the city of New Haven, for the purpose of laying and repairing water pipes, and to establish the water rents to be paid. At a later session, and after the company had expended a large amount, the legislature granted a revised charter to the city, in which the common council

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were authorized "to regulate or prohibit the excavating or opening of the city streets, for public or private purposes, and to regulate the laying of gas pipes, water pipes and drains." Under this grant the common council passed an ordinance requiring the water company to pay $1 for a license to open an unpaved street, $10 for every nine hundred feet of pipe laid, and $50 for opening any paved street. Held—

1. That the right conferred upon the common council, so far as the operations of the water company were concerned, was one of regulation merely.
2. That under this power the common council had the right to establish a reasonable fee for granting a license to the company to open a street · but that there could not be an assessment of taxes for revenue under the form of a license fee.
3. That the amount of the fee should be fixed with reference to the reasonable cost of issuing the license.
4. That the fees established by the common council were, both in their amount and in the graduated principle upon which they were fixed, unreasonable and illegal.

When the legislature has granted special privileges at different sessions to two independent corporations, the court will not so construe any general expressions in the last grant as to effect a repeal or destruction of the first.

AMICABLE SUBMISSION to the Superior Court upon an agreed statement of facts; reserved for the advice of this court. The case is sufficiently stated in the opinion.

S. L. Bronson, for the plaintiffs.

C. R. Ingersoll and *S. A. York*, for the defendants.

PARDEE, J. The legislature chartered the New Haven Water Company in 1849, for the purpose of supplying the city with water, and gave them power to open the ground in all streets, avenues and highways therein for the purpose of laying and repairing water-pipes; providing that they should not injure any street or highway, but should leave them in as good and perfect condition as before such opening; also, that they might establish the prices or rents to be paid for the water. Upon this grant the company has invested a large sum of money in making reservoirs for holding, and laying pipes for distributing water.

In 1869 the legislature granted a revised charter to the city of New Haven, and therein authorized the court of common council of said city "to regulate or prohibit the excavating or opening of streets, highways and public grounds for public

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or private purposes, and the location of any work or thing therein, whether temporary or permanent, upon, over or under the surface thereof, and the removal of buildings upon or through the same; and to regulate the laying of gas pipes, water pipes and drains for public or private purposes in the streets of the city." Under this grant the city has established and proposes to enforce against the water company an ordinance requiring them to pay to the city the sum of one dollar for a license to open an unpaved street, ten dollars for every nine hundred feet of pipe hereafter laid in any paved street, and fifty dollars for opening any paved street. The company denies the right of the city to enforce this ordinance against them; and this is the question before us.

The city insists that by the section quoted the legislature has clothed the common council with power absolutely to prohibit the laying of new and the reparation of old pipes by the water company; that is, to destroy or repeal the prior grant to them.

The grants to the company and to the city respectively were made at sessions of the legislature separated by years. There is no necessary connection between them; they bear no natural relation to each other. The purpose of the grant to the company is beneficial to the public; the distribution of water promotes health and furnishes protection against fire. Presumably the legislature would protect rather than destroy the franchise. There is not in the city charter any expressed intention to abridge any of the privileges granted to the company; much less any intention to delegate to the court of common council the right to terminate them. The language of the section taken as a whole does not authorize the court to carry the power of inference so far as to say that, without notice, without mention of their name, without cause and without hearing, the legislature intended thus indirectly to incorporate in the city charter a repeal of that granted to the company. When the legislature has granted special privileges at different sessions to two independent corporations, the court will not find in any general expressions in the last grant a repeal or destruction of the first.

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The right therefore conferred upon the city is one of regulation merely. Under this the power in the matter of fees for licenses is thus spoken of in the case of *Welch* v. *Hotchkiss*, 39 Conn., 143. The court says: "Whenever a municipal corporation is authorized to make by-laws relative to a given subject, and to require of those who desire to do any act or transact any business pertaining thereto to obtain a license therefor, the reasonable cost of granting such licenses may be properly charged to the persons procuring them, although the power to do so is not expressly given in the charter." Clearly the fees required of the company in the ordinance before us cannot be brought within this decision. The cost of issuing a license can be no greater for eighteen hundred feet of pipe than for nine hundred, and yet the fee is doubled; the cost can be no greater for a paved than for an unpaved street, and yet the cost is raised from one dollar to fifty dollars. The magnitude of these fees and the graduated principle upon which they are established force us to declare that they are not designed for the sole purpose of paying the cost of the licenses. While in form and name license fees they become in reality an irregular assessment of taxes for revenue. As such the city cannot enforce the ordinance before us against the water company. The court in the case just cited mentioned fifty cents as a fee for a license which by reason of its smallness would escape their condemnation. We will not change the standard for the purposes of the present case.

We advise the Superior Court to render judgment in favor of the water company.

In this opinion the other judges concurred.

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REUBEN W. LINSLEY AND OTHERS *vs.* MARY L. HUBBARD AND OTHERS.

Certain real estate was devised to *A* for life, and after her death upon certain contingencies to *B* and others. The General Assembly, upon the petition of *A*, and against the remonstrance of *B* and others, passed a resolution authorizing the sale of the real estate by certain trustees named, and the holding and investing by them of the proceeds for the benefit of all parties interested, according to their respective interests. Held to be constitutional and valid.

BILL for an injunction against the sale of certain real estate under a resolution of the General Assembly; brought to the Superior Court in New Haven County. The following facts were found by the court:

Chauncey Linsley died in the year 1862, owning in fee at the time of his death a certain farm containing about seventy acres of land with an old dwelling house and barn standing thereon, situated in North Branford in New Haven County, and of the value of about four thousand dollars. He left a will, the provisions of which important to the present case are stated in the resolution given below. The respondent, Mary L. Hubbard, is the granddaughter and sole heir at law of said Linsley. Parnel Linsley, his widow, who had the life use of the farm, died in 1874. Mary L. Hubbard has had the full use and enjoyment of the estate since the decease of her grandmother, and is now in possession of the same; she is now thirty-seven years of age, and is unmarried. Her residence is with her father in the town of Guilford, about seven miles from the farm, and she has been and is now supported by her relatives. The farm has not heretofore produced, and is not capable of producing, a net income exceeding one hundred dollars per year.

The petitioners have the contingent interest in the premises which the will gives them, and they are the parties named in the will of Chauncey Linsley, either directly, or as the heirs of the Reuben L. Dudley therein named.

In April, 1875, Mary L. Hubbard brought a petition to the General Assembly for a sale of the farm, which was duly

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referred to the joint standing committee on the sale of lands, and the present petitioners appeared in opposition, and with the said Mary were duly heard either in person or by counsel before the committee. The committee made a report in favor of granting the prayer of the petition and recommended the passage of a resolution submitted by them. The resolution so submitted was duly passed by the General Assembly and is as follows:

"Upon the petition of Mary L. Hubbard, of Guilford, showing that she is the granddaughter and only descendant of Chauncey Linsley, late of North Branford, deceased; that by his will, executed March 30th, 1848, and duly probated, he devised to her a life estate in a farm of about seventy acres, situated in North Branford, the farm having sundry buildings thereon; that upon the happening of certain contingencies it is provided by said will that said life estate shall become a fee simple in her and the heirs of her body; that otherwise, upon her decease, the remainder interest in said farm will pass to Reuben W. Linsley of Huntington, Seth H. Linsley of North Branford, Dana B. Page of Westbrook, Wilbur F. Page of Middletown, Daniel R. Page of Fair Haven, Polly Babcock of North Branford, and the heirs-at-law of Reuben L. Dudley, late of Michigan, deceased; that the said farm is now worth about four thousand dollars, but is depreciating in value, and produces but a very small income, if any, to the petitioner; that it is to her interest, and that of those who may have a future title to the property, that the same should be sold and the avails securely invested for their benefit, but that neither she alone, nor all who have a present and future interest, can give a complete title to the estate to any purchaser; and praying this General Assembly to pass a bill providing for a sale of the property and the proper investment of the avails of the sale: and whereas it appears that the said Reuben W. Linsley and Wilbur F. Page came before the proper committee of this Assembly, and were heard in answer to the petition; and that all the other parties having a future interest in the estate had legal notice to appear before this Assembly in answer to the same; and whereas the facts above set forth are found to be true: therefore—

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Resolved by this Assembly: That Lynde Harrison, of Guilford, and John H. Harrison, of North Branford, are hereby appointed trustees, and they are duly authorized to sell the whole or a part of the said farm, so devised by said Chauncey Linsley to Mary L. Hubbard, and to execute proper deeds of conveyance, which deeds, when delivered, shall convey the whole title to the lands and buildings therein described; and they are authorized at their discretion to sell the same at public or private sale; *provided*, that if the same or any part thereof shall be sold at private sale, the said Reuben W. Linsley shall have the opportunity to purchase the same, if he will offer to said trustees in writing as high a sum of money for the same as may be offered by any other person; but, to avail himself of this provision, he shall make his written offer within ten days after the time when he shall receive notice of the offer of other parties from either of said trustees. The trustees shall keep the avails of such sale or sales, after deducting the costs of this application and said sale, securely invested in first mortgages of real estate situated in the state of Connecticut, or deposited in some incorporated savings bank in this state, and they shall pay the interest or income derived therefrom to the said Mary L. Hubbard, during her natural life, and at her decease they shall pay over the principal to the heirs of her body, if any are then living; otherwise, they shall pay the same to such persons and in such proportions as is provided by said will of Chauncey Linsley for the disposition of his real estate upon the death of Mary L. Hubbard, and they shall then be discharged from their trust. If either or both of said trustees shall decline to act, or if in the future either shall die or resign, the court of probate for the district of Guilford shall fill the vacancies, and said court shall require bonds of said trustees upon the application of any parties interested in said estate, and shall tax the costs that are herein provided to be paid, and shall require said trustees to render an account of all sales and investments of the avails of such sales, and may remove either or both of said trustees for cause. The trustees shall sell said real estate, if at all, within one year from the passage of this resolution."

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

W. C. Case, for the petitioners.

1. This act is void, because opposed to natural justice, and in violation of the fundamental principles of the social compact. Rights are older than written constitutions, and bear to those instruments the relation of cause to consequence —not the opposite. The law never *creates* rights, it merely defines and protects them. Cooley on Const. Lim., 36, 37, 175; Lieber on Civil Liberty, 103. The nature of the social compact itself furnishes an inexorable law of limitation on legislative power, entirely independent of constitutional restraints, and it is as much the duty of the judiciary to recognize and enforce this law as any other. *Calder* v. *Bull*, 3 Dall., 386, 388. A violation of the right of private property is a violation of that law, and is the illustration invariably used to point the application of the doctrine which we claim. Sedgw. Stat. & Const. Law, (Pomeroy ed.,) 128; *Taylor* v. *Porter*, 4 Hill, 140; *Goshen* v. *Stonington*, 4 Conn., 225; *Booth* v. *Woodbury*, 32 id., 126; *People* v. *Morris*, 13 Wend., 328; Cooley on Const. Lim., 175.

2. The act is void, because it is in violation of an implied constitutional restraint upon legislation. Section 11, article 1st, of the constitution of this state, is: "The property of no person shall be taken for public use without just compensation therefor." By fair implication this section prohibits the taking of private property for private use, with or without compensation. The words of that section "should be construed as equivalent to a constitutional declaration that private property, *without the consent of the owner*, shall be taken only for the public use, and then only upon just compensation." Sedgw. Stat. & Const. Law, 447; *Bradley* v. *N. York & N. Haven R. R. Co.*, 21 Conn., 304.

3. The act is void, because it is a direct and palpable violation of that constitutional guaranty of the rights of private property known as "*due process of law.*" What is the meaning of this phrase? In *Taylor* v. *Porter*, before cited, Judge

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Bronson says: "It cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for asserting guilt or determining the title to property. The same measure of protection is extended to life, liberty and property; and if the latter can be taken without a forensic trial and judgment, there is no security for others." If that definition holds in the present case, either the act in question was a usurpation of judicial power, and for that reason alone void, or it was clearly without "due process of law," and for that reason void. Certain it is that the phrase does not mean a statute passed for the purpose of working the wrong complained of. That construction would render the restriction absolutely nugatory and turn this part of the constitution into mere nonsense. The acknowledged principle is, that private property can not be taken for strictly private purposes *without the consent of the owner*, whether compensation be provided or not, except upon forensic trial and judgment. *Taylor* v. *Porter*, 4 Hill, 140, 149, and authorities before cited. Those acts of the legislature authorizing the sale of the land of minors, and other persons not *sui juris*, are not in conflict with this doctrine. The decided cases which sustain those acts stand upon the ground that for persons not *sui juris*, and therefore incapable of consenting, the legislature, as *parens patriæ*, consents; but this reason fails in the case of persons *sui juris*, and therefore the rule itself fails. *Rice* v. *Parkman*, 16 Mass., 326; *Davison* v. *Johonnot*, 7 Met., 388; *Sohier* v. *Mass. Gen. Hospital*, 3 Cush., 483; *Clarke* v. *Hayes*, 9 Gray, 426; *Clarke* v. *Van Surlay*, 15 Wend., 436; *Cochran* v. *Van Surlay*, 20 id., 365, 373. Nor are those statutes which authorize the partition of lands among joint tenants, and the sale of such lands, if sale is necessary to give each tenant his right, inconsistent with this claim. Those statutes are really statutes for the protection and enforcement of the rights of property, and are intended simply to secure to every man the full measure of interest he acquires by his title and no more. Such statutes are held valid because the right of partition is incident to all real estate holden in common, and enters into the very nature

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of the title of estates so holden. *Richardson* v. *Monson*, 23 Conn., 97.

4. It can not be said that the petitioners are not in reality deprived of any property by this act, because their interest is contingent, and liable to be defeated by the future happening of a possible event. "It is very certain that the legislature cannot deprive a man of real property in which he has either a vested or a contingent right." Sedgw. Stat. & Const. Law, 152. Our rights are vested, though the remainder is contingent. Cooley on Const. Lim., 358. Nor because the property is not diverted from the purposes of the testator, but the avails of the sale are to be held for the benefit of the petitioners in the same manner that the land was. This is not true as a matter of fact. An inseparable part of the act appropriates a part of the petitioners' property to defraying the expense of the application to the legislature, and of the sale—*taking part of the petitioners' property to pay the expenses of depriving them of the rest.* If an inseparable part of a statute is void for reasons of constitutional restriction, the whole statute is void. *Commonwealth* v. *Hitchings*, 5 Gray, 482; *State* v. *Wheeler*, 25 Conn., 290; *Mobile & Ohio R. R. Co.* v. *The State*, 29 Ala., 573. But the petitioners' rights of property are none the less violated, even if money, equivalent in value to the farm in the judgment of the legislature, is received for the land and held to abide the contingencies contemplated by the will. What *are* the rights of property? Why, the right to hold *what is indisputably our own*, in any form we please, subject to nothing but the public necessity and the adjudicated rights of our fellow-men, and the right to dispose or withhold disposition subject to the same rule. Strike these out, and what is there left worth the solemn guaranty of a written constitution, or worthy to be mentioned as constituting, with the life and liberty of the citizen, the basis of free government. "A statute which, without some controlling public necessity and for public objects, seeks *to affect or interfere with* vested rights of private property, is equally beyond the true limits of the legislative power." Sedgw. Stat. & Const. Law, 151.

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5. It remains to consider the argument of inconvenience, which is always urged in cases involving the constitutionality of statutes and other legislative enactments. 1. As a matter of law. If this act is a clear violation of constitutional restraints upon legislation, no argument of inconvenience has any weight. The responsibility is upon the legislature and not upon the judiciary. Sedgw. Stat. & Const. Law., 411. 2. As a matter of fact. The danger to titles to real estate in this state, by reason of holding this act void, is purely imaginary. Our legislature, it is true, has given authority to sell land in a very large number of cases—in cases where the parties in interest were *sui juris*, and cases where they were not. The cases where they were not *sui juris* have been sufficiently remarked upon already. Those where the parties in interest were *sui juris* may be classified as follows:—1st. Cases where it appears on the face of the enactment that all parties in interest joined in the petition.—2d. Cases where the act finds the allegations of the petition true *generally*, and reference to the petition in the secretary's office shows that all parties in interest concurred.—3d. Cases where it appears on the face of the act that some parties in interest were summoned to appear and did not.—4th. Cases where neither the act itself, nor examination of the papers in the secretary's office, discloses whether the parties in interest were all notified and consented or not.—5th. Cases where it appears from the act itself that authority to sell was granted by the legislature without the consent and against the opposition of some of the parties. Those cases where the consent of all parties in interest appears affirmatively are so largely in excess, that it is clear our legislature, *as a rule*, have made consent an indispensable requisite. Cases where neither consent nor opposition appear affirmatively on the record, are hardly exceptions to this rule, for in most of them there was such consent as a matter of fact, and in the rest the legislature presumed it from notice and absence. But of the 5th class, that is, cases where the legislature has authorized sale without the consent and against the opposition of parties in interest, it is confidently believed, after careful research, that the pres-

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ent act is the only one ever passed by the legislature of the state of Connecticut. But whether it is the first of its kind or not, we respectfully submit that upon every consideration it ought to be the last.

L. Harrison and *J. W. Alling*, contra, cited *Calder* v. *Bull*, 2 Root, 350; *Starr* v. *Pease*, 8 Conn., 548; *Pratt* v. *Allen*, 13 id., 125; *Richardson* v. *Monson*, 23 id., 94; *Rice* v. *Parkman*, 16 Mass., 326; *Davison* v. *Johonnot*, 7 Met., 388; *Sohier* v. *Massachusetts Gen. Hospital*, 3 Cush., 496; *Satterlee* v. *Matthewson*, 2 Peters, 380; *Edwards* v. *Pope*, 4 Ill., 465; *Carroll* v. *Lessee of Olmsted*, 16 Ohio, 257; *Stewart* v. *Griffith*, 33 Misso., 19; *Norris* v. *Clymer*, 2 Penn. S. R., 277; *Blagge* v. *Miles*, 1 Story, 426; *In re Columbian Metal Works*, 3 Bankr. Reg., 75; *Sutherland* v. *Lake Superior Ship Canal Co.*, 9 id., 298; *Holman's heirs* v. *Bank of Norfolk*, 12 Ala., 369, 414; Cooley's Const. Lim., 352.

PARK, C. J. The controversy in this case calls in question the constitutionality of the resolution passed by the General Assembly in the year 1875, authorizing the sale of the land in which the petitioners have a contingent interest, and the investment of the proceeds for the benefit of all parties concerned.

It is said by the petitioners that this resolution deprives them of their interest in the property against their will, and is therefore void, not only as opposed to natural justice, but as in conflict with the provisions of the constitution of the state. It was held by this court in the case of *Richardson* v. *Monson*, 23 Conn., 94, that the statute which authorizes the sale of lands held in joint tenancy, tenancy in common, or coparcenary, whenever partition cannot conveniently be made in any other way, is constitutional. That case was ably discussed by counsel, who offered the same arguments against the constitutionality of the statute, which have been urged upon our consideration against the validity of this resolution. It is difficult to see any distinction in principle between the two cases. When a sale is made of real estate held in joint

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tenancy, the tenant opposed to the sale is as much deprived of his estate by the change which is made, as these petitioners are of their property, by the change authorized by this resolution. In either case the parties are not subjected to a loss of their property. It is simply changed from one kind of estate to another. In the case of *Sohier* v. *Massachusetts General Hospital*, 3 Cush., 496, the court say, in a case like the present, "The legislature authorizes the sale, taking care that the proceeds shall go to the trustees, for the use and benefit of those having the life estate, and of those having the remainder, as they are entitled under the will. This is depriving no one of his property, but is merely changing real into personal estate, for the benefit of all parties in interest. This part of the resolve therefore is within the scope of the powers exercised from the earliest times, and repeatedly adjudged to be rightfully exercised, by the legislature." In the case of *Rice* v. *Parkman*, 16 Mass., 326, it was held that the legislature might rightfully authorize a tenant for life to sell the whole estate, thus converting real into personal property, provision being made for securing the interests of those in remainder. We think the decision in the case of *Richardson* v. *Monson*, which we have referred to, must be regarded as decisive of this case.

We think the resolution in question constitutional, and not opposed to natural justice; and we therefore advise the Superior Court to dismiss the petition.

In this opinion CARPENTER, PARDEE and LOOMIS, JS., concurred; FOSTER, J., dissented.

ELIZA DOOLEY *vs.* THE CITY OF MERIDEN.

A city held liable for an injury from the slippery condition of a sidewalk by reason of ice upon it, where the city had been guilty of negligence in the care of the walk.

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CASE, for an injury from a defective sidewalk of the defendant city; brought to the Court of Common Pleas of New Haven County, and tried to the court, on the general issue, before *Peck*, Acting Judge. Facts found and judgment rendered for the plaintiff, and motion in error by defendants. The case is sufficiently stated in the opinion.

R. Hicks, for the plaintiffs in error, cited *Stanton* v. *City of Springfield*, 12 Allen, 570; *Nason* v. *City of Boston*, 14 id., 508; *Luther* v. *City of Worcester*, 97 Mass., 268; *Gilbert* v. *City of Roxbury*, 100 id., 185, 187; *Cook* v. *City of Milwaukee*, 2 Wisc., 270; *Perkins* v. *City of Fond du Lac*, 34 id., 435; *City of Rockford* v. *Hildebrand*, 61 Ill., 156; *Landolt* v. *City of Norwich*, 37 Conn., 615.

H. Stoddard, for the defendant in error.

FOSTER, J. From the finding of facts in this case it appears that the plaintiff, on the morning of the 13th of January, 1875, was on her way to a factory in Meriden, where she was employed, about a mile distant from her home. She was passing over the customary route from her home to her work. While walking along the sidewalk on Main street, between Broad and Center streets, and in the exercise of ordinary care, by reason of the formation of snow and ice in front of the property of Mrs. Hiram Bradley, she slipped and fell, breaking her wrist, and sustaining some other injuries. There was a gradual descent of the ground from Broad to Center streets; and Main street, at the place where the injury occurred, was the principal thoroughfare in the city of Meriden. The sidewalk in question was the only one in general use; the walk on the other side of the street had been for some days, and then was, in process of reconstruction, and was not used by foot passengers.

The weather had been clear for three or four days previous to the accident, except the night immediately preceding, during which there was a very light fall of fleecy snow, which perhaps partially covered the ice on the walk where the plain-

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tiff fell. Above and below the property of Mrs. Bradley the sidewalk had been and was kept clear of snow and ice, prior to and at the time when the plaintiff sustained her injuries.

The flagged walk in front of the premises of Mrs. Bradley was ten feet wide, and thirty-five feet in length, and was covered the whole width, for almost the entire length, with a solid coat of ice, varying from one to three inches in thickness, and of an uneven and irregular surface, but in some places smooth and slippery. The walk had been in this condition, which the finding says was very dangerous, for about a week before the accident. No attempt had been made to clear off the ice, though the weather had been so mild after it formed that it could have been removed by the most ordinary methods. No gravel or other substance had been placed on the walk to make it more safe, but it had been permitted by the defendants to be and remain in this dangerous condition.

A bank of snow, from two to three feet high, had been piled upon the outer side of the gutter, and there was no opening through which the plaintiff could pass to the road, and thereby avoid crossing the ice in question. On the afternoon of the same day, or on the day following the accident, the walk was cleared off by the owner of the adjoining premises. The defendants were duly notified in writing, as required by the statute, of the injury, and the time and place of its occurrence, within the prescribed time.

The court below rendered judgment in favor of the plaintiff.

However the law may be elsewhere, as to the liability of cities and boroughs for injuries sustained on account of ice formed on the sidewalks in their respective limits, we must regard the principles recently enunciated by this court in the case of *Congdon* v. *City of Norwich*, 37 Conn., 414, as establishing the law of Connecticut, and decisive of this case. The law as laid down in *Landolt* v. *City of Norwich*, id., 615, decided by the Superior Court, is also applicable to this case.

Applying the law as declared in these cases to the facts detailed on the record before us, but one result seems possible, and that is the one arrived at by the court below, a judgment in favor of the plaintiff. There is hardly a fact which would

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go to impose a liability, that is not found proved against the defendants, in the very minute, explicit, and full finding of facts, of which we have given a summary.

There is no error in the judgment complained of.

In this opinion the other judges concurred; except CARPENTER, J., who did not sit.

DAVID C. RIGGS, CONSERVATOR, *vs.* LEO C. ZALESKI.

A conservator can not maintain a suit in his own name for money lent by the ward.

The court has the right, and will exercise it in its discretion, of reversing a judgment for an error manifest on the record, though not assigned or the question made in the court below.

ASSUMPSIT for money lent; brought to the Court of Common Pleas of New Haven County, and tried to the court, on the general issue, before *Stoddard, J.*

The plaintiff sued as conservator of one Henry R. Johnson, by whom, while the plaintiff was conservator, the money had been lent. The court rendered judgment for the plaintiff and the defendant brought the record before this court by a motion in error. The question whether the plaintiff could maintain the suit in his own name as conservator was not made in the court below, but for the first time upon the motion in error.

T. C. Ingersoll, for the plaintiff in error, contended that a conservator can not sue in his own name upon the contracts of his ward, but can only so sue upon contracts made by him individually; citing *Snow* v. *Antrim*, Kirby, 174; *Campbell* v. *Crandall*, 2 Root, 371; *Griswold* v. *Butler*, 3 Conn., 231; *Treat* v. *Peck*, 5 id., 280, 286; *Hutchins* v. *Johnson*, 12 id., 382; *Petrie* v. *Shoemaker*, 24 Wend., 85; *McKillip* v. *McKillip*, 8 Barb., 555; *Lane* v. *Schermerhorn*, 1 Hill, 97; 1 Swift Dig., 50; 1 Chitty Pl., 19.

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J. A. Wood, for the defendant in error, contended—1. That a conservator can by statute sue for and collect all debts due to his ward, citing Gen. Statutes, p. 347, sec. 4.—2. That the objection should have been made in the court below, and could not now be made, citing Rule of the Court, 37 Conn., 619; *Russell* v. *Stocking*, 8 Conn., 236; *Picket* v. *Allen*, 10 id., 146; *McLoud* v. *Selby*, id., 393; *Torry* v. *Holmes*, id., 499.

PARK, C. J. The contract for the loan of the money to the defendant was not made with the conservator but with the ward, and we think it is clear that the conservator cannot sustain an action on it in his own name. The cases of *Treat* v. *Peck*, 5 Conn., 280, and *Hutchins* v. *Johnson*, 12 Conn., 376, are conclusive of this question.

Under this view the judgment of the Court of Common Pleas is clearly erroneous. But it is claimed by the counsel for the plaintiff that the defendant can not take advantage of this error here, because the question was not made in the court below, and we are referred to the rule recently established on the subject. Whatever construction may be given to that rule, the court has always reserved the power to consider errors apparent on the record, even though not assigned by the plaintiff in error; and the error here is so manifest that we think it better to reverse the judgment at once rather than leave the defendant to bring a writ of error, upon which it would inevitably be reversed.

The judgment is therefore reversed.

In this opinion the other judges concurred.

ANTOINETTE TURNER *vs.* SILAS I. BALDWIN.

Upon the question whether a certain alley-way, which had long been used in connection with a dwelling-house on which it abutted, had been acquired by adverse possession—held that a claim of right made while using the alley by a former owner of the house from whom the present claimant derived title,

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though inadmissible as a claim of right, was yet admissible as giving character to the use of the alley and showing it to have been adverse.

TRESPASS *qu. cl. fr.;* brought to the Court of Common Pleas in New Haven County, and tried to the court on the general issue and a special plea of title, before *Stoddard, J.* Facts found and judgment rendered for the defendant, and motion for a new trial by the plaintiff. The case is sufficiently stated in the opinion.

S. E. Baldwin and *W. K. Townsend*, in support of the motion.

J. W. Alling, contra.

FOSTER, J. To the declaration in this case, which was in trespass *quare clausum fregit*, the defendant interposed two pleas, the general issue and a special plea of title, *liberum tenementum*. Both issues were found for the defendant. The plaintiff seeks a new trial.

The *locus in quo*, to which each of the parties claimed both title and possession, is a strip of land about seven feet in width and twenty feet or more in length. The land lying on the easterly side of this strip is agreed to belong to the plaintiff, and that lying on the westerly side to the defendant. The claim of title by each party was rested to some extent, if not wholly, on adverse possession and enjoyment for a sufficient length of time to vest a right. The dwelling house of the plaintiff, on its westerly side, abutted on the easterly side of this strip of land, and during a portion of the time that this house was occupied by the plaintiff's grantors, a door opened from that side of the house upon this strip of land, which was then used as an alley-way for the accommodation of the house. The defendant claimed that this use was under a license from him or his grantors, for which they were to receive compensation; while the plaintiff claimed that it was adverse, and under a claim of right.

In support of the claim of the plaintiff the following question was propounded to one of the witnesses:—"Did or did

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not Mrs. Forbes, [the plaintiff's grantor,] while she lived in the house, use this alley-way and side door under a claim of right?" This question was objected to by the defendant, and excluded by the court, the plaintiff excepting.

This witness had previously testified that between the years 1821 and 1839 she very often called on the widow Forbes at this house, and that in doing so she passed through this alley-way, and entered the door on the west side of the house.

It is quite clear that no mere claims or naked assertions of title, made by a party in his own favor, in the absence of the opposite party, are admissible in evidence. It is equally clear that declarations which form part of the *res gesta*, or are expressive of its character, motive, or object, made at the time of the transaction, are admissible in evidence. Both these principles are too well established to require comment or the quotation of authority.

If the above question falls under the former of these principles, and asks for a mere assertion of title in one's own favor, in the absence of the opposite party, it was properly excluded; but if it falls under the latter principle it should have been allowed.

We think it falls under the latter principle. The answer, if responsive to the question, would have tended to show the character of the possession, the nature of the use and enjoyment of the *locus in quo*. That was a material point in issue, and the answer might have had a controlling effect on the decision.

On this ground we advise a new trial, omitting any consideration of some other points which have been discussed on the motion.

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

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SUPREME COURT OF ERRORS.

LITCHFIELD COUNTY.

JUNE TERM, 1876.

Present,

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

ABRAHAM HERMAN AND ANOTHER *vs.* CHARLES D. DEMING AND OTHERS.

A mortgage of real estate described the land conveyed as "four certain farms, situated in the town of *C*, and bounded and described as follows." The farms were then separately described, the descriptive part of the deed closing as follows: "Also all such other lands as we the grantors, or either of us, own or have any interest in, situated in said town of *C;* reference being had to the land and probate records for a more particular description of the same." There were several mortgagors and some of the pieces belonged to some and others to others. Held that another piece of land belonging to one of the grantors, not adjacent to or in any way connected with either of the farms described, was not conveyed by the mortgage. (Two Judges dissenting.)

Whether the land in question would have been conveyed under the same description by an absolute deed: *Quære.*

The policy of the law with regard to mortgages requires that they give definite information not only as to the debt secured but as to the property mortgaged.

BILL to foreclose a mortgage of real estate; brought to the Superior Court in Litchfield County. Facts found by a committee and a decree of foreclosure passed by *Martin, J.* Motion in error by Lois Scott, one of the respondents. The facts are fully stated in the opinion.

H. B. Graves, for the plaintiff in error, cited 1 Swift. Dig., 128; *North* v. *Belden*, 13 Conn., 380; *Mills* v. *Shepard*, 30 id., 98; *U. States* v. *King*, 3 Howard, 773.

C. B. Andrews and *L. P. Dean*, for the defendants in

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error, cited 1 Swift Dig., 122; 2 Washb. R. Prop., book 3, ch. 5, sec. 4, art. 24; *Allen* v. *Bates*, 6 Pick., 460; *Foss* v. *Crisp*, 20 id., 121; *Robinson* v. *Brennan*, 115 Mass., 582.

PARDEE, J. On the 31st day of January, 1863, John H. Scott and George N. Cooper executed and delivered their joint promissory note for sixty-six hundred dollars to Samuel S. Robbins, and to secure the payment thereof John H. Scott and Lois his wife, Peter Cooper, and Polly his wife, George N. Cooper and Charles D. Deming, on the same day jointly executed and delivered to Robbins a mortgage deed of divers parcels and tracts of land, some of which were wholly the property of one of the signers of the deed and some the property of others. The petitioner is now the owner of the note. The deed specifically sets forth the location, the boundaries, the names of abutting owners, and the number of acres contained in, and the names of, the several tracts of land. Of none of these was Lois Scott, one of the respondents, the owner; but she did then own in her own right a tract of woodland containing about fifty-three acres, situated in the town of Canaan. This tract is neither connected with, nor adjacent to, nor necessary to the use and enjoyment of, any of the tracts of land described in the deed, and is not mentioned or referred to therein unless included in the following clause, which follows the detailed descriptions, viz: "Also all such other lands and real estate as we, the said grantors, or either of us, own, or have any interest in, situate in said town of Canaan; reference being at all times had to the land records of said Canaan and to the probate records for the district of Sharon, for more particular description of the same."

Whatever might be held with regard to the sufficiency of such a description in an ordinary deed intended merely to convey title, yet we think such a general description clearly insufficient in the case of a mortgage. It is a fixed principle of our law that mortgage deeds should give subsequent creditors of the mortgagor definite information as to the debt due to the mortgagee and as to the particular property pledged for its payment. It is only by knowing what the property is that

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they can learn its value, and it is as important to them to know its value as to know the amount of the debt for which it is mortgaged; and they are entitled to the assistance of the law of registration in obtaining this information. To be told that the mortgage covers all the real estate which the grantor owns in the town of Hartford is to impose upon them the examination of many thousand pages of records; for it is to be borne in mind that the grantor himself may have received his titles by the same general description and from many different grantors. The recognition by the courts of such a mortgage as valid would be equivalent to the abrogation of the recording system, so far as mortgages are concerned. It is not unreasonable to require of the mortgagee that his deed should mention a name, or a locality, or point to a monument, or to a particular deed, or refer to some book or page. It would be only his proper contribution to the upholding of a system which confers great benefits upon the public.

We are of opinion therefore that the general description in this mortgage was not sufficient to convey the interest of Mrs. Scott, the owner, to the mortgagees. We are not prepared to say that we should apply the same rule without qualification to a deed that was intended only as a conveyance of title. The policy of our law with regard to the definite information to be given to creditors and purchasers by mortgages, does not apply to ordinary conveyances. Here however comes in the policy of the law with regard to records of titles, which is applicable to all recorded conveyances whether by absolute deed or by mortgage. In *North* v. *Belden*, 13 Conn., 380, this court said: "It has ever been the policy of our law that the title to real estate should appear upon record, that it might be easily and accurately traced. This policy has added greatly to the security of our land titles and has prevented much litigation which would otherwise have arisen." And Swift, in his Digest, Vol. I., p. 122, lays it down that "it is essential that the land to be conveyed should be so located, butted, bounded and described in the deed as that it can be known where it lies and be distinguished from any other tract of land, or there must be such reference to some known and

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certain description as will reduce the matter to certainty." If we were to give judicial sanction to this form of conveyancing we should practically put an end to the recording system. If we say that such general language, following as here a particular description, does more than strengthen and secure what has gone before it; that it is sufficiently descriptive to support a distinct and independent grant of additional estate, and that it meets the requirements of that system, we should establish a precedent upon which grantees would hereafter rely and from which the court would find it difficult to recede. After a succession of such conveyances land records would cease to furnish any information; the same confusion would result as would come from the removal of all fences, merestones and other monuments, which indicate the location of separating lines.

The rule of law which declares that to be certain which can be made certain is not complied with in such a deed. The rule demands a reference and pointing to particular documents or records. If we say that such a reference is sufficiently explicit for the town of Canaan and the probate district of Sharon, we say that it is proper for the town and probate district of Hartford, with its fifty thousand pages of records. A search through and an examination of these does not come within any reasonable interpretation of the rule.

We are aware that courts have confirmed grants made in this general form; for instance, in 1814, in *Jackson* v. *De Lancey*, 11 Johnson, 365, the court subjected to the operation of a deed made in 1770 a tract of land which was no otherwise described therein than in the following clause: "and all other lands, tenements and hereditaments belonging to said William Alexander, Earl of Stirling, within the Province of New York." This was made to rest upon the principle that grantors and grantees may make and take such conveyances as are satisfactory to themselves; and the principle is doubtless deduced from English decisions made without reference to any system of recording the transfer of title to real estate; made in cases where there was an actual delivery of possession by the grantor to the grantee in the presence of freehold-

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ers of the county. This gave actual notice to the public and stood in the place of constructive notice by a record; the open corporeal investiture, upon the land itself, was equivalent to a record of specific boundaries. And the principle is not of universal application; as a matter of fact the law does put some limitations upon the freedom of grantors and grantees in the matter of transferring the title to real estate; for instance, there must be two witnesses to the signature of the grantor; he must acknowledge that it is his free act or deed before a magistrate; and the magistrate must certify to this fact. These may be considered as invasions of the absolute right of the owner to make the conveyance in a form satisfactory to himself.

But as it is not necessary to the disposition of the case that we decide this point, we leave it open for future consideration if any case shall arise that shall call for a decision of it.

We are of opinion that the mortgage in question did not convey to the petitioners any title to or interest in the lot of land belonging to Mrs. Scott, and that there is error in the judgment complained of.

In this opinion CARPENTER and GRANGER, JS., concurred. PARK, C. J., and LOOMIS, J., dissented.

WILLIAM S. SEYMOUR *vs.* JULIA O'KEEFE.

Hay in a barn was sold by a bill of sale that provided that it should remain in the barn of the vendor until the vendee should see fit to remove it. The vendee endeavored to hire a barn to which to remove it, but did not obtain one till twelve days after. In the meantime the hay was attached by a creditor of the vendor. Held—

1. That the provision in the bill of sale as to the hay remaining in the barn, did not constitute a lease of the barn to the vendee.
2. That the vendee did not take possession within a reasonable time, and that therefore the property was held by the attachment.

TRESPASS *de bonis asportatis;* brought to the District Court

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of Litchfield County, and tried to the court, on the general issue, with notice that the defendant claimed to be the owner of the property, before *Foster, J.* Judgment for the plaintiff and motion for a new trial by the defendant. The case is sufficiently stated in the opinion.

M. W. Seymour, with whom was *E. W. Seymour*, in support of the motion.

H. Goodwin and *F. D. Fyler*, contra.

LOOMIS, J. On the 30th of November, 1874, one Lloyd Humphrey was indebted to the defendant by his promissory note of one thousand dollars, and in part payment thereof he sold to the defendant ten tons of hay, together with other personal property, and gave her a bill of sale in writing as follows:—

"Norfolk, Conn., November 30, 1874.

"To whom it may concern: Know ye that I, Lloyd Humphrey, of said Norfolk, for the sum of two hundred and fifty dollars, received to my full satisfaction, do this day grant, bargain and sell to Julia O'Keefe, of said Norfolk, the following property, to wit: Ten tons of hay, now in the mow in my barn on the Hall meadow road; fifteen forty-gallon casks of cider, now in the cellar of my dwelling house in said Norfolk; five feather beds, also in my dwelling house in said Norfolk; nineteen sheep, now in my barn in Winchester; and three hundred pounds of tobacco, now in my old dwelling house in said Norfolk; all of said property to remain on my premises until the said Julia O'Keefe shall see fit to remove the same.

Lloyd Humphrey."

The court below finds, (although it does not appear in the bill of sale,) that the hay was to be indorsed on the note, at the sum of eighty dollars, but no such indorsement was ever made. The day after the sale, December 1st, the hay, while in the barn of Humphrey, and before the defendant had moved or fed out any part of it, was attached at the suit of Dickerman and Jopp, against Humphrey, as his property, the officer

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leaving a notice of the attachment on the barn according to law. Judgment was duly obtained, and on the 8th of December execution issued, which was put into the hands of the plaintiff, a deputy sheriff, for service, and on the same day it was duly levied on the hay and notice posted on the barn as required by law.

On the 12th of December, notwithstanding the attachment and levy, the defendant commenced removing the hay, for which act this suit was brought. It is further found that between the 1st and 12th of December the defendant attempted to hire a barn to which she might remove the hay, but did not hire one till December 12th.

In the bill of sale the description is, "ten tons of hay now in the mow in my barn on the Hall meadow road." If this was the entire transaction, it would seem that the hay sold was never designated, set apart, or separated from the mow in the barn, as required by law to perfect the sale. But the facts bearing on this point are rendered doubtful by another part of the finding of the court, which states that the defendant "purchased the hay in two barns, estimated at ten tons," and that "the sale was valid, unless rendered constructively fraudulent as against the creditors of Humphrey by reason of its non-delivery." And the motion shows that this last point was the only matter in dispute between the parties in the court below. We will therefore confine our discussion to the question last suggested, namely—Was there a sufficient delivery of the hay to the defendant to enable her to hold it notwithstanding the attachment and levy thereon?

The doctrine that continued possession by the vendor after a sale renders the sale constructively fraudulent, is firmly established in this state as a rule of law and of public policy. The only doubt is whether the doctrine applies to this case. To enable the plaintiff to invoke the benefit of the rule, it must appear that there was the requisite time to deliver possession, and the claim here is, that the defendant did not delay for an unreasonable time to take possession, and therefore there was no retention of possession by the vendor after the sale.

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The defendant seems to predicate the claim that there was not in this case a reasonable time to take possession, mainly, if not wholly, on the fact that she had no barn of her own and was not able to hire one till the 12th of December. It seems to us that the test of what is a reasonable time, implied by this claim, is not the true one. It makes reasonable time depend too much upon what happens to be convenient to the purchaser. If this were permitted, our rigorous rule of public policy as to the retention of possession would exist in vain. It might easily be evaded. If the want of a secure place to put hay can excuse its non-delivery, the same rule must apply to the sale of horses, cattle, or indeed any personal property requiring storage and care; and instead of the reasonable time being limited, as in this case, to twelve days, it might, on the same principle, be extended over months.

The law is not content to declare what shall be the effect of a retention of possession, but in order to make the doctrine effectual, and prevent evasion, many other equally rigorous rules have been prescribed; for instance, the law determines with the same unrelenting spirit what shall be regarded as a continued possession in the vendor, so that even an actual delivery and an actual change of possession is not enough, so long as the property is so placed as that it holds the same apparent relation to the vendor that it had before the sale. There must, in short, be such a manifest, continued and open change of possession, as to indicate to the world a change of title. Now if, in order to make the main rule effective, the law prescribes such rigorous rules after the sale, it must require a similar rigor relative to the time when the act of delivery is to be performed. And the rule on this subject should be, and is, that "a purchaser of personal property is bound in every instance to take immediate possession, if it is practicable." *Ingraham* v. *Wheeler*, 6 Conn., 277.

But what if it is not practicable? Then we say he is bound to take possession, or do that which is equivalent, in a reasonable time. But "reasonable time" must be construed, not with reference to the mere convenience of the party, but only with reference to the time fairly required to perform the act

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of taking possession, or doing what is equivalent. We must construe the exception to the rule requiring immediate possession, in the spirit of the rule itself. The cases where it is held that immediate delivery is not practicable are usually illustrated in the books by the sale of a ship at sea, where immediate delivery is a physical impossibility, and the same principle has been applied to a case where the situation of the parties at the time of the sale was so remote from the place where the property was, that immediate manual delivery was physically impossible.

In *Mead* v. *Smith*, 16 Conn., 346, the bargain of sale was made in New York at 9½ o'clock A. M., and the property at the same time was in Greenwich, Connecticut. The purchaser started immediately after receiving his bill of sale, from New York to go to Greenwich, to take possession; but before he could arrive at the latter place it had been attached. And it was held that there was no want of diligence on the part of the purchaser, and that a reasonable time had not elapsed for the purpose of taking possession at the time it was attached.

This case extends the doctrine as far as it is reasonable to go. But it is to be noted that the purchaser started immediately in that case, while in the present case the defendant made no attempt whatever to take possession on the day of the sale, or on the next day, and neither of the parties performed any act whatever to indicate to the world that there had been a change of title, until two or three days after it had been attached, when the defendant fed some of the hay to her cattle. In this case also, the parties, when they made the trade, were in the vicinity of the property sold. It would have taken only a short time to have taken actual possession, or, if the hay was too bulky to be wholly removed the same day, there were several obvious ways of putting the property in the absolute power of the vendee, and having the vendor formally acknowledge, and manifest to the world the fact, that the property had passed under the sole dominion of the vendee. Story on Sales, §§ 311, 312.

But the parties not only did nothing towards a change of

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possession, but at the time of the bargain it is highly probable they did not contemplate any actual change of possession, for, near the end of the bill of sale, the vendor uses this significant language:—"All of said property to remain on my premises until the said Julia O'Keefe shall see fit to remove the same." This phrase did not, as the counsel for the defendant contended, amount to a lease of the premises. The vendee could not occupy the premises to feed out the hay thereon. She was not given any possession of the barn—the premises were not given to her; only the property might remain just where it was, on the *vendor's premises*. It was then in the same apparent relation to the vendor in every respect after the sale as before.

We think the defendant did not use due diligence, and that it was practicable for her to have taken actual possession, or at least to have done some equivalent act, clearly indicating to the world a change of ownership, before the property was attached.

The motion for a new trial should be denied.

In this opinion the other judges concurred.

SAMUEL W. BUCKINGHAM AND ANOTHER *vs.* JAMES M. OSBORNE.

An officer having attached personal property, undertook to complete his service of the writ by leaving a copy, with his doings endorsed upon it, at the usual place of abode of the defendant, as required by statute, but by mistake left it at the wrong place, and the writ on this ground was afterwards abated. After the attachment and before the session of the court the property was sold by the officer under the statute authorizing the sale of attached property that is perishable or expensive to keep. In trespass for taking and converting the property, brought against the plaintiff in the attachment suit, it was held—1. That the return of the officer that he had left the copy at the defendant's place of abode, was open to contradiction. 2. That the attempted service was of no effect. 3. That the writ and proceedings under it were no justification in the present suit.

A party has no power to rescind a contract of purchase unless there is a provi-

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sion in it giving him the right to do so. If the property purchased does not answer the terms of the contract, there being no fraud in the case, his only remedy is by a suit for the breach of the contract.

Where a contract of sale of personal property is inoperative under the statute of frauds for want of delivery, a tender made afterwards, and an unconditional acceptance, have the same effect between the parties as if the delivery had been made at the time of the sale.

TRESPASS for taking and carrying away a horse belonging to the plaintiffs; brought to the Superior Court in Litchfield County, and tried to the court, on the general issue with notice, before *Martin, J.* The court found the following facts:

In April, 1871, the plaintiffs agreed with the defendant to purchase of him the horse described in the declaration, for $150, payable within thirty days thereafter. The horse was not at that time delivered to the plaintiffs, nor was anything given to bind the bargain, or any note or memorandum in writing of the agreement made and signed by the parties or either of them.

The defendant subsequently delivered the horse to the plaintiffs at the town of Oxford, and it remained in their possession for two or three days, when, on or about the 1st day of May, 1871, they returned it to the defendant, and left it on his premises, claiming that by the terms of the agreement they had a right to do so, and that they had a right to rescind and did then rescind the contract of purchase, on account of a cough which, as they claimed, the horse had at the time of the purchase. The defendant forbade the plaintiffs to leave the horse and requested them to remove him, but they refused to do so, and left it hitched upon the defendant's premises, then and afterwards declaring that they would have nothing further to do with it, and the horse remained upon the defendant's premises until the attachment thereof by the defendant to be mentioned.

On the 16th of May, the defendant, by virtue of a legal writ of attachment in his favor against the present plaintiffs, attached the horse as their property, and upon proper proceedings had under the statute providing for the sale of live stock attached, the horse was sold under the attachment, and the avails of the sale were deposited with the clerk of the court,

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in whose hands they now were subject to the order and disposal of whoever might be entitled to the same.

The writ of attachment was made returnable to the term of the Superior Court in Litchfield County held on the third Tuesday of September, 1871, and on the return day of the writ the present plaintiffs pleaded in abatement thereof for defective service, (the officer having left the copy intended for the defendants at the wrong place,) and the cause remained on the docket of the court, by regular continuances, until the January term, 1873, when the writ was abated and dismissed, with judgment for the present plaintiffs to recover their costs; which judgment has never been set aside. The present suit was not commenced until after the decision of the court dismissing the writ. The writ upon which the horse was attached, and the officer's return thereon, were both in regular form and sufficient on their face, and the defendant had no knowledge or suspicion at the time of the sale of the horse of any defect in the service of the writ.

The horse, at the time it was attached by the defendant as the property of the plaintiffs, was in the possession of the defendant, under the claim of the plaintiffs that they had rescinded their contract for its purchase, and had ceased to have any title to or interest in the horse, and that it belonged to the defendant.

The plaintiffs have never paid the defendant the purchase price of the horse, but have always refused, and still refuse, to pay the same, or any part thereof. The horse was of the value of $150.

The plaintiffs claimed, upon the facts found, that, as matter of law, they were the owners of the horse at the time of the attachment by the defendant, that it was not competent for the defendant to deny their title as he had treated the property as theirs, and that, if they made a mistake in law in regard to their right to return the horse, such return and the leaving of the horse upon the defendant's premises, did not divest them of their right of property in it. They further claimed that, inasmuch as the writ of attachment had, previous to the commencement of the present action, been abated and dis-

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missed on the ground of defective service, the taking and sale of the horse constituted a trespass, and that the process afforded no justification to the defendant in the present action, and requested the court so to decide.

The defendant claimed that, by the facts proved, there never was a perfected sale of the horse to the plaintiffs; that the horse was never delivered to and retained by the plaintiffs, and nothing given to bind the bargain, and that there was no memorandum in writing of the agreement made and signed by the parties. He further claimed that the plaintiffs, by returning the horse into his possession in the manner and under the claim they did, and refusing to pay for the same, and never making any further claim to the horse, in law and in fact abandoned and lost the title to and possession of the horse, and could not recover in this action. He further claimed that, at all events, the process offered in evidence by the plaintiffs was a justification of the defendant in attaching and selling the horse, and asked the court so to decide.

The court overruled the claims of the plaintiffs and rendered judgment for the defendant to recover his costs. The plaintiffs thereupon moved for a new trial for error in the rulings of the court.

H. B. Graves, in support of the motion.

1. As a matter of law and fact the plaintiffs were the owners of the horse in question. They had contracted for it, and performance of the contract had been consummated by a delivery on the part of the defendant, and an acceptance by the plaintiffs. The delivery under such circumstances removed any objection to the plaintiffs' title growing out of the statute of frauds. *Calkins* v. *Lockwood*, 17 Conn., 154. Their mistake in supposing they had a right under the contract to return the horse did not divest them of their title. Further, the defendant was estopped from claiming that the title was not in the plaintiffs. He had attached it as their property and sold it as such. The finding fully establishes this point.

2. The taking and sale of the horse under a defective pro-

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cess was a trespass, and a conversion of the property to the defendant's own use. 2 Addison on Torts, 720, 779, 780.

3. The title being in the plaintiffs by construction of law, such title carried with it a possession sufficient to enable the plaintiffs to maintain trespass for its illegal conversion. *Bird* v. *Clark*, 3 Day, 272, 277; *Williams* v. *Lewis*, id., 498.

4. The process under which the horse was attached afforded no justification to the defendant in taking and converting it. The plaintiffs' action was brought for an illegal taking and conversion, under a process which the Superior Court had declared void and dismissed. Such a process could not justify any act done under it.

W. Cothren, contra.

1. There was never any legal and perfected sale of the horse. A contract for its sale was begun, but was never completed in accordance with the rules of law. The statute of frauds provides that "no agreement for the sale of any personal property, for fifty dollars or upward, shall be good, unless the buyer shall accept and actually receive part of the property sold, or give something to bind the bargain, or in part payment, or unless some memorandum in writing of such agreement shall be signed by the parties to be charged therewith or their agents." Gen. Stat., 441, sec. 44. In this case the horse is found to be of the value of $150, and not a single requirement of the statute was complied with. The plaintiffs did not, then and there, accept and actually receive the horse. They gave nothing to bind the bargain, or in part payment therefor. They did not make and sign any memorandum in writing of their agreement. They departed, after the negotiation, leaving the defendant to deliver the horse some other day. When the defendant delivered the horse at a subsequent time, they returned him in a day or two, under a claim of right, because he had a cough. They did not accept the horse, and have never accepted or paid a farthing for it, either then, or to this day, and insist that they never will pay anything. There was then no sale, delivery, or acceptance of the horse in law or in fact. *Calkins* v. *Lockwood*, 17 Conn., 173;

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Atwater v. *Hough*, 29 id., 508, 513; *Lampson* v. *Landon*, 5 Day, 506, 509; 2 Steph. N. P., 1989. "The acceptance must be clear and unequivocal, not constructive. A delivery without an ultimate acceptance, and such as completely affirms the contract, is not sufficient to satisfy the words of the statute." 1 Swift's Dig., 264.

2. But the plaintiffs say that the defendant attached the horse after they had refused to accept him. This fact cannot be complained of by them. They had no title to the horse, and claimed none. The act of attaching the horse was utterly nugatory, so far as the plaintiffs were concerned. He might just as well have attached anything else which he owned.

3. The action of trespass is grounded upon an injury to the possession or the right to possession. In this case, as the plaintiffs had neither the possession nor the right to the possession, their action must fail, if there were no other question in the case.

4. Even on the theory that the plaintiffs owned the horse, and were entitled to the possession, they cannot sustain this action. The property was taken by attachment, on a legal writ. Pursuant to statute, following all the legal steps, the horse was sold, and the avails deposited with the clerk, to await the issue of the suit. The writ was regular on its face, the officer's return was in legal form, when the defendant applied for an order of sale. The writ was returnable in September, and it was more than two years afterwards that the writ abated for matter *dehors* the writ and officer's return. Suppose the defendant had failed to sustain his suit upon issue joined upon the merits of the case. Would any one claim that an action of trespass would lie for the sale of the horse pursuant to the statute? How are the plaintiffs any more entitled to their action of trespass because the case is terminated by a plea in abatement? The proceedings under the sale are correct, at all events, and the entire record was correct when these proceedings were had. The officer took the property by legal writ, and made a legal return. Could the defendant be rendered guilty of trespass because afterwards, without his knowledge, the officer failed to leave a

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copy at the defendant's last usual place of abode, but left it at his place of business instead. Clearly not. *Jackson* v. *Hubbard*, 36 Conn., 10.

5. The process in the attachment suit furnishes a perfect defense to this action. The attachment was legal, and the proceeding under which the horse was sold was in all respects according to law.

PARK, C. J. There was nothing in the contract of sale of the horse which gave the plaintiffs a right to return the animal to the defendant and rescind the contract. They claimed the right so to do because they afterwards discovered that the horse had a cough, which they claimed that he had at the time the contract was made. But however this may have been, no right of rescission existed in the plaintiffs unless there was a condition in the contract of sale to that effect. If the horse did not answer the terms of the contract, there being no fraud in the sale, the plaintiffs' remedy was on the contract for a breach thereof. 1 Swift Dig., 383.

It is further claimed that the contract was within the statute of frauds, and therefore void, and that consequently the title to the horse never passed to the plaintiffs.

This claim is based upon the fact that the horse was not delivered at the time the contract was made, it being conceded by the plaintiffs that the case was not taken out of the statute by a compliance with any other of its provisions. But the horse was afterwards delivered under the contract, and however inoperative the agreement may have been previous to such delivery, the tender and acceptance of the horse under the contract had the same effect as a delivery at the time the contract was made. There is nothing in the finding tending to show that the acceptance was conditional; that the horse was received for the purpose of being examined in order to ascertain whether he answered the terms of the contract; but on the contrary the finding is, that the tender and acceptance were absolute; and this being so, the contract could not be rescinded except by an agreement of both the parties to that effect. If the defendant had accepted the horse as his prop-

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erty when the plaintiffs returned him, the contract would have been rescinded. But this was never done. When the plaintiffs returned the horse the defendant refused to receive him, and afterwards brought his suit for the purchase money, and sold the horse as the property of the plaintiffs. This being so, the horse continued to be the property of the plaintiffs, from the time he was delivered to them, notwithstanding their efforts to rescind the contract. The want of mutuality in the attempted rescission prevented a re-transfer of the property.

We come now to the main question in the case, which is, can the defendant justify the taking of the property by legal process which he instituted and attempted to serve? The process was good upon its face, but the claim is that it was never served upon the present plaintiffs, who were the defendants in it. The statute prescribes the mode, and the only mode, for the service of process. It is as follows in relation to writs of attachment. "In every case of attachment the officer serving the process shall leave with the person whose estate or body is attached, or at the place of his usual abode, if within this state, a true and attested copy of the process, and of the accompanying declaration or petition, and of his return thereon, describing any estate attached." The officer in this case undertook to serve the process by leaving a true and attested copy, as the statute prescribes, at the usual place of abode of the defendants therein; but the officer mistook the place of their abode, and left the copy at some other place, so that there was in fact no service of the process. But the officer made return on the process that he had left such copy at such usual place of abode of the defendants, and the question is, does this fact justify the taking of the property?

If the officer, after attaching the property, had made no further attempt to serve the process, no one would question the liability of the defendant. But does the fact that he attempted further service, which was wholly nugatory, because he did not do what the statute prescribes, make any difference? There is no such thing as a partial service of a process upon a defendant. Inasmuch as the mode of service is prescribed by the statute, whatever has been done in a given case,

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like the present, must necessarily amount, either to a full and complete service of the process, or to no service at all.

But it is said that the officer's return that he had served the process in the mode prescribed by the statute, is primâ facie evidence that he had done so in fact, and that this was sufficient to require the defendants therein to appear in the court to which the process was made returnable and make answer to the proceeding. But the return of the officer was open to contradiction, and it was contradicted, and the court abated the process because it had no jurisdiction of the defendants in it for the want of legal service of the process upon them. The defendants could have waived the want of service, and would have waived it if they had seen fit to answer to the merits of the case, but this they did not do, and the court was left without jurisdiction of the process.

A majority of the court think it is clear that the proceeding on which the property in question was taken affords no justification to the defendant; and they therefore advise a new trial.

In this opinion PARDEE and LOOMIS, JS., concurred; CARPENTER and FOSTER, JS., dissented.

ISAAC SANFORD, TRUSTEE, *vs.* HENRY P. ATWOOD AND ANOTHER.

A and *B* were married in 1861. By a parol agreement made just before the marriage the wife was to retain the control of her property and be entitled to its use and proceeds. She had about $5,000, with which in 1864 she purchased a farm, taking the deed to herself, and procured stock for it. The husband carried on business elsewhere and had nothing to do with the management of the farm until 1867, when, having failed in business, he came to the farm to live. The wife after this carried on the farm as before, except that he worked upon it when able, being in feeble health, and took special oversight of the out-door work. A horse that was foaled by a mare originally bought by the wife, was in 1874 attached by a creditor of the husband as his property. In trespass against the attaching creditor, brought by the husband as trustee for his wife, it was held—

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1. That evidence of the parol ante-nuptial agreement, even though inoperative in itself under the statute of frauds, was admissible, as tending to prove that the husband, by his subsequent conduct in allowing his wife to have the sole control of the property, intended to relinquish all claim that he might otherwise have had upon it.
2. That the stock on the farm belonging to the wife, its increase was her property.
3. That it did not affect the case that the debt for which the horse was attached was for provender fed out upon the farm and flour consumed in the family, since the husband, to whom the credit was given, had no interest in the property.
4. That the court could not presume that there was anything in the arrangement that was fraudulent against the husband's creditors, by reason of his earnings going into the products of the farm, as it did not appear that, in the circumstances, his services were worth more than his support.

Whether the legal title to the property vested in the husband in trust for the wife: *Quære.*

REPLEVIN for a horse attached as the property of the plaintiff in his individual capacity; brought by the plaintiff as trustee for his wife; reserved, by the Superior Court, on facts found by a committee, for the advice of this court. The case is sufficiently stated in the opinion.

W. Cothren, for the plaintiff.

G. L. Fields and *H. I. Boughton*, for the defendant.

CARPENTER, J. The plaintiff claims title to the property in question as trustee for his wife. It was attached as his property in a suit against him. The plaintiff replevied it; and the question is, whether he owned the property as trustee or in his own right.

The plaintiff was married in 1861. His wife had about $5,000 in money, and shortly before marriage it was verbally agreed that she should after marriage retain the management and control of her property and be entitled to its use and proceeds. In 1864 she bought with this money a farm, taking the deed to herself in the common form, and not as her sole and separate estate. She also paid for the stock on the farm and carried it on, her husband having nothing to do with it until 1867. About that time he failed in business and came to the farm, and from that time forward he and his wife lived

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together on it. She carried on the farm as before, except that her husband, who has been in feeble health, has worked some on it and has taken the principal oversight of the out-door work.

The horse in question was raised and used on the farm, and was the offspring of a mare owned by the wife.

All evidence of the parol agreement made before marriage was objected to on the ground that the agreement was void by the statute of frauds, because not in writing. It is not necessary for us to decide this point, as we are clear that, however this may be, evidence of the agreement was admissible as tending to prove that the husband, by his subsequent conduct in allowing his wife to have the sole control and management of the property in the manner described, intended thereby to relinquish all claim which he might otherwise have had to her property.

We think that the horse in suit must be regarded upon the facts stated as the property of the wife. It seems that Mrs. Sanford carried on the farm at her own expense, and that her husband, pursuant to a parol agreement, actually relinquished to her all his interest in the property. That being so, the products of the farm, including the increase of the stock, belonged to the wife. *Jackson* v. *Hubbard*, 36 Conn., 10. There may be a question whether the property, being hers, vested in her husband as trustee of the legal title for her. He has sued as her trustee, and no question is now made by the counsel for the defendant, but that if he did not hold the property in his own right he held it as trustee for her. We therefore do not consider this question.

It is claimed however that the debt due from Isaac Sanford to the defendants was for feed and provender fed out on the farm, and for flour, meal, &c., consumed in the family, and that this property is liable for such a debt. This argument assumes that the horse was income or profits of the wife's estate which vested in the husband as his own property, and therefore liable for debts contracted for the support of his wife and her children. This assumption, as we have just seen, is not well founded. The statute therefore, which by implication

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makes the income of the wife's property belonging to the husband liable for his debts in certain cases, has no application. We can conceive of no case in which that statute can be so extended as to make her property liable for his debts.

It is further claimed that, inasmuch as the husband's services were given to some extent to the cultivation of the farm, the law regards the transaction as fraudulent as against creditors and subjects this property to the payment of his debts. *Hinman* v. *Parkis*, 33 Conn., 199, and *Plumb* v. *Ives*, 39 Conn., 120, are cited in support of this claim. This case differs materially from the cases cited. To what extent his earnings went into the products of the farm does not appear. It is possible that they amounted to a considerable sum after supporting himself, but that fact does not appear, and we cannot presume it, especially as it is expressly stated that he was in feeble health.

We discover no sufficient reason for adjudging the transaction fraudulent.

We advise judgment for the plaintiff.

In this opinion the other judges concurred.

HARVEY THOMAS, JR., *vs.* PATRICK MULLAIN.

Where facts found are strong evidence of fraud, but do not necessarily prove it, this court can not, as a matter of law, infer fraud. The question is one of fact to be decided as such by the court below.

ASSUMPSIT on a note; brought to the District Court for Litchfield County, and tried to the court, on the general issue, with notice of fraud, before *Foster, J.* Facts found and judgment rendered for the plaintiff, and motion in error by the defendant. The case is sufficiently stated in the opinion.

W. Cothren, for the plaintiff in error.

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S. A. York, with whom was *J. S. Turrill*, for the defendant in error.

CARPENTER, J. The consideration of the note in suit was a horse sold by the plaintiff to the defendant. The defense is fraud in the sale of the horse. The court below, upon a special finding of facts, rendered judgment for the plaintiff. The defendant filed a motion in error.

The substance of the finding is as follows: The plaintiff claimed and stated that the horse was five years old, perfectly sound, and kind and gentle to work double with another horse, but required some breaking to be driven singly; that the horse had not been broken to drive singly, but could be easily so broken. At the time of the sale and the execution of the note, the plaintiff made and gave to the defendant the following writing:

"Southford, May 15th, 1874. I, Harvey Thomas, Jun., have sold a bay horse to Patrick Mullain. I warrant the said horse this day to be sound and not to be over six years old.

Harvey Thomas, Jun."

The horse was not over six years old, was sound, and would work well with another horse, but was unbroken to work singly; and was entirely unfit and unsafe to be driven singly; and when so driven, would bolt from the road and run against the fences, and could not be controlled; all of which the plaintiff well knew at the time of the sale of the horse.

The record does not clearly show what question was made and ruled adversely to the defendant in the court below; so that there is some doubt whether parol evidence tending to prove fraud was excluded in consequence of the written warranty, or received and found to be insufficient to establish fraud. If the former, the ruling was clearly erroneous, as fraud and the written contract might well subsist together. But we are inclined to regard the latter as the correct interpretation of the record. As the facts relating to the transaction are minutely stated, we think the evidence bearing upon the question of fraud must have been received and considered by the court. If so the only question which the record pre-

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sents for our consideration is, whether the facts stated are legally equivalent to a direct finding of fraud. It is not pretended that fraud is expressly found.

The record continues:—Upon the facts aforesaid the defendant claimed that a clear case of fraud or fraudulent representation, known to the plaintiff to be false and fraudulent, was made out, and that the same was sufficient to establish the fact that no consideration for said note was received by the defendant, and that therefore the court ought to render judgment for the defendant. That the giving of a written warranty as to part of the representations made by the plaintiff, known by him to be true, while the other representations which helped to induce the purchase of the horse, known by the plaintiff to be false, were not also included in the writing or warranty, was in itself a trick, and conclusive evidence of fraud on the part of the plaintiff, such as to warrant the court in giving judgment for the defendant.

All this relates to the weight of the evidence, and is, in substance, a request that the court, upon the facts stated, would find fraud. But the court took a different view of it and virtually found that there was no fraud.

We must confess that the facts and circumstances of the case afford strong evidence of fraud; and if the court below had so found, the result would have been quite as satisfactory to us. Indeed it is quite possible that by refusing so to find injustice was done. But the difficulty is that we are unable to see how, consistently with established principles, we can reverse the judgment. We cannot disturb the judgment upon a question of fact; and actual fraud in the sale of a chattel is a question of fact. It is true the law will sometimes infer fraud from the facts stated; but that is where they show conclusively the existence of the fraud.

The facts stated in this case do not necessarily prove that fraud exists. No complaint is made of the age or soundness of the horse. The plaintiff represented that he would work well with another horse, and that was true. He stated that he had not been broken to drive alone, and of that the defendant cannot complain. He further stated that he could "be

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easily so broken." That did not prove to be so. But that was a matter which the plaintiff could not know, unless he, or some one to his knowledge, had tried the experiment; and no such fact appears in the case. It was at best a matter of opinion, and the defendant probably so understood it and so received it. Of its correctness the defendant himself could judge—possibly as well as the plaintiff. The fact that the horse was entirely unfit and unsafe to be driven singly, and that when so driven he would bolt from the road and run against the fences and could not be controlled, may prove that he was mistaken, but does not necessarily prove an intentional misrepresentation. The plaintiff's knowledge that the horse in his unbroken condition was uncontrollable falls short of proving that he knew that he could not "be easily broken." It is possible that an untrained horse will act as this one did and yet yield readily to the training process.

Fraud is not directly found, and a majority of the court are of the opinion that the facts found do not necessarily show fraud. Consequently we cannot reverse the judgment.

In this opinion the other judges concurred; except PARK, C. J., who thought a different construction might be given to the finding of the court below.

EDWIN W. SPURR *vs.* FANNY W. COFFING AND OTHERS, ADMINISTRATORS.

Where one person orders goods for another, promising to pay for them, the question to which of the parties they were sold, is wholly one of fact.

ASSUMPSIT for merchandize sold to George Coffing, of whose estate the defendants were administrators; brought to the Superior Court in Litchfield County.

Coffing was the president and general agent of a joint stock corporation called the Washinee Company, and had ordered

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the merchandize of the plaintiffs, who had charged it on their books to the company, for whose use it was in fact intended. The question in the case was whether the merchandize was purchased by Coffing in his own name and on his own credit, or in the name and on the credit of the company. The company was in poor credit at the time and had since become insolvent. The facts were found in much detail by the Superior Court, including the fact of Coffing's promise at the time of the order to pay for the merchandize, and on the facts the case was reserved for the advice of this court.

G. C. Woodruff and *E. W. Seymour*, for the plaintiff.

D. J. Warner and *D. T. Warner*, for the defendants.

The Judges were of opinion that the question was simply, to whom the goods were sold, or, in other words, to whom the credit was given, and that this was wholly a question of fact. The case was therefore remanded for a finding of the fact upon this point.

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SUPREME COURT OF ERRORS.

FAIRFIELD COUNTY.

SEPTEMBER TERM, 1876.

Present,

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

STATE *vs.* BERNARD BURNS.

A complaint charging that the defendant, not being licensed, owned and kept intoxicating liquors with intent to sell them, exposed and offered them for sale, and sold them, is not bad for duplicity, although each of the several acts charged was itself specifically forbidden by the statute.

The rule is that where two or more acts are so connected that each represents a stage in the same offense, though each act taken alone would constitute an offense, they may be coupled in one count.

A verdict of guilty having been rendered upon the above complaint, it was held that the averment that the defendant kept liquors with intent to sell would support the verdict, even if the other acts were not sufficiently charged.

INFORMATION for keeping and selling intoxicating liquors; brought by appeal from the City Court of the city of Bridgeport to the Superior Court for Fairfield County, and tried to the jury, on the plea of not guilty, before *Culver, J.* Verdict guilty, and motion in arrest of judgment for the insufficiency of the information. This motion being overruled, the defendant filed a motion in error and for a new trial. The case is sufficiently stated in the opinion.

D. B. Lockwood and *M. Tuttle*, in support of the motions.

J. H. Olmstead, State's Attorney, contra.

PARDEE, J. The statute declares that "any person, without a license therefor, who shall sell or exchange, or offer or

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expose for sale or exchange, or own or keep with intent to sell or exchange, any intoxicating liquor, * * * shall be fined not less than fifty dollars nor more than five hundred dollars, or imprisoned not more than six months, or both."

The public prosecutor filed an information in which it was alleged that the defendant, "on the 28th day of December, 1875, did, at the city of Bridgeport, sell and exchange, and offer and expose for sale and exchange, and did own and keep with intent to sell and exchange, spirituous and intoxicating liquors, ale, lager beer, and Rhine wine, without previously having obtained a license therefor, against the peace of the state and contrary to the form of the statute in such case made and provided." After a verdict of guilty the defendant moved in arrest of judgment for the following reasons:—"First, that it is not alleged in said information that said spirituous and intoxicating liquors were sold to any certain person or persons, nor that they were sold to any person or persons to said prosecuting agent unknown. Second, that it is not alleged that said Burns was licensed to sell ale, lager beer, and Rhine wine only, and did without a license therefor sell spirituous and intoxicating liquors. Third, that separate and distinct offences are joined in one count in said information, to wit, that said Burns did sell, and exchange and offer and expose for sale and exchange, and did own and keep with intent to sell and exchange, spirituous and intoxicating liquors, ale, lager beer and Rhine wine, without previously having obtained a license therefor." The defendant also filed a motion for a new trial, and a motion in error, each substantially for the reasons set forth in the motion in arrest.

In relation to the third reason above specified it is said in Wharton's Criminal Law as follows: "Where a statute, as has already been observed, makes two or more distinct acts, connected with the same transaction, indictable, each one of which may be considered as representing a stage in the same offence, it has in many cases been ruled that they may be coupled in one count. Thus, setting up a gaming table, it has been said, may be an entire offence; keeping a gaming table and inducing others to bet upon it, may also constitute

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a distinct offence; for either, unconnected with the other, an indictment will lie, yet when both are perpetrated by the same person at the same time, they constitute but one offence, for which one count is sufficient, and for which but one penalty can be inflicted. An indictment which charges a prisoner with the offences of falsely making, forging and counterfeiting, of causing and procuring to be falsely made, forged and counterfeited, and of willingly aiding and assisting in the said false making, forging and counterfeiting, is a good indictment, though all of these charges are contained in a single count; and as the words of the statute have been pursued, there being a general verdict of guilty, judgment ought not to be arrested on the ground that the offences are distinct. So also with charging that the defendant 'administered and caused to be administered' poison, &c. So, 'obstruct or resist' process may be joined so as to read 'obstruct *and* resist' in the indictment. So in an indictment on the Massachusetts Revised Statutes, chap. 58, sec. 2, by which the setting up of any of the exhibitions therein mentioned without license therefor is prohibited, it is not duplicity to allege that the defendant did set up *and* promote such an exhibition. A neglect by supervisors of roads both to open and repair roads may be charged in one count of an indictment against them." Wharton's Am. Crim. Law, sec. 390, and cases there cited.

In *Barnes* v. *The State*, 20 Conn., 232, the information charged, in the third count, that the defendant did sell, and did offer to sell, by himself and by an agent, wines, spirituous liquors and other intoxicating beverages. After a verdict of guilty the defendant filed a bill of exceptions, and a motion in arrest of judgment for the insufficiency of the information, and afterwards brought his writ of error in the Superior Court. The defendant contended that the information was bad, first, for duplicity, in that it charged two distinct offences, to wit, that the defendant *sold*, and that he *offered to sell*. Upon this objection the court said as follows: "It is insisted that the third count in the information, upon which alone judgment was rendered, is bad for duplicity, uncertainty and repugnancy. It charges the defendant below with *selling* and

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offering to sell spirituous liquors, each of which acts, it is said, constitutes a distinct offence; and therefore the count is bad for duplicity. But there is nothing in the information showing that these acts might not have been parts of one and the same transaction. They are alleged to have been done at one time and at one place; the sale may have been made in consequence of an offer to sell made by the defendant. No matters, however multifarious, will operate to make a declaration or information double, provided that all taken together constitute but one connected charge or one transaction. *Rowles* v. *Lusty*, 4 Bing., 428. Thus, an information charging a person with having committed an assault upon another and beaten him, will not be bad for duplicity, although assaulting a person may be a criminal offence as well as beating him, provided both were parts of one and the same transaction. So an information for a burglary, stating that the prisoner in the night season broke and entered a house, with intent to steal, and did in fact steal therein, will not be defective. If an authority upon this subject were needed, we have only to refer to the late case of *Regina* v. *Bowen*, 1 Car. & Kirwan, 501. There the indictment stated that the prisoner feloniously and wilfully did deface, injure and destroy a certain register of baptisms, marriages and burials, in violation of a statute making a person committing either of those acts guilty of felony. The counsel for the prisoner proposed to demur specially, upon the ground that the prisoner was charged with more than one offence. But upon an intimation from Tindal, C. J., that the prisoner might be bound by the demurrer, and not be allowed to plead over, the demurrer was withdrawn and the prisoner pleaded not guilty. He was convicted, and the question as to the sufficiency of the indictment was reserved for the advice of all the judges; and they held that the indictment was good even upon a special demurrer."

In respect to the first objection specified in the motion in arrest, it is only necessary to remark that the owning and keeping of spirituous and intoxicating liquors with intent to sell and exchange the same, is a complete offence in itself. We have the right to presume from this record that this was

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the offence proven and that upon this the verdict was rendered. Of course it would be impossible for the pleader to allege that the secret intent of the offender, when taking the liquor into his keeping, pointed and was limited to one particular person as the purchaser.

There is no error, and there should be no new trial.

In this opinion the other judges concurred.

STATE *vs.* JOHN KINNEY.

Upon an indictment for rape the testimony of the woman upon whom the offence was committed may be confirmed by evidence that she had told the same story out of court; and this evidence is not limited to the mere fact of her having made such a statement, but may extend to the particulars of it.

INDICTMENT for rape; brought to the Superior Court in Fairfield County, and tried to the jury, on the plea of not guilty, before *Beardsley, J.*

Upon the trial of the case, after the person upon whom the alleged rape was committed had been sworn as a witness, and testified to the principal facts in the case, and after the counsel for the prisoner had cross-examined her and asked her many questions relative to the principal facts charged in the indictment, some of which tended to discredit her evidence, but before any attempt on his part to discredit her testimony otherwise than by such cross-examination, the Attorney for the State offered Richard W. Preece and George S. Pratt as witnesses to prove that she had previously, and soon after the assault charged upon her, told them the same story she had now testified to in court, with the particulars of the alleged crime as related to them by her. To the admission of this testimony the prisoner objected, but the judge admitted it.

The jury rendered a verdict of guilty, and the defendant moved for a new trial for error in this ruling of the court.

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G. H. Hollister and *D. B. Lockwood*, in support of the motion.

The evidence objected to is open to all the objections that apply to hearsay testimony. Roscoe Crim. Ev., 25, 26, 880; 1 Taylor on Ev., §§ 508, 519; 3 Greenl. Ev., § 213; 1 Phill. Ev., 193; *Rex* v. *Clarke*, 2 Stark., 241; *Regina* v. *Megson*, 9 Car. & P., 420; *Regina* v. *Osborne*, 1 Car. & Marsh., 622; *Regina* v. *Nicholas*, 2 Car. & Kir., 246; *Regina* v. *Walker*, 2 Mood. & Rob., 212; *State* v. *Ivins*, 36 N. Jersey, 233; *Stephen* v. *The State*, 11 Geo., 225; *Pefferling* v. *The State*, 40 Texas, 486; *Lacy* v. *The State*, 45 Ala., 80. A strict caution is given by Lord Hale with regard to the evidence for the prosecution in cases of rape: "An accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, though never so innocent." 1 Hale, P. C., 635; Roscoe Crim. Ev., 880. Cases of this character do not call for any relaxation of the rules of evidence for the purpose of supporting the accusation, for there is much greater danger that injustice may be done to the defendant than in prosecutions of any other character. *People* v. *Hulse*, 3 Hill, 309; *Baccio* v. *The People*, 41 N. York, 265. In the case of *State* v. *De Wolf*, 8 Conn., 93, the witness was allowed to testify only to the *fact* that the complainant had previously told her the same story.

J. H. Olmstead, State's Attorney, and *D. Davenport*, contra.

The evidence was offered and admitted, not as substantive evidence to prove the commission of the offence, but as corroborative evidence to strengthen the credit of the principal witness by showing constancy in her declarations. It is proper in all cases to support the credit of a witness whose veracity has been attacked, by showing that he made the same statement out of court. *Luttrel* v. *Reynel*, 1 Mod., 283; *People* v. *Vane*, 12 Wend., 79; *Packer's Lessee* v. *Gonsalus*, 1 Serg. & R., 536; *Wright's Lessee* v. *De Klyne*, 1 Peters C. C. R., 203; *Goodwin* v. *Harrison*, 1 Root, 80; Swift Ev., 123; Cowen & Hill's Notes to Phill. Ev., part 1, p. 777, note 533. Especially is this true in cases of rape. *State* v. *De Wolf*,

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8 Conn., 99; *Johnson* v. *The State*, 17 Ohio, 595; *Laughlin* v. *The State*, 18 id., 101; *McCombs* v. *The State*, 8 Ohio S. R., 646; *Regina* v. *Walker*, 2 Mood. & Rob., 212; *Woodin* v. *The People*, 1 Parker Crim. R., 465.

PARK, C. J. We think the case of *State* v. *De Wolf*, 8 Conn., 93, decisive of the present question. In that case, after the woman upon whom the assault had been made had given her testimony in relation to the main fact charged, which was of an attempt to commit a rape, and had been cross-examined at length, the public prosecutor was permitted to prove by a witness, that she had told the witness, out of court and in the absence of the accused, the same story that she had told in court. This was allowed in order to show constancy in her accusation. Judge DAGGETT, in giving the opinion of the court in that case, says with regard to the admissibility of such evidence: "It was properly admitted in this case, because on an indictment for rape or for an attempt to commit a rape, such evidence is received to show constancy in the declarations of the witness. If a female testifies that such an outrage has been committed on her person, an inquiry is at once suggested, why it was not communicated to her female friends. To satisfy such inquiry it is reasonable that she should be heard in her declaration that she did so communicate it, and that testimony should be received to confirm her story."

It is claimed by the defendant that it does not appear that the particulars of the main transaction as told to the witness out of court, were admitted in evidence, but only a general statement of an attempt to commit a rape. But we do not so understand the case. The counsel for the accused in their argument before the Court of Errors did not so understand it. They objected only to the particulars attending the main transaction communicated by the prosecutrix to the witness. They admitted that the witness might state in a general way, that she complained to her of an attempted rape upon her person.

The law so far was too well settled for controversy. Since

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the time of Lord Hale it has never been questioned by courts in England or in this country. Indeed, unless complaint is found to have been made by a prosecutrix in a given case, the want of it weighs heavily against the prosecution, and in favor of the accused, unless satisfactorily explained.

Furthermore, the case finds that the court permitted the witness to state that the complainant told her the same story which she had told in court. In court she had told all the particulars attending the main charge, and she had been cross-examined at length upon the details. The witness therefore was permitted to state, not only that complaint had been made to her, but all the particulars with regard to it, in the same manner that they had been stated in court. This is too plain for controversy.

We are aware that the decision in this case goes farther than the courts have gone in England, and in most of the states in this country, but still we think the rule adopted in this case is more conducive to the ascertainment of truth than the rule elsewhere established. The law never intends that the innocent shall be punished, or that the guilty shall escape punishment. Hence the aim of the common law has always been to adopt such rules for the ascertainment of truth, that the guilty will be convicted, and the innocent protected. If, therefore, the rule adopted by our court is more conducive to this end than the one elsewhere established, it is correct in principle. Why has the rule been adopted that in prosecutions for rape, and for attempts to commit rape, the public prosecutor may show that the woman on whom the assault was made complained of it to her friends? It is simply because such a course would be natural if the crime had been committed, but very unnatural if it had not been. But her natural impulses would prompt her to tell all the details of the transaction. Why, on the same principle, ought not her statement of the details to be evidence? If her story were untrue, the greater would be the opportunity for detection, and the accused would be helped in his defense. If her story were true, the evidence would show constancy in the charge even to the details, and the truth would the more

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clearly appear. We think then on principle our rule is the better one for the ascertainment of truth.

The state of Ohio has adopted the same rule of evidence, as will appear from a number of decisions in that state. *Johnson* v. *The State*, 17 Ohio, 595; *Laughlin* v. *The State*, 18 Ohio, 101; *McCombs* v. *The State*, 8 Ohio S. R., 646.

The leading case holding the contrary doctrine is that of *Rex* v. *Clarke*, 2 Stark. N. P. Cas., 242. But the propriety of the ruling in that case is doubted by Mr. Starkie in his work on Evidence, 2 Stark. Ev., 700, note *a*. And in *Regina* v. *Walker*, 2 Mood. & Rob., 212, Baron Parke said, in reference to the rule established in *Rex* v. *Clarke:* "The sense of the thing certainly is, that the jury should in the first instance know the nature of the complaint made by the prosecutrix, and all that she then said; but for reasons which I never could understand, the usage has obtained that the prosecutrix's counsel should only inquire generally whether a complaint was made by the prosecutrix of the prisoner's conduct towards her, leaving the counsel of the latter to bring before the jury the particulars of that complaint by cross-examination." Thus we see that the propriety of the rule of *Rex* v. *Clarke* has been doubted by high authority in England.

We do not advise a new trial.

In this opinion the other judges concurred.

ALBERT S. WILSON *vs.* THE WALTERSVILLE SCHOOL DISTRICT.

A vote of a school district directing the committee of the district not to re-employ a certain teacher, which was of no legal effect from want of notice of the matter in the warning, held to be inadmissible as proof of the state of feeling on the part of the district with regard to the matter.

And if the fact that a large number had thus shown their opposition to the teacher were admissible in evidence upon proper proof, yet a copy of the vote certified by the clerk of the district would not be proper proof of that fact.

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The certificate of the clerk imported verity only as to those matters upon which the district might lawfully act.

SPECIAL ASSUMPSIT for breach of a contract to employ the plaintiff as a school-teacher, with a count in general assumpsit for services rendered; brought to the Superior Court in Fairfield County, and tried to the jury on the general issue, with notice, before *Hitchcock, J.* Verdict for the defendants, and motion for a new trial by the plaintiff for error in the rulings of the court. The case is sufficiently stated in the opinion.

I. M. Sturges and *D. Davenport*, in support of the motion.

W. K. Seeley and *C. Thompson*, contra.

LOOMIS, J. This action was brought to recover damages for the refusal, on the part of the defendants, to receive the services of the plaintiff, as principal of a public school in the defendant district, in violation of an alleged contract in writing signed by the plaintiff and by two members of the district committee.

One point of the defence made at the trial was that the committee consisted of three members, and that two of them, without the knowledge of the other, fraudulently conspired and colluded with the plaintiff to make the pretended contract, knowing at the time that it was against the wishes of the members of the district, and of the parents of the pupils attending school therein, and to the detriment of the school.

In support of this claim the defendant offered in evidence the record of the vote of the meeting of the district of May 16th, 1872, which instructed the committee not to re-employ the plaintiff. To the admission of a copy of the record of this vote, (attested by the clerk in the ordinary manner,) the plaintiff objected, on the ground that the meeting was a special one, and that the subject of hiring a teacher or instructing the committee not to hire the plaintiff was not specified in the warning, and that the year in which the meeting was to be held was not mentioned.

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The court ruled that the evidence was not admissible for the purpose of showing that there was any legal action taken at the meeting in reference to the re-employment of the plaintiff, but admitted the same as tending to show the extent of the dissatisfaction existing in the district towards the plaintiff as teacher, and the knowledge on the part of the committee of the existence of the dissatisfaction of the district towards the plaintiff.

Was this ruling correct? The warning for the meeting contained no reference whatever to the subject-matter of the vote, and no year was specified during which the meeting was to be held. By the provisions of the statute, (Revision of 1875, p. 83, sec. 1,) and the repeated decisions of this court, such a warning must be regarded as illegal and void. *Hayden* v. *Noyes*, 5 Conn., 391; *Willard* v. *Killingworth*, 8 Conn., 247.

The ruling we are called upon to review recognized the illegality of the warning and the consequent invalidity of the vote, so far as it instructed the committee not to re-employ the plaintiff, but at the same time validity was given to the vote for the purpose of showing the dissatisfaction existing in the district towards the plaintiff. This distinction at first blush seems plausible, but upon reflection we do not regard it as well founded.

In the first place, the reasons for holding the vote void which directed the committee not to employ the plaintiff, apply with equal force to the same vote as indicating the dissatisfaction of the district. As no notice was given to the voters of the district that any such subject would come before the meeting, there was no special motive moving the friends of the plaintiff to attend. The presumption therefore is that a vote thus obtained did not truly represent the voice of the district in any respect.

In the next place, the real question was, not whether the *fact* that such a vote was passed tended to prove dissatisfaction, but whether the copy of the vote, attested by the clerk in his official capacity, was competent evidence to prove the dissatisfaction. If the copy proved anything, it proved the

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dissatisfaction of the district in its corporate capacity; but, as we have seen, for want of notice the district had no right to vote on the subject at all so as to affect the legal rights of any person.

But it may be suggested, in this connection, that the vote referred to, if not the voice of the district proper, was at least indicative of the dissatisfaction of the voters present who passed it. But the difficulty that meets us here is, that such fact cannot be proved by the unsworn statement or copy sent up by the clerk. The clerk's official certificate imports verity only as to those matters upon which the district might lawfully act. If therefore the meeting is considered as an informal assembly of the voters in the district, the clerk's unsworn statement of what took place could stand on no higher ground than the unsworn statement of any individual who happened to be present. It would be mere hearsay evidence in either case. If it became important to prove what was said and done at the meeting in question, it could, and should, have been so proved by the oath of some one who knew the facts.

It would seem from the record that there must have been some such evidence showing some part of the proceedings at that meeting; and if so, the question is suggested whether any harm was really done to the plaintiff by the admission of the record to prove the vote referred to. We think however that the plaintiff may have been prejudiced by this ruling. Although the court in terms qualified its admission by saying it had no legal effect to prevent the hiring of the plaintiff, yet while it stood as a formal vote of the district its moral effect must have been great. The jury would be apt to think that morally it deprived the committee of the power to make the contract, if it did not technically and legally.

There are some other questions of minor importance raised upon the record which we do not deem it necessary to discuss. A new trial is advised.

In this opinion the other judges concurred.

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THE AGRICULTURAL INSURANCE COMPANY *vs.* GEORGE I. KEELER AND ANOTHER.

A joint bond was executed by *R* and *K*, conditioned that *R* should pay over all funds coming into his hands as agent of an insurance company. In a suit on the bond against both obligors, to which *K* alone made defence, *R* appearing by attorney and consenting to judgment, it was held that the books of *R*, showing the receipt of moneys for the company, kept by him in the regular course of his agency, were admissible against *K*.

And held that it did not alter the case that by the books *R* stood charged with certain sums not actually received and for which he might not ultimately be liable, as this fact went to the weight of the evidence not to its admissibility.

DEBT on a bond; brought to the Superior Court in Fairfield County, and tried to the court on a general denial, before *Beardsley, J.* Judgment for the plaintiffs and motion for a new trial by the defendant Keeler, for error in the admission of evidence. The case is fully stated in the opinion.

L. Warner, in support of the motion.

H. S. Sanford, contra.

FOSTER, J. This is an action of debt on a joint and several bond. In the penal part of the instrument no distinction is made between the obligors; each appears to be a principal. The condition of the bond however plainly shows that the obligations incurred were on account of Raymond only, and that if Keeler should be held liable to the obligees he would have his remedy over against Raymond. Raymond must therefore be considered the principal and Keeler the surety.

On the 23d of May, 1871, the plaintiffs appointed Raymond their agent to take applications for policies of insurance, and to collect and remit to them the premiums due on the same. Raymond accepted the appointment, and in consideration thereof, and of the profit to be derived therefrom, he, with Keeler, made and delivered to the plaintiffs the bond, with the condition annexed, on which this suit is brought.

In the condition of this bond it was stipulated that Raymond should faithfully perform the various duties of an agent

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of the insurance company according to the requirements of the charter, by-laws, &c., of the company. Among other specified duties it was provided that he should, at all times, upon the request of the company, pay and deliver over to them all moneys, record-books, papers, or other property belonging to them which should come into his hands as such agent, and should pay at maturity any and all bonds, mortgages, notes, due-bills, checks, or other evidences of debt, which he might give to the company on account of any indebtedness to them. It was for the non-fulfilment of the stipulation to pay over the money belonging to them, and to recover the amount claimed by them to have been in the hands of Raymond as their agent, when his agency terminated, April 16th, 1872, that this suit was brought.

The single question raised on this motion is, whether the books of Raymond, kept by him, of said agency business, which books he delivered to the proper officer of the company as and for the books of his agency, were admissible in evidence against Keeler, to prove that any money, and if any, what amount, came into the hands of Raymond as agent, which was not by him paid over to the company.

No doubt can exist but that these books were evidence against Raymond, as they are admissions against the interest of the party making them. As a general rule the admissions of one of two joint-obligors is admissible against his co-obligor in a suit on their joint obligation. Such is the character of the present action, though Keeler is the surety and Raymond the principal.

But the defendant Keeler claims, and the motion discloses, that these books were not kept for the sole purpose of showing the moneys actually received by Raymond, but that by them he stands charged with other sums, not received, due for premiums on policies issued on credit. The company permitted Raymond to give credit to persons taking out policies through his agency, according to his reasonable discretion. If any policy was returned and cancelled within four months from its issue, the premium being unpaid, Raymond was credited with the amount of the unpaid premium, if the company

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were satisfied that he was not in fault. All other premiums were to be accounted for by Raymond as cash. There was no evidence that Keeler knew of this practice.

The force of the objection to the admissibility of these books in evidence seems to lie in the fact that they might show Raymond to be indebted to the company over and above the amount of money which actually came to his hands, and thus subject Keeler beyond the stipulations in the condition of his bond. But this objection is rather to the effect of the evidence than to its admissibility. The evidence derived from the books, very clearly, was not conclusive; it was subject to explanation, correction and contradiction. It was the duty of the court below, which duty we must take to have been faithfully performed, to ascertain the amount of money which belonged to the company that actually came into the hands of Raymond, and was not by him paid over to the company, and for that sum, and that sum only, to render judgment for the plaintiffs.

The main question however still recurs; were these books admissible in evidence? Raymond, it appears by the record, was not personally in court, but appeared by attorney, and offered to allow judgment to be entered against him for the amount of the plaintiffs' claim. Keeler alone made defence to the action.

Raymond, in performing his duties as a faithful agent, to which performance the defendants were jointly bound, must necessarily have kept books in which his transactions on account of the company, the issuing of policies, and the receipt of premiums, would be duly entered. That these entries were made during the transaction of the business for which the surety was bound, was apparent from the fact that they corresponded with the monthly statements rendered by Raymond to the company during the continuance of his agency. The provisions of the bond required these statements to be rendered. Mr. Greenleaf says:—"In the cases on this subject—the admissions of a principal as evidence in an action against the surety, the main inquiry has been whether the declarations of the principal were made during

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the transaction of the business for which the surety was bound, so as to become a part of the *res gestæ*. If so, they have been held admissible, otherwise not. * * * So if one become surety on a bond conditioned for the faithful conduct of another as clerk or collector, it is held that in an action on the bond against the surety, confessions of embezzlement made by the principal after his dismissal are not admissible in evidence, though with regard to entries made in the course of his duty it is otherwise." 1 Greenlf. Ev., § 187. Among the cases cited in support of this doctrine which are most analogous to the case at bar, are the cases of *Goss* v. *Watlington*, 3 Brod. & Bing., 132, *Middleton* v. *Melton*, 10 Barn. & Cress., 317, and *Whitnash et al.* v. *George et al.*, 8 Barn. & Cress., 556. *Goss* v. *Watlington* and *Middleton* v. *Melton* were actions against sureties on penal bonds conditioned for the faithful performance of the duties of the principal, a collector of taxes. In *Goss* v. *Watlington* it was held, that entries made by the collector in a public book, handed down to him by his predecessor in office, and afterward delivered to his successor, were evidence against the surety. Dallas, C. J., said: "It is clear that the defendant's obligation is, among other things, for the due delivery of these books which are referred to in the condition of the bond, * * * and thereby [the books] become evidence against him." *Middleton* v. *Melton* went even farther. It was there held that an entry made by a collector of taxes in a private book kept by him for his own convenience, whereby he charged himself with the receipt of sums of money, was evidence against the surety of the fact of the receipt of such money, in an action on a bond conditioned for the due payment of the taxes by the collector. And this upon the general principle that the entry was to the prejudice of the party who made it. *Whitnash* v. *George* was an action on a bond given to bankers, conditioned for the fidelity of a clerk. It was there held that entries made by him of the receipt of sums of money, in books kept by him in the discharge of his duty as clerk, were evidence against his sureties of the fact of the receipt of the money. These entries were admissible, said Lord Tenterden,

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"not altogether as declarations made by him against his interest, but because the entries were made by him in those accounts which it was his duty as clerk to keep, and which the defendants had contracted that he should faithfully keep."

It should be remarked, however, that in each of these cases the principal in the bond was dead, and the action was brought against the sureties alone. Mr. Greenleaf lays no stress on this fact of the death of the principal; indeed he makes no allusion to it, and without an examination of the cases quoted by him in support of the doctrine laid down in the text, the fact would not appear. But Mr. Pitman, in treating on this subject, quotes these same cases, and recognizes the law to be that entries made by the principal, acknowledging the receipt of moneys, under such circumstances as are detailed in those cases, were, after the principal's death, admissible in evidence in an action against the surety. He then says: "But the admissions of the principal are not, while he is alive, sufficient to charge the surety, the evidence not being the best the case is capable of affording." Pitman on Prin. & Surety, 229. The principal cases quoted are *Evans* v. *Beattie*, 5 Esp., 26, *Bacon* v. *Chesney*, 1 Stark., 192, *Hart* v. *Horn*, 2 Camp., 92, and *Ward* v. *Suffield*, 5 Bing. N. C., 381. *Evans* v. *Beattie* and *Bacon* v. *Chesney* were actions of assumpsit against a guarantor for goods sold and delivered to a third person. The declarations of that person, the purchaser of the goods, were held inadmissible to charge the guarantor. *Hart* v. *Horn* was an action of replevin, and it was ruled that the declarations of the landlord were inadmissible for the defendant to disprove the tenancy. In *Ward* v. *Suffield* the defendant, in consideration that the plaintiff would employ one Henry New as his agent for the sale of certain property, and also to collect his debts, agreed to be responsible for all sums which New might receive, not exceeding a specified amount. The admissions of New as to the amount due the plaintiff were offered in evidence and received on the trial at nisi prius, and the plaintiff had a verdict. The Court of Common Pleas refused to set the verdict aside, holding that the evidence, under the circumstances of the case,

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was properly received. Tindal, C. J., in his judgment however said: "It is true that when the principal debtor is alive, his declarations are not evidence against his surety."

Two of these cases, it will be noticed, are but nisi prius authorities, and as to one of them, *Evans* v. *Beattie*, Mr. Justice Johnson, in giving the opinion of the Supreme Court of the United States in *Drummond* v. *Prestman*, 12 Wheat., 515, says: "This case is loosely reported, and attributes some observations to Lord Ellenborough which we doubt much the authenticity of." Manifestly however there is a broad distinction between those cases where the proceeding is against the guarantor on a collateral liability, and the case at bar, where the principal and surety are jointly bound, and where they are together sued on their joint liability.

The case of *Perchard & Hamerton, Sheriffs of London*, v. *Tyndall*, 1 Esp., 394, was an action of debt on bond. The condition of the bond was for the faithful performance of covenants in an indenture between the plaintiffs and one Hyndes, an officer of the sheriff, the material one of which was for the payment of all levy-money made by him. The plaintiffs claimed that Hyndes, the bailiff, had received £153 15s. levy-money, which he had not paid over. On this issue was taken. To prove the receipt of the money the plaintiffs offered an indorsement on a warrant, made by Hyndes, acknowledging the receipt. For the defendant it was objected that to prove this fact Hyndes himself ought to be called. The report then states: "But this was overruled by Lord Kenyon, as in fact Hyndes himself was the defendant in the action."

In *Drummond* v. *Prestman*, 12 Wheat., 515, which was an action on a guaranty, it was held that the record of a judgment confessed by the principal for the amount of the debt due the plaintiff, was admissible in evidence, *inter alia*, to charge the guarantor. In the case at bar no judgment had been had against the principal, but the record shows, as we have already stated, that the principal appeared by attorney, and offered to allow judgment to be rendered against him for the amount claimed.

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Upon the whole case we have no doubt that the books were properly received in evidence, and we think therefore that the motion for a new trial should be denied.

In this opinion the other judges concurred.

CHARLES BECKER, TRUSTEE, *vs.* JOSIAH BAILIES.

The defendant attached as the property of *B* a musical instrument belonging to *B's* wife, the officer locking up the room containing it and taking the key. Soon after the building took fire and the instrument was damaged by water in extinguishing it. *B* requested the defendant, during the fire, to allow him to remove the instrument, which could have been done, but he refused, and afterwards refused to allow its removal to a dry place, and it became greatly damaged. Soon after the officer notified *B* that he relinquished the attachment upon it, but did not otherwise return or offer to return it. In trespass by *B*, as trustee for his wife, it was held—

1. That the notice of the relinquishment of the attachment did not amount to a return of the property nor to an unequivocal offer to return it.
2. That the defendant was liable for the damage done to the instrument after the relinquishment of the attachment.

The instrument was mortgaged at the time of the attachment to a third person for a certain sum. Held that this sum was not to be deducted from the value of the instrument in fixing the damages.

TRESPASS *de bonis asportatis*, with a count in trover; brought to the Superior Court in Fairfield County, and tried to the court (*Hitchcock, J.*) on the general issue, with notice that the property was taken as the property of the plaintiff by an officer upon an attachment in favor of the defendant against the plaintiff. The suit was brought by the plaintiff as trustee for his wife Catherine Becker. The court found the following facts:—

On the 11th of November, 1873, the defendant prayed out a writ of attachment against Charles Becker, the present plaintiff, demanding $100 damages, returnable before a justice of the peace of Bridgeport, and on the 12th of November put the same into the hands of Seymour Whiting, a sheriff of

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the city of Bridgeport, directing him to attach all the personal property contained in certain rooms belonging to the defendant, and hired of him by said Charles Becker, and used by him for a saloon; for the rent of which the suit was brought. The sheriff thereupon attached all the personal property in the saloon, the attachment being made on the 13th of November.

Among the articles thus attached was a musical instrument called an orchestrion, which was the property of Catherine Becker, wife of said Charles, who bought it of Wallenbarger & Gaunter, of New York, for $1,400, and mortgaged it back to that firm to secure the payment of an unpaid part of the purchase price; on which mortgage there was due at the time of the attachment the sum of $575, for which the firm held the individual notes of said Catherine, she having paid from her own money all of the price except said balance of $575.

The sheriff on attaching the property immediately took possession of the orchestrion and other personal property, together with the saloon, by direction of the defendant, excluded said Charles therefrom, and afterwards held possession and control of the same as against said Charles and Catherine Becker.

On the 14th of November, 1873, the sheriff left a copy of the writ with said Charles in service; and in his return on the writ, and in his endorsement on the copy, certified that he had attached the orchestrion by virtue of the writ.

Between one and two o'clock in the afternoon of the 14th of November, and after the copy of the writ had been left in service with said Charles Becker, a fire broke out in the upper part of the building in which the saloon was situated. Water, in large quantity, thrown by the firemen to extinguish the fire, came down into the saloon, and to some degree upon the orchestrion.

The defendant, the sheriff, and said Charles were all at the fire. Before any water had come through upon the orchestrion, and before it had received any injury, said Charles applied in good faith to the defendant, to be allowed to remove

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it to a place of safety, and could have so removed it; but the defendant forbade him to do so, and said that nothing should be taken from the saloon. The said Charles also applied to the sheriff for permission to remove the orchestrion, but he also refused to let him do so.

The day after the fire, one of the mortgagees of the orchestrion applied to the defendant and to the sheriff for permission to remove it to a dry place, the instrument then being in a bad condition, but neither of them would allow it to be done.

While the fire was raging, and water was running down into the saloon and upon the instrument, said Charles procured cloth of some description, and applied to the sheriff to place the same over the orchestrion, which was done, but it afforded but a very imperfect protection from the water; and the instrument was in no way properly protected from the water by the defendant and the sheriff, who held possession and control of the same and of the saloon, though with reasonable effort it might have been removed from the saloon to a place of safety, or protected there.

The said Charles and Catherine Becker gave no further attention to the instrument. It remained in the saloon for a considerable time after the fire, and was nearly if not totally ruined. This damage was produced in part by the water running down upon it at the time of the fire, and by its being afterwards kept in a bad condition, damp and unprotected in the saloon.

None of the property attached by the sheriff is found by the court to have been the property of said Catherine except the orchestrion.

At the time of the fire and before the instrument was injured, it could have been removed to a place of safety without material damage, though it was somewhat bulky.

At the time of the attachment the instrument was worth $1,400, and said Catherine had paid for it in full, except a balance of $575.

Proceedings to replevy the instrument, and some other property attached, as being said Catherine's property, at the

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time the fire occurred, were pending, and negotiations for some arrangement between the parties were going on, which might have been successful but for the fire.

At the time of the attachment and fire neither the defendant nor the sheriff knew that the orchestrion was the property of said Catherine, nor that Wallenbarger & Gaunter had any mortgage on it; nor did they take any means of acquiring knowledge on that subject.

Some time after the fire, and after great damage had been done to the orchestrion, the sheriff met said Charles on the street, and informed him that he relinquished the attachment on the instrument. The sheriff kept the saloon locked, and gave said Charles no permission, opportunity or facility for entering the same, but held control and possession of the saloon and of the instrument himself, and merely informed him that he relinquished the attachment on the orchestrion.

The defendant claimed that on these facts the law was so that if he was liable at all, it was for such injury only as occurred to the orchestrion during the fire and up to the time of relinquishing the attachment by the sheriff. He also claimed that he had a legal right to presume that after the fire the plaintiff would pursue his action to replevy the orchestrion; and that he was not holden for such care regarding it as he might have been under different circumstances; and that the instrument could not have been greatly injured from the time of the fire till the attachment was relinquished. He also claimed that after the attachment was relinquished the orchestrion remained in the saloon at the risk of the plaintiff. The court held that the law was not so, and decided adversely to these claims of the defendant.

The plaintiff claimed that as trustee of said Catherine he was in this suit entitled to recover the full value of the orchestrion and interest from the date of its attachment. But the court decided adversely to this claim, deducted the amount due on the mortgage to Wallenbarger & Gaunter, and rendered judgment for the plaintiff as such trustee to recover of the defendant the sum of $827, with interest on that sum from the 13th of November, 1873, and costs of suit.

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The defendant moved for a new trial, for error of the court in its rulings upon the claims made by him as above. The plaintiff also filed a motion in error, assigning as error the ruling of the court that the amount due on the mortgage should be deducted from the value of the orchestrion in fixing the damages.

D. B. Lockwood, for the defendant.

1. The officer attached the property described in the writ as the property of Charles Becker, in whose possession it was at the time of the attachment and had been for a long time. No notice was given to him that the orchestrion was not the property of said Charles, nor was he notified that it belonged to any other person, nor was it specifically identified or demanded of him. The orchestrion being intermingled with goods which the court has found were the property of said Charles, no action would lie against the officer until he was notified that it was the property of another and had refused to deliver it. *Tufts* v. *McClintock*, 28 Maine, 424; *Wilson* v. *Lane*, 33 N. Hamp., 466; *Lewis* v. *Whittemore*, 5 id., 364, 366; *Bond* v. *Ward*, 7 Mass., 123; *Shumway* v. *Rutter*, 8 Pick., 443; *Sawyer* v. *Merrill*, 6 id., 478; *Smith* v. *Sanborn*, 6 Gray, 134; *Gilman* v. *Hill*, 36 N. Hamp., 311.

2. But if the officer would be liable at all he is not liable to the extent found by the court. He is liable only for the actual damage sustained at the time of relinquishing his attachment. Ordinary diligence is all that is required of a sheriff in taking care of property attached. *Moore* v. *Westervelt*, 27 N. York, 234; *Browning* v. *Hanford*, 5 Hill, 588, 591; Shearm. & Redf. on Neg., § 530; Story on Bailm., §§ 130, 620. And the defendant is not liable where the officer would not be.

3. A replevin suit to recover possession of the property attached had been commenced, and the plaintiff by pursuing his replevin writ might have obtained possession of all the articles attached. After the fire, however, he abandons his replevin suit, refuses to have anything to do with the articles attached, including the orchestrion, folds his hands and seeks

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to charge the sheriff—or what is the same thing, the defendant—with the entire value of the property attached. This he cannot do. The officer had relinquished his attachment on the orchestrion. He had never moved it from the position in which he found it when he made the attachment, and the moment the attachment was relinquished the property was at the risk of the owner, and not at the risk of the officer. All the injury thereafter happening to the instrument was the result of the negligence of the owner, and this injury he cannot charge to the sheriff or the defendant. *Clark* v. *Smith*, 10 Conn., 1; *Palmer* v. *Gallup*, 16 id., 555.

4. The court did not err in holding that the amount due on the mortgage was to be deducted from the value of the property in fixing the damages. The value of the plaintiff's interest in the property was the value of the property after deducting the mortgage debt.

H. S. Sanford, for the plaintiff.

1. There was no offer to return the instrument. The officer simply stated that he relinquished the attachment. But if we put it in the most favorable light for the defendant, an offer without acceptance in cases like this ought to be held nugatory. If a trespasser should seize one's property without law or right, and should afterwards tender it back, it would appear to be no more than fair that one should have the option to receive or reject it. We submit that the rule of law requires the trespasser who has seized personal property to keep it and to pay for it, unless the owner is willing to take it back. And this view, we think, is supported by abundant authority. 1 Addison on Torts, § 541; *Cook* v. *Loomis*, 26 Conn., 483; *Gibbs* v. *Chase*, 10 Mass., 128; *Hanmer* v. *Wilsey*, 17 Wend., 92; *Otis* v. *Jones*, 21 id., 396; *Higgins* v. *Whitney*, 24 id., 379; *Hull* v. *Peters*, 7 Barb., 331; *Brewster* v. *Sullivan*, 38 N. York, 428.

2. The presumption of the pursuit of the proceedings in replevin seems preposterous. It would indeed be a novelty if one who has begun any suit whatever must follow it to judgment at his peril. How far the replevin proceedings had

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gone does not appear. The writ certainly was never issued and could not issue without a hearing on the sufficiency of the bond after reasonable notice to the defendant. The present defendant knew, therefore, that the replevin suit had been dropped.

3. The judge below mistook the rule of damages. 1 Addison on Torts, § 540; Sedg. on Dam., 474, 482; 2 Greenl. Ev., § 276; *Churchill* v. *Watson*, 5 Day, 140; *Baldwin* v. *Porter*, 12 Conn., 484; *White* v. *Webb*, 15 id., 302; *Hurd* v. *Hubbell*, 26 id., 390; *Andrews* v. *Durant*, 18 N. York, 502; *Beecher* v. *Denniston*, 13 Gray, 354. The case should be remanded with directions to the Superior Court to correct this error alone and render judgment accordingly. 1 Swift Dig., 793.

LOOMIS, J. This is an action of trespass and trover for unlawfully taking, by writ of attachment, a musical instrument, called an orchestrion, belonging to the plaintiff's wife. The defendant moves for a new trial because the court overruled sundry claims made by him for a mitigation of the damages.

The plaintiff, on the other hand, brings his motion in error, on the ground that the court mistook the law in deducting from the value of the instrument the amount of a mortgage upon it, due from the plaintiff to a third person.

The grounds upon which the defendant's motion for a new trial is based are rendered wholly untenable by the facts found by the court.

The instrument in question was never returned to and accepted by the plaintiff, or applied in any way for the use, benefit or advantage of the plaintiff, nor was there any unequivocal offer to return the property; and if there had been, its damaged condition, occasioned in great measure by the fault of the defendant, would have excused its rejection by the plaintiff. The chief point made by the defendant was that the relinquishment of the attachment placed the property at once at the risk of the owner; and that the judgment should include only such damage to the property as had been

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occasioned prior to that time. This claim, we think, involves an erroneous assumption both of law and of fact. Without, however, discussing the law, it will be a sufficient answer to say that the relinquishment referred to did not amount either to a return of the property or to an unequivocal offer to return it. The record states the facts bearing on this point as follows:—"Some time after the fire, and after great damage had accrued to the orchestrion, the sheriff met said Charles on the street, and informed him that he relinquished the attachment on said instrument. The sheriff kept said saloon (where said instrument was situated) locked, and gave said Charles no permission, opportunity or facility for entering the same, but held control and possession of said saloon and instrument himself, and merely informed him that he relinquished the attachment on said orchestrion."

The record also shows that the defendant, at the time of the fire, unreasonably refused the special request of the plaintiff to remove the instrument to a place of safety, which might have been done; and the day after the fire, upon request of the mortgagees, he also refused to remove it to a dry and suitable place. It is very clear therefore that the finding leaves no ground for granting the defendant's motion.

We proceed next to inquire whether the court erred in deducting from the ascertained value of the instrument the amount of the mortgage due from the plaintiff's wife to Wallenbarger & Gaunter.

This question is fully answered by the decision of this court in *White* v. *Webb*, 15 Conn., 302, which was an action of trespass and trover brought by a second mortgagee in possession of the mortgaged chattels against an officer who took them on a writ of attachment. There was a prior mortgage on the same property then outstanding and unsatisfied, which the defendant claimed should be deducted; but the court held otherwise, and based the decision upon the following well established principles:—"In actions of trover and trespass, for property taken and converted by the defendant, where there is no malicious motive on the part of the defendant, but he takes the property under a claim of right, and the real

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dispute is as to the title, the rule of damages is the value of the property at the time of the conversion or taking, and the interest on that sum to the time of judgment. If however the suit is brought by a bailee or special property man, against the general owner, then the plaintiff can recover the value of his special property only; but if the writ is against a stranger, then he recovers the value of the property and interest, according to the general rule, and holds the balance beyond his own interest in trust for the general owner."

In the decision complained of by the plaintiff there is manifest error so far as the damages are concerned, and the judgment is reversed to that extent and the case remanded.

The defendant's motion for a new trial is denied.

In this opinion the other judges concurred.

SHERMAN SMITH *vs.* PURDY LYON.

Under the statute with regard to replevin, previous to the Revision of 1875, that action would not lie to recover property held by an officer upon an execution.

And, under the same principle, it would not lie to recover property taken by a tax collector upon a tax warrant.

While an action of replevin so brought was pending, the act (Rev. of 1875, tit. 19, part 15, sec. 1,) was passed, which provides that "replevin may be maintained to recover any goods or chattels wrongfully detained, &c." Held not to be retroactive, and therefore not applicable to an action of replevin then pending.

And held that the word "maintained" did not necessarily imply that the statute was to operate on suits already brought.

A statute should never be held to be retroactive unless such a construction is required by an express provision or by unavoidable implication.

The statute requires that if judgment be rendered for the defendant in replevin, it shall be for a return of the property and for costs. A judgment was rendered for a defendant for costs only. Held that the plaintiff was not aggrieved by the error and could not take advantage of it.

REPLEVIN for a cow claimed to be unlawfully detained; brought to the Court of Common Pleas of Fairfield County.

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Plea the general issue, with notice that the defendant held the property under the levy of a tax warrant. Facts found by a committee, and judgment rendered by the court (*De Forest, J.*,) for the defendant; and a motion in error by the plaintiff. The case is fully stated in the opinion.

L. Warner and *H. W. R. Hoyt*, for the plaintiff.

C. G. Child and *S. Fessenden*, for the defendant.

PARDEE, J. The plaintiff resided in the Byram school district in the town of Greenwich. In April, 1871, that district voted to levy a tax upon all property taxable therein, for the purpose of defraying the expense of making an addition to its school-house. In December, 1871, the rate-bill, with warrant annexed in due and legal form, was placed in the hands of the defendant as collector of the district for service. This rate-bill included an assessment amounting to $36.50 upon the property of Caroline Smith, wife of the plaintiff. On the 13th of March, 1872, the defendant, by virtue of the warrant, made demand upon Mrs. Smith for the amount of her tax, and upon her refusal to pay the same levied the warrant upon a cow to satisfy the tax, and immediately gave legal notice of his intention to sell it on the 20th day of March, 1872. The defendant supposed the cow to be the property of the wife, when in fact it belonged to the husband. On the 19th day of March, 1872, the plaintiff took the cow from the possession of the defendant by virtue of a writ of replevin, having knowledge that he had taken and then held the same under and by virtue of the tax-warrant.

In March, 1872, the statute authorizing writs of replevin was in the following words: "Writs of replevin shall be allowed in the following cases only: first, in favor of any person to recover his cattle or other animals, when impounded; second, in favor of any person claiming to be the owner of goods or chattels attached in any suit, other than the defendant therein; third, whenever any goods shall be unlawfully detained, except by attachment, from the owner or other per-

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son entitled to the possession." This statute was interpreted and limited in the case of *Howard* v. *Crandall*, 39 Conn., 213, decided in 1872, in which it was determined that property held by virtue of an execution cannot be replevied under any of its provisions; and, as collectors of taxes have the powers, and must proceed generally in the same manner to collect, as officers having executions, it follows that this writ of replevin was without the sanction of the law. Upon this writ the cow was taken from the defendant's possession and placed in that of the plaintiff; the estate of the defendant was attached to the value of a hundred and fifty dollars, and he was summoned to appear before the Court of Common Pleas for the county of Fairfield holden on the 1st Tuesday of April, 1872, then and there to answer unto the plaintiff's complaint for the unlawful detention of his cow. This suit came by legal continuances to the term of that court holden in December, 1875, when judgment was rendered that the defendant should recover of the plaintiff his costs.

In 1874 the legislature passed the following act, and declared that it should go into operation on the 1st day of January, 1875: "The action of replevin may be maintained to recover any goods or chattels in which the plaintiff has a general or special property with a right to their immediate possession, and which are wrongfully detained from him in any manner, together with the damages from such wrongful detention." The plaintiff argues that, even if this writ of replevin was without authority of law at its inception, this last act going into effect while the suit was pending in court and before final judgment thereon, gave validity to the writ, and that therefore he was entitled to judgment in his favor.

The power of the legislature in many cases to confer or take away rights of action, to change the form of the remedy, to validate void contracts, to impose new duties and restrictions upon individuals, to deprive a party of a chance to recover costs already incurred, and to prevent the enforcement of certain forfeitures, is not to be denied; and in particular, the power of the legislature in 1875 to validate this writ of replevin is to be conceded. We have therefore no question

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as to the constitutionality of a law which in direct and positive terms is made to act retrospectively; our duty is simply that of construction.

One of the firmly established canons for the interpretation of statutes declares that all laws are to commence in the future and operate prospectively, and are to be considered as furnishing a rule for future cases only, unless they contain language unequivocally and certainly embracing past transactions. The rule is one of such obvious convenience and justice as to call for jealous care on the part of the court to protect and preserve it. Retroaction should never be allowed to a statute unless it is required by express command of the legislature or by an unavoidable implication arising from the necessity of adopting such a construction in order to give full effect to all of its provisions.

The statute of 1875 is quite broad and comprehensive, sufficiently so to embrace all cases, past and future; but we find nothing in it making plain the will of the legislature that it should be retroactive. There is no necessity for such an interpretation; it will have the usual effect of statutes, indeed complete effect, if its application is confined to cases arising subsequently to its enactment.

In 1872 the defendant was summoned into court, and for a long period detained there, to answer to a demand which could not be enforced. For his remuneration he looked to the bill of costs, the recovery of which he had reason to expect as the law then was. To this bill of costs he had no vested right, it is true; but, reading the act in the light of well-settled principles applicable to retrospective laws, we are unable to see, or infer even, any legislative intent to affect this or any other action already commenced. Nor are we willing to overthrow a rule so firmly founded in justice upon the plaintiff's suggestion as to the word "maintained;" for we do not think that, as used in the act, it in itself imports retroactive intent on the part of the legislature. A critical analysis of it would doubtless disclose the idea of continuing a life already commenced; but men both in and out of the profession often speak of maintaining an action, having reference to one yet to be instituted.

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Section 2d, title 22, page 551, of the Revision of 1875, provides substantially that all civil suits may be defended to final effect in the same manner as they might under the laws existing on the 31st day of December, 1874, unless it be otherwise specially provided by law; and although our determination of this case is based upon what is hereinbefore said, there is some force in the argument that if the act of 1875 takes from the defendant a complete and valid defence he is not in fact allowed to defend in the same manner as he might have done under the laws of 1874.

The plaintiff also complains that the judgment is erroneous, in that it is for costs only, while the statute requires that it should be for costs accompanied by an order for the return of the property. Motions in error are allowed for the relief of parties who are aggrieved by any judgment; and as in this case the plaintiff was allowed to retain possession of a cow valued at seventy-five dollars, when, as he now says, he should have been compelled to surrender it to the defendant, it is difficult to perceive in what manner he has been injured. In 4 Term Rep., 510, Buller, J., said:—"Besides, it is an invariable rule that if a judgment be more favorable for the plaintiff than he is entitled to, he cannot take advantage of it, because he is not injured." And, in *Alling* v. *Shelton*, 16 Conn., 436, it was determined that where the error complained of was, that the court in an action of replevin for goods taken by attachment, after a trial on the merits and a verdict for the defendant, rendered judgment that the defendant recover his costs, without any assessment of damages against the plaintiff, or order for the return of the goods, a writ of error would not lie in favor of the plaintiff to reverse such judgment.

Again, the plaintiff says that the right to the possession of the property was the real matter in controversy and not the determination of the question as to which party should pay the other a bill of costs. But the law does not permit the plaintiff, and does not compel the defendant, to try the question as to the possession of property legally taken and held by virtue of a warrant for the collection of taxes, upon this writ.

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The plaintiff came illegally into court; the court finding him thus there turned him away with the usual penalty of a bill of costs, irrespective of the question whether he had or had not a right to redress in some other form of action.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

Esther Parrott *vs.* The City of Bridgeport.

A writ of mandamus is not an appropriate remedy for the enforcement of contract rights of a private nature.

It is granted only to prevent a failure of justice in cases where ordinary legal processes furnish no relief.

The writ refused, where applied for to compel a city to construct a public street, (which had been laid out but not opened,) in a certain special manner, not required by law, but which it was averred had been agreed to by the city and taken into consideration in the assessment of the petitioner's damages and benefits.

Application for a writ of mandamus; brought to the Superior Court in Fairfield County. Motion by respondents to quash the application, and case reserved upon this motion for the advice of this court. The case is fully stated in the opinion.

C. Thompson, for the petitioner.

G. Stoddard, for the respondents.

Pardee, J. The petition shows that the city of Bridgeport, in the exercise of powers conferred upon it by its charter, completed in June, 1872, the laying out of a new street designated as Norman street, taking for that purpose a piece of land belonging to the petitioner, one thousand feet in length by fifty feet in width, of the value of about twelve hundred dollars, in addition to which she was assessed and compelled to pay one hundred dollars for benefits; that the street diag-

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onally crosses a dam belonging to her at the point where the gate is located, and thence runs through the pond, which is valuable for ice-cutting; that properly to prepare the street for public use a bridge must be built over the stream at the point where the flume and gates are located; that the flume and that section of the earth-work of the dam which is included within the lines of the street were destroyed by a flood in 1873; that in order to preserve the ice-cutting privilege these must be reconstructed, and that this cannot be done until the street is properly graded and the bridge so built as to detain water in the pond.

The petition also sets forth that previous to the assessment for benefits the petitioner requested the committee making the same to assess them with a view to the preservation of the pond privilege, and notified them that the road and bridge must be constructed in connection with the flume and gate; and that the committee agreed to, and did thus assess the benefits. The petitioner then avers that thereby the city of Bridgeport entered into a special contract with her to construct the earth-work approaches to the bridge in such manner as to prevent the leakage of water from the pond, and to lay the walls thereof in cement mortar for the same purpose; that if the street is not thus worked the Naugatuck Valley Ice Company, the petitioner's lessees, will lose ten thousand dollars by reason of their inability to detain water and cut ice in the pond; and that the city has hitherto neglected to prepare the street for public travel. The petitioner also says that this neglect occasions irreparable damage to her as distinguished from the general public, for this among other reasons, that the failure to so construct the dam and bridge as to detain water has deprived her of all profits from the pond privilege; and she concludes her petition with these words: "Wherefore she prays this honorable court to issue its writ of mandamus requiring and enjoining said city of Bridgeport, without further delay, to make and fit for safe and convenient use by her and the public said street its entire length, and to work that section of said street between Church Lane and Union Avenue in such a manner as to preserve the pond priv-

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ilege by laying the stone work of the bridge aforementioned in such a manner as to be water-tight, and have the same finished and completed on or before the 15th day of November, A. D. 1874, or within such time as the court shall fix, or signify cause to the contrary thereof to this court; and as in duty bound your applicant will ever pray."

This prayer is single and definite; it presents no alternative; it is not for the construction of the way at such time and in such manner as in the discretion of the city authorities will best enable them to discharge their governmental duty to the public; it is that the court shall order the work to be done in the manner specified by the petitioner, for her private advantage, disregarding all public considerations. She asks that a certain portion of the way shall be so constructed that it shall be water-tight and preserve the pond privilege, not because such an expenditure is necessary to render the way safe and convenient for travelers, but because the city has bound itself to her by a special contract so to do, and she is unable to profit by the pond privilege until performance of the agreement can be enforced. The duty, therefore, if any, which rests upon the city in this regard, is one which it owes to the petitioner as an individual, not to the public, and the special contract is the foundation upon which it rests. But the writ of mandamus has never been considered as an appropriate remedy for the enforcement of contract rights of a private and personal nature and obligations which rest wholly upon contract and which involve no questions of public trust or official duty. Indeed, strictly speaking, it never lies where the party aggrieved has adequate remedy at law, and its aid is only to be invoked to prevent an absolute failure of justice in cases where ordinary legal processes furnish no relief. In *County Commissioners* v. *Zanesville Turnpike Co.*, 16 Ohio State R., 308, the relators prayed for a writ compelling the respondents to contribute three-fourths of the expense of repairing a bridge, upon the ground that they had contracted so to do. The court denied the writ for the reason that it is not its office to enforce obligations arising upon contracts. In *State ex rel. Bohannon* v. *Howard County*, 39 Misso., 375, the

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relator prayed for the writ to compel the respondents to pay him a portion of his bounty as a volunteer. The petition was denied, the court saying that it would not "undertake by writ of mandamus to enforce simple common law rights between individuals, such as payment of money, or where there is another adequate legal remedy." In England, by act of Parliament, a plaintiff has the right to claim a writ of mandamus "commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested." Under this, in *Benson* v. *Paull*, 6 El. & Bl., 273, the plaintiff claimed the writ to enforce the execution of a lease in fulfilment of a contract between the parties. But Lord Campbell, C. J., said—"I am of opinion that the right to demand mandamus for the fulfilment of a duty, under section 68, does not extend to the fulfilment of duties arising merely from a personal contract. If it did so it would extend to every case of contract; for no doubt it is the duty of one who makes a promise to fulfil it."

We advise the Superior Court to dismiss the petition.

In this opinion the other judges concurred.

THE NORTHFORD RIVET COMPANY *vs.* THE BLACKMAN MANUFACTURING COMPANY.

Parol evidence is admissible to show that goods charged by the plaintiffs to *B*, were intended for, and sold upon the credit of, a corporation of which he was agent, and that the corporation received the goods and credited the plaintiffs for them.

The plaintiffs took the individual note of *B* on account of the goods, but it was not given or taken as payment of the account. Held that this did not discharge the liability of the corporation.

B having gone into bankruptcy, the plaintiffs presented the note against his estate and received a dividend upon it. Held that they might show that they did this under the advice of legal counsel, and upon an opinion given that it would not prejudice their claim against the corporation.

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ASSUMPSIT for goods sold; brought to the Court of Common Pleas of Fairfield County, and tried to the court, on the general issue, with notice, before *McManus*, *J.* Judgment for the plaintiffs and motion for a new trial by the defendants. The case is fully stated in the opinion.

J. A. Wilson, in support of the motion.

L. D. Brewster, contra.

FOSTER, J. The plaintiffs seek to recover of the defendants for merchandise sold and delivered at various times between the 16th of March, 1872, and the 7th of January, 1875; claiming a balance over the sums received in payment of $370.19.

The following facts are found:

One T. Blackman was the treasurer, agent, and business manager of the defendant corporation, and kept their books and accounts, to which all the officers of the company had free access. All the goods sold were furnished on Blackman's order while he was treasurer and agent of the company, and they all went to the use and benefit of the company. When the account commenced, the plaintiffs were acquainted with Blackman, knew that he had a store in New Haven, and knew that he was the agent of a manufacturing company. They also knew that all the goods purchased from them were for that company's use, but they did not know the corporate name of the company. They entered all goods sold or payments made under the account of T. Blackman, and made no change in the manner of keeping their account. All goods so furnished were credited on the defendants' books to the plaintiffs, and all payments made to the plaintiffs by Blackman were therein charged to the plaintiffs.

Early in April, 1875, the plaintiffs asked Blackman for the amount due on their bill up to January 1st, 1875, and he asked if they could use a note, to which they assented. Blackman gave them his individual note for the amount of the bill up to the last mentioned date, and the plaintiffs

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credited the same on their books in the ordinary course of business, the amount being $349.30, dated April 12, 1875. Blackman was in the habit of keeping the defendants' funds mingled with his own in bank, and had often given his individual notes in payment of their debts. The defendants, by their president, were knowing to this, and had forbidden Blackman to do so, but this prohibition was unknown to the plaintiffs. On the 6th of April, 1875, Blackman resigned his offices, and ceased all connection with the defendant corporation, but no notice thereof was given or received by the plaintiffs till April 28th, 1875. The defendants then claimed that Blackman was indebted to them several thousand dollars, by overdrawing, or mismanagement, or misconduct, but the plaintiffs had no notice thereof till after April 28th, 1875. No receipt for the note was given by the plaintiffs; Blackman did not intend by giving it to exonerate the defendants and charge himself; neither had the plaintiffs such intention in accepting it. Blackman made an assignment in bankruptcy in April, 1875, and specified in his schedule of indebtedness this note, of April 12th, 1875, because he was advised by his counsel that it was his duty to specify in the schedule all notes outstanding, with his name, either as maker or indorser. The plaintiffs presented the note to the assignee of Blackman's estate, having first been advised by their counsel that their rights against the defendants would in no way be prejudiced thereby. The amount of the dividend on the note was $10, and that has been received by the plaintiffs. The plaintiffs at this time did not know the fact that the goods were entered on the defendants' books as goods bought by the defendants of the plaintiffs. The defendants and Blackman made a settlement of their affairs in April, 1875, in which no specific mention or account was made of the note; the parties made what is styled in the finding of facts, "a lumping settlement."

The court upon these facts rendered judgment for the plaintiffs for the amount of the unpaid balance of their account. The defendants move for a new trial on several grounds.

In the first place, because the goods sold were charged to

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T. Blackman as an individual, and so the credit was given to him, and not to the defendants. A sufficient answer to this claim is, that the fact is found otherwise; it is found that the credit was given to the defendant corporation of which Blackman was treasurer, the plaintiffs not knowing the name of the corporation.

In this connection, an objection was made to any evidence in explanation of the charge on book; that it should be taken as it stood, and all oral testimony respecting it should be excluded. We have no difficulty as to this objection. Greater care and accuracy as to the party charged than was exhibited in this case, in making entries on book of merchandise sold and delivered, would certainly have been commendable. Still, we think the testimony was admissible; and when it appears that the articles were sold on the credit of the defendants, were received and enjoyed by the defendants, and were, on their books, credited to the plaintiffs, we are at loss to discover what grounds the defendants here have for complaint.

Another claim of the defendants is, that if they were ever liable for this debt, that liability was discharged when the plaintiffs took the individual note of Blackman; that presenting that note, and taking a dividend upon it from his estate, was an election, by the plaintiffs, of Blackman as their debtor; and that the defendants were thereby released from any claim the plaintiffs had against them.

These claims would have force if it were not found that the note was neither given nor received in payment of the debt. It was taken in payment only so far as it should prove to be payment; and so the original liability of the defendants was understood to be continued.

The objection to the evidence offered by the plaintiffs, that they were advised by their attorney that their rights would be in no way prejudiced by presenting the note against the estate of Blackman, was properly overruled. It was explanatory of the act; and in connection with the other evidence in the case, went to show that the plaintiffs never intentionally substituted Blackman for their debtor in place of the defendants.

There are no reasons why we should give any undue weight

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to technical objections urged by the defendants in this case. A debt to the plaintiffs was fairly contracted by the defendants, and it has not been paid. Justice demands that it should be. The law should enforce, rather than find means to avoid, the payment.

The motion for a new trial should be denied.

In this opinion the other judges concurred.

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SUPREME COURT OF ERRORS.

NEW HAVEN COUNTY.

DECEMBER TERM, 1876.

Present,

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

ISAAC BLAKESLEE *vs.* PATRICK MURPHY.

M brought an action against *B* before a justice of the peace, the only service upon *B* being by leaving a copy at his place of residence. He was at that time confined in an insane asylum in another part of the state, and neither he nor any one in his behalf had any notice of the suit, and *M* got judgment by default for $100 damages and $15 costs. *B* afterwards brought a petition to the Superior Court for an injunction against the collection of the judgment, which court decreed a perpetual injunction. Upon a motion in error by the respondent, it was held—

1. That the decree was not erroneous on the ground that there was adequate remedy at law by a writ of error, as the writ might not be so served as to operate as a supersedeas.
2. That parol evidence was admissible to prove that the petitioner had no notice of the pendency of the action against him, the proceeding not being a collateral impeachment of the judgment, but a direct proceeding to set it aside.
3. That the general rules governing petitions for new trials and limiting the granting of them, were not applicable, and that the petitioner therefore was not bound to show that he had a good defence against the action.
4. That by a perpetual injunction against the collection of the judgment the respondent was not deprived of his cause of action by reason of its merger in the judgment, since the judgment being void by reason of want of jurisdiction over the person of the petitioner, the original cause of action was not merged in it.
5. But held that the Superior Court had no jurisdiction by reason of the amount involved being less than five hundred dollars, the Court of Common Pleas having exclusive jurisdiction of all causes in equity wherein the "matter in demand" does not exceed that sum. (Two Judges dissenting.)

The "matter in demand," as used with reference to suits in equity, does not necessarily mean a money demand, but the pecuniary value of the matter in controversy.

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Here the matter in controversy was the judgment against the petitioner for $115, and that sum was to be regarded as its value.

PETITION for an injunction against the collection of a judgment at law obtained by the respondent against the plaintiff; brought to the Superior Court in New Haven County.

The petition alleged that on the 6th day of September, 1875, the petitioner was insane, and confined as an insane person in the Retreat for the Insane at the city of Hartford, and that at that time the respondent brought an action at law against him before a justice of the peace in Waterbury in New Haven County, where the respondent then resided, in which no other service was made upon him than by the officer leaving an attested copy of the writ at his usual place of abode in the town of Thomaston in Litchfield County; that Augustus Hamilton of Watertown in Litchfield County, through whom the petitioner brought his petition, then was and had ever since been his conservator; that the petitioner's former place of abode in Thomaston had not been occupied by him since his confinement in the Retreat for the Insane and was at the time the copy of the writ was so left there uninhabited, and that said conservator had no notice whatever of the pendency of the suit and that no notice whatever reached the petitioner; that in consequence judgment was rendered against the petitioner upon his default of appearance for the sum of $100 damages and $15.37 costs of suit, and that execution had been issued upon the judgment and placed in the hands of an officer, who threatened to levy the same upon the petitioner's estate; praying for an injunction against such levy and the collection of the judgment out of the property of the petitioner.

The case was heard upon a denial of the facts before *Hitchcock, J.*, who found the allegations of the petition to be true, but found that it did not appear whether the petitioner had a good defense against the action at law. Upon the hearing the respondent claimed that the petitioner had adequate remedy at law by a writ of error and that a court of equity therefore had no jurisdiction; also that the proceeding was in effect a petition for a new trial and that the Superior Court could not

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grant a new trial of a cause in a justice court; also that no evidence was admissible to show, in contradiction of the record of the justice court, that the petitioner had no notice of the pendency of the justice suit. The court overruled these claims of the respondent, allowed the petitioner to show that he had no notice of the pendency of the justice suit, and passed a decree perpetually enjoining the respondent from levying any execution issued upon the judgment.

The respondent brought the record before this court by a motion in error, assigning as error the above rulings of the court.

J. O'Neill, for the plaintiff in error.

1. The Superior Court had no jurisdiction over the petition. 1st. Because the value of the "matter in demand" in the petition is under five hundred dollars. The Court of Common Pleas alone, if any court, had jurisdiction of the subject matter. Gen. Statutes, tit. 19, ch. 4, sec. 2. 2d. Because the petitioner has adequate remedy at law. Our statute is not declaratory, but imposes a new and stricter rule, imposing on the petitioner the obligation of showing he has no adequate remedy at law. If no copy was left with the conservator, a writ of error will lie. A writ of error operates as a *supersedeas* of the execution. If the respondent actually obtained the money on his execution, and the judgment was set aside for error, he is abundantly able to pay it back. The contrary is not alleged. It must appear from the petition that there is no adequate remedy at law. The general allegation is not sufficient. *Whittlesey* v. *Hartford, Prov. & Fishkill R. R. Co.*, 23 Conn., 431; *Wooster* v. *Glover*, 37 id., 315.

2. The petitioner, in effect, asks for a new trial. The gist of the petition is that injustice has been done him; that he has had no day in court; and he asks for a new trial. But new trials have never been granted of justice suits, except in a single instance we shall mention. *Page* v. *Camp*, Kirby, 7; *Stone* v. *Stevens*, 12 Conn., 227. The single instance is, when the defendant is absent from the state, and has had no notice of the suit, the court to which an appeal might be taken

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may grant a new trial and proceed to final judgment itself, if the defendant shall make it appear that the judgment was wrongfully obtained against him and that he had good ground of defense. Gen. Statutes, tit. 19, ch. 15, sec. 4. Equity will not grant new trials, however unjust the judgment or great the hardship, unless the judgment was obtained by fraud, accident, or mistake, unconnected with any negligence or inattention on the part of the judgment debtors. *Carrington* v. *Holabird*, 17 Conn., 530, and 19 id., 84; *Pearce* v. *Olney*, 20 id., 544; *Day* v. *Wells*, 31 id., 349. Otherwise legal proceedings would be endless. *Lovejoy* v. *Webber*, 10 Mass., 104. Neither fraud, accident, nor mistake, is set up in this petition. And the finding here is that it does not appear that any injustice was done by the judgment in the justice court. In this respect the petitioner failed in his proof, and that failure should have been fatal. *Wooster* v. *Glover*, 37 Conn., 315.

3. There was error in admitting evidence. 1st. The law conclusively presumes that the process in the justice court was legally served on the defendant. Admitting parol evidence to contradict that presumption, and to show that the petitioner was an insane patient at Hartford, and that he had no actual notice of the suit, was error. *Coit* v. *Haven*, 30 Conn., 190. 2d. An insane person can never have actual notice of the pendency of a suit. The law does not require impossibilities. Neither does the law require that his conservator should have notice. *Snow* v. *Antrim*, Kirby, 174.

4. There was error in the decree of the court. The petitioner alleges that the judgment of the justice court is grossly unjust. If any part of that judgment is just, that amount, how small soever it may be, is merged in that judgment. We are deprived of our cause of action by the merger, and we are deprived of the judgment in the justice court by this decree. We are perpetually enjoined. In this there is error. *Goodsell* v. *Olmstead*, 42 Conn., 354.

C. W. Gillette and *G. E. Terry*, for the defendant in error.

1. The petitioner had not adequate remedy at law. His

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only legal remedy to avoid the judgment of the justice court would be by writ of error; but this would not be *adequate*, as execution had been issued, and it would not operate as a *supersedeas*. 1 Swift Dig., 794. Hence his resort to equity to prevent a wrong, that is, the levy of an execution issued upon a "pretended judgment, irregular, invalid, excessive, and grossly unjust."

2. The Superior Court had jurisdiction. There is no allegation or finding that the "value of the matter in demand is under five hundred dollars." There is no money demand in controversy; but like a bill to restrain waste, or the diversion of a water-course, or the destruction of ancient lights, it is to prevent the doing of an injury.

3. The court properly admitted evidence to show that no service was made on Blakeslee. This is not a collateral impeachment of the judgment, but a direct proceeding to set it aside, and in such a proceeding such evidence is always admissible.

4. Blakeslee was insane, and confined in the Retreat for the Insane at Hartford. If the officer left a copy at Thomaston, he manifestly could have had no actual notice of the pendency of the justice suit. He could not appear to defend in person. He was under charge of a conservator, who should have had notice of the suit. *Snow* v. *Antrim*, Kirby, 174. It is not claimed that the conservator had *any* notice. Surely, equity ought to interpose to prevent a wrong to an incapable, insane person, and prevent his estate being squandered.

CARPENTER, J. The respondent brought his action against the petitioner returnable before a justice of the peace. The only service was by leaving a copy of the process at the petitioner's place of residence in Thomaston. At that time he was confined in the Retreat for the Insane in Hartford; and neither he, nor any one in his behalf, received any notice of the pendency of the suit, and no one appeared to defend. The respondent obtained a judgment for one hundred dollars damages, and for fifteen dollars and thirty-seven cents costs of suit, on which execution issued. The petitioner obtained

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a decree in the Superior Court permanently restraining the respondent from serving and collecting the execution. The record is brought before this court by a motion in error.

1. It is objected that the decree is erroneous for the reason that there is adequate remedy at law; that is, that the judgment against the petitioner might have been reversed on a writ of error. It is true a writ of error, if served before the officer commenced the service of the execution, would have operated as a *supersedeas*. It does not appear whether service of the execution had actually been commenced or not, nor does it clearly appear that a writ of error could have been served so as to operate as a *supersedeas;* and as it is manifestly inequitable and unjust that a judgment obtained without notice to the defendant should be enforced, we are of the opinion that it is not clear that the remedy at law is adequate and complete, and that the judgment ought not to be reversed for that reason.

2. It is next objected that parol evidence to prove that the petitioner, the defendant in the action at law, had no notice of the suit, was inadmissible. This objection is not well taken. Parol evidence is admissible in such cases to prove that the defendant had no notice on a plea in abatement, a writ of error for error in fact not apparent on the record, and on a petition in chancery to set aside the judgment.

3. It is further objected that this is in effect a petition for a new trial, and that it is incumbent on the petitioner to show that he has a good defense to the action at law; and further, that the principles which govern courts of equity in granting or refusing new trials, are applicable to this case.

In this we think the respondent's counsel are mistaken. In such cases, usually if not always, the party seeking relief in equity had notice of the suit, and was heard, or might have been heard, before the rendition of the judgment. The court acquired jurisdiction of the cause by legal service of the process; and there is every presumption that the proceedings were legal and regular, and that the judgment was just and equitable, until the contrary affirmatively appears. Not so in the present case. The defendant in the action at law had no

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notice and has not had his day in court. The judgment is in effect void, and there is no presumption in favor of the judgment creditor. Positive law requires that a defendant shall have legal notice of the suit, and a reasonable opportunity to appear and defend before a judgment against him can be legally obtained; and neither reason nor sound policy will require a defendant against whom a judgment has been obtained without notice, to try the merits of the cause on a petition in chancery to set aside the judgment.

This is also an answer to another claim made by the respondent—that his cause of action is merged in the judgment, and that he is deprived of his judgment by the decree. There can be no merger in a judgment which is void for want of jurisdiction over the parties. This case differs from the case of *Goodsell* v. *Olmstead*, 42 Conn., 354. In that case the court had jurisdiction, and the judgment was not void. It was just and equitable as to a part of the amount, and fraudulent as to the balance. This court held that the judgment creditor should not be restrained from collecting on that judgment the amount justly due. In this case, the fact being established that there was no notice, the judgment becomes and should be declared void *in toto*. We see no reason why a court of equity should give effect to it, or any part of it.

4. One other question remains to be considered; and that is, whether the Superior Court has jurisdiction of this petition. On this point a majority of the court feel constrained to reverse the judgment of the court below. The statute provides that "all causes in equity wherein the matter in demand does not exceed five hundred dollars," &c., "shall be brought to the Court of Common Pleas," and "all causes wherein the matter in demand exceeds five hundred dollars shall be brought to the Superior Court." Gen. Statutes, page 413, secs. 2, 3. The question turns upon the construction of the phrase "matter in demand." It is contended that it applies only to those cases in which the petitioner seeks to recover a given sum of money; and has no application to a case like this, in which he resists the payment of an unjust demand.

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We think this construction is too narrow. The statute, thus construed, furnishes a rule in a limited number of cases only, as comparatively few petitions are brought simply to recover money. Many are brought to aid the petitioner in resisting the payment of money, and it is quite as important to furnish a rule of jurisdiction in the latter cases as in the former. Nearly all petitions relate to money or to property which has a specified or ascertainable value. Such money or property constitutes the matter in dispute or controversy, and we think the legislature used the words "matter in demand" in this broad sense, meaning thereby the pecuniary value of the matter in controversy. There may be cases to which this test cannot be applied, but this is not one of them.

This construction is in harmony with other provisions of the statute. In the 2d section there is a proviso, that "bills in equity for relief against any cause depending, or judgment rendered in the Superior Court, shall be brought to said court exclusively." Here is a clear implication that but for this proviso the general test, "matter in demand," would be applied to bills for relief against judgments rendered by, and causes pending in, the Superior Court. If so applied the matter in demand must mean the amount of the judgment rendered or the amount demanded in the pending action. It is difficult to see how any other meaning can be attached to it.

So also in petitions for foreclosure and to redeem mortgaged premises. Neither are strictly and technically petitions to recover money. The object of the one is, in terms, to obtain permission to *pay* money and remove an incumbrance from property. The object of the other is to cut off the right to redeem unless the debtor redeems within a limited time. The decree does not necessarily nor usually compel him to pay, but payment is at his option. In these cases there was a question whether the value of the property mortgaged or the amount of the debt determined the jurisdiction; and if the latter, a further question arose whether the amount of the debt, including accrued interest, or the amount described in the mortgage, should be the test. To settle these questions it was provided by statute that "the amount of the debt or

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liability secured by such mortgage or lien, as described in the mortgage or certificate of lien, shall be deemed to be the amount of the *matter in demand.*" Here the legislature uses these words, "matter in demand," in the broad sense for which we contend. It is not satisfactory to say that this section was designed to make these words applicable to such cases. The obvious construction and meaning of the whole section is to provide that the debt, as described in the mortgage, rather than the property mortgaged, should be regarded as the matter in demand.

The matter in demand therefore in this suit is the amount of the judgment debt—one hundred and fifteen dollars and thirty-seven cents. That being less than five hundred dollars, the case is within the jurisdiction of the Court of Common Pleas, and on that ground alone the decree is erroneous.

In this opinion PARDEE and GRANGER, JS., concurred. PARK, C. J., and LOOMIS, J., while concurring upon all the other points, were of opinion that the Superior Court had jurisdiction.

GEORGE T. PAINE *vs.* GEORGE S. LESTER.

The plaintiff, a citizen of Rhode Island, attached in this state a debt due from a resident of this state to a corporation located in the state of Pennsylvania. Previous to the attachment the corporation had gone into insolvency under the insolvent laws of that state, and had under those laws made an assignment of all its effects to a trustee for the benefit of its creditors, and notice of the assignment had been given to the Connecticut debtor. Held that the trustee in insolvency did not acquire a title to the debt that was good against the attachment.

The giving effect in this state to the laws of a sister state or foreign country, in the case of the transfer of or succession to personal property within the limits of the state, is wholly an act of comity, and not a recognition of a right.

This comity our courts will extend where there is no interest of our own citizens, or of the citizens of other states who are seeking to avail themselves of the benefit of our laws, to be injuriously affected by it.

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Where such interests exist, the courts owe a legal duty to the parties so interested which is more imperative than the demands of mere comity.

The citizens of other states coming into this state to avail themselves of our laws for the protection of their rights are, by the constitution of the United States, entitled to the same aid from our courts that one of our own citizens would be entitled to.

SCIRE FACIAS, upon a process of foreign attachment; brought to the Court of Common Pleas of New Haven County. The court made the following finding of facts:—

Paine, the present plaintiff, a citizen of the state of Rhode Island, brought an action of assumpsit and debt on judgment to the September term, 1875, of the Court of Common Pleas for New Haven County, against the German Insurance Company, a corporation located in and existing under the laws of the state of Pennsylvania. Service of process in the action was made upon Lester, the present defendant, July 7th, 1875, as the agent of the company, and Lester was also summoned at the same time by process of foreign attachment to appear as the debtor of the company. The company appeared in the action by its attorney and pleaded and defended, and after trial judgment was recovered against the company for the sum of $507 15 debt and $52.45 costs of suit.

Prior to the bringing of the action Lester had been the general agent of the company, but such agency had been terminated by mutual consent, leaving unsettled accounts between them, which remained unsettled at the time he was served with process.

On the 2d of September, 1874, the company had made an assignment under the insolvent laws of the state of Pennsylvania, of all the "goods, chattels, effects, rights and credits and property of every kind, real, personal and mixed of said company," to Joseph Eichenlaub, Jr., "in trust to sell the same, and to pay the policy-holders and other creditors of said company their just demands in full if there be sufficient assets to satisfy the whole, if not, then pro rata according to their respective demands, without preference as between individuals;" of which assignment Lester was informed by the following communication: "Office of German Insurance Com-

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pany, Erie, Penn., May 31, 1875. George S. Lester, Dear Sir: —Herewith find certified copy of assignment made by German Insurance Company to Joseph Eichenlaub, Jr., assignee, Sept. 2, 1874. While at Boston Mr. C. W. Sproat assured me that he would have attachment restraining money in your hands due German Insurance Company lifted the first of the present week. Will you please, as soon as attachment is dissolved, forward to me remittance for balance due, so that I may be enabled to close your account so long protracted by this process against you. As stated to you, I am desirous of closing matters of this nature as speedily as possible, and thus more speedily make final settlement of the Ins. Co.'s affairs. In this you can aid me very much by promptness, as other matters of like nature will be closed within a few days. Yours, &c., Joseph Eichenlaub, Jr., assignee German Insurance Company, per J. P. Covert."

Subsequently, and after process had been served upon him, Lester received from the assignee of the company another letter asking for a settlement of his accounts with him as assignee, to which request the following reply was sent by Lester: "New Haven, Sept. 1st, 1875. Joseph Eichenlaub, Jr., Assignee of German Ins. Co., Erie, Pa., Dear Sir:— Yours, 30th ultimo, duly at hand, and finds Mr. Lester absent for about ten days. As soon as Mr. Sproat's attachment was lifted, Mr. G. T. Paine, of Providence, put on another, which leaves the situation as before. Respectfully, George E. Nettleton, for George S. Lester."

The defendant, Lester, made to the court a disclosure of indebtedness to the company. Execution was issued on the judgment obtained both against the company and the alleged debt to the company in the hands of Lester. Demand was made of Lester to satisfy the same, but he refused to satisfy the same or any part thereof, and the execution was returned unsatisfied and is still unsatisfied. The court found that Lester, at the time of the service upon him of the process of foreign attachment by the present plaintiff, had in his hands moneys which were due to the German Insurance Company, or to Eichenlaub as the assignee of the company, and still

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held the same. Lester had cited in the insurance company and Eichenlaub as assignee, to defend the present suit, and they had appeared and assumed the defence.

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

T. C. Ingersoll, for the plaintiff.

1. An assignment under the insolvent laws of another state gives the assignee no title to a debt due the assignor by a resident of this state which has been attached by a *bonâ fide* creditor in our courts, whether such creditor be or not a resident of this state. The principle is entirely irrespective of whether notice of the assignment was given or whether the attachment was prior or subsequent to the assignment. It is also irrespective of whether the proceedings in insolvency in the foreign state were *in invitum* or voluntary. All these points are expressly decided by *Upton* v. *Hubbard*, 28 Conn., 284, and although in that case the attachment was prior to the assignment, this fact was not considered material by the court in reaching its decision. See opinion at p. 285. Personal property represented by a debt has a sufficiently definite *situs* to give a court jurisdiction over the subject matter so far as to justify a judgment against the debt attached. Gen. Statutes, 410. It has a *situs* in other respects. *Holcomb* v. *Phelps*, 16 Conn., 134. There is no case in Connecticut holding that an assignment under the insolvent laws of another state would affect personal property here to the prejudice of a subsequent attaching creditor. Any case looking that way will be found, on examination, to have reference to another kind of an assignment than one under foreign insolvent laws. The principle is, that insolvent laws, like bankrupt laws, no matter how just, or how similar to our own, cannot have an extra-territorial effect. *Taylor* v. *Geary*, Kirby, 313; *Wickersham* v. *Nicholson*, 14 Serg. & R., 126. Such is the law in New York and the New England states. *Dalton* v. *Currier*, 40 N. Hamp., 237; *Ingraham* v. *Geyer*, 13 Mass., 147; *Fox* v. *Adams*, 5 Greenl., 253; *Holmes* v. *Remsen*, 20 Johns, 262; *Abraham* v. *Plestoro*, 3 Wend., 538; *Johnson* v. *Hunt*, 23 id.,

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87; *Willitts* v. *Waite*, 25 N. York, 584; *Kelly* v. *Crapo*, 45 id., 86, 90, 97; 2 Kent Com., 405, 408. The assignment under the insolvent laws being thus likened to an assignment in bankruptcy, it makes no difference in principle whether the assignment is by the party himself or by the court; whether the debtor sets the law in motion or allows his creditors so to do, it is equally a transfer by such laws. The limitation of the exception to assignments *in invitum*, to be found in some of the books, is to be explained by the fact that by the English bankrupt law there could be no voluntary proceeding. But by the Pennsylvania laws, and most of the insolvent laws of the different states, as well as by the United States bankrupt law, provision is made for voluntary applications. *Upton* v. *Hubbard*, supra, p. 284. In this case it is found that the assignment was made "under the insolvent laws of the state of Pennsylvania." What those laws are we find by referring to the statutes of that state. See Brightley's Purdon's Digest, vol. 1, pages 775 and 779. The 22d section of the insolvent laws as there given provides for the making of an assignment by the petitioning debtor, under an order of the insolvent court, of all his effects to trustees appointed by his creditors. The assignment thus made is in no proper sense an assignment voluntarily made, or an assignment at common law, but wholly a statutory one.

2. The only right which the authorities recognize in such foreign assignee in reference to property in another state, is the right to receive payment of the debt, and make good acquittance therefor to the debtor, in the absence of attaching creditors. *Upton* v. *Hubbard*, supra, p. 286; *Ingraham* v. *Geyer*, 13 Mass., 147. Where such payment has been made or possession formally delivered prior to the attachment, it has been held that then the subsequent attachment would be defeated. But here there was no pretense of payment, or even of the settlement of the unliquidated balance.

H. D. Russell, for the defendant.

1. The process of garnishment did not reach the moneys in Lester's hands, as Paine stands in the same relation to

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Lester's indebtedness that the German Insurance Company does, and the same defences which could be used successfully if the German Insurance Company were plaintiffs will avail Lester as garnishee. *Boston Type Co.* v. *Mortimer*, 7 Pick., 166; *Hazen* v. *Emerson*, 9 id., 144; *Swamscott Machine Co.* v. *Partridge*, 25 N. Hamp., 369; *Strong* v. *Mitchell*, 19 Verm., 644.

2. The general doctrine relating to assignments in insolvency is, that the assignee takes all personal property abroad, as such property has no *situs*. 3 Parsons on Cont., 480; *Atwood* v. *Protection Ins Co.*, 14 Conn., 555, 562.

3. Assignments made in foreign countries are respected upon principles of comity. *Smith* v. *Buchanan*, 1 East, 6; *Milne* v. *Moreton*, 6 Binn., 361, 365; *Holmes* v. *Remsen*, 20 Johns., 262.

4. The courts of Connecticut have recognized assignments made in accordance with the laws of other states, even when they came in conflict with claims of citizens of this state. *Atwood* v. *Protection Fire Ins. Co.*, 14 Conn., 555; *Vanbuskirk* v. *Hartford Fire Ins. Co.*, id., 583; *Mead* v. *Dayton*, 28 id., 33; *Clark* v. *Conn. Peat Co.*, 35 id., 303.

5. The assignment in question was made under the insolvent laws of Pennsylvania, which are in entire harmony with our laws on the subject of insolvency.

6. The plaintiff is not a citizen of this state, and does not come within the exceptions sometimes recognized favoring citizens of the state where the debt sought to be attached is found.

GRANGER, J. Paine, the present plaintiff, on the 7th of July, 1875, brought an action of assumpsit against the German Insurance Company, and factorized Lester, the present defendant, as agent and debtor of the company. The insurance company was a corporation organized under the laws of the state of Pennsylvania, and located in that state. The company appeared in the action and made defense and judgment was rendered against it. Execution was issued on the judgment and demand made upon Lester for payment, but he

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refused to satisfy the same and the present action of scire facias was brought. It is not denied by the defendant that he was indebted to the insurance company at the time of the attachment in a larger amount than the judgment recovered. But he claims, and the fact is found by the court, that in September, 1874, the insurance company went into insolvency under the insolvent laws of the state of Pennsylvania, making an assignment of all its effects to one Eichenlaub, in trust for its creditors, and that, on the 31st of May, 1875, written notice of the assignment was given to Lester; and the question is, whether by such assignment and notice the assignee acquired a title to the debt due from Lester, so that it could not be taken by the later attachment of the present plaintiff.

It is a general principle that personal property, having no situs, is subject to the law of the owner's domicil, and can be transferred by a voluntary assignment or sale made by him according to the law of his domicil. This well settled principle the courts of England have applied to transfers of personal property made by decrees of foreign courts, and to cases of succession to such property by will or intestacy under foreign laws, or by foreign bankrupt proceedings. *Potter* v. *Brown*, 5 East., 131. Judge Story, in reviewing the English decisions, which have not been in entire harmony on the point, comes to the conclusion that they sustain this broad application of the principle, and that the mode of transfer is immaterial, the only question being whether it is good by the law of the owner's domicil. Story's Conflict of Laws, § 404 *et seq.* Chancellor Kent came to the same conclusion after elaborately reviewing the English authorities, in the case of *Holmes* v. *Remsen*, 4 Johns. Ch. R., 460, and regarded the rule as thus established as founded on sound legal principles and the only reasonable one. He says (p. 484): "I entertain no doubt that the same rule is known and observed among the other nations of Europe. It is embraced by the general principle, so universally acknowledged by the civilians, that the distribution and disposition of personal property are governed by the law of the owner's domicil."

But neither the current of English decisions, nor the high

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authority of Chancellor Kent, in the elaborate and learned opinion which we have referred to, seems to have made a permanent impression upon the jurisprudence of this country, and the weight of American authorities is in favor of a much more restricted application of the rule that personal property follows the law of the owner's domicil. While fully admitting this general principle, the American cases, instead of starting from it in entering upon the discussion, start from another equally well settled principle, that the laws of a state or country have no legal effect beyond the limits of its territory. This being so, they regard the giving effect to the laws of a sister state or foreign country, in the case of the transfer of or succession to personal property within their own limits, as wholly an act of comity, and not a recognition of a right. This comity they are prepared to extend where there is no reason to the contrary, especially if there is no interest of their own citizens or of the citizens of a sister state who are seeking to avail themselves of the protection of their laws, to be injuriously affected by such recognition. Story's Conflict of Laws, § 414; *Upton* v. *Hubbard*, 28 Conn., 274; *Fox* v. *Adams*, 5 Greenl., 245; *Ingraham* v. *Geyer*, 13 Mass., 146; *King* v. *Johnson*, 5 Harring., 31; *Hoyt* v. *Thompson*, 19 N. York, 207; *Willitts* v. *Waite*, 25 N. York, 587; *Kelly* v. *Crapo*, 45 N. York, 86; *Dunlap* v. *Rogers*, 47 N. Hamp., 281; *The Watchman*, Ware, 232; *Milne* v. *Moreton*, 6 Binney, 361, 365.

The remarks of the court in the case last cited are specially noteworthy, as coming from the state of Pennsylvania, the effect of whose insolvent proceedings is in question in this case. The court say, (per Yeates, J., p. 353,) "It is one thing to assert that assignees of bankrupts under foreign institutions should be allowed by the courtesy of nations to support suits as representatives of such bankrupts for debts due to them, and another thing to give efficacy to those institutions to cut out attaching creditors, although posterior in point of time, who have commenced their proceedings under the known laws of the government to which they owe allegiance and from which they are entitled to protection. The right of

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such assignees thus to sue in a foreign country does not result from the force or effect of the law, but from long used and well established comity."

The title of a foreign assignee or trustee in insolvency, depending for its recognition here solely on our comity, that comity will not be shown where there is any good reason against it. Here the debt due from Lester to the German Insurance Company, and the right to which in the assignee we are asked to recognize, has been attached by the plaintiff, and all the necessary steps taken under our laws for its appropriation to the indebtedness of the insurance company to the plaintiff. It is of no consequence that the attachment was not made until after the assignment in insolvency, and after notice of the assignment had been given to Lester—for the right of the plaintiff is not the right of a prior attaching creditor, but the right of a creditor asserting his claim against the opposing claim of the assignee in insolvency, the one resting on legal proceedings authorized by our laws, and the other only on a comity which we can exercise or refuse to exercise at our discretion. In these circumstances the court owes a legal duty to the plaintiff which is far more imperative than the demands of mere hospitality to a stranger.

In this case the plaintiff is a citizen of Rhode Island, but that fact does not affect the case. *Upton* v. *Hubbard*, 28 Conn., 275. The citizens of all our sister states have by the constitution of the United States the same privileges with our own citizens, and any one of them who has availed himself of the legal remedies furnished by our laws, to secure payment of a debt due him, has the same claim to the assistance of our courts that one of our own citizens would have.

It does not appear very clearly by the finding whether the assignment was made by the insurance company in the first instance, and as an ordinary assignment for the benefit of creditors, or as a part of certain insolvent proceedings commenced by petition, in the course of which the petitioning creditor is required by the statute to execute an assignment of all his property to certain trustees appointed by his creditors at a meeting called by the insolvent court for that purpose.

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It is found only that the assignment was made "under the insolvent laws of the state of Pennsylvania." It was however stated in the argument, and seemed to be agreed, that the assignment was made under the 22d section of the act with regard to "Insolvents," which is a different statute and in a different part of the statute book, from that which regulates assignments for the benefit of creditors. 1 Brightly's Purdon's Digest of Penn. Statutes, pp. 90 and 775. Whatever therefore might be said with regard to a voluntary assignment for the benefit of creditors, the present assignment must be regarded as clearly a statutory and not a common law conveyance, and therefore as having no strictly legal effect beyond the limit of the operation of the laws of the state.

For the reasons which we have given we think the right of the plaintiff must prevail over the claim of the assignee of the insurance company, and advise that judgment be rendered in his favor.

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

BENJAMIN NOYES *vs.* JOHN H. BENHAM AND ANOTHER.

A store was hired by *B* and *N* jointly at an agreed rent for two years, the father of each guaranteeing his son's contract for the rent. The lessees went into occupancy, and, in accordance with their purpose in hiring the store together, divided the floor between them, each railing off and occupying separately his portion. Each leased desk room within his enclosure and received the rent, but *B* received a larger amount than *N*. Held that the rents thus received from sub-tenants were received to their separate use, and that *B* was not liable to account to *N* for the excess of rents received by him.

B used the rents received by him in payment of his share of the rent upon the joint lease, leaving a portion of *N's* share unpaid. Held that, if the money had been received by *B* to their joint use, yet that, as it was so received with *N's* consent and without any condition as to the use to be made of it, its application by *B* to his portion of the rent would merely leave *B* indebted to *N* for the latter's share of the money, and would not give to *N's* guarantor either a right to recover such share of *B* or a right to a contribution from *B's* guarantor.

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ASSUMPSIT for money had and received; brought to the Court of Common Pleas of New Haven County and tried to the court on the general issue before *Stoddard, J.* Facts found and judgment rendered for the defendants, and motion in error by the plaintiff. The case is sufficiently stated in the opinion.

A. H. Robertson, for the plaintiff.

C. S. Hamilton, for the defendants.

PARDEE, J. From the finding of facts made by the court below we learn that George A. Basserman leased a store in New Haven to Leonard W. Benham and John B. Noyes, jointly, for the term of two years from May 1st, 1873, the lessees covenanting to pay as rent therefor $1,600 for the first and $1,800 for the second year, in equal quarterly payments. The said Noyes is a son of the plaintiff, and the said Benham is one of the defendants and a son of the other. Upon the day of the date of the lease the plaintiff executed and delivered to the lessor the following writing appended to the lease: "For and in consideration of the letting of the premises above described, and for value received, I guarantee the punctual payment of the rent and the covenants in the above agreement mentioned to be paid and performed by the said John B. Noyes, without requiring any notice of non-payment or non-performance or proof of notice or demand being made whereby to charge me therefor. Dated at New Haven, this 25th day of March, 1873. (Signed) B. Noyes." And upon the same day the defendant John H. Benham executed and delivered to the lessor the following writing, likewise appended to the lease: "For and in consideration of the letting of the premises above described, and for value received, I guarantee the punctual payment of the rent and performance of the covenants in the above agreement mentioned, to be paid and performed by the said Leonard Benham, without any notice of non-payment or non-performance or proof of notice or demand being made whereby to charge me therefor. Dated

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at New Haven this 25th day of March, 1873. (Signed) John H. Benham."

Each of the lessees intended to have in the store an office for the transaction of his individual business and to occupy solely a designated portion thereof for that purpose, and at the commencement of the term the lessee Benham railed off a part of the front of the store at his own expense and took and maintained exclusive possession of the enclosure; and at the same time the lessee Noyes railed off at his own expense the rear portion and took and maintained exclusive possession thereof. During the year 1873 the lessee Benham rented desk-room within his enclosure to one Chapman, reserving a rent of $125 per quarter. The first quarterly payment under this sub-lease became due on August 1st, 1873, and was wholly claimed by Benham, but in fact was paid half to him and half to his co-lessee Noyes; the final application of which payment is not disclosed. All subsequent payments by Chapman were made wholly to Benham, or to his father. The said L. W. Benham remained in possession of the part of the store enclosed by himself to the end of the term, either in person or by a second sub-tenant, one McAlister, to whom the said John H. Benham made a lease, with the lessor's consent, extending from May 1st, 1874, to May 1st, 1875, reserving rent to himself to be paid monthly at the rate of $900 for the year. One-half of the rent for the entire term has been paid by L. W. Benham and his father John H. Benham to the lessor Basserman, who executed and delivered to the father, upon final payment being made, the following receipt:— "$225. May 12, 1875. Received, New Haven, Conn., of John H. Benham, two hundred and twenty-five dollars, being in full for balance of rent for one part of store No. 74 Church Street, the same being in full of all demands to date. The whole to May 1st, 1875. (Signed) Geo. A. Basserman." The said John H. Benham paid to the lessor $200 more than had been received from the sub-tenants Chapman and McAlister.

From the commencement of the term on May 1st, 1873, to about July 1st, 1874, the rear portion of the store was used at times by the said John B. Noyes alone, at times by him

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and his father, the plaintiff, together, and at times by other persons to whom they had sub-let it. On or about the last named date the plaintiff and his son left the store, the former posting upon the door thereof the following notice: "The rear part of the within store to rent. Inquire of B. Noyes." This portion of the store was not thereafter leased by him, or any one else, but remained unoccupied to the end of the term. The total amount paid to the lessor upon this rear portion of the store for the two years by the plaintiff and his son and by their sub-tenants, is about one thousand dollars, and there remained due and unpaid thereon at the date of the finding about $700. The plaintiff brought this action of assumpsit against the defendants returnable before the Court of Common Pleas for the county of New Haven at the May Term, 1875, and filed the following bill of particulars:

"John H. Benham and Leonard W. Benham—To Benjamin Noyes, Dr. To rent collected for him on store No. 74 Church Street, from April 1st, 1874, to May 1st, 1875, $600; interest from May 1st, 1875, $60=$660.

Upon this, he asked the court to hold that he was entitled to recover from the defendant John H. Benham one-half of the rent which he received from McAlister, but the court refused so to hold, and rendered judgment for the defendants. Of this the plaintiff complains, and has filed his motion in error.

We think that he is not entitled to a judgment in his favor; for, although the lease from Basserman was in form to L. W. Benham and J. B. Noyes jointly, yet as between themselves they could by mutual agreement sever in the use and occupation of the premises, and take, each for himself, exclusive possession of a definitely marked portion for the term; and the plain import of the finding is that they did make such an agreement, and the judgment of the court below simply declares the legal effect which must follow the making and execution thereof. The guarantors recognized it, and severed in their efforts to protect their individual liability; the plaintiff took possession of the rear portion and notified all persons desiring to hire the same to make application to himself. The

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legal effect of the arrangement which all parties joined in carrying into execution to the end of the term is to free the rent paid by Chapman and McAlister to the defendants from the burden of making contribution to any deficiency of income from the rear portion.

Again, if J. B. Noyes and L. W. Benham made no division of their interests and a joint-tenancy existed during the term, the rent paid by Chapman and McAlister belonged to them equally; if more than half of it was paid to the latter with the consent of the former without the imposition of any condition as to its use, then Benham could pay it to the lessor and cause the payment to be applied in diminution of his own liability as tenant and that of his father as guarantor; he would simply become debtor to J. B. Noyes for the surplus, which indebtedness the latter could enforce in a proper action. We do not perceive that under such circumstances B. Noyes, even by virtue of his position as guarantor for his son, would have any greater right to subject one or both of the defendants to the law of contribution by reason of this possession and application of money, than he would have to apply the same process to them by reason of their reception of money from his son in the form of a simple loan; for there had been no such pledge, general or special, of the rent money to the lessor, before it went into the hands of L. W. Benham, by the lessees, either for the protection of their own or of the guarantor's liability, as would make it security therefor in a legal sense. And conceding that each guaranteed that his son should pay the whole rent reserved in the lease, seeing that Benham has paid one-half of it from a fund not previously dedicated to this special use, that half of Noyes's liability was thereby extinguished, and that he has not paid the other half, there would seem to be little equity in compelling the former to refund the McAlister rent to Noyes.

The principal question between the parties is whether the rents received from McAlister were received to the separate use of Benham or to the joint use of Benham and Noyes. As our view of this question necessarily disposes of the case, whoever might be parties to the suit, we have not considered

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an objection made by the defendants to the plaintiff's right to sue, nor the question whether the defendants would be jointly liable.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

TOWN OF BEACON FALLS *vs.* TOWN OF SEYMOUR.

By statute, Rev. of 1866, p. 621, sec. 22, (slightly changed in Rev. of 1875.) the selectmen of any town are to furnish necessary support to inhabitants of other towns residing within such town, who are poor and unable to support themselves, the amount to be recovered of the towns where they belong; and where any such pauper becomes chargeable to the town the selectmen are to send notice of his condition to the town to which he belongs, the notice to state the name of the pauper and that he is chargeable. The selectmen of the town of *B* sent the following notice to the town of *S*. "We hereby give you notice that N. W. and his wife E. W., paupers of your town, are now here, poor and unable to support themselves, and we look to you for all lawful expenses that may be incurred for their support from this time." Held to be insufficient as not showing that the paupers were in fact chargeable to the town sending the notice.

ASSUMPSIT for supplies furnished to certain paupers, claimed to belong to the defendant town; brought to the Court of Common Pleas of New Haven County, and tried to the jury on the general issue before *Robinson, J.*

Upon the trial the plaintiffs offered evidence of the following notice sent by the selectmen of the town of Beacon Falls to those of the town of Seymour:

"Selectmen of the Town of Seymour, Conn.: We hereby give you notice that Newell J. Warner and his wife Eunice M. Warner, paupers of your town, are now here within the limits of this town, poor and unable to support themselves, and we look to you for all lawful expenses which may be incurred for their support from this date. Dated Beacon Falls, March 26, 1873.

JAMES S. WHEELER, }
NOYES WHEELER, } *Selectmen.*"

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The defendants claimed, and requested the court to instruct the jury, that this notice was not legal or sufficient to render the defendants liable for the support of the paupers by the plaintiffs subsequent thereto, in not stating that the paupers were chargeable to the plaintiffs or actually on expense to the town, or that the selectmen had been called upon to aid them. Also that the notice did not sufficiently state that the paupers were *residing* in the town of Beacon Falls.

The court on this point charged the jury as follows:

"The defendants claim that this notice served on Seymour by Beacon Falls was not legal because it did not state that the paupers were actually an expense. The statute requires that, whenever a pauper belonging to another town becomes chargeable, the selectmen of the town where he so becomes chargeable shall give notice of his condition to such other town within five days after they shall know its name, and if they fail to do this cannot recover except for support furnished after such notice was given. The statute does not prescribe the form of this notice. It is to be notice of the pauper's condition. The statute says that a letter mailed to the selectmen, giving the name of the pauper and that he is chargeable, shall be sufficient notice; but it does not say that every other notice shall be insufficient. The notice actually given in this present instance seems to me to be sufficient, and for the purposes of this case I charge you that it is legal and sufficient and gave good and statutory notice of the condition of these paupers."

Sundry other questions were made in the case, which it is not necessary to notice.

The jury having returned a verdict for the plaintiffs, the defendants moved for a new trial for error in the charge of the court.

H. B. Munson, with whom was *W. H. Williams*, in support of the motion.

The notice was insufficient. The statute has prescribed the substance, if not the form, of the notice, and also the time when it shall be given. The time to give notice is after

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the pauper has become—1st, *actually* chargeable—and 2d, after the town has *actually* assisted him; (section 22 of the statute, Revision of 1866, p. 621;) and the notice must be that he "*is* chargeable," not that he *will be* chargeable at a future time however soon. See opinion of Kent, J., in *Verona* v. *Penobscot*, 56 Maine, 13: "Suppose the overseers of a town, anticipating that they must soon relieve a family, send a notice to the town where the settlement is that they have fallen into distress, although in fact no supplies have been furnished, such notice would be insufficient." This construction has been uniform, and in carefully looking over all the cases in this and all the New England states where the statutes are similar to ours, we have not been able to find a single notice in which the term *chargeable* or *on expense* is not used. *Middletown* v. *Berlin*, 18 Conn., 189; *Bangor* v. *Deer Isle*, 1 Greenl., 329; *Dover* v. *Paris*, 5 id., 430; *Chichester* v. *Pembroke*, 2 N. Hamp., 530; *Embden* v. *Augusta*, 12 Mass., 307; *Shutesbury* v. *Oxford*, 16 id., 102.

H. Stoddard, contra.

1. The notice was given March 26th, 1873, and while the Revision of 1866 was in force. The Revision of 1875 differs somewhat in phraseology, if not in substance. By the law in force when this notice was given, (see Rev. of 1866, page 624, sec. 22,) the town wherein a person was, must furnish support when the person was in the condition described by the following language: "Whenever a person, not an inhabitant of such town, residing therein, shall become *poor and unable to support himself*." Then the statute provides that such town "shall furnish such *pauper* such support as may be necessary as soon as the condition of such *pauper* shall come to their knowledge." Evidently the phrase "*poor and unable to support himself*," is in this statute used as convertible with the term "*pauper*." It is perfectly certain that the "*condition*" spoken of in this clause of the statute, is described therein and is expressed by the language "*shall become poor and unable to support himself*." *Hamden* v. *Bethany*, 43 Conn., 212. There are no other words in the statute descrip-

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tive of the "*condition*," except the use of the convertible word "pauper." But the notice contains both—"*paupers* of your town," and "*poor and unable to support themselves*." The use of the statutory word "*paupers*," in the phrase "paupers of your town," expresses a present, existing, actual condition of things. The notice says they are "paupers." How can language be more expressive of their then actual "condition." So also the use of the statutory words: "*poor and unable to support themselves*," express a present, existing, actual condition of things. We submit that the employment of the precise language used in the statute is not only sufficient, but is "certain to a certain intent in every particular."

2. It is said that we should have used the word "chargeable." Certainly the words "*paupers* of your town," are as broadly significant as the word "chargeable." The word "pauper" necessarily includes every element of "chargeability." But the word "chargeable," which the statute says may be used in place of a description of "condition," is not accurately descriptive of a person's condition. It is an apt phrase to describe the *legal result* of a certain state of facts, which facts constitute condition. No objection can be stated to the notice in question that will not apply with far greater force to either phrase, "chargeable" or "on expense." The word "chargeable" is doubtless preferable to the words "on expense," because a person might be temporarily "on expense" under such circumstances that the town would never think of seeking remuneration from another town. The statute says that notice of the "condition" *must be given*, and afterwards, in permitting the use of the word "chargeable" in place of an actual description of the *actual condition* of the person, intended to give the selectmen the option of stating the simple legal result of the condition of the person, or the more complicated matter of actual condition of the person. But certain it is that it is preferable to state the actual condition just as was done in the case at bar.

3. It is said that the notice does not state that the paupers were "*residing*" in Beacon Falls. But the notice used the words, "paupers of your town are now here within the limits

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of this town, poor and unable to support themselves." In *New Milford* v. *Sherman*, 21 Conn., 115, Judge ELLSWORTH says: "Being in the town and in necessitous circumstances, is a *residing therein* within the meaning of the law," and this is quoted approvingly by Judge MCCURDY, in *Trumbull* v. *Moss*, 28 Conn., 257. Technical niceties in notices of this kind are not required. If the meaning is plain to the ordinary understanding it is enough. *Washington* v. *Kent*, 38 Conn., 251; *Hamden* v. *Bethany*, 43 id., 212.

PARK, C. J. We think the notice in this case is insufficient. Towns are under no common law obligation for the support of paupers. All their liability in this respect is imposed by statute. They are not liable, therefore, for the support of paupers any farther than the statute makes them so. Neither is there any equity in such cases in favor of either town in a controversy, but questions of this character must be determined by the rigid rules of the statute. Those rules govern this case, and by them we are to determine whether the notice given by the plaintiffs to the defendants in this case is sufficient to require the latter to respond to the demand of the former for the expenses incurred by them in the support of the paupers in question. The statute in force at the time the notice was given is as follows, (Revised Statutes of 1866, page 621:) "The selectmen of every town, whenever a person, not an inhabitant of such town, residing therein, shall become poor, and unable to support himself, shall furnish such pauper such support as may be necessary, as soon as the condition of such pauper shall come to their knowledge." * * "The selectmen of every town, in which a pauper belonging to another town is chargeable, shall give notice of his condition to the town to which the pauper belongs." * * "And a letter put into the mail stating the name of the pauper, and that he is chargeable, signed by one of the selectmen of the town where he resides, directed to the selectmen of the town where he belongs, etc., shall be sufficient evidence," &c.

From the reading of the statute it is obvious that the pauper

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must be *chargeable* in the town giving the notice at the time the notice is sent, and the notice must contain a statement of the fact. That the pauper is chargeable is made a prerequisite to the giving of notice, and that the notice contains a statement of the fact is made a prerequisite to the liability of the town where the pauper belongs. For the statute further provides that, "where the selectmen have knowledge of the town where such pauper belongs, such town shall not be liable for any expenses for the time in which such notice is neglected to be given." Revised Statutes of 1866, page 622. Here "such notice" refers to the notice previously provided for. The question then is, does the notice in question contain a statement that the paupers are chargeable, that is, are poor and unable to support themselves, and are being supported by the town, or words of that import? The notice was as follows: "We hereby give you notice that Newell J. Warner, and his wife, Eunice M. Warner, paupers of your town, are now here within the limits of this town, poor and unable to support themselves, and we look to you for all lawful expenses which may be incurred for their support from this date." What is there here which imports that the paupers are being supported by the town? The clause, "we look to you for all lawful expenses which may be incurred for their support," clearly refers to future expenses, in case they should become chargeable, and nothing else. The phrase "expenses which may be incurred," cannot possibly be construed as expenses now being incurred. The language would seem to indicate a doubt whether any expenses would ever be incurred, and to treat the matter as a mere possibility. The present tense is not used, but the future tense only. The plain meaning of the sentence is this: "We may incur expenses for their support, and if we do we shall look to you for reimbursement." This is the import of the language and the only meaning that can be given to it. Substitute this language for that used, and the notice will appear clearly insufficient.

The additional words, "from this date," do not alter the meaning. The notice would take effect just as early without those words as with them. And it is clear that there is

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nothing in this notice which imports that the paupers were then chargeable, unless the language "paupers of your town, are now here within the limits of this town, poor and unable to support themselves," so imports; that is, imports that they were then being supported by the town as well as being poor and unable to support themselves. But this language merely describes the condition of the persons, a condition which necessarily must precede support, for towns are not bound to furnish support until persons are actually in this condition. The condition must first exist, and then the liability to furnish support follows. The town may be liable to furnish support and yet may never in fact be called upon to do so, for in many cases persons "poor and unable to support themselves" are supported wholly by charity. Suppose some benevolent person should take all the paupers from the alms-house of some town, by consent of the town, and support them for a year. The paupers would be none the less paupers during the year. Their condition would be the same whether supported by the town or by this private charity; and during the year the town would be relieved from responsibility in regard to them. How then can it be claimed that this notice, which merely states that "Newell J. Warner, and his wife Eunice M. Warner, paupers of your town, are now here within the limits of this town, poor, and unable to support themselves," is a sufficient notice to the defendants to make them liable under the statute? But the counsel for the plaintiffs contend that the word "chargeable" is used in the statute as merely descriptive of the condition of the pauper, in order to show that he is the proper subject of support, and not that he is also actually receiving support. But the preceding words of the statute fully describe the condition of the pauper—"poor and unable to support himself," and why should another word of the same import be used in the same sentence? Clearly the two expressions were intended to have different meanings.

But we have direct authority on this subject. Section seven of the statute, (Revised Statutes of 1866, page 618,) reads as follows: "Any inhabitant of any town in the state may remove himself, &c., into any town, &c., and shall gain a

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settlement in the town to which he may so remove, if he shall reside in said town for the full term of six years successively, after his removal into such town, and shall, during the whole of said time, support himself and his family, if any he have, without his or their becoming chargeable to such town, or to the town that may by law be liable to be charged for the support of such person or family; but if such person, &c., shall become chargeable to the town that may be liable for his or their support, &c." Here, manifestly the words, "*without becoming chargeable to such town*," mean, without subjecting the town to actual expense for their support.

Section eight of the same statute reads, "When any inhabitant of any town shall remove into another town, and while there he, &c., shall become chargeable to the town, &c., the civil authority, &c., may order such pauper to be taken and transported from the town where he resides, and is chargeable, to the town to which he belongs, &c." Here, again manifestly the word *chargeable* is used in the same sense as in section seven. In proper order this section ought to follow the section in controversy, for the two sections are concerning the same subject matter. One provides for the liability of a town where one of its settled inhabitants has removed to another town, and is there chargeable. The other provides for the removal of the pauper to the town where he belongs when he is chargeable in another town. If these sections were together in consecutive order in the same statute, then the principle of construction everywhere applied would apply to the case, that when a statute uses a word in a certain sense, it is to be presumed to have been used in the same sense in all other parts of the statute wherever it occurs.

A new trial is advised.

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

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LEOPOLD C. ZALESKI *vs.* ELIZABETH S. CLARK.

The plaintiff, a sculptor, made a plaster bust of the deceased husband of the defendant, under an agreement that she was not to be bound to take it unless she was satisfied with it. When it was finished she was not satisfied with it and refused to accept it. In a suit for the price agreed it was found that the bust was a fine piece of work, a correct copy of a photograph furnished by the defendant, and that it accurately portrayed the features of its subject; and that the only fault found with it was that it did not have the expression of the deceased when living, which was caused by no imperfection in the work but by the nature of the material. Held that the plaintiff was not entitled to recover.

As the bust was to be satisfactory to the defendant, it was for her alone to determine whether it was so, and it was not enough that her dissatisfaction was unreasonable.

The order for the bust was procured by a third person who had a general authority to solicit orders for the plaintiff, but none to make such a condition. Held —1. That such a general authority would seem to be sufficient to authorize the agent to agree upon the terms of the contract. 2. But that, if the authority was not sufficient, the result would be that there was no special contract, and as the defendant had not accepted the bust there was no sale and no liability on the part of the defendant.

ASSUMPSIT, to recover the price of a bust made for the defendant; brought to the Court of Common Pleas of New Haven County, and tried to the court on the general issue, before *Robinson, J.* The court made the following finding of facts:

The plaintiff in March, 1875, was a sculptor by profession, and particularly devoted himself to modeling in plaster, from photographs, the busts of deceased persons. A certain Mrs. Johnson formed his acquaintance, saw his work and was much pleased with it, and endeavored to procure him some orders. Mrs. Johnson was herself an artist, and it had been agreed between her and the plaintiff that they would together occupy a certain store in New Haven and pay the rent therefor, and that Mrs. Johnson should get orders for the plaintiff, if she could, and was to receive a commission therefor, and that the plaintiff should assist her in her business in a similar way and for similar remuneration. Among others she went to Mrs. Clark, the defendant, an old friend of hers, a widow,

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told her of the plaintiff, and asked her if she would not like a bust of her deceased husband. Mrs. Clark said she would very much. Mrs. Johnson said that she believed the plaintiff would give perfect satisfaction, and that Mrs. Clark would run no risk in ordering it as she need not take it unless she was satisfied with it. These representations of Mrs. Johnson as to Mrs. Clark's not being liable to take the bust unless it satisfied her were made without any authority to make them from the plaintiff.

Mrs. Clark thereupon gave Mrs. Johnson a photograph, which was a good likeness of the deceased, to be used by the plaintiff in preparing the bust, and Mrs. Johnson gave it to the plaintiff. The plaintiff made the bust, and while at work on it was visited by the defendant, who made some suggestions regarding it which were followed by the plaintiff. When the bust was completed the defendant notified the plaintiff that she should not accept it or pay the price for it, which it had been agreed should be $150.

The bust was a fine piece of work, was a correct copy of the photograph, and accurately represented and portrayed the features of the deceased. The only fault found with it was that it did not have the expression of the deceased during his life, and this the court found from the evidence to have resulted not from any imperfection in the workmanship, but from the nature of a bust as a dead white model, and necessarily destitute of the expression of color and life. The defendant was not satisfied with it, but her dissatisfaction was caused by reasons which would have applied to any bust whatever, and not to this as distinguished from any other.

Upon these facts the plaintiff claimed that he was entitled to recover, that the defendant in ordering a bust was supposed to know the character of the object ordered, and was bound to receive and pay for it, unless there was some objection to this particular bust which did not arise out of the inherent character of busts in general. The defendant claimed that the plaintiff was bound to satisfy her at all events, and that unless she was satisfied she was not bound to take the bust, no matter what was the reason of her dissatisfaction.

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The court overruled the claim of the defendant and rendered judgment for the plaintiff to recover $150, with interest from May 1st, 1875.

The defendant moved for a new trial for error in the above ruling of the court.

C. Ives, in support of the motion.

1. The plaintiff's agent made a contract with the defendant, by which she agreed that if he would make for her a bust of her deceased husband which satisfied her, she would take it and pay for it $150. No other agreement was made, and no contract whatever was made by the defendant with the plaintiff personally. Upon this contract, therefore, the plaintiff must rely to make out his case. The plaintiff did not perform this contract. The bust he made was not satisfactory to the defendant, and for that reason she was not bound to take and pay for it. Tastes, opinions and judgments differ. He who contracts to do work which will satisfy one does not make out a case by showing that the work done would have been satisfactory to ten thousand others. The face pictured upon canvas or modeled in clay attracts or repels us according as the artist succeeds or fails in reproducing the expression of life. If the defendant in this case looked upon the bust as a hideous caricature, it matters not to her who or how many may think it a beautiful work of art. It is not what she agreed to take or pay for. The precise point involved in this case has been twice decided by the Supreme Court of Massachusetts. The case of *McCarren* v. *McNulty*, 7 Gray, 139, was an action brought to recover the price of a book case. The contract was to "make it in a good, strong, and workmanlike manner, to the satisfaction of" one of the defendants. The court held that the plaintiff could not recover without proving that the book case was "satisfactory." It says: "It may be that the plaintiff was injudicious or indiscreet in undertaking to labor and furnish materials for a compensation, the payment of which was made dependent upon a contingency so hazardous or doubtful as the approval or satisfaction of a party particularly in interest. But of that

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he was the sole judge. Against the consequences resulting from his own bargain the law can afford him no relief. Having voluntarily assumed the obligations and the risk of the contract, his legal rights are to be ascertained and determined solely according to its provisions." The same principle has been re-affirmed in a very recent case, in language still more emphatic. *Brown* v. *Foster*, 113 Mass., 136.

2. The plaintiff was bound by the contract made by Mrs. Johnson with the defendant.—1st. It does not appear that the plaintiff placed her under any restrictions in regard to the business of her agency. She was to "get orders for the plaintiff if she could, and was to receive a commission therefor." These few words covered her powers as agent.—2d. In making this contract she was acting within the general and apparent scope of her authority, so that had she in fact been forbidden to make such a conditional contract, yet, as she did make it, the plaintiff is bound by it. "A person having a horse to sell, intrusts a servant with power to sell the horse, and directs him not to warrant the horse; and if the servant, nevertheless, upon the sale should warrant him, the master would be bound by the warranty; because the servant would be acting within the general scope of his authority, and the public cannot be supposed to be cognizant of any private conversation between the master and the servant." Story on Agency, §§ 132, 133; 1 Swift's Digest, 328; *Thames Steamboat Co.* v. *Housatonic R. R. Co.*, 24 Conn., 51.—3d. The defendant made no contract with the plaintiff personally. It is found that she made a certain contract with Mrs. Johnson as plaintiff's agent, and if she is liable on it, she is liable upon it as it was made, and the plaintiff cannot hold the defendant for that portion which he approves and reject the rest. He must take all or none. He has elected to take the order, and he must take it as it was given, and be bound by its condition that the defendant, if not satisfied, need not take the bust.

T. C. Ingersoll, contra.

1. The defendant's claim at the trial below was, that the

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contract was substantially a void contract, on the theory that it called for an impossibility, namely, an ideal satisfaction, for which the plaintiff had only himself to blame. 2 Parsons on Contracts, 673. Is this the proper view? Rather than this, should not the contract be so construed that, without doing violence to language, the honest intention of the parties can be reached, and the contract upheld and enforced?

2. But there was no contract that the bust should be especially satisfactory. It is expressly found that the plaintiff did not authorize Mrs. Johnson to say to the defendant that "she need not take the bust unless she was satisfied with it." In fact Mrs. Johnson was not only not the plaintiff's agent for this purpose, but she did not assume to the defendant that she was his agent at all, nor that she was in any way connected in business with him, but she went to the defendant merely "as an old friend of hers," and stated "that she *believed* the plaintiff would give perfect satisfaction, &c." On no conceivable ground therefore was the defendant justified in relying, to the plaintiff's prejudice, upon these extraordinary representations of Mrs. Johnson. 1 Parsons on Contracts, 39, 40, 60, and cases cited. In this particular transaction the only agency appearing was an agency between these two parties themselves, Mrs. Johnson acting as the defendant's agent in handing the photograph and giving the order to the plaintiff, which act of agency on the part of Mrs. Johnson the defendant subsequently ratified by visiting the plaintiff while at work on the bust, and "making some suggestions regarding it, which were followed by the plaintiff."

3. But assuming that the plaintiff was bound by all the representations of Mrs. Johnson, the most that can be claimed is, that the contract called for a bust which should be satisfactory as far as the character of the thing ordered and the nature of the material to be worked upon would admit. That it was satisfactory in this aspect the court expressly finds. The satisfaction to be met was a *reasonable* satisfaction, not a mere whim or caprice. That the bust when finished lacked the attractions of life and color, was no more a legal ground for dissatisfaction on the part of the defendant, who had

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ordered a bust to be made out of plaster, than the absence of heat and upholstery would justify a similar dissatisfaction on the part of one who had ordered from a mason builder the four walls of a house, and on completion found the residence a cheerless one. Such dissatisfaction, in reference to works of art certainly, is too much of the dreamy and poetic order to be properly the subject of legal recognition. In this poetic sense, as distinguished from the legal, it may not be improper to recognize it, and to give the defendant our sympathy, as was the case with Pygmalion of mythological renown, who, a sculptor himself, was thus afflicted, and who, mourning over the one imperfection of his masterpiece, is represented by a modern dramatist as groaning out his dissatisfaction in this wise:

> "No, the thing is cold, dull stone,
> Shaped to a certain form, but still dull stone,
> The lifeless, senseless mockery of life,
> The gods make life, the sculptor only death;
> The merest cut throat, when he plies his trade,
> Makes better death than I with all my skill."

In consideration of the fact that the only fault found with the bust was that it failed "of the expression of the deceased *during his life*," and further, that this failure of expression was due solely to "the nature of a bust as a *dead white model*," it is submitted that the dissatisfaction of this defendant and that of the mythological sculptor are identical. Redress or remedy in either case is beyond the reach of human law.

CARPENTER, J. Courts of law must allow parties to make their own contracts, and can enforce only such as they actually make. Whether the contract is wise or unwise, reasonable or unreasonable, is ordinarily an immaterial inquiry. The simple inquiry is, what is the contract? and has the plaintiff performed his part of it? In this case the plaintiff undertook to make a bust which should be satisfactory to the defendant. The case shows that she was not satisfied with it. The plaintiff has not yet then fulfilled his contract. It is not enough to say that she ought to be satisfied with it, and that

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her dissatisfaction is unreasonable. She, and not the court, is entitled to judge of that. The contract was not to make one that she *ought* to be satisfied with, but to make one that she *would* be satisfied with. Nor is it sufficient to say that the bust was the very best thing of the kind that could possibly be produced. Such an article might not be satisfactory to the defendant, while one of inferior workmanship might be entirely satisfactory. A contract to produce a bust perfect in every respect, and one with which the defendant ought to be satisfied, is one thing; an undertaking to make one with which she will be satisfied is quite another thing. The former can only be determined by experts, or those whose education and habits of life qualify them to judge of such matters. The latter can only be determined by the defendant herself. It may have been unwise in the plaintiff to make such a contract, but having made it, he is bound by it. *McCarren* v. *McNulty*, 7 Gray, 139; *Brown* v. *Foster*, 113 Mass., 136.

It further appears that the plaintiff did not make this contract personally, but it was made through the agency of a Mrs. Johnson; and the court below has found that her representations as to the defendant's "not being liable to take the bust unless it satisfied her, were made without any authority to make them from the plaintiff."

It appears that she had a general authority to procure orders for the plaintiff. In the absence of any limitation of her power it would seem that she would be authorized to agree upon the terms of the contract; but conceding that she had no power to make such a contract as this is, we do not see how that circumstance will aid the plaintiff's case. There was no other contract; and if this was unauthorized and not binding upon the plaintiff, then there was no special contract. If none, then, inasmuch as the defendant never accepted the bust, there was no sale and she is not liable.

A new trial is advised.

In this opinion the other judges concurred.

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DAVID T. MORGAN *vs.* GEORGE JONES.

The statute with regard to the taking of depositions (Gen. Statutes, p. 436, sec. 3,) requires that they be "sealed up" by the magistrate taking them. Held that the sticking together by means of gum, of the envelope containing the deposition, was sufficient.

The statute does not prescribe the time within which a deposition shall be sealed up and returned to court, and what is a reasonable time must depend upon the circumstances.

A deposition to be used in this state by the plaintiff in the case, was taken before a magistrate in the state of New York in May, 1875, but was retained by him until the 6th day of March, 1876, when it was sealed up and the next day delivered to the clerk of the court, on which day the trial commenced. It appeared that the sole purpose for which it was retained and kept open by the magistrate was that certain documents attached to the deposition might be examined and referred to in another deposition in the same cause which the magistrate expected to take. It also appeared that the defendant was present with his counsel when the deposition was taken, that it had not been altered since taken, and that the defendant was not injured by the delay. Held that the delay was not a sufficient reason for rejecting the deposition.

Upon the mere question whether *A* was at a certain time indebted to *B*, or *B* to *A*, an enquiry as to the amount of property owned by *A* is irrelevant.

ASSUMPSIT for money paid for the defendant and upon an account stated, held by the plaintiff by assignment; brought to the Superior Court in New Haven County, and tried to the court on the general issue, before *Martin, J.* Facts found and judgment rendered for the plaintiff, and motion for a new trial by the defendant. The case is sufficiently stated in the opinion.

S. E. Baldwin and *J. H. Whiting*, in support of the motion.

H. E. Pardee, contra.

GRANGER, J. The first question presented by the motion is, whether the deposition of S. Ostrom was admissible in evidence. The deposition was taken at Poughkeepsie, N. Y., before a magistrate duly authorized to take depositions, on the 24th day of May, 1875. The adverse party was present in person, and with counsel. It was not filed in the Superior Court until March 7th, 1876, being the day on which the trial

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took place. It was inclosed in a large envelope, properly directed and endorsed, which was closed by gumming down the flap of the envelope, without the use of any wafer, or seal, and no other precautions were taken to prevent the envelope from being opened without authority. It was thus secured by the magistrate on March 6th, 1876. The magistrate had been requested to take the deposition of H. A. Nelson to be used in the same case, of which the defendant had notice, and was advised that it was important that Nelson should have an opportunity to see some of the exhibits attached to Ostrom's deposition at the time of giving his own; and Ostrom's deposition was retained and kept unsealed by the magistrate for this purpose, and no other.

The defendant objected to the admission of the deposition on the grounds, first, that it was not perfected, and returned to court in proper season; second, that it was not properly sealed, nor sealed at all. The court overruled both objections, and admitted the deposition, which contained material evidence for the plaintiff.

We think the court decided correctly. The statute relating to the taking of depositions prescribes no time within which a deposition shall be sealed up and returned to court. Whether the time which this deposition was left open was reasonable or not, must depend mainly upon the facts and circumstances attending the taking, and whether any injury has been done the defendant by delay in returning the deposition. *Phelps* v. *Hunt*, 40 Conn., 101, and cases there cited. It appears that the defendant and his counsel were present at the taking of it, and of course must have known its contents; there is no pretence that any alteration was made in it after it was taken, nor that it was delayed or kept open for any improper purpose, nor that the defendant was in any way prejudiced by the fact that it was not returned to court till the day of trial. This first ground of objection cannot be sustained.

And the second is equally untenable. It is claimed by the defendant that the statute required that the deposition should be "sealed up" by placing upon it a wafer, wax, or some other

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substance upon which the magistrate must impress a seal. We do not think the statute requires any such act to be done, but only that the envelope shall be securely closed, so as to prevent any improper inspection of the deposition before it is opened in court. Any mode that accomplishes this end, whether it be by sealing with wax, or by closing the flap of the envelope by means of gum, we think answers the requirement of the law at the present day; the necessity of using "seals" upon depositions, as understood and defined by the common law, having been dispensed with by statute, and by practice for a long time. Act of 1857, Revision of 1875, p. 438, sec. 17.

The suit is brought by the plaintiff as assignee and holder of a debt claimed to be due from the defendant Jones, to Shepard Ostrom. The debt, if any, arose out of certain disbursements made by Ostrom, for the benefit of Jones, in paying two judgments recovered against Jones in the state of New York by one Lewis. From the bill of particulars and exhibits offered by the plaintiff it appears that the payments made by Ostrom were made by E. P. Bullard from the rents of two stores in Boston, in which rents Ostrom and Jones were equal owners—Bullard being the agent of both Ostrom and Jones to collect the rents and pay over the same in satisfaction of Lewis's judgments. The plaintiff claimed that there was due Ostrom from Jones at the time of the assignment the sum of $2,374.06. The defendant denied that this sum was due, and in support of his claim offered in evidence, without objection, a receipt, which is as follows:

"Pleasant Valley, April 4th, 1863. Received from George Jones my note dated August 18th, 1862, eight months, due April 21st, 1863, in favor of Silas Bronson of New York, for two thousand dollars; said note having been paid by said Jones, and being the balance of amount of twenty-two hundred and forty-eight dollars and ninety-three cents, with interest, paid by me on account of judgments obtained in Court of Appeals in this state, by one George Lewis or his executors against George Jones. SHEPARD OSTROM."

The defendant requested the court to hold that this receipt

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operated as a receipt in full, and as a full discharge of all claims by Ostrom for moneys at any time paid by him on the Lewis judgments. The court refused to sustain the claim of the defendant, and to hold as requested, and also refused to give credit for the sum mentioned in the receipt as against the balance of $2,374.06, due Ostrom on the 30th day of January, 1869, as shown by Bullard's statement of account, and found by the court to be the true balance of account at that time.

It is expressly found that this receipt relates to the very judgments referred to in the plaintiff's bill of particulars, and it is not even suggested that the receipt was procured by fraud, or that it was given through any mistake. No reason appears in the finding why the court refused to give it the effect and construction claimed by the defendant, and none is suggested in the brief of the plaintiff's counsel. The finding by the court is, that on the 4th of April, 1863, Jones delivered to Ostrom a note due from Ostrom to one Silas Bronson, and Ostrom gave him a receipt therefor, and that the judgments referred to in the receipt are the same referred to in prior exhibits, namely, two judgments of Lewis against Jones. Now it is very apparent on inspection of the receipt that it is something more than a mere receipt for the note held by Bronson against Ostrom. It states distinctly that the note has been paid by Jones, and that it is the balance of twenty-two hundred and forty-eight dollars and ninety-three cents, with interest, paid by him on account of the Lewis judgments. The amount paid by Jones for Ostrom to take up this note was $2,000. It nowhere appears in the finding or in the plaintiff's bill of particulars that Ostrom had any other claim against Jones than what grew out of his payments on the Lewis judgments, and it does not appear by the statement of account between Ostrom and Jones that Jones has had any credit for the $2,000 paid to Bronson for Ostrom to take up the note.

But we do not intend to decide whether it is to be considered a receipt in full or as a receipt for so much money paid by Jones on the Lewis judgments. The court below refused

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to hold that it was either, and gave no effect to the receipt. In this we think the ruling was wrong.*

There is one other question presented by the record which we briefly consider, and that is, whether the interrogatories put to the defendant on cross-examination were proper. The record states that the defendant testified on his direct examination, in order to show want of bona fides in the assignment to Morgan, and that the assignment was made by Ostrom to avoid a set-off of claims due from him to Jones, that Ostrom owed him several thousand dollars at the time this suit was brought. On cross-examination he testified that he knew that Ostrom owed him several thousand dollars, from Bullard's deposition, and the exhibits thereto annexed. He was then asked if he had any property, and replied in the affirmative. He was then asked, "What does your property consist of, and where is it situated?—I mean in brief not in detail." This was objected to as irrelevant and impertinent; but the court overruled the objection and admitted it. The witness replied that he had a claim against Shephard Ostrom, and one against E. P. Bullard on which he had brought suit in New York, and that he had invested over $100,000 in stocks of two or three companies. He was then asked to name the companies. To this question the same objection was made, but the court admitted it, and the defendant gave the names of the companies.

Evidence which tends in any manner to prove the point in issue between the parties is presumably admissible, but very clearly any evidence which does not in any manner tend to prove such point is inadmissible as being wholly irrelevant. Now the point or question at issue was whether Jones the defendant owed Ostrom at the time he made the assignment to Morgan the plaintiff, and this was the principal if not the sole issue; and whether Jones was worth one dollar or a hundred thousand dollars was of no importance, and could throw no light on the question at issue. The evidence was wholly irrelevant, and clearly inadmissible.

* The foregoing point being mainly one of fact, and not admitting of statement as a legal proposition, has not been noticed in the head note of the case. R.

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There are several other questions made in the case which we do not think it necessary to consider. For the reasons we have given we think a new trial must be granted.

In this opinion the other judges concurred.

THE NEW HAVEN PIPE COMPANY *vs.* THOMAS K. WORK.

A piece of land was sold to *T*, subject to two mortgages, which the grantee by the deed assumed and agreed to pay. The second mortgage was made by *W*, a former owner, who afterwards was compelled to pay it. The first mortgagee afterwards foreclosed both *W* and *T*, and on his title becoming absolute conveyed the property to *W* on his paying the amount of the first mortgage. Held that, if *W* had a right of action against *T* upon his assumption of the second mortgage, yet he could recover only so much of that mortgage debt as remained unsatisfied after applying to it the value of the mortgaged property above the first mortgage.

And held that, until such value was determined, the claim was of such an unliquidated character that it could not be set off in an action of assumpsit brought by *T* against *W*.

ASSUMPSIT for commissions on the sale of real estate; brought to the City Court of the city of New Haven. The defendant pleaded the general issue, with notice of a set-off, upon which the whole question in the case arose. The court found the following facts.

The plaintiffs are a joint stock corporation and hold by assignment from one Norman A. Tanner the claim for broker's commissions upon which the suit was brought; the amount claimed being $316, which, aside from the question of set-off, was justly due to Tanner at the time of the assignment of the claim. The plaintiffs took the assignment with no knowledge of any right of set-off on the part of the defendant.

On the 7th day of April, 1870, the defendant was the owner of a tract of land situated in Hartford in this state, which was subject to mortgages to the Society for Savings amount-

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ing in the whole to $14,000, and to two mortgages to one R. C. Osborn for $3,500 in the whole. On that day he executed another mortgage on the same property to one S. A. Ensign, for $5,500, payable three years from date with semi-annual interest; and on the 13th day of September, 1870, he conveyed the land, subject to all these mortgages, to Joseph P. Tully, of the state of New York. The deed to Tully contained the following clause: "Said grantee hereby assumes and agrees to pay said mortgages, with the interest from this date, as a part of the consideration of this deed, and save said grantor harmless therefrom." Tully accepted the deed, and on the 9th day of October, 1871, conveyed the land to Norman A. Tanner, mentioned above; the deed to Tanner, after describing the land as subject to all the above mentioned mortgages, containing the following clause: "All of which mortgages said grantee assumes and agrees to pay, with interest from October 12th, 1871, as part consideration of this deed." Tanner accepted the deed and put it upon record.

On the 10th day of April, 1873, the defendant paid the $5,500 due upon the Ensign mortgage, the note then falling due. Afterwards Tully assigned to the defendant his claim upon Tanner upon the latter's assumption of the mortgage debt thus paid by the defendant. No notice of this assignment was given to Tanner, and neither he nor the plaintiffs had any knowledge of it until after the suit was brought.

Afterwards Osborn foreclosed the two mortgages held by him, and after the foreclosure became absolute conveyed the property to the defendant on his paying the amount of his two mortgages, with a small sum in addition for his trouble.

Upon these facts the defendant claimed—1st. That, at the time of the trial there was, without any assignment from Tully of his claim against Tanner, a liquidated debt due from Tanner to the defendant, which could be set off against the claim of the plaintiffs. 2d. That, if the assignment was necessary, the set-off could be made without either Tanner or the plaintiffs having had notice of the assignment previous to the bringing of the suit.

The plaintiffs claimed—1st. That the claim offered as a

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set-off, if a debt at all against Tanner or the plaintiffs, was unliquidated and could not be the subject of set-off under the statute. 2d. That, if liquidated, it was a debt by assignment as against Tanner and the plaintiffs, and could not be the subject of set-off under the statute, unless notice of the assignment had been given to Tanner or the plaintiffs before the bringing of the suit.

The court overruled the claims of the defendant, and rendered judgment for the plaintiffs for the sum of $316 damages and costs. The defendant brought the record before this court by a motion in error.

H. F. Hall, for the plaintiff in error.

1. At the time of the bringing of the suit Tanner was indebted to the defendant in the amount of the Ensign mortgage paid by the defendant. By accepting the deed reciting his undertaking to pay the mortgages Tanner became directly liable to the mortgagees for the amount thereof. *Foster* v. *Atwater*, 42 Conn., 244; *Ricard* v. *Sanderson*, 41 N. York, 179. The defendant having been obliged to pay the third mortgage, an immediate right of action accrued to him against Tanner, and the law implies a promise from Tanner to repay him. 1 Swift Dig., 411. Any right of action which the mortgagee had against Tanner became vested in the defendant by virtue of the payment by him of the mortgage debt. The defendant as mortgagor was a surety as to the mortgage, and, having been compelled to pay it, whoever had assumed the obligation of payment became indebted to him for the amount. *Thorp* v. *Keokuk Coal Co.*, 48 N. York, 258. This liability attaches to whoever purchases the land and assumes the debt. 1 Hilliard on Mortg., ch. 13, sec. 59. It is found that Tanner assumed and agreed to pay the mortgages. His liability here is to the defendant as a surety who has been compelled to pay the debt which belonged to Tanner to pay. 1 Swift Dig., 411; *Thorp* v. *Keokuk Coal Co.*, supra. Even without payment by the defendant, Tanner was liable to him as soon as the note became due. By promising Tully to pay the mortgage debt, he became directly liable to the defendant

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for not doing so. This rests on the broad doctrine that whoever promises upon good consideration to do anything for the benefit of a third party is directly liable to such third party. *Lawrence* v. *Fox*, 20 N. York, 268; *Thorp* v. *Keokuk Coal Co.*, 48 id., 253. And it matters not whether he knows the third party or not. *Hall* v. *Marston*, 17 Mass., 575. The liability is a personal one and is in no way affected by the defendant's subsequently acquiring the land by purchase from the second mortgagee. *Post* v. *Tradesmen's Bank*, 28 Conn., 430; *Foster* v. *Atwater*, 42 id., 244; *Thorp* v. *Keokuk Coal Co.*, supra. The land may have deteriorated so that the third mortgage was of no value. This may have been through Tanner's fault or neglect. Such loss in value may be presumed from the fact of the third mortgagee not proceeding to collect his debt by foreclosure, as is usually done in such cases. Also from the second mortgagee selling the land for the face of his claim and a small premium. There is no fraud found, nor any collusion between the defendant and the second mortgagee, and none can be presumed. The defendant at this time did not stand in the position of a third mortgagee; even if he had, any such acquiring of the property would not have constituted a merger of his title as mortgagee in the fee.

2. The defendant is entitled to set off this claim against any claim which Tanner may have had against him. *Adams* v. *Leavens*, 20 Conn., 73. It is not necessary to allege or prove any notice to Tanner by the defendant in order to establish the defendant's right either of action or of set-off. Tanner is presumed to have notice. *Ward* v. *Henry*, 5 Conn., 600; *Marcy* v. *Crawford*, 16 id., 555; *Post* v. *Clark*, 35 id., 342.

3. This right of set-off is not impaired by reason of the assignment by Tanner to the plaintiffs. In this state the assignee of a chose in action not negotiable has all the rights which his assignee had, and no more. *Camp* v. *Tompkins*, 9 Conn., 552; *Smith* v. *Russell*, 17 id., 107. The assignment is looked upon rather as a power of attorney, authorizing the assignee to sue for and recover the debt in the name of the assignor. *Smith* v. *Russell*, supra. Until notice to the

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debtor the debt remains in the assignor and is liable for his debts. *Woodbridge* v. *Perkins*, 3 Day, 364; *Bishop* v. *Holcomb*, 10 Conn., 447; *Vanbuskirk* v. *Hartford Fire Ins. Co.*, 14 id., 141; *Adams* v. *Leavens*, 20 id., 80. No notice to the defendant as debtor to Tanner was given in this case. The assignee takes subject to all the equities which the assignor was bound by. *Adams* v. *Leavens*, supra.

C. S. Hamilton, for the defendant in error.

1. The defendant had no cause of action in his own right against Tanner, growing out of the assumption of the mortgages by the latter in the deed of Tully to him, even though, by his payment of the Ensign mortgage, he became entitled to the rights of Ensign as mortgagee. Ensign as mortgagee had no such right of action against Tanner. The mere sale of the property to him subject to the mortgages did not make him personally liable for the mortgage debts. 2 Washb. R. Prop., ch. 16, sec. 4, art. 10, and sec. 5, art. 6. *Johnson* v. *Monell*, 13 Iowa, 301, 303. If, in the absence of a personal liability, there was a consideration for his special promise to assume and pay the mortgages, yet it is clear that he is bound only by his special promise, implied in his acceptance of the deed from Tully, which contained an express stipulation that he assumed and would pay the mortgage debts. This being a purely personal contract with his immediate grantor, he was not bound by it to any one but Tully, and consequently was indebted only to him. *Drury* v. *Tremont Improvement Co.*, 13 Allen, 168, 172; *King* v. *Whitely*, 10 Paige, 465; *Garnsey* v. *Rogers*, 47 N. York, 233, 240. If Tanner can be regarded as having assumed any personal liability to the defendant by the stipulation in the deed, such liability is at most that of a surety or guarantor for Tully, as the principal debtor to the defendant, in which case there can be no right of set-off in favor of the defendant. *Morley* v. *Inglis*, 4 Bing. N. C., 58, 71; *Crawford* v. *Stirling*, 4 Esp., 207, 209. There cannot be a debt, unless there is some contract or promise out of which it grows; and in order that there be a contract or promise, there must be—(*a*) contracting parties;

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(*b*) a sufficient consideration to support the contract or promise; (*c*) assent of the parties; and (*d*) a subject matter of contract. But here there is—(*a*) only one contracting party, for the defendant is not known in the agreement made between Tanner and Tully; (*b*) no consideration moving from the defendant to Tanner; (*c*) no promise either express or implied to *the defendant.* There is no privity of contract between the defendant and Tanner. The defendant stands in precisely the same relation that he would had he sold the premises, free of incumbrance, to Tully for $5,500, and Tully had sold them, for the same price, to Tanner, and neither Tully nor Tanner had as yet paid the purchase money. *Mellen* v. *Whipple*, 1 Gray, 317.

2. If Tully had a right of action against Tanner, upon his assumption of the mortgages, that right was not so assigned to the defendant that he became possessed of the right. To make the assignment good as against third parties a notice to Tanner was necessary. No such notice had been given when the plaintiffs brought their suit, and consequently no such right existed in the defendant at that time. At the time the suit was brought Tully had the right, entirely unimpaired, of releasing Tanner from his obligation, a right which could not have existed if the defendant had then become vested with the right of action. Not having the right of action then, the defendant could not acquire it after the suit was brought, so as to avail himself of it by way of set-off against the plaintiffs, who had no knowledge of the assignment when they brought their suit.

3. The claim which the defendant attempts to set off, if a claim against Tanner in any respect, is unliquidated, and hence cannot be the subject of set-off. The statute allows a set-off of "mutual *debts*" only. A debt is a fixed and specific quantity or sum, *and no future valuation or inquiry is required to settle its amount.* Bouv. Law Dict., *Debt.*; 3 Black. Com., 154. It does not appear exactly when the defendant paid the $5,500 note to Ensign, nor how much interest and taxes he paid, nor how much had been paid by Tully or Tanner. Besides this the defendant, by an arrangement with the second

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mortgagee, had received back the premises in satisfaction of his debt. In the absence of other finding as to the value of the premises the one expressed in the deeds ($32,000) must be taken to be correct. The mortgages amount in the aggregate to $23,000. And where the value of the mortgaged premises exceeds the mortgage debts a foreclosure operates as payment. *Bassett* v. *Mason*, 18 Conn., 131; *Weiner* v. *Heintz*, 17 Ill., 259, 262. A set-off *pro tanto* cannot be taken out of an unliquidated debt. Waterman on Set-off, § 303; *U. States* v. *Barker*, 1 Paine C. C. R., 156. The courts of the United States and of the several states have universally held that wherever it was necessary for the court to hear evidence, or to do anything in order to fix the amount of the claim, such claim could not be allowed as a set-off. Waterman on Set-off, §§ 297, 298; *Riddle* v. *Gage*, 37 N. Hamp., 524; *Farquar* v. *Collins*, 3 A. K. Marsh., 34; *State* v. *Welsted*, 6 Halst., 399; *Smock* v. *Worford*, 1 Southard, 308; *Stanbery* v. *Smythe*, 13 Ohio S. R., 500. The claim is simply for damages on a special contract; as such it cannot be the subject of set-off. *Grimes* v. *Reese*, 30 Geo., 332.

PARDEE, J. Upon the facts as found in this case the defendant has failed to establish any right to the set-off claimed. The equity of redemption in the land in question passed from him to Tully, and from the latter to Tanner, and was the consideration upon which they entered into their respective agreements. Previous to the commencement of this suit the second mortgagee took this equitable right from both of them by the process of foreclosure, and after the title had become absolute in him he transferred it to the defendant, who now holds it. By statute (Gen. Statutes, tit. 18, chap. 7, sec. 2,) the foreclosure of a mortgage does not preclude the mortgage creditor from recovering so much of the claim to secure which the mortgage was given, as the property mortgaged, estimated at the expiration of the time limited for redemption, shall be insufficient in value to satisfy. And where the value of the property mortgaged exceeds the mortgage debt, a foreclosure of that mortgage having become

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absolute operates even at law as a payment of the debt. *Bassett* v. *Mason*, 18 Conn., 131. After the defendant had thus taken to himself Ensign's interest by payment and the title of the second mortgagee by purchase, and held them against both Tully and Tanner, as between him and them, under the circumstances of this case, he is to be considered as having appropriated the land, the primary fund, to the payment of the notes which they had respectively promised to pay; and it still remains an open question, only to be closed upon judicial inquiry, whether the value of the land thus taken and held was sufficient for the discharge of the aggregate indebtedness upon it. It may have saved the defendant from the loss from which Tully agreed to protect him; may have paid the note which Tully agreed to pay; and he may have been entitled to no more than nominal damages by reason of Tully's default. In the absence of any proof upon this point the defendant failed to establish his damages at any certain or definite sum, and left the court without data for determining them. Of course no claim for set-off can be made to rest upon such uncertainties.

This view of the case renders unnecessary any consideration of other questions presented.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

WILLIAM BEACH *vs.* HARVEY ELLIOTT.

The surety on a bail bond is not liable unless there has been an avoidance by the debtor.

There is no such avoidance where there has not been due diligence on the part of the officer.

The conduct of the officer held in the present case not to have been due diligence.

DEBT on a recognizance as special bail for one Charles C.

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Dolph; brought by appeal from a justice of the peace to the Court of Common Pleas for New Haven County, and tried to the court, on the general issue with notice, before *Stoddard, J.* Facts found and judgment rendered for the defendant, and motion for a new trial by the plaintiff. The case is sufficiently stated in the opinion.

H. Stoddard and *H. S. Hotchkiss*, in support of the motion.

L. Harrison, with whom was *J. C. Cable*, contra.

GRANGER, J. The questions in this case are—first, whether the officer used due diligence in the service of the execution against the debtor Dolph; second, whether the latter avoided service.

The facts are that judgment was rendered against Dolph in an action for fraud on the 16th of February, 1876, the defendant having entered into a recognizance of special bail as surety for him. The parties, except Dolph, who resided in Guilford, all resided in Branford. The sheriff, who subsequently served the execution, and the plaintiff Beach were informed on the day when judgment was rendered against Dolph, that he intended to remove from Guilford about the 1st of April following. The execution was issued on the judgment on the 21st of February and put into the hands of sheriff Hart. Dolph continued to reside in Guilford until the 8th day of April, 1876, when he removed his family and goods to New Haven, and Elliott agreed to be responsible for the team. From the 16th of February to the 8th of April Dolph was engaged in his usual business, and publicly about the streets of Guilford, and on the first Monday of April was at the polls and voted, and during all this time was not out of town. During this time Hart, the sheriff, met him several times, and called at his house to serve other papers on him, but did not at any of these times make any demand on the execution, or inquire when and to what place he was to remove. On the 11th day of April the sheriff was informed that Dolph had removed and on that day went to the place of

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his residence in Guilford to make demand on the execution. He found the house vacant, and inquired of several persons where Dolph had removed, and was informed that his goods had been seen on the road to New Haven. He then inquired of the owner of the team which had been used in transporting his goods, and was informed that he could not tell where he was to be found, only that he had gone to New Haven, but that the person who drove the team, and who was in the owner's employment, could tell him where he had taken his goods. He however made no inquiry of the person referred to. Dolph went to New Haven, made no concealment of his place of residence, was publicly about his business, and all the time within the officer's precincts. It does not appear from the finding that he made the least attempt to avoid the officer, nor does it appear that the officer made the least attempt to serve the execution upon him.

Upon these facts we think it very clear that the officer did not exercise due diligence, and that there was no effort on the part of Dolph to avoid the service of the execution, and inasmuch as there was not, the law is well settled that the surety is not liable.

The obligation of bail is defined by statute, Revised Statutes, page 412, section 4. This section provides that every surety on any bail bond shall be obliged to satisfy the judgment, in case of the principal's *avoidance*, and a return of *non est inventus*, unless, &c.

The case of *Beebe* v. *Gardner*, 11 Conn., 104, is decisive of all the questions involved in this case. In that case the court says: "The debtor is not liable on his bond until there has been an avoidance by him. There is no such avoidance without the exercise of due diligence on the part of the officer, and he cannot omit the use of it to the prejudice of the debtor by reason of any private arrangement or secret understanding with the surety. This, in effect, would be to entrap the principal against the honesty and justice of the case, and such conduct, instead of being rewarded, should be censured." We think this doctrine applies with equal if not greater force to the surety, and we are all satisfied that there is no error

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in the judgment of the court below and that the motion for a new trial must be denied.

In this opinion the other judges concurred.

JC 26 Am R 457 m

RICHARD S. FELLOWES *vs.* THE CITY OF NEW HAVEN.

The duty on the part of a city of opening a public street, carries with it the right to determine the grade of the street and the manner of constructing it.

With the exercise by the city authorities of their discretion in the matter no other tribunal has any right to interfere, so long as they keep within the limits of their powers.

If, in such a case, private property is incidentally damaged, the party injured may or may not be entitled to compensation, according to the circumstances; but such damage, unless possibly in extreme cases, affords no reason for the interference of a court of equity.

Where a city, in the discharge of a duty imposed by law, has by adverse proceedings taken land for a public street and paid the damages legally assessed, it is not liable for an injury incidentally and necessarily caused to the adjoining land by the grading and working of the street in a proper manner.

It is presumed in such a case that the city, in taking and paying for the land for a street, took, as an incident, a right to establish the grade according to its own judgment, and to bring the street to that grade, without further compensation.

PETITION for an injunction, to restrain the respondent city from injuring the land of the petitioner by making excavations and fillings in working a public street upon which the land abutted; brought to the Superior Court in New Haven County. A temporary injunction was granted at the time the suit was brought. The following facts were found by the court:

The petitioner owns and occupies the land described in his petition. It is situated on Humphrey street, within the city of New Haven. The city, claiming the right so to do under the provisions of its charter and by-laws, has excavated in Humphrey street for the purpose of grading the street and the side-walk on the southern side, up to the line of the peti-

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tioner's land for a distance of three hundred feet or more to a depth of from nothing up to eight feet in the deepest part, and has cut the excavation down perpendicularly at the line, so that throughout nearly the whole of the three hundred feet the fence and shrubbery of the petitioner, and from one to twelve feet in width of his land inside his fence, by reason of its own weight merely will cave and fall off into the street, unless kept in place by a retaining wall, which the city does not intend to erect.

The city threatens and intends still further to excavate up to the petitioner's line in the same manner other portions of the street, and portions of the adjoining land of the petitioner will in like manner cave and fall off into the street if the threat and intention are carried out.

The city has also filled in the street for a distance of several hundred feet adjoining the petitioner's land to a depth of from nothing to about eight feet at the deepest part, and has placed a portion of the filling against the fence which separates the land of the petitioner from the street, so close as to crowd the fence over upon the petitioner's land, and so close that considerable quantities of the filling have passed through the fence into and upon the land of the petitioner, in some places to the extent of two or three feet in width.

The city threatens and intends to fill still further along the fence, so as to crowd the fence over upon the petitioner's land still more, and so that still more of the filling will pass into and upon the land of the petitioner inside his fence.

The portion of the street filled, and yet to be filled, according to the grade assumed by the city, cannot be filled up to the line without the effect aforesaid upon the fence and land of the petitioner unless a restraining wall is erected upon the line, which wall the city does not intend to erect. Such a sustaining and retaining wall will cost several thousand dollars.

In addition to the large expense of the walls it will cost a large sum to adjust the premises of the petitioner to the changed condition of the street consequent upon the excava-

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tion and filling. The charter and by-laws of the city are made part of the finding.

Upon the foregoing facts the question whether the temporary injunction granted in this case should be made perpetual, modified or vacated was reserved, for the advice of this court.

G. H. Watrous and *T. E. Doolittle*, with whom was *W. L. Bennett*, for the petitioner.

1. The city, in removing the lateral support from the land of the petitioner, is doing that which an individual would be held liable for doing. The owner of land is entitled to have his land in its natural state supported by the adjoining soil. This rule of law is so firmly established and so little controverted, that it is hardly necessary to quote authorities upholding it. *McGuire* v. *Grant*, 25 N. Jer., 356; *Lasala* v. *Holbrook*, 4 Paige, 169; *Farrand* v. *Marshall*, 19 Barb., 380, and 21 id., 409; *Foley* v. *Wyeth*, 2 Allen, 132; *Humphreys* v. *Brogden*, 12 Queen Bench, 739; Washb. on Easements, 429. The authorities are collected and reviewed in an article on "The natural right of support from neighboring soil," 1 Am. Law Review, 1. If a railroad corporation should do the act complained of, or a turnpike company, although it is chartered to build a public highway, such corporation would be liable as an individual is liable. *Richardson* v. *Vermont Central R. R. Co.*, 25 Verm., 465. It has frequently been decided that railroad corporations are liable for such consequential damages as individuals would be liable for, and we claim this to be law in Connecticut. *Boughton* v. *Carter*, 18 Johns., 405; *Hay* v. *Cohoes Co.*, 2 Comst., 159; *Tinsman* v. *Belvedere &c. R. R. Co.*, 26 N. Jer., 148; *Evansville &c. R. R. Co.* v. *Dick*, 9 Ind., 433; *Hooker* v. *N. Haven & Northampton Co.*, 14 Conn., 156, and 15 id., 312; *Denslow* v. *N. Haven & Northampton Co.*, 16 id., 98; *Bradley* v. *N. York & N. Haven R. R. Co.*, 21 id., 294. It is true that an individual would be liable for the acts which the respondents intend doing, and that a corporation chartered to make a highway would have no more power to do them than an individual. How is it that a city can claim to do them? What sovereign power has it,

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that it may do these acts without regard to consequences, even though the consequences be that property is entirely destroyed? If an individual desires to slide his neighbor's earth into his pit, he shall not do it unless his neighbor will sell him the right. The city may take the right, but why should it take it without paying for it? We claim that the city can only do, upon the land taken, that which the former owner could do; that when, in consequence of its acts, it destroys property or deprives the owner of its use, if this is more than an individual might have done, it *takes* property, within at least the spirit and intention of the constitution; and that not only are we sustained in this position by strong authority, but that, owing to the constant wrongs and injustice occasioned by any other construction, the current of modern decision is strongly in our favor. The cases that are directly against this position are not numerous, and among all that are cited on the other side there are only five or six decided in different states, which hold that a city is not liable in cases like the present. The leading case among them, and which has given birth to all the others, is *Radcliff's Exrs.* v. *Mayor &c. of Brooklyn*, 4 Comst., 195. But Mr. Sedgwick, in his work on Damages, (p. 112,) says of this case:—"It appears to me the decision is an unfortunate one, although sound, *perhaps, on a strict construction of the constitutional clause.* But it is to be regretted that the court felt itself bound to apply a strict instead of a liberal interpretation. The tendency of our legislation, in matters of public improvement, is undoubtedly to sacrifice the individual to the community; and we cannot attach too much importance to those provisions of our fundamental law which are framed to protect private property against encroachments, which, though sanctioned by legislative enactment, are in truth often dictated by private interests." Mr. Waterman, in his work on Trespass (vol. 2, § 666,) quotes these remarks with approval, and adds—"It would seem as though, on general principles, the owners of property sustaining injury from this cause were entitled to compensation." In *Goodall* v. *City of Milwaukee*, 5 Wis., 42, and *Eaton* v. *Boston & Montreal R. R. Co.*, 51 N. Hamp.,

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532, and in the Ohio cases, the case of *Radcliff's Exrs.* v. *Mayor &c. of Brooklyn*, is directly overruled. The authority of it, and the doctrine it supports, are much weakened by the dissatisfaction expressed in many of the cases at the hardship and injustice to which the principle adopted has led. The Iowa court pronounces the state of the law "lamentable." *Creal* v. *City of Keokuk*, 4 G. Greene, 53. "This, it must be admitted, is very harsh law, says the Pennsylvania court. *In re Ridge Street*, 29 Penn. S. R., 395. And the Wisconsin court uses similar language in *Alexander* v. *City of Milwaukee*, 16 Wis., 247. We ask this court to follow a more wise and liberal construction, both of the charter of the city and of the constitution, and to hold that when the city takes land for a highway, it takes all the rights the former owner had to use his land for such purpose, and no more; that if it wishes to take the vested rights of an adjoining proprietor, it must first make compensation. The courts in nearly all the states have, either in express decisions, or in the language which they have used, shown that they regard this rule as the only just one. Thus in Massachusetts, Shaw, C. J., says, in *Thayer* v. *City of Boston*, 19 Pick., 516, after having stated the opposite doctrine of *damnum absque injuriâ*, "But the court are of the opinion that this argument, if pressed to all its consequences, and made the foundation of an inflexible rule, would often lead to very unjust results. We think that the city of Boston may be liable in an action on the case, *where acts are done by its authority which would warrant a like action against an individual.*" See also *Stetson* v. *Faxon*, 19 Pick., 147; *Rounds* v. *Mumford*, 2 R. Isl., 154; *Rhodes* v. *City of Cincinnati*, 10 Ohio, 159; *McCombs* v. *Akron*, 15 id., 474; *Akron* v. *McCombs*, 18 id., 229; *Crawford* v. *Delaware*, 7 Ohio S. R., 459; *City of Louisville* v. *Louisville Rolling Mill Co.*, 3 Bush, 416; *Meares* v. *Commissioners of Wilmington*, 9 Ired. Law R., 73; *Goodall* v. *City of Milwaukee*, 5 Wis., 42; *Weeks* v. *City of Milwaukee*, 10 id., 269; *Pettigrew* v. *Evansville*, 25 id., 227; *Arimond* v. *Green Bay Co.*, 31 id., 316, 335; *Pumpelly* v. *Green Bay Co.*, 13 Wall., 166; *Nevins* v. *City of Peoria*, 41 Ill., 515; *City of Aurora* v.

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Reed, 57 id., 29, 33; *City of Jacksonville* v. *Lambert*, 62 id., 519; *Eaton* v. *Boston & Montreal R. R. Co.*, 51 N. Hamp., 504; *Thompson* v. *Androscoggin River Improvement Co.*, 54 id., 545.

2. The argument thus far has been directed to the question of the right of the city, by its use of the land embraced in the street, to destroy the support of the petitioner's land, and thus cause him consequential damages for which they are not liable. We come now to the other question in the case, whether the city can fill in upon our land, where it lies below the level of the street, without being bound to make us compensation, or liable in damages. It is difficult to see how our claim at this point can be resisted with any show of reason, since there is here an actual appropriation of the land of the petitioner to the use of the public. If the public may use two or three feet of the land of the petitioner as a foundation for their road-bed, and may throw sand and earth upon it, without making compensation, the word "taking" has lost all meaning. *Pumpelly* v. *Green Bay Co.*, 13 Wall., 181; *Pettigrew* v. *Evansville*, 25 Wis., 227; *Nevins* v. *City of Peoria*, 41 Ill., 515. In that part of the case first argued, the city will say that though they destroy and prevent the petitioner from using his land, they do not *use* it themselves, it is not converted to the public use. But here they do actually use and enjoy the land, and must have it to support their road. There is here clearly a proposed taking for which compensation should be first made.

D. R. Wright, for the respondents.

1. No claim can be made in this case that the corporation did not exercise reasonable care and skill in the performance of the work resolved upon. There is no finding in the record justifying such a claim; and in the absence of such a finding, the court will presume that the work, so far as it has already been done, has been performed with reasonable care and skill; and that the remainder will be completed in like manner, and without unnecessary vexation or injury to the petitioner.

2. There is no provision in the charter of the city of New

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Haven, nor any general statute of the state, creating a liability for consequential damages to an adjoining owner, arising from the acts complained of. We are, therefore, remitted to the common law, to determine both the rights of the corporation and of the petitioner.

3. The damages, if any, caused by the cuttings and fillings are indirect and consequential in their character, and not such as entitle the petitioner to compensation; neither is he entitled to be reimbursed for any expense he may be put to when the proposed work is completed. There is no *taking* of his lands in any legal or constitutional sense of that term. Such is the doctrine in all the states of the Union where the question has arisen, (with the exception of the state of Ohio, and possibly some qualification of the doctrine in the state of Kentucky,) and also in the federal courts and in England. The following cases establish this proposition. In the state of Massachusetts. *Callender* v. *Marsh*, 1 Pick., 418; *Brown* v. *City of Lowell*, 8 Met., 172. In the state of Connecticut. *Hollister* v. *Union Co.*, 9 Conn., 436; *Hooker* v. *N. Haven & Northampton Co.*, 14 id., 146; *Bradley* v. *N. York & N. Haven R. R. Co.*, 21 id., 294; *Clark* v. *Saybrook*, id., 313; *Skinner* v. *Hartford Bridge Co.*, 29 id., 523; *Burritt* v. *City of New Haven*, 42 id., 174. In the state of Maine. *Mason* v. *Kennebec & Portland R. R. Co.*, 31 Maine, 215; *Hovey* v. *Mayo*, 43 id., 322. In the state of Rhode Island. *Rounds* v. *Mumford*, 2 R. Isl., 154. In the state of New York. *In re Furman St.*, 17 Wend., 649; *Graves* v. *Otis*, 2 Hill, 466; *Wilson* v. *Mayor &c., of N. York*, 1 Denio, 595; *Benedict* v. *Goyt*, 3 Barb., 459; *Waddell* v. *Mayor &c., of N. York*, 8 id., 95; *Radcliff's Exrs.* v. *Mayor &c., of Brooklyn*, 4 N. York, 195; *Mills* v. *City of Brooklyn*, 32 id., 489. In the state of Pennsylvania. *Green* v. *Reading*, 9 Watts, 382; *Henry* v. *Pittsburgh & Alleghany Bridge Co.*, 8 Watts & Serg., 85; *Charlton* v. *Allegheny City*, 1 Grant's Cas., 208; *O'Connor* v. *City of Pittsburgh*, 18 Penn. S. R., 187; *City of Reading* v. *Keppleman*, 61 id., 233. In the state of Indiana. *Snyder* v. *Rockport*, 6 Ind., 237; *City of Lafayette* v. *Spencer*, 14 id., 399; *Macy* v. *City of Indianapolis*, 17 id., 267; *City of*

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Lafayette v. *Bush*, 19 id., 326; *City of Lafayette* v. *Fowler*, 34 id., 140; *City of Terre Haute* v. *Turner*, 36 id., 522. In the state of Illinois. *Roberts* v. *City of Chicago*, 26 Ill., 249; *Murphy* v. *City of Chicago*, 29 id., 279, 287. In the state of Iowa. *Creal* v. *City of Keokuk*, 4 G. Greene, 47; *Russell* v. *City of Burlington*, 30 Iowa, 262; *City of Burlington* v. *Gilbert*, 31 id., 356. In the state of Missouri. *Taylor* v. *City of St. Louis*, 14 Misso., 20; *Hoffman* v. *City of St. Louis*, 15 id., 651. In the state of Arkansas. *Simmons* v. *City of Camden*, 26 Ark., 277. In the state of Tennessee. *Humes* v. *Mayor &c., of Knoxville*, 1 Humph., 403. In the state of Mississippi. *White* v. *Yazoo City*, 27 Miss., 357. In the state of Georgia. *Markham* v. *Mayor &c., of Atlanta*, 23 Geo., 402; *Mayor &c., of Rome* v. *Omberg*, 28 id., 46. In the state of Louisiana. *Reynolds* v. *Shreveport*, 13 Louis. An. R., 426. In the state of Florida. *Dorman* v. *City of Jacksonville*, 13 Florida, 538. In the state of Wisconsin. *Alexander* v. *City of Milwaukee*, 16 Wis., 247, 256. In the United States courts. *Goszler* v. *Corporation of Georgetown*, 6 Wheat., 593; *Smith* v. *Corporation of Washington*, 20 How., 135. In the courts of England. *Cast Plate Manufacturers* v. *Meredith*, 4 T. R., 796; *Sutton* v. *Clarke*, 6 Taunt., 29; *Hall* v. *Smith*, 2 Bing., 156. This current of authorities would be entirely unbroken but for certain decisions in the states of Kentucky and Ohio, which we perhaps ought briefly to notice. The former state adopted the doctrine of the other states in the case of *Keasy* v. *City of Louisville*, 4 Dana, 154, decided in 1836; but in the later case of *City of Louisville* v. *Louisville Rolling Mill Co.*, 3 Bush, 416, decided in 1867, the right to recover was made to depend on the extraordinary and peculiar character of the injuries received in that particular case. Judge Robertson dissented; holding, in accordance with the prevailing doctrine, that the magnitude of the injury made no difference in the principle involved. This decision is condemned by Judge Dillon in his work on Municipal Corporations. (Vol. 2, note to § 783.) The cases cited on the other side from the Ohio reports, go upon the ground that, if the cutting down of a street be for the good of all and the

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injury of one, there should be compensation. It is a singular fact that the two cases of *Scovill* v. *Geddings*, 7 Ohio, 211, and that of *Hickox* v. *City of Cleveland*, 8 Ohio, 543, accord with the authorities in the other states; while in the case of *Crawford* v. *Delaware*, 7 Ohio S. R., 459, it is frankly admitted that the doctrine adopted is in "*direct conflict with the decisions both in England and America.*" All the other cases referred to are reviewed in *City of Cincinnati* v. *Penny*, 21 Ohio S. R., 499, and the broad doctrine of the earlier cases is much modified. This last case makes the municipal liability depend upon circumstances, a position that cannot be maintained on principle. Bronson, C. J., in the case of *Radcliff's Exrs.* v. *Mayor &c., of Brooklyn*, before cited, remarks that these cases are "in conflict with many other cases, and cannot be law beyond the state of Ohio." And the Supreme Court of Wisconsin, referring to the Ohio cases, declares them not to be law.

4. It must be conceded for all the purposes of this case that Humphrey street has been regularly laid out, and that damages, or damages and benefits as the case may be, were assessed to the adjoining proprietors; so that the petitioner, or those under whom he holds, were compensated for the original *taking*. Such compensation not only embraced the direct damages resulting from the *taking*, but also, (as shown by the numerous cases cited,) the incidental and consequential damages which flow from such taking. The sliding of the dirt down the embankment and upon his land is not a *fresh taking*, but is incidental to, and consequential upon, the original taking. This is true on principle, and is well settled in the books. In the first place on principle. The land is taken for the express purpose of laying out a street; convenience, taste, and economy require it should be of uniform width; it cannot be of such uniform width when laid over uneven ground, without the incidental land-slide when there is a cutting, and the overflow when there is a filling. These incidents and consequences are, therefore, *inseparable from the taking*, and are contemplated and paid for by the assessment of damages *at the time of the taking*. If they are not

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incidents, then it must happen in every case where a street is laid over uneven ground; that the line of the street must *notch out* at every elevation, so as to prevent a land-slide, and at every depression, so as to avoid an overflow of dirt. The bare statement is sufficient to show the absurdity of the claim. It is a principle of common sense as well as of common law, that when the land is taken for a definite purpose, everything goes with it which is necessary to accomplish that purpose. And it is so decided in the books. *Hollister* v. *Union Co.*, 9 Conn., 436; *Bradley* v. *N. York & N. Haven R. R. Co.*, 21 id., 294; *Imlay* v. *Union Branch R. R. Co.*, 26 id., 260; *Cone* v. *City of Hartford*, 28 id., 376; *Skinner* v. *Hartford Bridge Co.*, 29 id., 536; *Callender* v. *Marsh*. 1 Pick., 429; 2 Dillon Municp. Corp., § 487.

CARPENTER, J. There is in the city of New Haven a public highway called Humphrey street. The city authorities in grading this street and fitting it for public travel propose to excavate in some places to the depth of eight feet, and in others to raise the bed of the road some eight feet above the adjoining ground. In consequence of such grading the petitioner's land, which is described in the petition, and which bounds on the street, will in the one case cave and fall into the street, and in the other will be covered to some extent with the earth and gravel used in filling and raising the street. This can only be avoided by building supporting and restraining walls at great expense, which walls the city declines to build. The Superior Court temporarily enjoined the respondents, and the question whether the injunction shall be made perpetual is reserved for the advice of this court.

The public laws of this state and the charter of the city of New Haven impose upon the respondents the duty of constructing and maintaining within the limits of the city all necessary highways for the accommodation of the public travel. This they are required to do, not for their own pecuniary benefit, but for the benefit of the public at large. It is not a valuable privilege, but a heavy burden.

While engaged in the performance of this duty they were

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interrupted, at the instance of the petitioner, by a mandate from the Superior Court suspending further proceedings, and we are now asked to continue the injunction until the anticipated damage can be ascertained and paid.

In support of this request the petitioner claims that the injury to his land in the manner stated constitutes a taking for public use, which can only be done by making proper compensation. There is no taking of the title; and upon the facts stated it is not necessarily a taking of an easement. Assuming that the petitioner's land will be used for building purposes, it must be graded by removing and filling so as to conform to the grade of the street. In that event the caving or falling off, and the overflow caused by the city, will do the petitioner no harm, as he will have all the land free from any burden or easement. Now there is nothing in this case to show that the petitioner will not use his land precisely in that manner. If he does he is clearly not entitled to an injunction, as his land is not taken in any proper sense for public use.

But if he desires to use it in a different manner and for different purposes, then it may require some expense to adjust his land to the grade of the street. When that is done however he still has his land; none of it has in fact been taken. He has been subjected to some expense, but in that he is like many others, perhaps a large majority, of those who own city lots. Such expenses are necessarily involved in all such improvements; and to hold that they constitute a taking of private property for public use would impose intolerable burdens upon towns and cities. Besides, if the incidental injury thus sustained is to be regarded as having been considered in estimating damages to the petitioner when the street was laid out, then he has been fully compensated and cannot now complain.

But if it be conceded that the petitioner will sustain an actionable injury it does not follow that an injunction will lie. A court of equity will not ordinarily take cognizance of such injuries, but will leave parties to their remedy at law. There is nothing in this case to make it an exception to the rule.

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If this petition is sustained the effect will be that the Superior Court will exercise a supervisory and controlling power over a municipal corporation while engaged in the performance of a governmental duty. The Superior Court has power by statute to compel such a corporation to perform its duty, but it has no power to control the discretion and judgment of the corporation in respect to the manner of performing it. We have no precedent for a case like this in our own reports, and we are not aware that any such case has ever been sustained by the Superior Court. The novelty of the proceeding, if not an argument against it, is at least some evidence that the prevailing sense of the profession has been against it.

In respect to authorities outside of our own state, it is remarkable that among the many cases cited by both parties, after the most laborious research, only two of them were petitions in chancery seeking to restrain the corporation from grading the street according to its own judgment. The first of these is *Goszler* v. *Corporation of Georgetown*, 6 Wheaton, 593. In that case the Supreme Court of the United States affirmed the judgment of the Circuit Court dismissing the bill. The second is *City of Louisville* v. *Louisville Rolling Mill Co.*, 4 Bush, (Ky.,) 416. In that case the improvement contemplated by the city would cause damage to the petitioners amounting nearly to a destruction of their property. In addition to that, it was proposed to assess the petitioners for benefits. The extreme hardship of the case induced a majority of the court to sustain the bill. That certainly is not a controlling authority in this case, as the circumstances of the two cases are very different.

But independent of precedent or authority, we see nothing in reason that will sustain this petition. The street was laid out by the respondents, and the duty of opening it for public travel devolved upon them. That duty carries with it the right to determine the grade and the manner of opening the street. With the exercise of their judgment and discretion in this matter no other tribunal has any right to interfere so long as they keep within the limits of their powers. Within those limits they are and must be entirely independent of the

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judiciary. If, within those limits, private property is incidentally damaged, the party injured may or may not be entitled to compensation, according to the circumstances, but such damage, unless possibly in extreme cases, affords no reason for the interference of a court of equity.

In this case the damage to the property is manifestly slight, and is of such a nature that compensation, if the petitioner is entitled to it, can easily be made. For these reasons, as well as for others hereinafter stated, we ought to advise the Superior Court to dismiss the bill.

The principal question, however, which occupied the attention of counsel was the question of compensation. As that was discussed at great length and with great ability, and as it is a question of great practical importance, perhaps we ought to dispose of it.

The discussion took a wide range and a large number of cases were cited and commented on; but when the question at issue is carefully considered and clearly stated, it will be seen that many of the cases cited are not applicable.

The question is, when a municipal corporation, in the discharge of a duty imposed by law, and which is strictly governmental, has taken land *in invitum*, and assessed and paid the damages, is it liable for the injury incidentally and necessarily sustained by the adjoining land in consequence of working and grading the street in a proper manner? As thus stated it will be seen that the case is to be distinguished from a class of cases in which the officers of a town or city, acting *colore officii*, by accident or by a mistake in judgment, unnecessarily commit a trespass or do an injury outside of the limits of the highway.

It is also to be distinguished from another and a large class of cases in which corporations are chartered for the purpose of promoting some public enterprise, but for their own private advantage, such as railroad, canal and turnpike companies. Such corporations, although engaged in enterprises which are for public use, so as to justify the taking of land under the right of eminent domain, are organized for the purpose of making a profit from their investment, and they expect ulti-

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mately to be reimbursed as well as to receive an annual percentage of profits. Such corporations stand on very different grounds from towns and cities, which are compelled by law to construct and maintain public highways without any hope or expectation of deriving any pecuniary benefit therefrom. This distinction was clearly taken by this court in the case of *Hooker* v. *The New Haven & Northampton Co.*, 15 Conn., 312. In that case, in speaking of some English cases cited, the court say:—"Those were actions, not against a corporation deriving a benefit from an injury to an individual, but suits against commissioners or trustees, appointed to execute a public trust or duty, representing the public, and having themselves no personal interest therein."

Thus that case, and many other cases cited from this state and other states, are not directly in point, and do not materially affect the question. We therefore pass them without further notice.

The doctrine is advanced in some of the cases that corporations like individuals are liable for damage done to the land of others; and this is relied on by the petitioner as sustaining his claim. That doctrine, when applied to a case like this, is liable to confuse and mislead. The corporation is restricted in its use of the land and must use it for a highway; an individual may use it for any lawful purpose he pleases. The corporation uses it for the benefit of the public at large; an individual uses it for his own benefit. The corporation derives no pecuniary advantage from its use; while an individual does. If the corporation was an unrestricted owner, like an individual, or if an individual was bound to use it only for a highway, it would be proper to apply the same rule to both. But so long as their circumstances and their relations to the land and the public differ so widely, reasoning from one to the other is fallacious. That doctrine may well apply where corporations exceed their powers and thereby injure others, and where private corporations act for themselves and not for the public; but it has no application to municipal corporations acting within the scope of their powers, in the discharge of a governmental duty.

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We come now to a discussion of the precise question involved in this case. It will be noticed that the authorities which are in point are not very numerous. So far as we have been able to discover the right to compensation has been denied in every state in the Union where the question has arisen except in the state of Ohio. Perhaps also the state of North Carolina should be excepted. We will not stop to enumerate the cases thus decided, but will content ourselves with a brief reference to the Ohio cases to see how far they sustain the petitioner's claim.

We repeat here what we have already said in another connection, that not one of those cases was a petition in chancery seeking the interference of a court of equity with a municipal corporation in the discharge of a governmental duty.

The last decision in that state on this subject which we have seen is the case of *City of Cincinnati* v. *Penny*, 21 Ohio St. R., 499. That case was decided in 1871. The case was this: The city made an excavation in a public street for the purpose of constructing a sewer. The foundation walls of the plaintiff's building, which were four feet below the surface of the ground, were thereby weakened and the building injured. The court held that the city was not liable. The court states the question and answers it as follows: "Are municipal corporations, under the laws of this state, liable for damages to proprietors of lots abutting on streets and alleys, for injuries to buildings erected thereon, resulting from the exercise of their corporate powers in improving or appropriating such streets and alleys to public uses, while acting within the scope of their municipal authority, and without negligence or malice? Strictly, this question should be answered in the negative. But in the ordinary application of the principle involved, neither an unqualified affirmative nor negative answer would be a fair statement of the rule of law upon this subject."

An affirmative answer is qualified by holding that the abutting proprietor must not have contributed to his injury by his own negligence or indiscretion; that he must have acted prudently under the circumstances of fact which then surrounded

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him, and must have taken into consideration the right of the municipality to make future improvements in the streets, and to appropriate them to other public uses, within the scope of its authority.

A negative answer is thus qualified:—"That the municipality, before such lot was improved, had taken no such action in the matter of improving or appropriating such street or alley to public uses as to reasonably indicate that the uses and improvements of the street or alley were permanently fixed and appropriated."

We remark here, parenthetically, that this qualification would exempt these respondents from liability in the state of Ohio.

The court then proceeds to put its own interpretation upon the cases previously decided in that state. We must accept that interpretation as the law of that state to-day. We quote at length, as it obviates the necessity of any further reference to the cases cited.

"We believe that all the cases heretofore decided by this court upon this subject can be reconciled upon the principle stated; although the language employed by different judges in delivering opinions may not be reconcilable. In *Goodloe* v. *Cincinnati*, 4 Ohio, 500, it was held that a municipal corporation was liable for injuries to a house where the street was illegally and maliciously cut down by the municipal authorities. In *Smith* v. *Cincinnati*, 4 Ohio, 514, it was held, that the corporation was liable for such injuries, in the absence of malice, if its acts were illegal. In *Scovill* v. *Geddings*, 7 Ohio, 562, it was held that the agents of the corporation were not liable for injuries to a house and lot, where no unnecessary damage was done, and they acted in good faith and under the authority of the trustees. In *Hickox* v. *Cleveland*, 8 Ohio, 543, it was held that the city was not liable where the municipal authorities acted without negligence and within the scope of municipal authority. *Rhodes* v. *Cleveland*, 10 Ohio, 159, was a case where the injury complained of was to the land (and not to structures thereon) by causing it to be overflowed by water from drains and ditches.

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The corporation was held liable. But a distinction may well be taken between that case and one for injury to a building erected on a lot without reference to proper and reasonable drainage of the street. The next cases are *McCombs* v. *Akron*, 15 Ohio, 474, and *Akron* v. *McCombs*, 18 Ohio, 229. In these cases it was held that a municipal corporation is liable for injuries resulting from a change of grade, whereby the means of access to a building erected on an abutting lot were cut off or impaired. It appears however that the building was erected with reference to an established grade, and the injury resulted from a change in the grade. Avery, J., in delivering the opinion of the court in the latter case, says: 'He [McCombs] had made his improvements with an express view to the level and grade of Howard street, adjoining which the building stood.'" *Crawford* v. *Delaware*, 7 Ohio, 459, is then cited and commented on, and the doctrine of the case approved. In that case it was decided, "that when such corporation, in the exercise of its legal powers, makes a reasonable and proper grade of its streets, without touching or doing unnecessary injury to the unimproved property of owners along the streets so graded, and when such grading is not unreasonably, improperly or wantonly done by such authorities, they are not guilty of such a wrong as will make them liable to action, even though some damage may result to such owners of property along the street by such grading."

The court then refers to the case of *The Street Railway* v. *Cumminsville*, 14 Ohio St. R., 523, and quotes from it approvingly as follows:—"The acquisition of land for a highway of any kind, carries with it the right to put the ground in a suitable condition to answer the purposes of the acquisition, and to this public right all private rights of lot owners are necessarily subordinated. If, before the public has exercised this right through the regularly constituted authorities, the lot is improved, the owner must make the improvement with reference to the reasonable and proper exercise of the right thereafter; and cannot complain if his means of access to his improvements are impaired through his own indiscretion. But when the public has taken possession and regularly

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defined the interests and improvements necessary for its uses, establishing grades, &c., lot owners have the right to assume this exercise of authority as a final decision of the wants of the public, and to make their improvements in reference to it."

We have dwelt upon this case, not for the purpose of showing what the law of Connecticut is, for in some respects the law of this state is confessedly different, but for the purpose of showing that even in Ohio the law is so that if the petitioner was suing in their courts he probably could not recover. The current of authority, therefore, as it seems to us, is decidedly against the claim of the petitioner.

If we look at this question independently of decided cases we shall come to the same result. When a man purchases real estate to be used for a particular purpose, he necessarily acquires the right, so far as the grantor is concerned, to use all lawful means to accomplish that purpose, and the grantor cannot complain of any incidental injury resulting from such use. Presumptively he demanded and received compensation accordingly. So when the city of New Haven took a portion of the petitioner's land for the purposes of a street, it must be presumed that they took, as an incident thereto, a right to establish the grade according to their own judgment, and to bring the street to that grade without further compensation. This presumption necessarily arises from the nature of the transaction and the well established and well known powers and duties of municipal corporations in respect to streets and highways. The obligation to construct and maintain public streets carries with it the right to determine the grade; and such a grade must be established as will accommodate the public travel. And whenever from any cause public convenience demands that the grade shall be changed, it is the duty of the corporation to change it. All this must have been known and considered at the time the street was laid out.

This view of the case imposes no hardship upon the individual land owner. The topography of the land through which a street runs is apparent to the eye; the connection with other streets at either end is equally apparent. The grade can be determined and the amount of cutting and filling

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can be estimated with reasonable certainty. The probable use of the land abutting on the street, and its value as affected by opening the street, are proper subjects of consideration in awarding damages and assessing benefits. These considerations are not limited to the present grade and use, but appraisers will invariably forecast the future. In addition to this it will be remembered that appraisers and juries called upon to award damages in such cases are always disposed, and justly so, to make full compensation.

It is absurd to claim that the city could only prepare a road-bed upon the surface of the ground as it then was. Both reason and experience teach us that that is not the way in which public improvements are made in our cities and large towns. The road-bed must of necessity be lowered in some places and raised in others. If by the original lay-out the city acquired the right to do this to any extent, where is the limit? Was it at one foot or at eight feet? Or was it at some intermediate point? Manifestly the court can establish no limit to the power and discretion of the city so long as they act reasonably and with due regard to the rights of others. In cases of extreme hardship possibly there may be a remedy, as in the Kentucky case above referred to. Such cases however are of rare occurrence and are not to be anticipated.

Our conclusion therefore is, upon principle and authority, that the petitioner, in contemplation of law, has already received compensation for all the damage he will sustain, and that the petition on that ground also must be dismissed.

In this opinion the other judges concurred.

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SUPREME COURT OF ERRORS.

COUNTIES OF HARTFORD, MIDDLESEX AND TOLLAND.

JANUARY TERM, 1877. HELD AT HARTFORD.

Present,

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

EAST HADDAM CENTRAL BAPTIST CHURCH *vs.* EAST HADDAM BAPTIST ECCLESIASTICAL SOCIETY.

A church association brought a bill in equity against certain parties who claimed to have acquired title to the church property, to restrain them from interfering with the petitioners' use of it and to set aside the deed under which they claimed. The petitioners alleged that they were a corporation and owned the real estate in question. It was found that they were not a corporation, but a mere voluntary association, and that the title to the property had never been in them but in certain trustees for the church. Held that the petitioners could not maintain their bill.

A voluntary association can not as such hold real estate.

Individual members of the church could be protected in their equitable rights upon a proper bill, making the trustees, and all other persons having a legal or equitable interest, parties.

BILL IN EQUITY for an injunction and to set aside a deed of certain church property; brought to the Superior Court in Middlesex County, and reserved, upon facts found, for the advice of this court. The case is sufficiently stated in the opinion.

D. Chadwick and *W. F. Wilcox*, for the petitioners.

H. Willey, with whom was *L. Harrison*, for the respondents.

CARPENTER, J. The petitioners allege that they are a cor-

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poration, and, as such, the owners of a church edifice and a parsonage; that a pretended meeting of the church which constitutes the corporation was secretly and fraudulently held, at which it was voted to convey the property to the respondents, and that it was so conveyed; that the meeting was held without any legal notice or warning; that the respondents are using the property and have hired and put into the church and parsonage the Rev. Mr. Beebe, a person who is not a regular Baptist clergyman; and that the petitioners have lost the use of the property, and that the deed is a cloud upon their title.

They pray that the respondents and the said Beebe may be restrained from using the property, and from interfering with the petitioners in their use of it, and that the deed may be decreed to be null and void.

It is obvious from this statement of the case that the allegation of title is essential to the cause of action. If the petitioners have no title they have no standing in court. It will be observed that they do not come into court as individuals having an equitable interest in the property, seeking the aid of a court of chancery to enforce a trust and carry out the intention of the donors, but they come claiming to be the absolute owners, not only of an equitable interest, but of the legal title.

The report of the committee shows that the petitioners are not a corporation but a voluntary association. As such they are not the legal owners of the property in question, and by the laws of this state cannot own real estate. On this ground alone it is difficult to see upon what principle the petitioners can claim the relief prayed for.

But this is not all. The land on which the church edifice stands was deeded in 1844 by George Higgins to Elijah Spencer. In 1849 Spencer conveyed it to Stanton S. Card and others, trustees of the First Baptist Society in East Haddam —presumptively a corporation. In 1854 the society deeded it to said Card and others, trustees for the church, "for the sole use of the First Baptist Church, to be held by said trustees subject to the control and direction of the church, as

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shall appear by their vote at any meeting of said church, called or assembled in the ordinary manner of holding their church meetings."

We do not find that the title ever passed from these trustees. It appears that they, in behalf of the church, took possession of the property and continued to hold possession for about twenty years. The legal title therefore appears to be in the trustees to whom it was conveyed in 1854, and, as at present advised, we are unable to see how the deed referred to in the petition, which was dated April 20th, 1875, purporting to be executed by "the Central East Haddam Baptist Church," can have any effect upon the title.

The other piece of property, the parsonage, was conveyed in 1869 by John Comstock to Henry J. Holmes and others, trustees for said church, "to be used as a parsonage forever." So far as the record discloses the title is in these trustees at the present time.

It is quite clear therefore that the petitioners are not the legal owners of the property in dispute; but so far as we know the property is owned by trustees who are not parties to this proceeding.

It is possible that the trustees have allowed the property to be used for other purposes than those for which it was originally intended; but before the court can properly take any action in respect to that matter, all persons interested in it, legal as well as equitable, should be made parties to the proceeding and have an opportunity to be heard.

For these reasons we advise the Superior Court to dismiss the bill.

In this opinion the other judges concurred.

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SHELDON KINNEY, JR., *vs.* AUGUSTUS WHITON.

Where a declaration is made to one person for the purpose of influencing his conduct, and though not confidential is not intended for others, a bystander who overhears it and acts upon it can not set up an estoppel against the party making the declaration.

W gave *B* a writing by which he agreed to deliver to *B* or bearer a phaeton of a certain description and value on a certain day a few months later. *B* soon after assigned the contract to *K* for a valuable consideration, and the phaeton not being delivered on the day agreed, *K* brought suit upon it. Held that *W* could show by parol evidence that the consideration for the contract was a certain note endorsed to him by *B*, which was to fall due before the day of the delivery of the phaeton, and that it was agreed that he was not to deliver the phaeton unless the note was first paid.

Such parol proof does not contradict or vary the written contract, the writing not purporting to state the consideration.

And the plaintiff especially could not object to parol evidence of the consideration, as it was necessary to his recovery that he should prove a consideration, and as the written contract did not state what it was it could be proved only by parol.

ASSUMPSIT upon a contract to deliver a phaeton to one Boyce, by whom the contract was assigned to the plaintiff; brought to the Court of Common Pleas of Hartford County, and tried to the court, on the general issue with notice, before *McManus, J.* The court made the following finding of facts:

On the 20th of October, 1868, one Boyce, a dealer in patent rights, and a resident of the state of New York, called on Whiton, the defendant, who was a carriage maker residing in Bloomfield in this state, and proposed to give him promissory notes in exchange for carriages of the defendant's manufacture. Boyce had several notes of various amounts, all made payable to one Hazard or bearer, and all having been given to Boyce in payment for patent rights, and legally collectible. Whiton was informed by Boyce of the consideration of the notes, and after examining them he selected several, amounting in all to $2,166.66, for which he agreed to give Boyce an equivalent in carriages, provided Boyce would put his name on the back of the notes, he believing, from the representations then made to him, that Boyce was good.

The plaintiff, who then kept a hotel in Windsor, a few miles

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from Whiton's shop, with whom Boyce was stopping, had driven Boyce to Whiton's and introduced him. He had then no pecuniary interest in Boyce's affairs, and was paid by him for his board, and for his services in driving him about, a fair compensation. The plaintiff expressed his opinion favorably to Whiton concerning the notes, but did not profess any personal knowledge of the makers or their solvency. Whiton did not have in his possession carriages enough to equal the notes so selected by him into about $360. Boyce proposed that he should take the notes, including one made by Dyke & Babcock, of North Adams, Massachusetts, dated October 3d, 1868, payable six months after that date, for $666.66, and should deliver the carriages on hand, five or six in number, and should make a phaeton of the value of $325, and subsequently deliver it, Boyce saying to him at the time, "You may have time till after the North Adams note is due, so that if it is not paid you won't have to deliver the phaeton." At the same time he also said that he thought that note was surely good, for one of the three men to whom he there sold his patents paid cash, and the other two gave this note. Kinney was present at this interview, but did not hear this conversation; but the understanding between Boyce and Whiton was that Whiton should not deliver the phaeton unless the note of Dyke & Babcock was paid, and the time for the delivery of the phaeton was therefore fixed some days after that note would mature. Kinney was ignorant of this understanding. On the following day Whiton delivered the carriages to Boyce, and received the notes, Boyce endorsing his name and address on the back of each. Boyce then said that Kinney ought to have a memorandum to show that the phaeton was to be made and delivered, and wrote the following:

"On or before the 1st day of May, 1869, I promise to deliver to A. Boyce or bearer, in Hartford, one phaeton buggy worth three hundred and twenty-five dollars. It is to be the same as I have sold to A. Boyce this day, for which I have this day received my pay."

Whiton signed the paper and delivered it to Boyce. Kinney was not then present. The carriages were then taken to

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Hartford, to Spencer's stables. Whiton was at the stables the same day, and Boyce then offered the paper to one Bartlett, to whom he was indebted. Bartlett asked Whiton if the paper was genuine, and if the phaeton would be delivered. Whiton replied, "It will be ready for you or any one who holds that order." Kinney and others were standing near by and heard this, and Kinney did not know of the existence of the paper until then. Whiton did not then know that any person thought of purchasing the paper, but did suppose that Boyce would leave it with Kinney or some one else to whom he could deliver the phaeton. Kinney would not have bought the bill had it not been for what Whiton then said. All of the carriages were taken to New York on the same day.

On the 26th of February, 1869, Kinney purchased the paper from Boyce in good faith, paying him therefor $250. Soon after Kinney delivered the paper to S. W. Gregory as collateral security. In April, 1869, Gregory presented the paper to Whiton, and asked if it was good. He replied, "Yes," and consented that Gregory might take two business wagons instead of a phaeton, paying the difference in money, and he delivered one wagon. In June he sent Gregory a bill demanding pay for the wagon, and then informed him that he would not give any credit on the order, because some of the notes he had received from Boyce had not been paid. Gregory paid for the wagon, and after having sent his clerk to Whiton with the order to demand the phaeton, which Whiton refused, gave back the paper to Kinney, who ever since has been the lawful owner of the same.

The note of Dyke & Babcock was duly presented to them at maturity, but payment was refused, and the note was protested for non-payment, and a notice sent to Boyce that the holder would look to him for payment. The note has never been paid, but a suit brought on it against the makers, June 11th, 1869, in Massachusetts, was prosecuted to final judgment in Whiton's favor, and nothing has ever been paid or collected on the judgment. Two other of the notes of $200 each have not been paid, the makers being insolvent, and the claim of the defendant against Boyce on account of his endorsements now amounts to $1,066.66, and interest.

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The plaintiff claimed that upon the evidence offered the defendant was in law estopped by his conduct and language from claiming that there was any verbal condition or agreement annexed to the written agreement in suit, which could affect it in the hands of the plaintiff. The defendant claimed that he was not thus estopped, and asked the court to rule that the plaintiff could not recover, because the non-payment of the Dyke & Babcock note had released him from his obligation to deliver the phaeton to Boyce, and that the plaintiff could not have rights against the defendant superior to those of Boyce.

The court overruled the claim of the defendant, and rendered judgment in favor of the plaintiff for $435.18 damages and costs. The defendant filed a motion in error, assigning as error the above ruling of the court.

E. Hall and *E. S. White*, for the plaintiff in error.

1. The first question in this case is, whether the defendant is in law estopped by his conduct and language, as set forth in the finding, from claiming that the writing in suit was executed and delivered upon a verbal agreement as to the consideration. To constitute an estoppel *in pais*, the party making the representations must have intended that the other party should act upon them. Bigelow on Estoppel, 437, 485; *Danforth* v. *Adams*, 29 Conn., 107; *Andrews* v. *Lyons*, 11 Allen, 349; *Payne* v. *Burnham*, 62 N. York, 73. The language of a party, to operate as an estoppel, must have been addressed to the party claiming it. *Mayenborg* v. *Haynes*, 50 N. York, 675; Bigelow on Estoppel, 486. The representations must have reference to a present or past state of things. Bigelow on Estoppel, 438. The facts found do not bring this case within these principles. The statement of the defendant, so far as it related to the delivery of the phaeton, was a representation relative to a future transaction. And it was not addressed to the plaintiff. Further, it could not have been made with the intention that the plaintiff should act upon it, for the defendant did not then know that any one thought of purchasing the paper. Estoppels are not favored

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in law, and must be strictly made out. *Andrews* v. *Lyons*, 11 Allen, 351.

2. Parol evidence was admissible to prove the exact consideration of the defendant's contract, and such evidence did not in any way contradict or vary the written contract, since the written contract does not state what the consideration was, nor that there was any. The plaintiff had no rights in the case different from those which Boyce had, and it was as necessary for him as it would have been for Boyce to show that there was a consideration and what it was.

G. G. Sill and *C. H. Briscoe*, for the defendant in error.

1. When Bartlett, in the presence of Kinney, inquired of Whiton, showing him the paper, if it was genuine, and if the phaeton would be delivered, and he replied, "It will be ready for you or any one who holds that order," is the latter estopped from showing that he is not liable on the order? It is not necessary to look beyond our own reports for an answer to this question. The case of *Preston* v. *Mann*, 25 Conn., 118, contains as clear exposition of the law on this subject as any. See also *Middletown Bank* v. *Jerome*, 18 Conn., 443; *West Winsted Sav. Bank* v. *Ford*, 27 id., 282. If it is claimed that Whiton did not know that any one thought of buying the order, we say that it makes no difference what his motive was in making the statement. See *Preston* v. *Mann*, supra, 128. Nor does it make any difference that he said this to Bartlett. He said it in presence of the plaintiff and others, and added that it would be ready for any one who held the order. This announcement would be analogous to the certificate mentioned in *Middletown Bank* v. *Jerome*, supra. That was directed to any one who might see it—this to any one who might hear it. *Horn* v. *Cole*, 51 N. Hamp., 287; *Stevens* v. *Dennett*, id., 324; *Quirk* v. *Thomas*, 6 Mich., 76; *Mitchell* v. *Reed*, 9 Cal., 204.

2. If the court below erred in its rulings, yet if, upon the facts found, the plaintiff is entitled to a judgment, this court will not reverse that judgment. The defendant can not maintain his defence because he depends upon parol evidence to

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show that there was an unwritten condition attached to this written contract. Parol evidence is not admissible to add to or vary a written contract. *Hall* v. *Rand*, 8 Conn., 560; *Brainerd* v. *Brainerd*, 15 id., 575; *Glendale Manuf. Co.* v. *Protection Ins. Co.*, 21 id., 19, 37.

GRANGER, J. The contract signed by the defendant, by which he promised, on or before May 1st, 1869, to deliver to Boyce or bearer a phaeton of a certain description and value, is clearly of no validity except as supported by a consideration. It states none upon its face, and the plaintiff, when he bought it of Boyce, must be presumed to have known that he was taking a document that was of no binding force in itself. The actual consideration was the note of Dyke & Babcock and its payment when due, the note falling due on the 6th of April, 1869, and the time of the delivery of the phaeton having been fixed some three weeks later, so that, as Boyce stated to the defendant at the time, if the note was not paid he would not have to deliver the phaeton.

The plaintiff, who holds the defendant's contract by purchase from Boyce, claims that proof can not be gone into of what this consideration in fact was, because it would be adding to or varying a written contract by parol evidence. But the plaintiff stands no better in suing upon this contract than Boyce himself would have done, unless it be on the ground of an estoppel, which we will consider hereafter. The instrument had nothing negotiable about it. It was a promise, it is true, to Boyce or bearer; but it was not for the payment of money. Such an instrument is open to every inquiry and to every defense, in the hands of an assignee, that it would have been open to in the hands of the assignor. If Boyce were suing upon it he would have to prove a consideration. It would be a part of his case, not the want of it a part of the defence. And in showing that there was a valid consideration he would have to show what it was, and all the facts with regard to it. It would not be for him to object to parol evidence of the consideration; he himself would be the one who would have to offer the evidence. Such evidence does not in any proper

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sense vary the written contract. There is nothing in the contract that is inconsistent with such consideration. The contract says nothing about it. Indeed the written document does not purport to be the whole contract, but only a part of it. The statement of the consideration is needed to make the full contract of both parties. As it stands it is only the promise of one of the parties. Indeed the paper as drawn not only does not state the consideration, but carries upon its face an implication that the consideration had not been paid. It is as follows: "On or before the first day of May, 1869, I promise to deliver to A. Boyce or bearer one phaeton buggy worth three hundred and twenty-five dollars. It is to be the same as I have sold to A. Boyce this day, for which I have this day received my pay." Here the statement with regard to the payment applies obviously only to the phaeton delivered that day, and by being limited to that phaeton impliedly states that the phaeton to be delivered in May was not yet paid for.

But the plaintiff at this point comes in with his claim of an estoppel, and says that the defendant, by reason of his declaration to one Bartlett, that the phaeton would be ready for any one who brought the order, is estopped from claiming that he was not to deliver it till the Dyke & Babcock note was paid. It appears that Boyce offered the paper to Bartlett in the defendant's presence, and that Bartlett then enquired of the latter whether it was genuine, and whether the phaeton would be delivered. The defendant's answer evidently was intended as a recognition of his signature and of the obligation of the contract upon him. He does not now deny the genuineness of the paper, nor his obligation to perform the contract according to its terms. Perhaps also, if Bartlett had purchased the contract in good faith and upon the strength of the defendant's declaration, he would have a right to say that the defendant misled him into a belief that the consideration was paid, and the obligation to deliver the phaeton an absolute one. As he did not in fact make the purchase we need not decide this point. But if he could have sustained a claim to an estoppel we do not think that it necessarily follows that the plaintiff can do so. Bigelow, in his

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work on Estoppel, page 437, gives a summary statement of the essential elements of an estoppel by conduct, and among them that the representation "should have been made with the intention that the other party should act upon it." This doctrine is laid down in *Plumer* v. *Lord*, 9 Allen, 455, and still more strongly in *Andrews* v. *Lyons*, 11 Allen, 349. Some of our own decisions perhaps go somewhat beyond this limit, particularly that in *Preston* v. *Mann*, 25 Conn., 118, and we should undoubtedly hold that it is enough if the circumstances are such that the party is fairly chargeable with knowledge that his declaration may induce the action taken. Here it can not be supposed that there was in fact any intention to induce the action taken by the plaintiff. It seems extremely improbable that the possibility of such action was in the defendant's mind. He knew that the plaintiff had been present during the whole negotiation between himself and Boyce and had no reason to doubt that he fully understood all the facts. Boyce when, after the negotiation, he drew the paper for the defendant to sign, said to him that "Kinney ought to have a memorandum to show that the phaeton was to be made and delivered." The very paper therefore was procured by Boyce to be put into the plaintiff's hands, of course as his agent. It would seem therefore as if the last thing to enter the defendant's mind, would be the idea that the plaintiff could become the purchaser of the contract on any ignorance of the facts or under any inducement from such a remark as his to Bartlett. It is difficult to see therefore how the defendant can be fairly chargeable with either an intention to influence the action of the plaintiff, or with a knowledge that his action might be influenced by what he said.

There may of course be cases where a declaration, though in reply to an enquiry from one of a company, may have been intended for all present—a public declaration to be acted upon by any one present who should choose. In such a case any one of the company acting upon it would be an original party to the representation. Of such a character is a representation, whether in writing or made orally, that is intended for

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all the public, as in the certificate signed by tne party for general use, in the case of *Middletown Bank* v. *Jerome*, 18 Conn., 443. Here the declaration, though it speaks of a delivery of the phaeton to any one bringing the order, (for the defendant seems to have regarded it as simply an order, and it was taken of him by Boyce simply as an authority for Kinney as his agent to receive the phaeton,) was, for aught that appears, addressed solely to Bartlett and intended solely for him. Estoppels are not favored, and in the absence of any finding upon the point, we can not presume that the defendant turned around to the bystanders and in a raised voice addressed all present. The case must be regarded as one where a declaration addressed to and intended for one person, is overheard by another, who afterwards acts upon the strength of it.

But the plaintiff claims that even if this be his position, yet he is entitled to the benefit of the estoppel, and we are referred to two or three decisions that seem to favor this view. One of these is the case of *Quirk* v. *Thomas*, 6 Mich., 78. In this case land was conveyed to a grantee to defraud creditors, and it was held that the deed, appearing on the public records, was a declaration to the world that the grantee was the true owner, and that though intended only to defraud creditors, any bonâ fide purchaser could set up an estoppel against any denial of the grantee's title. It is difficult to see how this decision bears upon the question. Such a deed would be a declaration to all the world, and any purchaser accepting it and acting upon it would be a party to it. Indeed the whole system of registering deeds of land would become of no value if a purchaser could not rely upon the records as he finds them. The case of *Mitchell* v. *Reed*, 9 Cal., 204, which is also cited by the plaintiff's counsel, lays down the doctrine claimed by the plaintiff in direct language, but does not commend itself to our judgment. It is there held that when a declaration, not confidential, is made to *A*, and comes to the knowledge of others, who act upon it, those who so act upon it can set up an estoppel against the party making the representation. The case was this. A person keeping a saloon

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and apparently the owner of liquors in it, repeatedly stated that they belonged to *B* and not to himself. A creditor of *B* having heard of this statement, but not directly from the saloon keeper, attached the liquors as the property of *B*, and it was held that the saloon keeper was estopped from claiming that they belonged to himself and not to *B*. Here the declaration, though never made directly to the party who finally acted upon it, was yet a general declaration, apparently made to be communicated to others, and very much what it would have been if it had been written and posted in front of the saloon, or as if his sign had indicated that he was agent of *B*. The distinction which the court draws is between declarations that are confidential, in which case a party receiving them at second hand can not set up an estoppel, and declarations that are not confidential, no matter if made privately and to a single person, which yet reach others, by being overheard or repeated. We think the distinction should be, between declarations intended to be public or for all hearers, and those not so intended, although not confidential. In the case of the public declaration the whole public may act upon it, and their action will fall within the scope of the intention, actual or presumed, of the party making the declaration. In the case of the declaration not publicly made, nor intended to be public, the action of any stranger acting upon it would fall wholly without the scope of such intention.

The case of *Horn* v. *Cole*, 51 N. Hamp., 287, is another of those relied upon by the plaintiff's counsel, and is in its general character much like the California case just referred to, and cites that case in support of its position. In this case *A*, to prevent his goods from being attached, represented that they belonged to *B*, and a party to whom the representation was made attached them upon a claim which he held against *B*, and it was held that *A* was estopped from denying that the goods belonged to *B*. The case does not involve any consideration of the question of the effect of a communication of *A's* statement to a third party, or of its being overheard by a bystander, as the party acting upon the representation was

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the one to whom the representation was made. But the court go into an elaborate review of the authorities on the general subject of estoppel by conduct, and in the course of it contend for the enlargement of the application of the doctrine, regarding it as a broad doctrine of equity, which can not be governed by narrow and strict rules of construction, and which should be favored, as tending to promote justice, rather than restricted as tending to exclude evidence of the truth. In the course of the discussion the court refer to the cases of *Quirk* v. *Thomas* and *Mitchell* v. *Reed*, which we have considered above, as falling in with their general views, and contend specially for such an extension of the principle of estoppel as will make it applicable to cases where the party making the representation misled some other party than the one whose action he designed to influence.

But we are not able to concur in the results at which the court arrived in the three cases we have been considering. It seems to us to be an unsafe doctrine to adopt, that a person who gets at second hand a declaration not intended for the public and not intended for him, may act upon it as safely as the person to whom the declaration was addressed and for whom alone it was intended. Where the declaration was intended only for the person to whom it was addressed the party making it has assumed no obligation to any other person. A bystander who casually overhears a conversation has no right to appropriate to himself, without further enquiry, what was intended for another. If he desires to act in the matter he can make direct enquiry for himself. It would be dangerous to adopt any other rule. The conversation overheard may have been really a fragment of a negotiation extending through several conversations, and may be materially qualified by what had been said before or might be said afterwards. Indeed in any case the person making the declaration may upon further reflection have modified his statement the next day, or retracted it altogether; and where a person finds that he has inadvertently or inconsiderately committed himself upon some point and wishes to withdraw or correct his statement, he has done his whole duty when he

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looks up the person to whom he made the statement, and sets himself right with him, and is under no obligation to hunt up the bystanders and make the correction to them. The bystanders if they wish to estop him, must look him up and get a statement for themselves.

In *Mayenberg* v. *Haynes*, 50 N. York, 675, the Court of Appeals of that state, affirming the decision of the Supreme Court, held that a declaration made to *A* and by him communicated to and acted upon by *B*, would not constitute an estoppel in *B's* favor, where it was no part of the original intention that it should thus be communicated to him and influence his action. There is no substantial difference between that case and that of a bystander who overhears a declaration not intended for him.

We think there is manifest error in the judgment of the Court of Common Pleas, and it is reversed.

In this opinion the other judges concurred.

BRIDGET NUGENT *vs.* TERRENCE WRINN.

By long established practice one hour of grace is allowed to parties in appearing in actions brought before justices of the peace.

But the rule that limits one hour for this purpose is not inflexible in its application. Circumstances may occur which will make it proper for a magistrate in the exercise of a reasonable discretion to vary from it. And where the matter comes to one of minutes, allowance should be made for the want of accuracy of ordinary time-pieces.

A case before a justice in a country town stood adjourned to a certain day at nine o'clock in the forenoon. The plaintiff, his attorney and the justice waited until, by the attorney's watch, it was ten minutes after ten, when the justice defaulted the defendant, and they went to the attorney's office close by, where the attorney was drawing up a form of judgment for the justice to sign, when the defendant came in. It was then by the attorney's watch twenty minutes after ten. The defendant claimed that by her clock it wanted six minutes of ten when she left her house, which was only two minutes' walk from the justice's office, and asked to be allowed to file a demurrer, which her counsel had prepared for her the day before, and to appeal the case The justice refused

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to open the case, and entered up judgment for the plaintiff. Judgment reversed on a writ of error.

WRIT OF ERROR to reverse a judgment of a justice of the peace; brought to the Court of Common Pleas of Hartford County, which (*McManus, J.*,) affirmed the judgment, and by motion in error from that judgment brought to this court. The case is fully stated in the opinion.

R. Hicks, for the plaintiff in error, cited *Burgess* v. *Tweedy*, 16 Conn., 45; *Wilde* v. *Dunn*, 11 Johns., 459; *Sweet* v. *Coon*, 15 id., 86; *Baldwin* v. *Carter*, id., 496; *Atwood* v. *Austin*, 16 id., 180; *Barber* v. *Parker*, 11 Wend., 52.

M. M. Holcomb and *S. O. Prentice*, for the defendant in error, cited *State* v. *Rowley*, 12 Conn., 106; *Burgess* v. *Tweedy*, 16 id., 39; *Shufelt* v. *Cramer*, 20 Johns., 309; *In re Pulver*, 6 Wend., 632.

PARDEE, J. Terrence Wrinn brought an action of assumpsit against Bridget Nugent, returnable before a justice of the peace in the town of Southington, which by proper adjournment was set down for trial at nine o'clock in the forenoon of July 31st, 1875. On that day the justice, the plaintiff and his counsel were at the appointed hour and place and remained until ten minutes after ten o'clock, as indicated by the watch of the latter, when, the defendant not appearing, she was three times publicly called and defaulted. The justice then left the court-room, crossed the street to the office of the plaintiff's counsel, and signed a record of the judgment which had been written upon the file. The defendant entered the court-room just after the departure of the justice. She went immediately to the office where the justice then was, entering before the completion of the record, bringing a demurrer which had been drawn for her by her counsel on the previous day, and asked to be allowed to file it and appeal the case, claiming that her house was only two minutes walk from the court-room, and that when she left home her clock indicated nine o'clock and fifty-four minutes. Between the hours of nine and ten o'clock the defendant's husband was in the

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vicinity of the court-room; he knew of the pendency of the cause and the hour to which the hearing had been adjourned; he saw the justice in the court-room and saw him leave it; he knew that his wife had the demurrer and that she intended to file it; at half past nine he had told her to hasten or she would be late; but he said nothing to the justice, or to the plaintiff, or to the counsel. It is found that she reached the office when the court was making up the record, at about ten o'clock and twenty minutes. The plaintiff objected to her motion, and the justice rejected it and entered up judgment against her. She thereupon brought her writ of error to the Court of Common Pleas for Hartford County at the September term, 1875, and at the March term, 1876, that court decided that there was no error in the action of the justice; and now she has filed her motion in error and brought the case before this court.

By an unwritten law, which under long continued usage has acquired the strength of a legislative enactment, one hour of grace is the privilege of parties in the matter of appearing to answer to actions in the courts of justices of the peace. We do not design either to extend or curtail this right. But different time-pieces will always vary in marking minutes, and no absolutely fixed and unvarying rule can be laid down by which the magistrate is to be governed in the matter of adjourning his court. As a practical matter however, it is to be remembered that courts and forms exist for men and not men for these; and that it is better that the door of justice should stand open one minute beyond, than that it should be closed one minute within the hour. Chief Justice WILLIAMS said in *Burgess* v. *Tweedy*, 16 Conn., 45: "It may be asked, is this rule to be inflexible? Shall the defendant have a right to demand his dismission at the moment the hour has passed, when he has good reason to believe that the other party or the magistrate is at hand? Shall he be permitted to pass them at the door because the clock may have struck? We think not. Nor, on the other hand, shall the defendant come with his witnesses from a distance at the call of his adversary, and be obliged to wait as if no hour was named, and thus be deprived

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of all the advantages which were intended by fixing a precise time. Both evils should be avoided; and while the general rule should be, that from the hour named to the succeeding hour no proceedings ought to be had unless all parties were present, yet circumstances may occur which would authorize the magistrate in the exercise of a reasonable discretion to vary from it." In *Atwood* v. *Austin*, 16 Johnson's R., 182, where the defendant was defaulted, but came in while the plaintiff's witnesses were under examination, and the justice decided that it was too late for him to appear, the court held that the judgment was erroneous. Presumably this defendant intended to appear and protect her rights; she had made all necessary legal preparation upon the previous day; and she has given evidence of her earnestness in contesting the plaintiff's claim upon its merits. When she appeared the justice and the parties were within one minute's walk of the court-room; another minute would have sufficed to receive the demurrer and grant the appeal. It is not found or suggested even that any inconvenience would have resulted either to court, party or witness. Inasmuch as, strictly speaking, in the absence of any standard of reference we cannot have any certainty as to moments of time in this transaction, the court below is not to be understood as finding as a fixed fact that it was ten o'clock and ten minutes when the justice adjourned his court; but only that one time-piece, the watch of the plaintiff's counsel, so indicated. As the appearance of the defendant followed so closely upon the default, and as we prefer to hear rather than deny a hearing, we are inclined to say that there is error in the judgment of the court below confirming the refusal of the justice to receive the plea and grant the appeal.

In this opinion the other judges concurred.

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HORACE PARTRIDGE AND ANOTHER *vs.* LAWSON J. WOODING AND ANOTHER.

A, owning a clock factory and machinery, entered into an arrangement with *B* & *C* by which they were to occupy at an agreed rent so much of the factory as was necessary for manufacturing clocks and to have the use of the machinery, and were to make for him at their own expense all the clocks that he should order, making none for other parties, which clocks were to be boxed and set aside for him, and paid for as thus set aside, and which were to remain in the factory until forwarded by his order to purchasers. A quantity of clocks, made for *A*, were thus boxed, and placed in a room of the factory, where they remained over two years. Held that they were to be regarded as during this time, in the possession of *A*.

The firm of *B* & *C* was dissolved while the clocks were thus stored in the factory, and the factory was unoccupied for two months, at the end of which time *C* went into partnership with *D* and the new firm took the factory of *A* on the same terms. This firm was soon after dissolved and *C* went on alone under the same arrangement. While *C* was thus occupying, the clocks in question were attached by one of his creditors. Held that, upon the dissolution of the firm of *B* & *C* and the closing of the factory, any possession that they might be regarded as having had terminated, and that the new arrangement made with *C* & *D* did not operate to take the possession from *A*.

Even if the possession were to be regarded as retained by *B* & *C* and afterwards by *C* alone, the creditors of *C* could attach only his interest in the property.

TRESPASS for taking and carrying away a quantity of clocks; brought to the Court of Common Pleas of Hartford County. The case was tried to the court upon the general issue, with notice that the defendants would show that the clocks were attached as the property of one Charles Lewis, by the defendant Foley, as a deputy sheriff, upon a writ in favor of the defendant Wooding, in a suit against the said Lewis. The court found the following facts:—

Previous to January 1, 1875, the plaintiff Partridge was engaged in the business of selling clocks in Boston in the state of Massachusetts, and had been in the business for many years. On that day Benjamin F. Hunt, the other plaintiff, went into partnership with him in the same business under the name of Horace Partridge & Company, and all the rights of Partridge under the contracts hereinafter stated became at that time vested in, and have ever since been the property

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of, the firm. Partridge is, and for many years has been, the owner in fee of a building in Bristol, Connecticut, with machinery therein, suitable for the manufacture of clocks. In 1866 he began the manufacture of clocks at this factory, with workmen and a superintendent employed by him. About 1868 he made arrangements with certain parties, giving them the use of the machinery, and as much as they would need of the factory for the manufacture of clocks; he to take all the clocks when completed, at a price agreed on. This arrangement continued until after 1873. In the fall of 1871 B. B. Lewis and Charles S. Lewis, under the firm of B. B. Lewis & Son, took the factory and occupied it until January 1, 1873, under a verbal contract with Partridge that they should make for him such clocks as he should order, at an agreed price per clock; they to hire help and furnish materials, to repair the machinery at their own expense, and to pay a certain agreed rent for the factory. All the clocks when finished were to be packed in cases, and the cases to remain in the factory, to be shipped thence as Partridge should order. B. B. Lewis & Son drew their pay from Partridge as fast as they completed and boxed the clocks ordered from time to time, their custom being to draw on him for the amount due for each lot as fast as completed. They were obliged to keep the clocks in the factory for him, until shipped by his order to purchasers, but no special portion of the factory was set apart for that purpose. He always kept the clocks so finished and paid for, insured. B. B. Lewis & Son never claimed to own or control the clocks thus boxed and stored for him, but did own all work and materials until so finished, boxed and paid for. This arrangement was made and acted on in good faith by Partridge and B. B. Lewis & Son, and was of great convenience to him, and was generally known to the employees in the factory. The clocks mentioned in the plaintiffs' writ were made by B. B. Lewis & Son, and paid for by Partridge in conformity with the above arrangement prior to January 1st, 1873.

Partridge was accustomed to furnish B. B. Lewis & Son with labels containing his name and address in Boston,

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describing him as a manufacturer and dealer in clocks, to be pasted in the inside of all clocks when completed. None of the clocks mentioned in the plaintiffs' writ were provided with these labels, the supply having been exhausted at the time they were finished and cased. The factory had two floors besides the attic. The upper floor was mostly used for work, the attic was used for storing odds and ends, and also for storing clocks finished and paid for, awaiting Partridge's order for delivery to his customers. The lower floor had a room partitioned off for setting up clocks, and a saw room. The space between these was occupied by the main entrance to the building, by a planer and other machinery, and for storing finished and unfinished work, and there were workmen engaged in this part of the building the greater portion of the time. There were always some cases of clocks finished and paid for, kept in this part of the building awaiting Partridge's orders for shipment. The "No. 3," so called, were slow of sale, and those described in the writ were of this kind, and besides these several hundred No. 3 clocks remained in the factory on the 1st of January, 1873, and afterwards.

B. B. Lewis & Son dissolved January 1st, 1873, and for several weeks thereafter Charles S. Lewis, one of that firm, by Partridge's request kept the key, took care of the building, and did work there for himself as he desired. In March, 1873, Charles S. Lewis associated with two other men under the firm name of C. S. Lewis & Co., and occupied the factory under substantially the same arrangement as the former one, with a slight difference in the price of the clocks, and permission from Partridge to do any work for other parties, except making clocks, provided they would supply Partridge with all that he should order. These parties dropped out of the firm before October, 1874, after which date C. S. Lewis continued to carry on the manufacture until the date of the alleged trespass complained of by the plaintiffs. There were no No. 3 clocks made after January 1, 1873. They were always kept on the lower floor, in the space between the saw room and setting up room; but were removed to different places therein, from time to time, by C. S. Lewis & Co., for their convenience;

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and in August, 1875, there were in this space several cases of finished clocks that were not paid for by Partridge or the plaintiffs, and were the property of C. S. Lewis, some cases of railroad indicators, also Lewis's property, and several cases of No. 3 clocks, all of which had been finished and paid for by Partridge before January 1, 1873, and were awaiting his orders for shipment. There were no exterior marks on the cases of No. 3s to indicate whose property they were, and it never had been the custom to put any marks on the cases until shipment. C. S. Lewis had been for some time harassed by creditors, and had offered to give, and in many instances did give, clocks in payment for his bills, making no stipulated exceptions of the No. 3s, and had repeatedly offered to pay the defendant Wooding in the same manner, but in no case did Lewis actually deliver any No. 3s to such creditors excepting in one instance, where the clocks were delivered by the mistake of an employee, which was immediately rectified by Lewis, who supplied the deficient case, which was some time before the trespass complained of.

Lewis had at various times traded clocks for material, and for a horse and wagon, and used them in paying his employees, but in no case with the knowledge or consent of the plaintiffs, nor did he so dispose of any that had been paid for by the plaintiffs.

Wooding had a lawful claim of $94.30 against C. S. Lewis, and sued for the same in August, 1875, the defendant Foley, a deputy sheriff, serving the writ. The defendants went to the factory, and Davis, an employee, pointed out cases containing two hundred and sixteen No. 3 clocks, and informed the defendants that they belonged to C. S. Lewis. Davis knew at the time that they had been paid for by Partridge. Foley was about to attach cases of unfinished clocks that were the property of Lewis, but Davis represented to the defendants that if they left the unfinished work the workmen of Lewis would have security thereon for their wages. Lewis was not present at the time. There was then property of Lewis's in the factory which was of as great value as the clocks attached. The clocks were worth $216. Foley in

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good faith attached them, supposing them to be Lewis's property, and they were sold by him on an execution in the Wooding suit. The defendants were notified by the plaintiffs before the levy of the execution that the clocks were their property, and demand was made of them therefor and refused.

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

G. A. Gowdy for the plaintiffs.

1. Upon the facts as found the occupants of the factory were making clocks as the agents of the plaintiffs. They were to use the machinery and as much of the factory as they would need for the manufacture. The clocks when made were to be packed in boxes and were to remain on storage until the plaintiffs should order them to be shipped. The Lewises were to make such clocks as the plaintiffs should order, and make none for other parties; the plaintiffs always kept the clocks so finished insured; the Lewises never claimed to own them; and the labels supplied by the plaintiffs to be put upon the clocks described the plaintiffs as manufacturers of clocks. These facts clearly constitute an agency on the part of the Lewises. It does not alter the case that they were to hire their own help, furnish material and pay rent. These are incidents of the arrangement that are not necessarily inconsistent with the agency.

2. The clocks attached were made for the plaintiffs by the firm of B. B. Lewis & Son. If they remained as to creditors the property of the firm, by reason of want of delivery, yet it was only as property of the firm, and the private interest of one of the partners would be only his share of the surplus after the partnership debts were paid. The officer did not attach the interest of C. S. Lewis in the clocks, but took them as the property of Lewis and sold them bodily. This he could not do. *Brewster* v. *Hammett*, 4 Conn., 540; *Barber* v. *Hartford Bank*, 9 id., 410; *Filley* v. *Phelps*, 18 id., 300.

3. But in any view of the relation of the Lewises to the plaintiffs, there was a sufficient delivery of the clocks, and they were when attached in the possession of the plaintiffs.

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By the terms of the contract the plaintiffs reserved storage room enough for the clocks made for them, which storage room they were at liberty to use as long as they pleased. No more of the factory was leased to the Lewises than was needed for manufacturing the clocks. The rest remained under the control of the plaintiffs. The clocks therefore, when so stored, were delivered to them, and while on storage were in their possession. *Potter* v. *Payne*, 21 Conn., 362; *Potter* v. *Mather*, 24 id., 554; *Bird* v. *Andrews*, 40 id., 542.

S. P. Newell, for the defendants.

1. Possession by the vendor is not merely evidence of fraud, but is fraud in law. This court has said, in the case of *Hatstat* v. *Blakeslee*, 41 Conn., 302, "Purchasers must learn and understand that if they purchase property, and without a legal excuse permit the possession to remain in fact or *apparently* and *visibly* the same as before the sale, they hazard its loss by attachment for the debts of the vendor as still his property."

2. There was no actual delivery into any place set apart as the plaintiffs' warehouse. They had no right to any specific part of the factory, or the exclusive possession of any part. These goods were with C. S. Lewis's own goods in the room that Lewis used every day in manufacturing and storing his own goods. There were no marks upon the goods attached to distinguish them from the goods confessedly his. The interval between the firms of B. B. Lewis & Son, and C. S. Lewis & Co. and C. S. Lewis, does not affect the question. The factory remained in the possession of C. S. Lewis, who was the managing member of both firms, and at the time of the attachment was the sole proprietor of the factory. Nor, for the same reason, does the change of firms affect the question. The mischief is that the apparent control is the same in both cases. If anything that took place can be considered a delivery, there was certainly a re-delivery, by the consent and by the express stipulation of the plaintiffs. A re-delivery is as bad as an original retention of possession. *Norton* v. *Doolittle*, 32 Conn., 405. The fact that the goods were left

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for a special purpose, and not for the vendor's benefit, is of no consequence. *Carter* v. *Watkins*, 14 Conn., 243; *Hall* v. *Gaylor*, 37 id., 553.

3. The defendants did not know of the sale to Partridge, but supposed the goods to be Lewis's. They had no reason to know. They were piled with Lewis's goods, in the same sort of boxes. Other boxes of goods from the same pile had been turned out to various creditors of Lewis. Lewis had offered to pay Wooding in clocks, not specifying any particular clocks. Davis, an employee of Lewis, said they were Lewis's clocks. Lewis had sold clocks whenever he had an opportunity to do so, traded them for materials, and paid workmen with them. If the defendants had known of the sale it would have made no difference. *Swift* v. *Thompson*, 9 Conn., 70; *Couch* v. *Carrier*, 16 id., 507. Hence the evidence of workmen's knowledge was inadmissible.

4. There is nothing in the relation of the parties to prevent the application of the general rule. 1st. The fact that the relation of landlord and tenant existed between them is of no consequence. 2d. The Lewises were not Partridge's agents. He tried manufacturing by agents in 1866, and soon abandoned it. They bought the stock, and paid the men, and paid rent for the factory. It is admitted on all hands that the clocks were theirs till boxed. This is totally inconsistent with the idea of agency. They had the right to make other goods. No business of any kind was done in the factory except this business of Lewis's. Partridge resided and carried on business in Boston, and was not personally present at the factory. 3d. They did make, sell, and otherwise dispose of clocks as they pleased. It is not an uncommon thing for manufacturers to sell exclusively to one merchant, but this does not in any way change their relation. Not even if the goods are manufactured on his orders. *Carter* v. *Watkins*, 14 Conn., 243, is conclusive on this point. The combs in that case were made on an order. That case is even stronger than this.

PARK, C. J. If two persons own personal property jointly,

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and sell it to another in good faith, for a valuable consideration, and are suffered to retain possession of it, a creditor of one of them can disturb the sale only to the extent of that one's interest in the property at the time of the sale. So far he can treat the property as though it had never been sold. But the fact that there has been a retention of the possession of the property does not enlarge his right, so that he can attach more of the property than his debtor ever owned. He may take his debtor's former interest, but he must be satisfied with that.

No one will question the soundness of this doctrine. Applying it to the case in hand, it seems to be clear that, however else the case may be viewed, the defendants had no right to attach this property, so far as it was acquired by the plaintiffs from B. B. Lewis. The clocks were manufactured by B. B. Lewis and C. S. Lewis as partners. They jointly owned the property; the plaintiffs paid them jointly for it; and it is clear that Wooding, as a creditor of C. S. Lewis alone, had no right to attach the interest in the property which had before the sale belonged to B. B. Lewis. In any view of the case, therefore, his right to the property must be confined to the share of C. S. Lewis at the time of the sale.

But had the defendants the right to attach the property at all? The clocks were manufactured under a contract entered into in 1871, between Partridge, one of the plaintiffs, and the firm of B. B. Lewis & Son, wherein it was agreed that the firm should occupy so much of the clock factory belonging to Partridge as should be necessary for the manufacture of clocks, that they should furnish materials and workmen for the purpose, and should manufacture clocks solely for Partridge. He agreed to take all the clocks manufactured by the firm, paying a certain price for the same as fast as they should be packed in boxes ready for the market. He was the owner of the establishment and of all the machinery and tools in it, and had previously carried on the manufacturing business himself. The firm manufactured clocks under the contract till January, 1873, when it was dissolved, and during the time manufactured the clocks in question, and packed

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them in boxes. Partridge paid for the clocks as fast as they were manufactured according to the contract; and paid for the clocks now in controversy. During this time all boxes ready for market remained in the establishment until sold by Partridge. This was done for purposes of convenience and the saving of expense. The contract terminated the first of January, 1873, at the time the partnership was dissolved. The establishment was closed till March of the same year, when C. S. Lewis formed a partnership with other persons. The new firm made a similar contract with Partridge for the occupancy of the factory and the manufacture of clocks, and went into possession of the establishment under their agreement. The firm continued to manufacture clocks till the fall of 1874, when it was dissolved, and the business was continued by C. S. Lewis under another similar arrangement with Partridge. The property in question was attached as the property of C. S. Lewis, while he was in possession of the establishment under the last agreement. These are the principal facts in the case, and on them this question must be determined.

It is to be observed that the firms of B. B. Lewis & Son and C. S. Lewis & Co. had no right under their contracts to store any goods of their own upon the premises, neither did they do so in fact. As fast as the goods were manufactured, and placed in boxes, they were to be paid for and were in fact paid for by Partridge. The same was true under the last agreement with C. S. Lewis. The firms under the first two contracts, and C. S. Lewis under the last, were merely manufacturers of goods. They were in possession of the establishment only as manufacturers, and to the extent only that was necessary to carry on the manufacturing business. Partridge was in the exclusive possession for every other purpose. It follows, therefore, that the goods in question were in the exclusive possession of Partridge from the time they were placed in boxes and paid for by him. The case is widely different from what it would have been if B. B. Lewis & Son had leased the entire establishment for the purpose of carrying on the business of manufacturing and selling clocks on their own account, and Partridge had been merely one of

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their customers, who after buying the clocks had left them in their possession. This is the view of the case which the defendants present, and urge upon our consideration. The distinction is obvious.

Again, the firm of B. B. Lewis & Son was dissolved on the first day of January, 1873, and the establishment was closed till some time in March following. The possession of the old firm terminated with the existence of the firm. Whatever possession C. S. Lewis had of the premises, as a member of the firm, he had it jointly with B. B. Lewis. When the new firm was organized in March, and were let into another limited possession of the premises, the possession of C. S. Lewis was a joint possession with other parties under another contract. Suppose the new firm had come into possession for the sole purpose of manufacturing boots and shoes, or of carrying on the grocery or dry-goods business, and were limited in their possession to what was necessary for the purpose, would any one claim that Partridge thereby returned these goods to the possession of C. S. Lewis, simply because he with others was in the establishment manufacturing boots and shoes, any more than if he had been let into the building to extinguish a fire, or to look after the safety of the premises during a period of suspension of business? Manifestly, there was no intention to return the possession of the property. No object could have been accomplished by so doing; it could not have been used by C. S. Lewis otherwise than for purposes of sale. We think the goods were continuously in the exclusive possession of Partridge from the time they were packed in boxes and paid for by him, until Hunt his partner in January, 1875, acquired an equal interest with him, and were in the exclusive possession of the plaintiffs from that time until the attachment.

We advise judgment for the plaintiffs.

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

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EDWARD VON WETTBERG *vs.* JAMES CARSON.

An assignment in insolvency made by two partners described the property assigned as "all our real and personal estate, and claims and choses in action, of every kind whatsoever, and wheresoever situated, except property by law exempt from execution." Held to carry their individual as well as partnership property.

The statute (Gen. Statutes, p. 384, sec. 27,) provides that property of a debtor attached within sixty days before proceedings in insolvency are instituted, shall go to the trustee in insolvency, who shall have the same right to recover such property as the officer might have had. Held that where a receipt was given for attached property where none had in fact been attached, so that there was in fact no property in the hands of the receiptor to go to the trustee, there could be no recovery against him by the officer in a suit upon the receipt.

COVENANT, upon a receipt given for attached property; brought to the City Court of the city of Hartford, and tried on an issue closed to the court. Facts found and judgment rendered for the defendant, and motion in error by the plaintiff. The facts are fully stated in the opinion.

M. R. West and *M. E. Merrill*, for the plaintiff.

W. Hamersley, for the defendant.

GRANGER, J. The facts of this case are substantially as follows: On the 24th of July, 1875, a writ was issued in favor of Chauncey B. Boardman, of Hartford, against James Tehan, directed to the sheriff of Hartford County, his deputy, or either constable of the town of Hartford, with directions to attach to the value of seven hundred dollars the property of the defendant. The writ was placed in the hands of the plaintiff as deputy sheriff, who served the same, and on the 24th of July, 1875, pursuant to the instructions of the attorney of Boardman, the plaintiff in serving the writ of attachment took into his custody two horses and one hack, the property of Tehan, of the value of seven hundred dollars, and removed them from his premises. Tehan then, in order to obtain possession of the property, offered to procure a receiptor for it. The plaintiff assented, and the following

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receipt was drawn by the officer, and executed by Tehan and the present defendant:

"Received of Edward Von Wettberg, deputy of the sheriff of the county of Hartford, state of Connecticut, seven hundred dollars, lawful money of the United States. All which is this day attached as the property of James Tehan, at the suit of Chauncey B. Boardman, of the town of Hartford and said county, against James Tehan, of said town of Hartford, as per writ demanding seven hundred dollars damages and costs of suit, and returnable to the August term of the City Court for the city of Hartford, on the first Monday of August, 1875. Which said property we hereby jointly and severally acknowledge to be the proper estate of said defendant, and to be of the value of seven hundred dollars. And we further jointly and severally agree to keep the same at our own risk and expense, and to redeliver the same to the said Wettberg, deputy sheriff, or to his order, on demand, and on failure thereof to pay the said Wettberg, deputy sheriff, for said property at the above valuation, and such other costs and damages as he may sustain thereby. Dated at Hartford, this 24th day of July, 1875.

JAMES TEHAN, (L. S.)
JAMES CARSON, (L. S.)'

Upon the execution and delivery of this receipt to the plaintiff, he delivered up the property taken by him to Tehan.

On the 28th day of August, 1875, Tehan and one Thompson C. Stroud, who was a partner of Tehan, made an assignment of their property for the benefit of all their creditors in proportion to their respective claims, in accordance with the insolvent laws of this state. The assignment was filed in the probate court on the 30th of August, 1875. A trustee was afterwards appointed, and the settlement of the estate proceeded with. Judgment was obtained in the suit in the City Court and execution was issued, and on the 30th day of August, 1875, soon after the assignment was filed in the probate court, demand was made on Tehan, and on the present defendant Carson, for the amount named in the execution, being $674.07 debt, and $16.54 costs, and both Carson and

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Tehan refused to pay the same. And on the same day demand was made on them both for the amount of money named in the receipt, and both refused to pay the same. Neither Carson nor Tehan, nor Tehan and Stroud, ever received any money from Von Wettberg, at the time of signing the receipt or at any other time, and "no lawful money of the United States" was attached or taken by the officer on the original process. The officer returned on the writ that he had attached as the property of the defendant seven hundred dollars lawful money of the United States.

On the 6th of September, 1875, Tehan and Stroud made separate assignments of their respective estates, for the benefit of their creditors, which were filed in the probate court on the same day, but no further proceedings were had on these assignments. Tehan did not by virtue of his assignment convey to his trustee any money, nor did any money pass to him. Nor did Tehan and Stroud, by virtue of their assignment, convey any money to the trustee of their respective estates, nor was any money paid over to the trustee, by them as copartners, or by either of them separately. Carson has never paid any money, since giving the receipt, to the plaintiff in this suit, or to Boardman, the plaintiff in the original suit, or to the partnership of Tehan and Stroud, or to them individually, nor to the assignee of the estate of Tehan and Stroud. The court below rendered judgment for the defendant, and the case comes before this court on a motion in error.

The main question in the case is—whether the assignment of Tehan and Stroud, under the statute relating to insolvent debtors, discharged the lien created by Boardman's attachment, and as a legal consequence released the defendant, Carson, from his liability to the plaintiff on the receipt. The language of the assignment is, "that we, James Tehan and Thompson C. Stroud, partners under the name of James Tehan, do hereby give, grant, sell, convey, transfer and assign to E. Henry Hyde, Jr., trustee, &c., all *our* real and personal estate, debts, demands, claims and choses in action of every kind whatsoever, and wheresoever the same may be situated,

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except what property is by law exempt from execution." We think there can be no doubt that it was the intention of the parties to this instrument to convey, not only the copartnership property, but their individual property also. This intention is manifest from the language used—"all our real and personal estate, &c., of every kind whatsoever, and wheresoever the same may be situated." In the case of *Coggill* v. *Botsford*, 29 Conn., 445, the language used in the deed of assignment was, "all their property real and personal," and Judge SANFORD says that the words are certainly broad enough to include the separate property of each of the partners, as well as the common property of both of them. The language of the present deed is much broader and more explicit than in the case cited, and we entertain no doubt that the assignment of Tehan and Stroud conveyed all their copartnership and individual property.

And this being so, we are equally clear that the attachment of Boardman was thereby dissolved, and that he had no claim against the officer, and the officer none against the defendant. It is provided by statute (Gen. Statutes, p. 283, sec. 25,) that "the commencement of proceedings in insolvency shall dissolve all attachments, and all levies of executions not completed, made within sixty days next preceding, on the property of the insolvent debtor." The case finds that the assignment was filed in the probate court on the 30th of August, 1875. The attachment was made on the 24th of July, 1875, and the case comes clearly within the above provision. Again, it is provided in the 27th section of the same statute that "receipts and bonds substituted for attachments and executions on the property of a debtor, and property belonging to him attached or levied upon by execution within sixty days before proceedings in insolvency are commenced against him, shall be delivered to the trustee of the estate in insolvency, who shall have the same rights to recover such property in the name of the officer attaching the same as such officer might have. In *Bishop* v. *Fowler*, 35 Conn., 6, Judge HINMAN says, "The receipt represents the property of the insolvent, which presumptively is in the hands of the receiptors.

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If that property had been delivered up when demanded, it would have belonged to the trustee, for the benefit of all the creditors of the insolvent estate, and the avails of it when recovered of the receiptors are but a substitute for the property itself, and should belong to the same trustee." So in this case, if the property represented by the receipt had been delivered up when demanded, it would have belonged to the trustee for the benefit of all the creditors, and to allow the plaintiff to recover for the benefit of Boardman, "would in effect make him a privileged creditor over the other creditors of the assigned estate. This is directly contrary to the policy of the insolvent law." HINMAN, J., in the case above cited. But in this case no money or other property was in fact attached, belonging to Tehan or Stroud or both, except what went back into Tehan's hands. The receipt was purely fictitious, so far as the money attached was concerned, till the property of Tehan and Stroud went into the hands of their trustee. And their creditors have suffered no loss. We think it would be unjust to allow the plaintiff to recover on this receipt for the benefit of Boardman, as well as clearly against the statutes referred to.

Many other questions have been made in the case, but the views above expressed render a discussion of them unimportant.

There is no error in the judgment of the court below.

In this opinion the other judges concurred.

AMELIA CAMP *vs.* STEVENS ROGERS.

The statute (Gen. Statutes, p. 234, sec. 21,) provides that the driver of any vehicle, meeting another on the public highway, who shall neglect to turn to the right, and thereby drive against the vehicle so met and injure its owner, or any person in it, or the property of any person, shall pay to the party injured treble damages; and that "the owner of the vehicle so driven shall, if the driver is unable to do so, pay such damages, to be recovered by writ of

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scire facias." Held that, by the word "owner" in the last clause, the person in control of the vehicle, either mediately or immediately, was intended, and not necessarily the actual owner.

Any other construction would make the owner of a vehicle liable for the acts of a person in possession of it, over whom he had no control and to whom he did not stand in the relation of master or principal.

An act that thus arbitrarily and without reason makes one person liable for the acts of another is void, either as against natural justice or as violating that article of the constitution which forbids the taking away of any person's property without due process of law.

It is to be presumed that the legislature in enacting a law intended to make one that should be reasonable and just, and where a law admits of a construction that will make it so, it is the duty of a court to uphold it by giving it such a construction, where under a literal construction it would have to be held void.

SCIRE FACIAS, brought to the Court of Common Pleas of Hartford County, under the statute (Gen. Statutes, tit. 16, part 1, chap. 7, sec. 21,) which provides that "every driver of any vehicle who shall, by neglecting to conform to the preceding section, [requiring him to turn to the right on meeting any other vehicle upon the public highway,] drive against another vehicle and injure its owner or any person in it or the property of any person, * * * shall pay to the party injured treble damages and costs; and shall, if the injury be done designedly, forfeit to the state not more than one hundred dollars. And the owner of such vehicle shall, if the driver is unable to do so, pay the damages provided in this and the preceding section, to be recovered by a writ of scire facias." The case was tried to the court on the general issue, and the following facts found.

On the 20th day of September, 1875, the defendant, Rogers, was the keeper of a livery stable in Hartford, and on that day let a horse and carriage to T. S. Dart for a few hours for pleasure driving, for the use of which Dart was to pay a reasonable compensation. Dart was not in the employ or the agent of Rogers, but hired the horse and carriage in the usual way.

While Dart was driving the team upon Washington street in the city of Hartford, and going in a southerly direction, he met the plaintiff's son, who was driving a horse and wagon of the plaintiff, and going in an opposite direction. By the

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carelessness of Dart, who was driving upon the wrong side of the street, one of the shafts of the carriage in which Dart was riding was forced about two inches into the breast of the horse driven by the son of the plaintiff, in consequence of which the horse of the plaintiff died.

The plaintiff brought suit, alleging the foregoing facts, against Dart, before the Court of Common Pleas for Hartford County, founded upon the above statute, and recovered judgment for $300 damages and $77.34 costs. Rogers was a witness on the trial. Execution was issued against Dart and returned unsatisfied, he having no property to respond to the judgment. The present suit is brought against Rogers, under the provisions of the above statute.

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

C. H. Briscoe and *G. M. Spencer*, for the plaintiff.

1. The act under which this suit is brought was passed originally in 1797, and the provision that the owner shall, if the driver be unable, pay the damages, occupied an entire section. Stat. 1797, pages 473 and 474, sections 1, 2, 3, 4. This section was converted into a single sentence in 1821, and the language has been since often altered. Revision of 1821, p. 438; of 1849, p. 289; of 1866, p. 321. The intention of the legislature is very clear from the language of the statutes.

2. The act is not unconstitutional. The legislature says in effect, to the owners of vehicles, that if they put them into the hands of irresponsible persons to use, they shall be liable for their negligence or carelessness in such use. This is but a slight step beyond holding a person liable for the negligence of a servant in driving, or for other acts in his employ. *Kimball* v. *Cushman*, 103 Mass., 194; *McCahill* v. *Kipp*, 2 E. D. Smith, 413; 1 Swift Dig., 67. Or where a city is held liable when a person is pushed off from an unguarded place by a crowd. *Alger* v. *City of Lowell*, 3 Allen, 402. Or holding a town liable for acts of third persons. *Davis* v. *Leominster*, 1 Allen, 182; *City of Chicago* v. *Robbins*, 2

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Black, 423. Or holding owners of vessels liable for injuries caused by the negligence of any one on board. *Yates* v. *Brown*, 8 Pick., 27. The statutes are full of instances where the legislature has exercised the power of restraining owners in the use of their property without question. Such are the laws relative to dogs; to rams going at large; to impounding cattle; and to the sale of intoxicating liquors, and many others.

S. F. Jones, for the defendant.

1. If this statute is to be construed literally, and the owner of any vehicle thus driven against the vehicle of another is to be held liable merely because he is owner and without reference to any relation of master and servant or principal and agent between the owner and the person driving, then we contend that the statute *is void*, as being against clear principles of natural justice, and against the constitution of the state, art. 1, sec. 8, which provides that the property of no person shall be taken from him "without due process of law." *People* v. *Morris*, 13 Wend., 328; *Ham* v. *McClaws*, 1 Bay, 93; Cooley's Const. Lim., 175, 355, 358. The law might just as reasonably have provided that every *maker* of a carriage should forever be liable for the damage done by any irresponsible person owning or driving it. It would be just as valid a statute if it had provided that the owner of a horsewhip should always be liable for any damage done with it by any irresponsible person. The absurdity of such a statute can only be equalled by the absurdity of the claim that it does not violate the most obvious principles of natural justice.

2. Where a statute upon one construction violates constitutional principles and upon another can be made consistent with them, the courts will be astute in giving it such a construction as will save it from invalidity. This is a rule of constant application in courts. *Dow* v. *Harris*, 4 N. Hamp., 17; Cooley's Const. Lim., 184; *Woodruff* v. *Neal*, 28 Conn., 165; *Hubbard* v. *Callahan*, 42 id., 524.

3. The statute will admit of such a construction as will not invalidate it. The word *driver* would seem to be intended

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to apply, not to any person who happened to be driving, (who might be the owner himself,) but to a person driving as a *servant*—the word *driver* being correlative to the word *owner* in the rest of the statute—the one intending the servant, the other the master. The word *owner* may properly and naturally be taken to mean, not the technical owner, but any person having a special property in the vehicle—as a borrower. Such a special property makes one an owner in a certain sense. This meaning of the word is the more probable, as it is used in the same section, with regard to the vehicle injured, where the statute says: "shall drive against another vehicle and injure its *owner*." Suppose this had been all, and a borrower were riding in the carriage and were injured, would it not be held that he was *pro hac vice* the owner, and so entitled to damages?

4. If, however, the court has still any doubts about the completeness of our defence, then we finally put ourselves upon the narrower construction of the statute to which we feel sure the court will resort before holding us liable. 1st. The statute says: "shall drive against another *vehicle*." The driver did not drive against the plaintiff's *vehicle*, but only against her *horse*. It is not enough to say that a vehicle implies a horse drawing it. This statute is in abrogation of clear common law rights, and is to be construed *strictly*. It might just as well be said that the statute means, by "owner of the vehicle," the owner of the *wagon and horse* that is being driven. If it is to be so construed this will be an important change, because one man may own the horse and another the vehicle, and in that case the owner of the vehicle, now bound to pay the whole, would have a right of contribution against the owner of the horse. The word "vehicle," being twice used in the same section, must be taken to have the same meaning in both cases.—2d. The statute says: "shall drive against another vehicle and injure its owner or any person in it, or the property of any person." Here there is no mention of the *horse* as being injured—unless it is covered by the words "or the property of any person." But this evidently means *any property in the vehicle*. The language is

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to be observed—"shall injure *its owner*, or *any person in it*, or *any property*"—meaning any property *in it*. That is, shall injure *any person or any property in the vehicle*. This is very clear if we look at other parts of the same section. The next following clause is: "shall drive against any vehicle traveling the same course and shall injure any person, or the horses or other property of any person." Here the same language is used, yet it clearly does not embrace the horse or horses, as they are specially mentioned. Besides, as the word "horses" is used in this clause, why was it not used in the other, if the horses were intended? Its use here shows that the draftsman had it in mind, and that he designedly omitted it in the clause under discussion.

LOOMIS, J. If the construction which the plaintiff contends should be given to the statute upon which her right to recover must depend, then there can be no case in which the owner of a vehicle would not be liable, not only for the actual damage caused by a violation of the statute on the part of any person driving it, but for the threefold and punitive damages given by the statute against the driver. If the owner of a vehicle should leave it, with his horse attached to it, at a post by the side of the street, and in his absence a thief or trespasser should take it, and by reckless driving damage a horse or carriage that he happened to meet, the owner would be liable. So if one lends his vehicle to a friend, and he again lends it to a stranger, the owner would be liable, not only for any damage done by the stranger in driving it, but even by the servant of the stranger. Indeed we should have this strange anomaly—that if my neighbor borrows my carriage and is riding in it with his servant and the latter wilfully neglects to turn to the right and injures a team that he meets, while my neighbor would not be liable as master, because the act of his servant was willful, I should yet be liable as owner, and that too with no right to indemnity from the master. Such a result is in itself so absurd as to show, either that the statute ought not to be so construed as to produce it, or that, if this be a correct construction, it is so far void,

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either as manifestly against natural justice, or as violating that article of the constitution which forbids the taking away of any person's property "without due process of law." If such a law, so construed, were to be held valid, then a law that should by a merely arbitrary rule make one man liable for the debts of another would be valid. Indeed there is no limit that could be put to the most arbitrary acts of the legislature in making one man liable for the acts of another.

As to the meaning of the expression "due process of law," as used in many of the constitutions of the states of the Union, Cooley, in his Constitutional Limitations, p. 355, says: "We have met in no judicial decision a statement that embodies more tersely and accurately the correct view of the principle we are considering, than the following from an opinion of Mr. Justice Johnson of the Supreme Court of the United States: 'The good sense of mankind has at length settled down to this—that these words were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'" Again, he says, (p. 358,) speaking of the cases where courts of equity order the property of one man to become vested in another: "In these cases the courts proceed in accordance with 'the law of the land,' and the right of one man is divested by way of enforcing a higher and better right in another." Again he says (p. 175): "The bills of rights in the American constitutions forbid that parties shall be deprived of property except by the law of the land; but if the prohibition had been omitted, a legislative enactment to pass one man's property over to another would nevertheless be void." In *People* v. *Morris*, 13 Wend., 328, it is said that "vested rights of the citizen are sacred and inviolable against the plenitude of power in the legislative department." In *Ham* v. *McClaws*, 1 Bay, (So. Car.,) 93, it is laid down that "statutes passed against the plain and obvious principles of common right and common reason are null and void, so far as calculated to operate against those principles;" and in *Morrison* v. *Barksdale*, Harper, 101, that "if absurd consequences, or those mani-

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festly against common reason, arise collaterally out of a statute, it is pro tanto void." And see *Welch* v. *Wadsworth*, 30 Conn., 150.

If upon the construction we have been considering the law in question would be void, or even of doubtful validity, it is our duty to find, if we are able, some other construction that will relieve it of this difficulty. If a law can be upheld by a reasonable construction, it ought to be done, and it is to be presumed that the legislature in passing it intended to enact a reasonable and just law, rather than an unreasonable and unjust one.

We think the statute intended by the word "owner," not the literal and technical owner, but the person in possession and control, either mediately or immediately, of the vehicle. Any person hiring a carriage is, for the time for which he takes it, in a certain sense its owner. He has a special property in it and could maintain trespass for it—and while his right to it continues, trover. This meaning of the word "owner" is the more probable as it is used in that sense in another place in the same section, where the statute says, "shall drive against another vehicle and injure its *owner*," evidently meaning an owner that is riding in it.

There is a reason for the passing of the statute in this view of the meaning of the word. In the absence of such a statutory provision the master would not be liable for an injury done by his servant in driving, where it was done intentionally and maliciously. The statute wipes out this distinction and makes the master liable for even the intentional and malicious act of his servant in the particulars mentioned in it, in every case where the servant is irresponsible. There may be a good reason for this, as the master employs the servant and so in some measure is responsible for his character; besides which he has a remedy against him and can indemnify himself from his wages. And the subjecting of the owner to a liability for the threefold damages recovered of the driver can be justified, or indeed accounted for, only by supposing the master to be intended.

It is a rule of very frequent application that courts will be

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astute in giving a construction to a statute that shall save it from invalidity. Cooley, in his Constitutional Limitations, page 184, says:—"The duty of the court to uphold a statute when the conflict between it and the constitution is not clear, may require it in some cases, where the meaning of the constitution is not in doubt, to lean in favor of such a construction of the statute as might not at first view seem most obvious and natural. The court, if possible, must give the statute such a construction as will enable it to have effect." In *Dow* v. *Harris*, 4 N. Hamp., 17, the court say it is their duty "so to construe every act of the legislature as to make it consistent, if possible, with the provisions of the constitution, without stopping to inquire what construction might be warranted by the natural import of the language used." Plowden says that "in some cases the letter of an act of Parliament, in order to effectuate its object, is restrained, in others it is enlarged, and in others still the construction is contrary to the letter." And see remarks of the court in *Clark* v. *Hoskins*, 6 Conn., 109, *Sage* v. *Hawley*, 16 Conn., 113, and *Bishop* v. *Vose*, 27 Conn., 9.

Under the construction which we give to the statute the defendant is not liable by virtue of his mere ownership of the vehicle. And as it is found that Dart had hired the horse and carriage in the usual way, the defendant being a livery stable keeper and making a business of letting teams, and that there was no relation of master and servant between them, we think the defendant can not be held liable on any ground, and advise the Court of Common Pleas to render judgment in his favor.

In this opinion the other judges concurred.

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WILLIAM H. SEYMOUR AND WIFE *vs.* THE CONTINENTAL LIFE INSURANCE COMPANY.

A promissory note was made in 1872, with interest payable semi-annually at the rate of eight per cent. per annum, which was then legal. The note was given for a loan made by a corporation, and was intended to run for several years. In 1875 an act was passed limiting the rate of interest for money loaned to seven per cent. Held that eight per cent. continued to be the legal rate of interest upon the note, after that act was passed, and until the note was paid.

The note was given by a husband and wife and secured by a mortgage of her land. The husband at the same time signed a paper agreeing to an increase of interest so long as any interest remained unpaid and to a foreclosure if it remained unpaid sixty days after due. Held that this paper was admissible for the purpose of showing that a permanent loan was intended.

The statute, (Gen. Statutes, p. 343, sec. 2,) which provides that any promissory note payable on demand, which remains unpaid four months from its date, shall be considered overdue and dishonored, does not affect the rights of the original parties to the note, but only those of third parties, as endorsers, guarantors or purchasers.

DEBT, for the recovery of usurious interest claimed to have been received of the plaintiffs by the defendants; brought to the Superior Court in Hartford County, and tried to the court on the general issue before *Granger, J.* The court found the following facts:—

The following note was executed, at the time it bears date, by the plaintiffs, who were then, and are still, husband and wife.

"$12,000. "HARTFORD, Sept. 21st, 1872.

"On demand we promise to pay to the order of the Continental Life Insurance Company, twelve thousand dollars, with interest at the rate of eight per cent. per annum, payable semi-annually at the office of said company, value received.

WILLIAM H. SEYMOUR,
ELIZABETH P. SEYMOUR."

This note was at the time it was given secured by a mortgage executed by the makers, of a farm in West Hartford, belonging to the wife. At the same time, and as a part of the same transaction, the following paper was signed by the husband alone, and delivered, with the mortgage, to the defendants.

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"HARTFORD, Sept. 21st, 1872.

"Having made a loan this day of The Continental Life Ins. Co., of twelve thousand dollars, and interest at eight per cent. payable semi-annually, this is to certify that I agree to pay said interest promptly when due; if not paid within ten days of time due I will pay two per cent. extra on whole amount of loan until said interest is paid, and will submit to a foreclosure if in any event the interest should not be paid within sixty days of the time it is due.

WILLIAM H. SEYMOUR."

It was admitted that the note, with the interest thereon at the rate of eight per cent. per annum, according to the tenor of the note, was fully paid by the plaintiffs and the mortgage security released; and that the principal of the note and a large part of the interest was paid from the avails realized from a re-mortgage of the same premises to a third party; and that during the last year before the suit was brought, interest at the rate of eight per cent. was paid to and received by the defendants, and that demand for the amount of the interest so paid and received was made on the defendants before the suit was brought.

To the admission of the stipulation signed by William H. Seymour, and which was offered in evidence by the defendants, the plaintiffs objected, on the ground that if admissible against him, it was not admissible against his wife, and in no way could bind her, or affect her interest; and that it was not admissible against either to show when the note matured, as that was settled by positive law, its reference to the note being only by way of description, and no more evidence of the intent of the parties than the note itself. The court held that the stipulation was admissible against the husband only.

Upon these facts the plaintiffs claimed that as the note was a negotiable promissory note, payable on demand, under the laws of the state, it became by statute overdue and dishonored four months after its date, and that after that time the defendants could only legally recover for forbearance on the principal sum, "interest by way of damages, at the legal rate of seven per cent. per annum;" and that the defendants,

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having received for forbearance more than at that rate, forfeited the whole amount so received for forbearance, to any person suing therefor within one year thereafter; and that therefore the plaintiffs were entitled to recover the amount claimed in their bill of particulars. But the court did not so decide, but overruled the claims of the plaintiffs and rendered judgment for the defendants to recover their costs.

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

The statutes affecting the case are given in the briefs of the counsel.

R. S. Welles, for the plaintiffs.

First. The note in this case was made September 21st, 1872, and is to be construed according to the law existing at that time. *Van Hoffman* v. *City of Quincy*, 4 Wall., 535, 550, 553; *Walker* v. *Whitehead*, 16 id., 314, 317. There was a statute then existing, applicable to this note, providing when it should mature, and the rate of interest it should draw after its maturity.

1. When did it mature? Being a negotiable promissory note on demand, by the statute of 1865 it became "overdue and dishonored" four months after its date. Gen. Stat. of 1866, p. 600, sec. 2; Gen. Stat. of 1875, p. 343, sec. 2. The words "*overdue and dishonored*" have a technical meaning well settled. A note is *due* "when the time for payment of it has arrived;" *overdue* when that time has passed, and *dishonored* if then unpaid. It has been held that under this statute such a note, though expressed to be with interest, and intended to lie as a continuing security, becomes due four months from its date, without allowing days of grace. *Rhodes* v. *Seymour*, 36 Conn., 1, 6. This note matured, therefore, January 21st, 1873. The payee had a right to terminate its life before that time by making demand, and the maker by tendering payment. The statute did not affect the rights of the parties till the limitation had expired. The words "on demand" are equivalent to the words of the statute "four months from date," with the option to either party to termi-

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nate the contract before that time. That such was the understanding of the defendants is evident from the stipulation, in which it is provided that if the interest be not paid "promptly when due," "two per cent. extra should be paid on the whole amount of the loan," which shows that the whole interest after the first half yearly payment was considered as flexible in amount, subject to be raised by way of penalty, and not fixed by the contract in the note; also by the stipulation to "submit to a foreclosure" on non-payment of interest for sixty days, proving that they considered that the principal would be past due or overdue *without demand*, when the first half yearly payment should become due.

2. What rate of interest was collectible by the defendants after the maturity of the note? By the act of 1872 it was provided "that no greater rate of interest than six per centum per annum shall be recovered in any action except when the agreement to pay such greater rate of interest is in writing." The agreement in the note to pay eight per cent. should not be construed to extend beyond its maturity, especially in face of the stipulation, where the interest after maturity is treated as a penalty, not covered by the contract and liable to be raised on a contingency. *Fisher* v. *Bidwell*, 27 Conn., 363; *Brewster* v. *Wakefield*, 22 How., 118; *Ludwick* v. *Huntzinger*, 5 Watts & Serg., 51. The only other construction is that the parties intended that the note should draw eight per cent. interest till fully paid, without reference to its maturity, or to a demand, or to legal enactments that might be passed making that rate illegal. But this would conflict with the terms of the note, ("on demand,") and of the stipulation. The court will not presume such an intent, and much less sanction it. *Parmelee* v. *Lawrence*, 48 Ill., 331, 342. There is no clear, positive and unequivocal agreement to pay eight per cent. after the maturity of the note. The expression "with interest at the rate of eight per cent. per annum," should be construed to specify the rate at which the interest should be calculated up to maturity, while the expression "payable semi-annually" should be construed to refer not to the eight per cent., not to the *rate* or *amount* of interest, but simply to designate *how*

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often after maturity the interest by way of damages or penalty should be paid. There was a contingency as to what the amount would be, which proves that the agreement in the note did not control it. In the case of *Hubbard* v. *Callahan*, 42 Conn., 538, there was a clear and absolute agreement for interest "after maturity." Here there is no such agreement, and consequently under the statute of 1872 the note drew only six per cent. interest after maturity. *Suffield Eccl. So.* v. *Loomis*, 42 Conn., 570. On July 1st, 1873, the legislature passed an act providing that "no person or incorporated institution in this state, upon any contract for the loan of money, shall take, directly or indirectly, more than the value of seven dollars for the forbearance of one hundred dollars for one year." This act applied to this note unless there was a contract for interest after maturity. On July 11th, 1873, the legislature passed another act, providing that in all suits thereafter brought for the recovery of moneys loaned, "no greater rate of interest than seven per cent. per annum shall be recovered or allowed for the time after the money loaned becomes due." As this money loaned had become due before July 11th, 1873, these statutes, after their passage, controlled the interest on this loan, unless the contract rate so clearly extended after maturity as to be entitled to invoke the protection of the constitution of the United States. *Barlow* v. *Gregory*, 31 Conn., 261, 265. "A contract should be clearly proved before it invokes the protection of the constitution." *Concord* v. *Portsmouth Savings Bank*, 2 Otto, 625, 630. This prohibition continued till the revision of 1875, when interest at seven per cent., and no more, was allowed in all cases, "including actions to recover money loaned at a greater rate, as damages for the detention of money after it becomes payable." Gen. Stat., p. 351, sec. 2; *Bullock* v. *Boyd*, Hoff. Cha., 294, 300; *Savings Bank* v. *Bates*, 8 Conn., 505. The interest that we seek to recover in this action was all received after this revision took effect, and was within the prohibition of the statute.

Second. The court finds that the note and stipulation were parts of the same transaction. The stipulation is admissible

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as against the defendants who offered it; but not as against Mrs. Seymour, who did not sign it. A joint note of husband and wife cannot be altered adversely to the interests of the wife, by any subsequent act of the husband. That this paper was subsequent appears by the words "having made a loan." The mortgage describes the note only. Even if admissible against him, the wife furnishes the money and the security, and is the meritorious cause of action, and can recover independently of her husband. Gen. Stat., p. 417, sec. 12; *Haman* v. *New Britain Nat. Bank*, 42 Conn., 141.

H. B. Freeman, for the defendants.

1. Although by its terms the note was payable *on demand*, yet it was not intended to be a *four months' note*, or to be paid *at once*, as the payment of interest *semi-annually* clearly shows. It was a contract technically known as a "permanent loan." The court in the case of *Hubbard* v. *Callahan*, 42 Conn., 528, says of these contracts: "With the exception of loans made by regular banks of discount, it is quite common for the parties to specify an earlier day than is really intended for payment. The immense sums of money loaned by the savings banks, insurance companies, and the school fund of the state, are all evidenced by notes, bonds, or other instruments on demand, or on very short time, and yet these are called permanent loans." It is immaterial, therefore, when the note, by its terms, became legally due. *Gray* v. *Briscoe*, 6 Bush, 690. The parties are to be regarded as having contracted for the payment of interest *after the maturity of the note, until payment.* The note and stipulation clearly show that the rate of interest was fixed with reference, not to the *time of maturity*, but *of payment.* The interest was payable semi-annually. And the stipulation expressly provides that "if interest is not paid within ten days of the time due," two per cent. extra is to be paid "on the whole amount of the loan until said interest is paid;" also that a foreclosure will be submitted to "if, in any event, the interest should not be paid within sixty days of the time it is due." The parties having thus contracted for the payment of interest, after maturity,

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until payment, the rate of interest must be regulated by the statute in force at the time of the contract. The act of July 2d, 1872, provided that "when there is no agreement for a different rate of interest," the same shall be six per cent., and that it shall be lawful "to contract for payment and receipt of any rate of interest." The lawful rate of interest was the *rate agreed upon between the parties*, which, in this case, was eight per cent. Was this contract for interest after the maturity of the note, "a contract for payment and receipt of *any rate of interest* within the meaning of the statute?" It has been so expressly held by this court. "There is nothing," say the court, in *Hubbard* v. *Callahan*, 42 Conn., 527, "in the nature of the transaction, nor in the customary mode of loaning money, that makes it unreasonable or unjust to allow parties to contract for a rate of interest after maturity, as well as before, but rather the contrary is true." See also *Brannon* v. *Hursell*, 112 Mass., 63, 71.

2. The stipulation signed by the husband is claimed by the plaintiffs not to be admissible to show when the note matured, "as that was settled by positive law." The finding of the court, that "at the time the loan was made and the note executed, the stipulation was executed, and *as a part of the same transaction*," must be conclusive as to its admissibility. If the *note* was admissible as against William H. Seymour, the *stipulation* was also, as *together* they constituted the contract between the parties.

CARPENTER, J. In *Hubbard* v. *Callahan*, 42 Conn., 524, a note was made payable in one year after date, with interest after due at the rate of fifteen per cent. per annum. The contract when made was legal; when the note fell due the law forbade the taking of a greater rate of interest than seven per cent. This court held that the plaintiff was entitled to recover fifteen per cent. interest after due.

In *Suffield Eccl. Society* v. *Loomis*, 42 Conn., 570, the note was payable in three years after date, with no contract for interest after maturity. The contract rate of interest was above the legal rate after the note fell due. This court held

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that the plaintiff could recover, after maturity, only the statutory rate of interest.

In both these cases the court enforced the contract according to the intention of the parties. In the present case the contract of the parties, as understood and intended by them, if legal, will be sustained.

The note now under consideration was on demand, and was outstanding several years. The rate of interest expressed in the note was eight per cent, which was a legal rate at the time the note was given. Before the principal was paid the law forbade the taking of more than seven per cent. The plaintiffs having paid eight per cent, bring this action to recover the penalty for taking usurious interest.

They claim that the note was due by force of the statute at the expiration of four months, and that after that time the defendants could legally take but seven per cent. The statute is as follows: "Any negotiable promissory note payable on demand, which remains unpaid four months from its date, shall be considered as overdue and dishonored after that time." Gen. Statutes, page 343, sec. 2. This statute was not designed to change the real contract between the parties. Its object was to make certain that which before was indefinite and uncertain, and it relates to the rights and liabilities of third parties who may become interested in such notes as indorsers, guarantors or purchasers. In respect to them such notes are not ordinarily dishonored until the expiration of four months. After that time they are dishonored. Their rights and liabilities materially depend upon that fact, while the rights and liabilities of the immediate parties to the note are unaffected by it. Hence the statute may well affect the former and not the latter. The payee may sue and collect, and the maker may pay, the note at any time within four months as well as after. A third party purchasing the note at any time within four months takes it free from equities; after that time he takes it subject to them. The payee or holder, in order to retain the security of an indorser or guarantor, must take certain steps at the end of four months. The payee, as between himself and the maker, holds it at all times subject

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to equities, and the liability of the maker is the same whether dishonored or not, and irrespective of demand and notice or suit at maturity.

It is manifest that the parties intended this transaction as a loan to continue for a term of years. The contract between William H. Seymour and the defendants, which the court found was a part of the transaction, tends to show this, and was admissible for that purpose. The rate of interest as fixed by the note was expected and intended by the parties to be paid so long as the loan should continue. That being a legal rate when the note was made, it continued such until it was paid.

This interpretation gives effect to the intention of the parties and does the plaintiffs no injustice. If they regarded the rate of interest as exorbitant they might at any time have terminated the contract by paying the principal. So long as they paid interest they paid it pursuant to their contract, and now have no cause of complaint.

There is no error in the judgment of the Superior Court.

In this opinion the other judges concurred.

EDWARD E. WARREN AND ANOTHER *vs.* JASON H. CLEMENCE AND FANNY CLEMENCE, HIS WIFE.

An action of assumpsit was brought against a husband and wife, and judgment rendered against the husband and in favor of the wife. Held that, under a proper construction of the acts of 1848, 1873 and 1875, (Gen. Statutes, pp. 417, 444, and Session Laws of 1875, p. 31,) the wife was not entitled to costs.

ASSUMPSIT, brought to the Court of Common Pleas of Hartford County, and reserved for the advice of this court. The case is fully stated in the opinion.

S. P. Newell, for the plaintiffs.

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G. A. Gowdy, for the defendant Fanny Clemence.

PARDEE, J. The plaintiffs brought an action of assumpsit against the defendants returnable to the Court of Common Pleas for Hartford County, at the January term, 1876. It came by continuances to the September term, 1876, when it was tried to the court upon the general issue with notice of the coverture of the defendant Fanny. The court found that Jason H. Clemence was indebted to the plaintiffs and rendered judgment accordingly, and found that they had no cause of action against the wife, and reserves for our advice the question as to whether she is entitled to have costs taxed in her favor.

The statute, section 12, chapter 13, title 19, to be found on page 444 of the revision of 1875, first enacted in 1848, is in the following words: "In all actions against two or more defendants, if the plaintiff shall fail to sustain a good cause of action against any defendant, he shall not for that reason be prevented from recovering judgment against the other defendant or defendants; and the defendant or defendants against whom no recovery is obtained shall be entitled to costs." This provision is of general application, saving a plaintiff who has mistakenly joined two or more persons as defendants from a non-suit, and subjecting him to costs for his error.

The statute, section 12, chapter 5, title 19, on page 417 of the revision of 1875, is in the following words: "In any civil action by or against a married woman her husband may be joined with her, as a co-plaintiff or co-defendant as the case may be; and when so joined, if a cause of action is found to exist in favor of or against one of them only, a judgment or decree shall be rendered accordingly; and in such cases no costs shall be taxed for such husband or wife in favor of whom no cause of action is found, nor against such husband or wife against whom no cause of action is found." This last section when first enacted (Session Laws of 1873, page 159,) was in the following words: "The husband and wife may be joined in all actions at law or in equity as parties plaintiff or defendant, and if upon trial a cause of action is found in

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favor of either of the plaintiffs or against either of the defendants, a judgment or decree shall be rendered accordingly, and in such cases no costs shall be taxed for such husband or wife in favor of whom no cause of action is found, or against such husband or wife against whom no cause of action is found;" and it stood as the second section of an act entitled "An Act in addition to an Act concerning the Domestic Relations," the first section of which advanced the law concerning married women and made them liable on their own contracts, and permitted suits to be instituted against them alone or jointly with their husbands, and permitted the wife to sue alone or jointly with her husband for all debts which should accrue to her. The second section saves a suit from failure where the husband and wife are improperly joined either as plaintiffs or defendants, but forbids costs to either of them for an error in joining them in the latter capacity. Doubtless the meaning of the expression, "and in such cases no costs shall be taxed for such husband or wife in favor of whom no cause of action is found," is that they may be joined as defendants, and if a cause of action is found against one only, the plaintiff shall have judgment against that one; but the other, in whose favor it is found that the plaintiff had no cause of action against him or her, shall have no costs. It is not to be supposed that the legislature deemed it necessary to provide here that a plaintiff, husband or wife, who could not establish any claim against a defendant, should not recover costs from him.

Previous legislation had worked a partial dissolution of the legal unity of husband and wife, and a partial change in the common law as to the cases in which the husband should sue or be sued alone, and as to those in which the wife might or might not be joined. In exceptional matters she had been authorized to do acts, and had been made subject to obligations, as if she were sole, so that it had become exceedingly difficult to determine in advance whether in enforcing a particular claim they should join, and equally difficult to determine whether they could properly be made co-defendants. The legislature therefore provided a measure of relief by saying that a mistake in either case should not be followed by a bill of costs. It is a clear manifestation of legislative intent to

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except this joinder of husband and wife from the operation of the general law of 1848, which in terms had saved a plaintiff from a nonsuit for misjoinder of defendants, preserving for any defendant against whom the plaintiff failed to prove a claim, his costs. It is an instance of a special provision for a class of litigants, which the legislature had the power to make; it is an exception to the general rule; each statute has an independent field for operation. Recognizing this, the legislature when establishing the revision of 1875 allowed both the general and the excepting statutes to stand.

In 1875 another act was passed which is to be found in the Session Laws of 1875, page 31, and is in the following words: "That section 12, chapter 13, title 19, of the Revised Statutes be amended, by striking out the present section and substituting the following: 'In all suits where a cause of action shall be sustained in favor of or against only a part of the parties thereto, judgment may be rendered in favor of or against such parties only, but any defendant against whom no recovery shall be obtained shall be entitled to costs; and additional parties may be made plaintiffs by amendment and additional defendants may be cited to appear therein, upon such notice and such payment of costs by the plaintiffs as the court before which such action is pending may prescribe;'" thus saving a plaintiff who has mistakenly joined two or more defendants, and two or more plaintiffs mistakenly joining, from a nonsuit, at the price of a bill of costs, and making provision for a simple method for citing in additional parties. When this act was passed the act of 1848 and the act of 1873 both stood on the statute book and both were within reach of the act of 1875. The legislature perceived this, and still recognizing the propriety of the special provision touching husband and wife in 1873, carefully protected that act from any change by a particular limitation of the effect of the act of 1875 to the act of 1848, describing the latter by section, chapter and title. This is equivalent to a declaration that the act of 1873 shall stand.

We think that the wife is not entitled to costs.

In this opinion the other judges concurred.

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CHARLES E. MITCHELL AND ANOTHER *vs.* JOHN P. STANLEY AND ANOTHER.

Where land is sold with a covenant against incumbrances, and an incumbrance exists of a permanent character, which impairs the value of the premises, and can not be removed as a matter of right by the purchaser, the damages will be measured by the diminished value of the premises.

The defendants conveyed to the plaintiffs, with a covenant against incumbrances, a tract of land on which there was the following incumbrance: a company owning a canal on which the land abutted, had, by a deed of a former owner, the right to pass and repass upon the land along the canal within two rods of the canal bank, for the purpose of cleaning and repairing the canal, upon paying the owner reasonable damage. In an action for a breach of the covenant, it was found that the actual damage from the exercise of the right to the time of suit was $10, but that the land was worth $750 less by reason of the incumbrance. Held that the plaintiffs were entitled to recover $750.

COVENANT, for breach of a covenant against incumbrances, brought to the Superior Court in Hartford County. The following facts were found by a committee:—

On the 4th day of October, 1872, the plaintiffs purchased of the defendants an undivided two-thirds part of a tract of land in the borough of New Britain and paid them the sum of $5,000 in cash, the defendants executing and delivering to the plaintiffs a warranty deed of the two-thirds, clear of incumbrance, and with the usual covenants of warranty and seizin. The plaintiffs, upon delivery of the deed, went into possession, having about the same time acquired title to the remaining one-third part of the tract.

At the time of the sale the defendants were the owners of the two-thirds of the tract, but it was incumbered as hereinafter related. This fact was not disclosed to the plaintiffs, and they then and for a long time afterwards were entirely ignorant of any incumbrance upon the land.

On the 9th of July, 1835, William B. North was the owner in fee, and was then in possession, of the whole of this tract of land, and also of another lying east of and adjoining it, separated from it only by a canal used in conveying water to certain manufactories in New Britain; and on that day for valuable consideration he conveyed by his warranty deed, clear of incumbrances, the tract lying on the east side of the

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canal to Seth J. North, John Stanley, and Henry Stanley, who then were the owners of the canal, and did also in the same deed convey to them an interest in the tract now owned by the plaintiffs in the following words:—"Also the right to pass and repass on the land of said William B. North, within two rods of the west bank of the abovementioned canal, for the purpose of repairing and cleaning said canal, upon paying to the said William B. North all reasonable damages."

All the title of the defendants to the two-thirds part of the tract sold by them to the plaintiffs was derived from William B. North.

At the time the plaintiffs brought this suit the incumbrance still existed upon the whole of the tract, though the right had been exercised but a few times between the time of the delivery of the deed to them and the date of their writ. The damage from such exercise of the right to the plaintiffs is $10.

The price paid by the plaintiffs for the two-thirds part was at its full value at the time of the purchase and delivery of the deed to them, if unincumbered; and the two-thirds part at that time was in fact worth $750 less than it would have been worth if it had been free from the incumbrance.

The report of the committee having been accepted, the plaintiffs requested the court (*Sanford, J.*,) to render judgment in their favor for $750 with interest, and claimed that they were entitled to that sum as damages upon the facts found. But the court overruled this claim of the plaintiffs and rendered judgment in their favor for $10 and interest as damages. The plaintiffs thereupon moved for a new trial for error in this ruling of the court.

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

The sole question in this case is, what is the rule of damages in an action upon the covenant against incumbrances, where the easement, the existence of which constitutes the breach, extends to the whole land, is not extinguishable of right, is permanent in its nature, and is in the actual exercise of the owner of the dominant estate?

It is clear from the mere statement of the question that the

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rule of damages applicable to mortgages and other incumbrances *extinguishable of right*, and the rule of damages applicable to leases and rights of dower and other incumbrances which, though not extinguishable of right, are *presently about to expire by their own limitation*, is neither of them adapted to the case under consideration, and equally clear, upon general principles, that where the easement is permanent and not extinguishable of right and is in actual use by the dominant owner, the actual injury sustained by the actual impairment in value of the premises for which full value was paid, is the just and reasonable rule of damages. The covenant is against the *existence* of incumbrances and not against the *exercise* of incumbrances. The rule of damages should on general principles be appropriate to the terms of the contract and the nature of the breach.

The correct rule is laid down by Washburn in his work on Real Property as follows: "If the incumbrance be of a permanent character, such as a right of way, or other easement which impairs the value of the premises, and cannot be removed by the purchaser as a matter of right, the damages will be measured by the diminished value of the premises thereby occasioned, to be determined by a jury." 3 Washb. R. Prop., book 3, ch. 5, § 5, art. 39. To the same effect are *Wetherbee* v. *Bennett*, 2 Allen, 428; *Woodbury* v. *Luddy*, 14 id., 6; *Harlow* v. *Thomas*, 15 Pick., 69; *Norton* v. *Hubbard*, 10 Conn., 435; Sedgwick on Dam., 199; Rawle on Covenants for Title, 291.

Upon an examination of the authorities it seems that the following classification of incumbrances with reference to the rule of damages, is substantially correct. 1. Incumbrances extinguishable of right, (such as mortgages,) where the breach is technical, and the damage nominal, unless both become substantial by the discharge of the incumbrance before the trial by the covenantee in the exercise of his right. 2. Incumbrances not extinguishable of right, (such as passways or rights of dower,) where both breach and damage are substantial or otherwise, irrespective of the question whether or not the covenantee has been so fortunate as to extinguish

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the same. Which last class is further divisible into two subclasses as follows: (*a.*) Easements not extinguishable of right, *but presently about to terminate by their own limitations*, where the rule seeks to obtain the "annual value of the easement," or "the fair rental value of the land to the expiration of the term," but where the market value of the land is usually regarded as too remote and general for such cases. Rawle on Covenants for Title, 293; *Porter* v. *Bradley*, 7 R. Isl., 542; *Batchelder* v. *Sturgis*, 3 Cush., 205; *Christy* v. *Ogle*, 33 Ill., 295; *Mills* v. *Catlin*, 22 Verm., 106. (*b.*) Incumbrances not extinguishable as matter of right, and *permanent in their nature*, where the rule is the difference in value between the estate if unincumbered, and the same estate with the burden upon it. (See cases and authorities cited above.) Much more should this rule apply where, as here, it is expressly found that the plaintiffs paid the full unincumbered value of the land.

The same result seems to flow from the nature of an easement, which is defined to be "every right to or interest in the land which may subsist in third persons, *to the diminution of the value of the land*, but consistent with the passing of the fee by the conveyance." 2 Greenl. Ev., § 242; *Mitchell* v. *Warner*, 5 Conn., 508.

L. E. Stanton and *J. H. Pease*, contra.

1. A covenant against incumbrances is a covenant of indemnity only. The covenantee can recover only nominal damages for the breach of such covenant, unless he can show some actual damage. 3 Washb. R. Prop., book 3, ch. 5, § 5, art. 39; *Gilbert* v. *Bulkley*, 5 Conn., 262; *Hubbard* v. *Norton*, 10 id., 422; 1 Swift Dig., 674; *Andrews* v. *Davison*, 17 N. Hamp., 413; Sedgw. on Dam., 152. If therefore the covenantee has paid anything for the removal of the incumbrance, he can recover the amount fairly paid to accomplish such removal, and if nothing has been paid, only nominal damages. *Prescott* v. *Trueman*, 4 Mass., 627; *Chapel* v. *Bull*, 17 id., 213; *Harlow* v. *Thomas*, 15 Pick., 66; *Richardson* v. *Dorr*, 6 Verm., 21; *Pillsbury* v. *Mitchell*, 5 Wis., 17; Sedgw. on

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Dam., 178. Upon a careful examination of all the cases on this subject, it will be observed that the courts aim to reimburse the covenantee for the actual damage he has suffered, but no more, so that in the case at bar it is the duty of the court to determine the actual damage suffered by the plaintiffs and reimburse them therefor; but in so doing the court must be equally careful not to give more than the actual damage by them suffered. Sedgw. on Dam., 38, 152; *Greene* v. *Tallman*, 20 N. York, 191.

2. No facts are found to warrant a judgment for more than $10. The damage resulting to the covenantees from the exercise of this easement between the time of purchase and the date of the writ, is found to be ten dollars, and the record finds no other actual damage. It does not appear that the land had been purchased for any specific purpose, or that that purpose had been defeated and thereby loss occasioned to the plaintiffs. It is only found that the land at the time of purchase was in fact worth $750 less than it would have been had it been unincumbered. In *Prescott* v. *Trueman*, and *Harlow* v. *Thomas*, cited above, and in *Batchelder* v. *Sturgis*, 3 Cush., 205, we find that if the incumbrance is of a permanent nature, such as the covenantee cannot remove, he could "recover a just compensation for the real injury resulting from its continuance." But no facts appear upon this record upon which to base a claim of damage for the continuance of the incumbrance. There is nothing in the record to show that the covenantees have suffered any damage by its continuance except $10. "Compensation for the real injury resulting from the continuance of the easement," is not "the difference between the value of the land at the time of purchase, with and without the incumbrance," for years may have elapsed, there may have been a great diminution in the value of the land, or the cause for which the easement was created may have passed away and rendered the same useless and of no value. *Greene* v. *Creighton*, 7 R. Isl., 1; *Porter* v. *Bradley*, id., 538; *Copeland* v. *Copeland*, 30 Maine, 446. Upon referring to the record we find at the close of the descriptive portion of the deed in which the easement is created, these

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words, "upon paying to said William B. North all reasonable damages," which of itself shows such a limitation upon the right of way as to make it of little value. The case cited by the plaintiffs of *Wetherbee* v. *Bennett*, 2 Allen, 428, differs in the facts from the present case. There the $500 was found by the jury to be actual damage.

GRANGER, J. This case comes here on a motion for a new trial by the plaintiffs, and the only question raised by the motion is—whether the plaintiffs were entitled to recover the sum of $750, instead of $10 and interest.

We think the plaintiffs are entitled to recover the larger sum. The case finds that they paid full value for the land, and that by reason of the incumbrance the land was worth $750 less than it would have been without it. They therefore have sustained a loss of $750, and the defendants are bound by their covenant to make good this loss, it being the actual damage the plaintiffs have sustained by reason of the breach of the covenant. It is laid down as law in many of the cases cited in the defendants' brief, that the plaintiff in cases of this sort is entitled to recover actual damage, and the defendants insist that the $10 is the only actual damage that the plaintiffs have sustained. It is true that this is the only direct damage they have received from the exercise of the right of way. But is this the only actual damage? We think not. The incumbrance is permanent and perpetual and the estate of the plaintiffs forever burdened with this servitude, which they have no power, as a matter of right, to remove, and which diminishes the value of their land to the amount of $750. The true rule of damage we think is well stated in 3 Washburn on Real Property, (Vol. 2, 2d ed., 730,) as follows:—"If the incumbrance be of a permanent character, such as a right of way, or other easement which impairs the value of the premises, and cannot be removed by the purchaser as a matter of right, the damages will be measured by the diminished value of the premises thereby occasioned." This rule is sustained by cases cited in the plaintiffs' brief. *Wetherbee* v. *Bennett*, 2 Allen, 428; *Woodbury* v. *Luddy*, 14

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Allen, 6; *Harlow* v. *Thomas*, 15 Pick., 69; Rawle on Covenants, 291; Sedgwick on Damages, 6th edition, 199; *Norton* v. *Hubbard*, 10 Conn., 435. We think that the above rule is clearly applicable to this case, and is decisive of it. There can be no doubt that $750 is the actual damage sustained by the plaintiffs, as much so as if there had been a breach of the covenant of seizin, and the quantity of land described in the deed had fallen short to the amount of $750. No one would question but that the defendants would be bound in that case to pay that amount. Again, if the incumbrance had been a mortgage and the plaintiffs had been obliged to pay $750 to remove it, there can be no doubt that this sum would be the measure of damage. We can see no difference in the result to a plaintiff, whether this loss is occasioned by failure of title to a portion of the land, or by his having to pay more money to remove a mortgage, or by his property being rendered less valuable by reason of the encumbrance.

For these reasons we think a new trial should be granted.

In this opinion the other judges concurred.

JOHN HARRISON AND OTHERS *vs.* THOMAS SIMONDS AND OTHERS.

An office is not vacant when there is a de facto incumbent.

Such incumbent must be ousted upon an information in the nature of a quo warranto, before the court will grant a mandamus to compel proceedings for filling the office.

And the court will not grant a mandamus where it appears that the object sought could have been secured without serious difficulty without the aid of the court.

APPLICATION for a mandamus; brought to the Superior Court, and reserved, upon facts found, for the advice of this court. The points of law decided will be sufficiently understood from the opinion, without a statement of the facts.

C. E. Perkins and *L. E. Stanton*, for the plaintiffs.

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J. Halsey and *C. J. Cole*, for the defendants.

CARPENTER, J. We are all satisfied that the writ prayed for ought not to issue. The principal controversy relates to the election of officers. The request is that a special meeting may be called to elect officers of the society, upon the assumption that the annual meeting held in March, 1876, was illegal. It is claimed that the warning for that meeting did not conform to the statute. Whether this is so or not we do not care now to decide.

It appears that this meeting was warned as all others have been warned for the last fifteen years, so that if this was illegal all others have been so. It is not the case therefore of officers, legally elected in the first instance, holding over through a failure to elect; for the election of these men when first elected carries with it the same suspicion or taint of illegality as attaches to the election of 1876. They are therefore officers *de jure* by virtue of a legal election in 1876, or officers *de facto* merely. It is agreed that the defendants are in fact acting as trustees of the society, and that no other persons are acting in that capacity or claim the right so to act. Indeed the plaintiffs assume as the foundation of their entire case that the defendants are *de facto* trustees. If they are such *de jure* then the offices are filled in every sense, and the election of other officers would be a nullity. The statute authorizes special meetings to fill vacancies. If there is no vacancy no special meeting can properly be held to elect officers.

If it be conceded that the defendants are not trustees *de jure*, the same reasons exist— with less force perhaps, yet on the whole satisfactory to us—why a special election should not be held. There is no vacancy. An office is not vacant when there is a *de facto* incumbent.

It is not the policy of the law to encourage proceedings which must inevitably result in producing two claimants, each with color of title, to the same office at the same time. There may be cases where the right to an office should be judicially determined, even though there be no contestant, and the

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incumbent, if found to be without title, ousted, that the constituency may have an opportunity to elect. It seems to us that in this case the title should have been first determined in a proper proceeding for that purpose.

It is virtually insisted that we should in this proceeding determine the question of title; that is, that we should hold that the annual meeting in March, 1876, was illegal for some or all the reasons assigned, and consequently hold that there is a vacancy, or create one by ousting the present incumbents. That under our practice will not be done. In *Duane* v. *McDonald*, 41 Conn., 517, we held that a writ of mandamus was not a proper proceeding to try the title to an office. The doctrine of that case is, as will clearly appear from the opinion and authorities cited, that the appropriate remedy is an information in the nature of a *quo warranto*. It is true in that case the plaintiff claimed that he was entitled to the office, and the proceeding was not only to oust the defendant, but to install the plaintiff. But that circumstance does not in principle distinguish that case from this. The title to an office is the substance of the issue in both cases. The decision in that case is sound in principle and abundantly sustained by the authorities cited, and we think it is decisive of this.

Another object for which the proposed meeting was to be called was "to act upon the admission of new members." We see no occasion for a mandamus to compel the trustees to call a special meeting for that purpose. When first requested they prepared a notice for a meeting in the usual form, and sent it to the pastor to be read in two public meetings according to the usual course. The pastor, upon consultation with some of the petitioners for the meeting, concluded that it was not a legal warning and declined to read it. Had they then prepared a notice satisfactory to themselves and requested the trustees to sign and publish it in a legal way, we see no reason to believe that they would have declined. That was an obvious, expeditious, and, so far as we can see, efficient remedy; and we think it should have been resorted to, under the circumstances, before applying for a writ of mandamus.

Other questions were involved in the case and discussed by counsel, but a decision of them is unnecessary.

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The Superior Court is advised to render judgment for the defendants.

In this opinion the other judges concurred.

EDWARD GOODMAN *vs.* MARY E. RANDALL.

A mortgage drawn for the purpose of securing to *A* a debt due him, was formally witnessed and acknowledged, but by accident was not signed by the mortgagor. In this form it was delivered to *A* and recorded. On the same day the mortgagor conveyed the premises to *B*, the deed containing the following clause: "Subject to a mortgage to *A* for $500, which the grantee assumes and agrees to pay as part consideration of this deed." On a bill in equity brought by *A* against *B* for a correction of the deed and for a foreclosure, it was held—

1. That equity could not furnish relief on the ground that the deed was defectively executed. Such relief could be furnished only by compelling a specific performance of the contract lying behind the deed, and a title thus conveyed or decreed would take effect only from the time of the decree, and would be only such title as the respondent might then have.
2. That specific performance could not now be compelled because the respondent was not the party who contracted to convey, and the party who contracted to convey had no longer any title.
3. That there was no estoppel in pais, as the respondent had done nothing by which the petitioner had been misled.
4. That there was no estoppel by deed, as a grantee is not estopped, by accepting a deed which describes the premises as subject to an incumbrance, from showing that the incumbrance has no existence in fact.
5. That the petitioner was not entitled to a decree of foreclosure, as he had no title legal or equitable, the deed being wholly void.

BILL IN EQUITY, for the reformation of a mortgage deed and for a foreclosure; brought to the Court of Common Pleas of Hartford County. The court found the following facts:

Upon the 19th day of February, 1874, Samuel Hubbard was the owner of the real estate described in the petition, and on that day gave to Eugene S. Allen a certain document purporting to be a mortgage of the real estate, to secure a note of $500, which document was duly witnessed, acknowledged and recorded, and was delivered to the mortgagee.

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Hubbard intended to execute the same, but by mistake it was never signed by him.

On the same day Hubbard by a warranty deed, with the usual covenants, conveyed the premises to John D. Parker by a deed of that date, duly executed, acknowledged and recorded, which deed contained the following clause: "Subject to a mortgage to E. S. Allen for the sum of five hundred dollars, which the grantee assumes and agrees to pay as part consideration of this deed; said mortgage is at seven per cent. per annum, payable semi-annually, payable at Hartford at the office of the holder of taxes."

On the 20th day of July, 1874, Parker conveyed the property to Josiah C. Merriam, by a valid deed containing a clause for the assumption of the mortgage by the grantee, like that in the deed of Hubbard to Parker.

On the 21st day of August, 1874, Merriam conveyed the property to the respondent, Mary E. Randall, by a valid deed of that date, containing a clause for the assumption of the mortgage by the grantee like that in the deed of Hubbard to Parker. The grantees received the deeds, and took possession of the land at the dates of their respective deeds, and the respondent still occupies the same.

Afterwards, on the 15th day of August, 1875, Hubbard executed and delivered to Allen another mortgage of the land to secure the same debt, which mortgage was in all respects like the first, except that it was signed.

On the 20th of July, 1875, Allen assigned to the petitioner for a valuable consideration the mortgage note of $500 and quit-claimed to him all his interest in the land. The note has never been paid.

Upon these facts the court (*McManus, J.*,) dismissed the bill, with costs. The petitioner thereupon brought the record before this court by a motion in error.

E. Goodman, for the plaintiff in error.

1. By our statute deeds of land shall be in writing, sealed by the grantor, subscribed with his own hand, witnessed by two witnesses, and acknowledged. But this statute ought not

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to have an absolutely literal construction. There is not one instance in a hundred where the grantor puts the seal on the deed himself, and it has never been decided that it was necessary that he should. Nor is it necessary that he should write his name against the seal on the mortgage. To sign an instrument it is not necessary that the name be written at the end of the instrument; it may be in any part of it. But subscribing means the same thing as signing. *James* v. *Patten*, 8 Barb., 344. The statute of frauds requires all agreements concerning lands to be in writing, signed by the party to be charged therewith. In cases of this kind the name of the party signed in any part of the agreement is sufficient. 1 Parsons on Cont., 28. If the grantor had signed with the wrong name, the deed would have been good. *Middleton* v. *Findla*, 25 Cal., 76. It is good if written by a third person in the grantor's presence. *Videau* v. *Griffin*, 21 Cal., 389; *Jansen* v. *McCahill*, 22 id., 563; *Gardner* v. *Gardner*, 5 Cush., 483; *Frost* v. *Deering*, 21 Maine, 156; *Rex* v. *Inhabitants of Longnor*, 4 Barn. & Adol., 647.

2. The deed of Hubbard to Parker shows that he accepted the mortgage made by him to Allen. Any contemporaneous writing showing that a party had adopted a sealed instrument as his own deed, is good. *Ingoldsby* v. *Juan*, 12 Cal., 564; *Frost* v. *Deering*, 21 Maine, 156. In this case the grantor afterwards did subscribe another deed which was a copy of the original one. This last deed is a full ratification of the former. It is the same as if he had originally signed that deed. *Saltoun* v. *Houstoun*, 1 Bing., 433; *Maclean* v. *Dunn*, 4 id., 722; *Sampson* v. *Easterby*, 9 Barn. & Cress., 505.

3. It is not the grantor that claims this mortgage is not good, but a party who holds a conveyance subject to it, and who has promised to pay the debt secured by it. The grantee of that land, and every one who holds under him, is estopped from making this claim. The deed that conveyed to them the interest of the property that they hold was a sealed instrument. This deed was accepted by the grantee. It is equivalent to an agreement with Hubbard to pay that debt and take the property with that incumbrance. 1 Parsons on Cont.,

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223; *Huff* v. *Nickerson*, 27 Maine, 206; *Wickham* v. *Hawker*, 7 Mees. & Wels., 63. It is just as if the deed had been conditioned that Parker might have this property if he would pay the debt of $500. *Webster* v. *Coon*, 31 Wis., 72; *Vermont Mining Co.* v. *Windham County Bank*, 44 Verm., 489; *Choteau's Exrs.* v. *Burlando*, 20 Misso., 482; *Bishop* v. *Schneider*, 46 id., 472; *Ryan* v. *Carr*, id., 483; *Townsend* v. *Ward*, 27 Conn., 610. Hubbard, if he now owned the equity of redemption in this land, would be estopped from claiming that he did not mortgage this to Allen, and so is every one who claims it under him. *Coe* v. *Talcott*, 5 Day, 88; *Preston* v. *Mann*, 25 Conn., 128.

4. This instrument was recorded in the records of the town where the land lies. This is notice to all the world of our title. It is an equitable title that is good to us under our statute. (Gen. Statutes, p. 554, sec. 13.) Besides, we prove here that Hubbard's grantee and every subsequent grantee had actual notice of our claim. They bought subject to that and agreed to pay our debt.

5. A court of equity can rectify the mortgage. *Smith* v. *Chapman*, 4 Conn., 344; *Watson* v. *Wells*, 5 id., 468; *Sumner* v. *Rhodes*, 14 id., 138. Equity will reform it, although it is without seal or signature. 1 Story Eq. Jur., § 174; *Wade* v. *Paget*, 1 Brown Cha. R., 363; *Wadsworth* v. *Wendell*, 5 Johns. Ch., 224.

C. E. Perkins, for the defendant in error.

The court below could not pass a decree to foreclose the first mortgage because there never was any such mortgage. As to the second one, it was given when the maker had no interest whatever in the land; and moreover, both that deed and the quit-claim from Allen to the petitioner were void, as given by persons ousted of possession. The bill cannot be sustained as a bill to reform the first deed. 1st. Because the necessary persons are not made parties to it. 2d. Because a court of equity, though it will amend or alter a deed, will not make one. 3d. Because these respondents never agreed to make one. *Dickinson* v. *Glenney*, 27 Conn., 111. The

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mere fact that in the deed to them it was stated that there was such a mortgage which they assumed, has no effect on them. It merely stated as a fact that which did not exist. The grantee was not bound by this statement. He had a right to show the actual fact.

CARPENTER, J. The petitioner, the owner by purchase of a note, which the maker attempted to secure by a mortgage of real estate, brings his petition for a foreclosure or relief in some other form. The deed seems to have been witnessed by two witnesses, and has appended to it a certificate of acknowledgment in the usual form, but was never signed by the grantor. In that condition it appears to have been delivered to the grantee and recorded. On the same day the premises, described as subject to this mortgage, were conveyed to a third party, the conveyance stipulating that the grantee should pay the mortgage debt. The deed to the respondent contains similar provisions. The court below dismissed the bill, and the petitioner brings the case before this court by a motion in error.

It is very clear that the petitioner in the present condition of the deed is not entitled to a decree of foreclosure. The deed conveyed no title, legal or equitable; therefore the mortgagee acquired no lien on the property, and there is no equity of redemption to foreclose. Our statute requires all conveyances to be "in writing, sealed by the grantor, and subscribed with his own hand, or with his mark with his name thereto annexed, or by his attorney, &c." The deed not having been signed by the grantor in any form, is not merely a defective conveyance, but is wholly void.

The fact that the person named therein as grantor acknowledged it to be his deed, is not sufficient. An acknowledgment is required, but a compliance in that respect can never dispense with the manual act of subscribing by the grantor.

It is claimed that the deed may be established by a court of equity and thus have validity as a mortgage. Courts of equity will sometimes give effect to deeds that are defectively executed; but not, so far as we know, to a deed defective

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because it was not signed by the grantor. The principle upon which a remedy is thus afforded is that there is a valid contract lying back of the deed which courts of equity will lay hold of and through it give relief. In *Dickinson* v. *Glenney*, 27 Conn., 112, STORRS, C. J., says: "We confess that it seems to us that this proceeding is not the reformation of a deficient instrument, but belongs rather to the branch of equity jurisprudence which relates to the specific performance of contracts; to the performance of contracts of which the defective instrument is the evidence or memorandum." If this is a correct statement of the principle, and we think it is, then it is obvious that no relief can be granted which will give effect to this instrument as a valid mortgage from the day of its date. The decree will operate prospectively only, and upon such title as the party may then have.

Now if it be conceded that the case is not within the statute of frauds, and that there is a valid contract which might be enforced, still there is a difficulty in decreeing a specific performance, inasmuch as the party contracting, and who, if any one, should be directed to perform it, is not before the court; and if he was, a specific performance is impossible, as he long since parted with all his title to other parties.

We are unable to see that the doctrine of estoppel will aid the petitioner. The original owner cannot be estopped by deed, because the instrument relied on as a deed was never signed. His grantees, including the respondent, cannot thereby be estopped, because they will be in no worse condition in that respect than their grantor. They cannot be estopped by the deeds given to and accepted by them. A grantee by accepting a deed which describes the premises as subject to an incumbrance, is not estopped from claiming that the incumbrance has no existence in fact. The respondent may or may not be liable in some other form of action upon a promise, express or implied, in her deed. However this may be, we are satisfied that the petitioner has no lien that can be enforced in this proceeding.

The doctrine of estoppel *in pais* has no application to the case. This respondent, so far as the record before us dis-

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closes, has done no act whereby the petitioner, or any one under whom she claims, has been deceived or misled.

There is no error in the judgment of the court below.

In this opinion the other judges concurred.

WILLIAM F. HART *vs.* OLIVER D. HART AND OTHERS.

A contract was signed by all the heirs of an intestate, by which they agreed that the estate should be settled in the probate court according to a draft of a will prepared by the intestate but never signed. One of the heirs who was weak-minded and ignorant of his rights, was unduly influenced by the others, in whom he reposed special confidence, to sign the agreement, and thereby relinquished a much larger interest than he received. Upon a bill in equity brought by him to the Superior Court to set aside the agreement and for an injunction against the proceedings in the court of probate under it, in which it was claimed by the respondents that the probate court alone had jurisdiction of the matter, it was held that the Superior Court had jurisdiction.

BILL IN EQUITY, to set aside a contract and for an injunction against certain proceedings in the settlement of an estate; brought to the Superior Court in Hartford County, and heard before *Sanford, J.* The court found the following facts:

The petitioner is a nephew and heir-at-law of Charles W. Hart, late of New Britain. In January, 1876, Charles W. Hart died, leaving two brothers, Oliver D. Hart and George A. Hart, and two sisters, Antoinette H. Booth, wife of George Booth, and Jane M. Nott, wife of Jonathan Nott, all of New Britain, which brothers and sisters and the petitioner, (who is a son of a deceased brother of the said Charles,) are his only heirs-at-law. Shortly before his decease a draft of a will was made under his direction, by which he distributed his estate among the heirs at law above named, giving to the petitioner the interest of one thousand dollars during his life. This will was never signed by him. At the time of his death he was the owner of real estate of the value of $3,000, and of personal estate of the value of $7,800, and was indebted

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in an amount not exceeding $100. The petitioner was entitled, as heir-at-law, to receive one-fifth of the estate, after the payment of debts and expenses of administration, as his distributive share.

After the decease of the said Charles the respondents prepared the following instrument, which was signed by Oliver D. Hart, George A. Hart, Antoinette H. Booth, Jane M. Nott, and the petitioner:

"To the Court of Probate, within and for the District of Berlin:

"We, heirs to the estate of Charles W. Hart, late of said New Britain, respectfully request this honorable court to appoint Oliver D. Hart administrator of said estate.

"And whereas we are informed and believe that a short time before his decease the said Charles W. Hart had a draft made of his last will, in which he made us and each of us legatees, but never executed the same; now, therefore, ~~decl~~ desiring in all things to conform to his wishes in the matter of disposing of his estate, we mutually agree, each with the other, that said draft of his last will shall have the same force and validity in the settlement of said estate and disposition of said property as if the same had been executed in accordance with all statutory requirements for the execution of wills, and that we will accept of the bequests therein contained, and made to us and each of us, in full satisfaction of our claims and interests, and the claims and interests of each of us, in and to said estate and property. And we further agree that said draft of said will shall be made a part of the files and records of said probate court, and proceeded with in the same way by it as if the same had been duly executed by the said Charles W. Hart, in accordance with the statute laws of the state of Connecticut. Dated at New Britain, this 8th day of February, A. D. 1876."

The petitioner, at the time he signed this document, was about twenty-one years of age, was ignorant of the contents of the unexecuted will, was of weak and feeble intellect and understanding, and easily influenced, and was, in fact, unduly influenced by the respondents, in whom he reposed special

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confidence and trust, to execute the agreement. The agreement was unconscionable and unjust, and the petitioner did not comprehend the terms thereof, and would not have signed it had it not been for the undue influence of the respondents.

Oliver D. Hart was appointed administrator of the estate by the probate court, and it was his intention and the intention of the other respondents to present the abovementioned agreement to the court of probate and have the estate settled in accordance with its provisions and not as an intestate estate, and the respondents refused, before the bringing of the petition, to cancel or surrender the agreement, though they were requested so to do.

Upon the argument the counsel for the respondents asked the court to dismiss the bill on the ground that the subject matter was within the sole jurisdiction of the court of probate, which, in the settlement of the estate, would be obliged necessarily to pass upon the validity of the instrument, and that a court of equity had no jurisdiction to pass upon matters which were so cognizable by the probate court, but that the proper remedy would be by appeal from any order of the probate court relating to the instrument; but the court refused so to hold or to dismiss the bill.

The court, upon the facts so found, passed a decree that the agreement be set aside, and enjoined the respondents from taking any steps to settle the estate on the basis of the agreement, (except so far as the appointment of Oliver D. Hart as administrator was concerned,) or treating the estate as other than intestate.

The respondents brought the record before this court by a motion in error, assigning as error the want of jurisdiction in the court.

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

In this state it has always been held that matters connected with the settlement of estates of deceased persons were within the sole jurisdiction of courts of probate, and courts of equity would not take cognizance of matters pertaining to the settlement of such estates, unless in cases where the difficulties in

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proceeding before the probate courts were insurmountable. *Sheldon* v. *Sheldon*, 2 Root, 512; *Bacon* v. *Fairman*, 6 Conn., 121; *Bailey* v. *Strong*, 8 id., 278; *Beach* v. *Norton*, 9 id., 182; *Gates* v. *Treat*, 17 id., 388; *Bissell* v. *Bissell*, 24 id., 241. The general principle is too well settled to be contested, and the next thing is to see whether the matter in controversy is one which properly comes under the cognizance of the probate court. It is tob clear for controversy that all matters pertaining to the distribution of estates, what method of distribution should be adopted, who are entitled to share, in what proportions and under what rules, is a matter for the court of probate. In several of the cases cited above the questions related to distribution, and were held not to be within the power of a court of equity for that reason. *Gates* v. *Treat*, 17 Conn., 388; *Bissell* v. *Bissell*, 24 id., 241. Nor can there be any question but that the court of probate has power to give redress to this petitioner if he has reason for it. In the cases already cited it is held that "courts of probate have all the powers of a court of chancery, and in some respects much greater powers in relation to the trials of questions within their jurisdiction." *Beach* v. *Norton*, 9 Conn., 198; *Mix's Appeal from Probate*, 35 id., 123. If the paper in question was filed in the court of probate, as is found was the intent of the respondents, and that court was asked to have the estate settled in accordance with it, it could doubtless have heard and decided the question whether it was valid or invalid for any reason set up in this bill. This being the case, it being a matter clearly within the control of the probate court, in relation to the method of distribution of the estate, what possible reason can be given why the Superior Court should interfere and prevent the question from ever coming before the probate court at all? No such power has ever been exercised in this state, nor, it is believed, anywhere else. *In re Broderick's Will*, 21 Wall., 503. What different rule is to be applied in such a case from that which is applied in case of a will? Suppose a bill alleges that the respondents have obtained a will by undue influence, or that a respondent has forged a paper which he intends to present as a will, no one

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would claim that the Superior Court could interfere and enjoin the presentation of the will to the probate court; but how does that case differ from this in principle? Suppose a formal distribution by the parties under the statute had been made, will any one claim that a court of equity could deprive the court of probate of the cognizance of it?

F. L. Hungerford, for the defendant in error.

GRANGER, J. The respondents bring this case before us on a motion in error, and the only question arising on the record is, whether the Superior Court had jurisdiction of the matters alleged in the bill.

The respondents claim that the courts of probate have sole jurisdiction of all matters pertaining to the settlement of estates, and that courts of equity will not take cognizance of matters connected with such settlements, unless in cases where the difficulties before the probate courts are insurmountable; and that the matters here in controversy come properly under the cognizance of the probate court, and that it has power to give redress to this petitioner if he has reason for it.

That the petitioner has a right to redress is not denied, and could not be under the facts in this case, for a more palpable wrong is rarely done than the one these respondents attempted to perpetrate, and so far as they were able did perpetrate, upon the petitioner. They endeavored to divest him of his legal rights in the estate of his uncle, and so far succeeded by taking advantage of his weakness of intellect, and by keeping him in ignorance of his rights, and by abusing his confidence in them as his near relatives, as to procure his signature to an agreement, by which he, in effect, relinquished to the respondents his share as heir-at-law, worth about two thousand dollars, for the sum of sixty dollars a year during his life.

Nothing could be more grossly inequitable, and a court of equity, unless restrained by the most rigid rule of law, ought to take jurisdiction, and lay its hand on such a transaction.

There is no question but that, in all ordinary matters relating to the settlement of estates, courts of probate have sole

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jurisdiction; but this is no ordinary matter. It is an application to the Superior Court to set aside an unconscionable contract and restrain the respondents from acting under it in any manner. The court of probate would have no power, if this contract was presented to it, to declare it void and set it aside. It might refuse to receive and act upon it in the settlement of the estate, but the contract would still be outstanding and in full force. Suppose the court of probate should refuse to receive the contract, and should decline to settle the estate according to the terms of the unexecuted will, but should proceed to settle it as intestate estate, and distribute to the petitioner his share, what is to prevent the administrator from refusing to pay over his share to the petitioner, and claiming that he has agreed to accept the interest of one thousand dollars during his life in full of his distributive portion? Or suppose the respondents should change their intention, and withhold the agreement from the court, and the estate should be settled and distributed as the statute provides, and the share of the petitioner should consist entirely of money, what is to prevent the administrator from refusing to pay it over, under the agreement? And the respondents, having by undue influence operated on the weak mind of the petitioner, and induced him to sign an agreement, unconscionable and unjust, it is not unreasonable to suppose that they might again persuade him to accept the interest of one thousand dollars during his life, in lieu of his just share in the estate. The court of probate would be powerless to prevent any such wrong, and a court of law could not restore the petitioner to the full rights which he would thereby lose. The petitioner is entitled to be protected from every operation of such a contract as this. No court but a court of equity can effectually and adequately do this. That court can declare the contract void, which it has done, and ought to have done, for no contract of this kind, obtained as this was, ought to be in the hands of the respondents as a contract having any force or validity.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

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GEORGE L. ROCKWELL *vs.* ROSWELL W. NEWTON.

The defendant agreed to pay the plaintiff, a real estate broker, $70 if he would find a person with whom he could exchange certain land owned by him for other land on satisfactory terms. The plaintiff found *A*, who offered to give the defendant for his land certain real estate of his own, which he stated to be encumbered to the amount of $3,000 and no more, and a certain sum in money. The defendant accepted the offer and the parties agreed to meet at the plaintiff's office at a later hour the same day and execute the deeds, which the defendant requested the plaintiff to prepare. The plaintiff prepared the deeds and *A* attended at the time agreed, but the defendant did not come, and never consummated the exchange. It appeared that, after the parties separated at the first meeting, the defendant discovered that there was a lien of $300 for unpaid taxes on *A's* land, but he did not inform *A* or give any reason for abandoning the exchange. *A* had failed to mention the tax lien by inadvertence, and was able and prepared to pay the taxes and remove it. In a suit brought by the plaintiff to recover the $70 for procuring a party to make the exchange, it was held that he could not recover.

The defendant, finding that *A* had misstated the amount of the incumbrance on his property, had a right to drop the negotiation at once, without further communication with him.

ASSUMPSIT, to recover brokerage; brought to the City Court of the city of Hartford, and tried to the court on the general issue before *Sumner, J.* The court found the following facts and made them a part of the record.

The defendant, some time in the spring of 1876, agreed with the plaintiff, who was a real estate broker living in the city of Hartford, that he would give him $70 if he would find some one with whom he could exchange certain real estate which he owned, upon terms which should be satisfactory to him. Through the agency of the plaintiff the defendant and one Norman Smith were brought together at the office of the plaintiff on the morning of May 4th, 1876. Smith was the owner of real estate on Capen street in Hartford, which he offered to exchange for the defendant's property on the following terms: Smith to convey to the defendant his property encumbered by a mortgage of $3,000, which he represented to be the extent of the encumbrances upon it, and to give his notes to the amount of $2,500, secured by mortgage upon the

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property he was to get from the defendant. The defendant accepted the proposition, and agreed to meet Smith at the plaintiff's office on the afternoon of the same day for the purpose of making the exchange, and the defendant instructed the plaintiff to have the deeds and papers necessary to consummate the bargain prepared accordingly.

The deeds and papers were so prepared by the plaintiff, and Smith was ready at the time and place named to execute the agreement on his part. The defendant however failed to appear, and from that time has wholly refused to execute his part of the agreement.

The defendant has never given, or offered to give, to the plaintiff, or to Smith, any reason for his failure to comply with the agreement. But the court finds that after making the agreement with Smith, and before the time of meeting him at the plaintiff's office on the afternoon of May 4th, the defendant found that taxes to the amount of $300 were due and unpaid upon Smith's real estate, which taxes were in addition to the encumbrance of $3,000, and a statutory lien upon his estate.

Smith inadvertently omitted to mention the arrears of taxes without intention to deceive or defraud the defendant.

The defendant never made complaint to the plaintiff or to Smith on account of the unpaid taxes, or assigned it as a reason to them, or either of them, for the non-fulfillment of his agreement. Neither the plaintiff nor Smith sought the defendant to ascertain why he neglected to meet them at the time agreed.

The court finds that Smith was ready, able, and willing, to pay the taxes at the time and place agreed upon to exchange the real estate, and would have paid them had the defendant requested him so to do. But he did not offer to pay the taxes, and did not pay them before the time for the meeting. The plaintiff himself was ignorant of the condition of Smith's encumbrances.

Upon these facts the court rendered judgment for the plaintiff to recover $70 and his costs. The defendant brought the record before this court by a motion in error.

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L. Sperry, for the plaintiff in error.

1. The contract in this case was for a specific service at an agreed price; it was therefore an entire contract, and the price did not become payable until the service was wholly rendered. *Coburn* v. *City of Hartford*, 38 Conn., 290. In other words, performance of the contract on the part of the plaintiff was a condition precedent to recovery. *Brown* v. *Fitch*, 33 N. Jer. Law R., 418. The court below does not find that the real estate in question has been exchanged through the plaintiff's agency, and consequently there can be no recovery.

2. But the plaintiff claims to have executed his part of the contract. It is found that through the agency of the plaintiff one Norman Smith and the defendant were brought together, and a time, place and terms agreed upon for an exchange of the property in question. Upon the strength of this fact the plaintiff claims to have "found some one with whom the defendant could exchange upon terms satisfactory to himself." That is to say, the arrangement between Smith and the defendant was a contract, and, as such, was conclusive evidence that the defendant was satisfied with the customer so produced, and that the agreement was equivalent to an exchange. But was there a contract between Smith and the defendant? Being a verbal agreement to exchange real estate, it was void within the statute of frauds. But was there any undertaking on the part of the defendant which could be considered as evidence of a willingness to exchange with Smith? It appears by the finding that the representations made by Smith to the defendant, and in consideration of which the agreement to exchange was entered into, were materially false. This was not known by the defendant at the time, but was subsequently discovered by him, and previous to the time appointed for the exchange. There having thus been a misunderstanding between the parties as to the terms of the contract, it follows that there could have been no meeting of their minds, and consequently no contract between them. "In order to constitute a contract it is necessary that the parties should assent to it, and, as is well

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expressed by Mr. Parsons, in his treatise on Contracts, page 399, 'they must assent to the same thing in the same sense.' The proposition of one party must be met by an acceptance of the other which corresponds with it, which cannot be the case when the proposition is misunderstood by the party to whom it is made." *Hartford & N. Haven R. R. Co.* v. *Jackson*, 24 Conn., 517. "It is an undeniable principle of the law of contracts that an offer of a bargain by one person to another imposes no obligation upon the former, until it is accepted by the latter *according to the terms in which the offer was made.* Any qualification of, or departure from, those terms invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of the parties, the negotiation is open, and imposes no obligation on either." *Eliason* v. *Henshaw*, 4 Wheat., 225, 228.

H. O'Flaherty, for the defendant in error.

1. The plaintiff was bound by his contract only to find a person with whom the defendant could make an exchange. He found such a person who was ready and willing to make the exchange and on terms satisfactory to the defendant.

2. The statement by Smith that his property was encumbered only to the amount of $3,000, was not made to deceive the defendant, nor was it a warranty that there was no other encumbrance, at that time, upon the property. It simply amounted to this: that when the exchange should be consummated, and a deed of the property given, the encumbrance should not exceed $3,000.

3. The defendant having instructed the plaintiff to have the deeds necessary to consummate the exchange ready, and having agreed upon the time and place to execute the deeds, should have been on hand to make the exchange, or to give a reason for his failure so to do. *Tiernan* v. *Roland*, 15 Penn. S. R., 429, 441. The discovery of the additional encumbrance of $300 was no excuse for his failure to keep the appointment. He should have appeared and requested Smith to pay the tax upon the land, and upon his refusing so to do,

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the defendant might then have refused to make the exchange. *Marsh* v. *Holly*, 42 Conn., 463. Smith was then able and willing, and would have paid the tax, and given the defendant a deed of the property with no encumbrance thereon except the mortgage of $3,000.

PARDEE, J. Upon the discovery of the fact that there was a lien upon the property in addition to the amount represented by Smith in the negotiation with the defendant, the latter had the right to determine for himself that the oral proposition made by Smith was not satisfactory. He was under no obligation to give him any notice, he being chargeable with knowledge that his taxes remained unpaid and constituted a lien upon his land. No duty rested upon the defendant to take the initiative in re-opening negotiations. Smith at no time made any proposition embracing the truth concerning the property, which the defendant would accept; the latter did not place himself in any position which required him to ask for or make a different one; he stood where he could reject the one made as soon as he knew what, in fact, its terms were. The error of Smith concerned the property in a most important particular. The defendant finding during the preliminary negotiations that this error had intervened, declined to continue them; he had no knowledge as to either the ability or willingness of Smith to discharge the lien; indeed the presumption might well be against both. Neither party having substituted anything in the place of the rejected proposition the whole matter ended.

Inasmuch as no exchange was in fact effected for the reason that the minds of the parties did not meet upon any common point, we think that the plaintiff has never performed the condition precedent upon which his right to recover brokerage rests.

There is error in the judgment below.

In this opinion the other judges concurred; except PARK, C. J., who did not sit.

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HENRY L. DOUGLASS *vs.* CHARLES H. SKINNER.

The plaintiff sold groceries from time to time to *M*. The defendant, a relative of *M*, was during this time allowed by him to receive his earnings and apply them to the support of *M's* family and the payment of his debts, and promised the plaintiff to pay his account with others as he collected such earnings, and did from time to time make payments to the plaintiff on his account. When the plaintiff stopt delivering goods to *M* the balance due him was over $300, and there was in the defendant's hands, of *M's* earnings, $164. Held that the plaintiff could not recover this sum of the defendant as money received to his use.

The fund being held by the defendant for the support of *M's* family and the payment of his debts generally, the plaintiff was not entitled to the whole of it, and if to a portion, it could not be determined in an action at law to what portion.

ASSUMPSIT for money received to the plaintiff's use; brought to the Court of Common Pleas of Hartford County and tried to the court on the general issue, before *McManus, J.* Facts found and judgment rendered for the plaintiff, and motion in error by the defendant. The case is fully stated in the opinion.

M. E. Merrill, for the plaintiff in error.

E. Goodman, for the defendant in error.

PARDEE, J. The plaintiff sold groceries to one Moore from November, 1872, to May, 1874. At the latter date his indebtedness to the plaintiff exceeded $300. During this time Moore had permitted the defendant, who is his brother-in-law, to receive the greater part of his earnings and expend the same for the benefit of Moore and his family, Moore receiving the remainder. Both the defendant and Moore, from time to time, paid to the plaintiff a part of the money thus received by each of them. The defendant repeatedly informed the plaintiff that he was drawing Moore's earnings and expending them in paying his lawful debts for his family and his business, and promised to pay the plaintiff so soon as he should collect such earnings; and he caused the plaintiff to believe that he would apply such part of Moore's wages as should come into

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his hands to the payment of the plaintiff and other creditors. When the plaintiff ceased to give credit to Moore the defendant had in his hands of Moore's earnings thus received $164.83.

The plaintiff brought this action of assumpsit, the declaration containing the common counts, to the Court of Common Pleas for Hartford County, which court rendered judgment that the plaintiff should recover the sum of $164.83 for money had and received for the use of the plaintiff. For the reversal of this judgment the defendant has filed his motion in error.

It is agreed that the defendant was not an original promisor; it is not claimed that he has ever undertaken to pay the debt from his own estate; but the plaintiff inferred from his acts and words that he would apply so much of the earnings as he should be allowed to receive, towards the support of Moore's family and the payment of all his debts. This constitutes no such pledge to the plaintiff as places him before all other creditors; no particular money was dedicated to his claim; there remained to the defendant full power to pay any other debt or debts; he is not confined even to debts due at the time he received the earnings or at the time of bringing this suit, for the continued support of the family was as much in his view as payment of past debts; he, to the plaintiff's knowledge, held the earnings upon the special trust imposed by Moore, that they should be managed for the benefit of the latter and his family according to the defendant's discretion, and what the latter said to the plaintiff is to be interpreted in the light of knowledge common to both. As the plaintiff was informed before he gave credit that other and future creditors without restriction as to time or amount would have an equal claim with himself upon the fund, as he cannot control the defendant in the exercise of his discretion as to the best manner of meeting the necessities of Moore's family, as the record is silent as to the existence or non-existence of other creditors, it is manifest that he has not laid any foundation for the support of this action at law. He fails to make it certain that he is entitled to the whole, and fails equally to furnish any rule for a division of the fund; and he must continue to fail thus, for each new credit given to Moore introduces a

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new factor into the calculation. Upon this record, as a matter of law, the bare fact that in May, 1874, the defendant had in his hands, of Moore's earnings, $164.83, furnishes no basis for a judgment in this action that he held it for the use of the plaintiff.

There is error in the judgment complained of.

In this opinion the other judges concurred.

ALANSON D. WATERS *vs.* SAMUEL HUBBARD AND ANOTHER.

H mortgaged several parcels of land to *A* to secure a note. *W* purchased a part of the lots of *H*, and by the deed agreed to assume and pay the mortgage debt, and mortgaged the lots so purchased by him to *A* to secure such payment. Held that a petition for a foreclosure brought by *A* against both *H* and *W*, praying for a foreclosure of both the mortgages, was not multifarious.

A accepted the mortgage of *W* only as additional security, and with no intention to discharge *H*. Held that, while by the assumption of the mortgage debt by *W*, *H* might become as between themselves a mere surety in respect to the debt, yet his relation to the mortgagee was not changed.

A part of the land mortgaged by *H* had been previously mortgaged by him to *M*, and had since been foreclosed by a decree against both *H* and *A*. After the expiration of the time for redemption *A* had purchased the land of *M*, under an agreement previously made that if no one redeemed he could have it on paying the mortgage debt and all expenses of the foreclosure. Held that *H* acquired by *A's* purchase of this land no right to redeem it with the other land mortgaged.

The decree required *W* to pay the entire mortgage debt within the time limited or be foreclosed as to the property mortgaged by him, and on his failure to make such payment required *H* to pay the debt or be foreclosed as to all the property. Held to be correct.

If the mode of applying the mortgaged property to the payment of the mortgage debt were, as in some of the states, by a sale and application of the proceeds, the decree should have required the land mortgaged by *W* to be first sold and its proceeds applied; but under our law the mortgagee is entitled to all the mortgaged property unless the debt is paid.

It seems that a decree of foreclosure requiring one respondent to pay a certain debt or be foreclosed, and another respondent, on his failure, to pay a part of the debt or be foreclosed, is valid.

BILL for a foreclosure; brought to the City Court of the city of Hartford, and heard before *Sumner, J.*

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The bill alleged that Samuel Hubbard on the 28th of January, 1875, mortgaged to the petitioner a certain piece of land in the city of Hartford, subject to a mortgage to one Montgomery, and eleven other pieces also in Hartford, free from encumbrance, to secure a note of $6,000; that Montgomery at the March term, 1875, of the Superior Court, obtained a decree of foreclosure of the mortgage to him, such foreclosure becoming absolute against Hubbard and the petitioner in July, 1875; that Hubbard on the 3d of April, 1875, mortgaged two of the eleven pieces to the petitioner by a second mortgage, to secure a note of $300; that on the 27th of August, 1875, Hubbard conveyed to Wyllys Wells six of the eleven lots, including the two covered by his second mortgage, the deed to Wells containing a provision that the grantee assumed and agreed to pay the entire mortgage debt of $6,300 due to the petitioner; that Wells, on the 13th of April, 1876, mortgaged all the six lots conveyed to him to the petitioner, to secure payment of the $6,300; that neither Hubbard nor Wells had paid the mortgage debt; and praying for a decree of foreclosure against them both.

The respondents filed a motion for the dismissal of the bill on the ground of multifariousness, which motion the court denied.

The court found the allegations of the bill to be true, and the following further facts:

All the lots embraced in the first mortgage of Hubbard to Waters, the petitioner, (except the piece mortgaged to Montgomery,) had been on the same day conveyed to Hubbard by Waters, and as a part of the transaction Waters executed and delivered to Hubbard the following instrument under his seal: "Whereas Samuel Hubbard has this day mortgaged to me certain lands lying in Hartford, for a particular description of which reference may be had to said mortgage deed, now I, Alanson D. Waters, in consideration thereof, hereby covenant and agree with the said Hubbard that, in case he should sell any part of the land at a fair price, I will release such part to him, or to the purchaser, upon his paying or assigning to me in part payment of my said debt the sum or sums that he shall receive for said sales. Hartford, Jan. 28, 1875."

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On the 3d of April, 1875, Hubbard made a second mortgage to Waters of two of the eleven lots, to secure a note of $300.

On the 15th of April, 1876, Wyllys Wells, at the request of Waters, mortgaged to him the six lots which had been conveyed by Hubbard to him, to secure the two notes of Hubbard which he had assumed. The defeasance of the mortgage was as follows: "The condition of this deed is such, that whereas the grantor is justly indebted to the grantee in the sum of six thousand three hundred dollars, as evidenced by two promissory notes made by Samuel Hubbard, payable to the said grantee or order, one being dated January 28, 1875, for six thousand dollars, payable one year from date, with the interest semi-annually, and the other dated April 3d, 1875, for three hundred dollars, payable on demand with interest semi-annually, I having assumed and agreed to pay said notes and the interest on them from September 1st, 1875; now therefore, if said notes shall be well and truly paid according to their tenor, and the interest thereon, and the interest on the interest as above since due, then this deed shall be void, otherwise in full force and effect."

Previous to the last Monday of June, 1875, the time that the foreclosure was to take effect against Hubbard in the case of the Montgomery mortgage, Hubbard made an agreement with Montgomery by which, if he should pay the amount found due on or before the Saturday next preceding the first Monday of July, 1875, it was to be accepted as if it had been paid on the last Monday of June. On the first Monday of July, 1875, Hubbard proposed to Montgomery that one Graves should take an assignment of the mortgage, and Graves offered to do so and pay Montgomery the amount of his claim, but Montgomery declined to make the arrangement. The time for redemption by Waters expired the first Monday of July, 1875. Before the last Monday of June, Waters and Montgomery made an agreement that if no one should redeem within the time limited by the decree, Montgomery would deed the land to Waters, upon his paying him the full amount of the mortgage debt and interest, and all costs and expenses incurred in

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the foreclosure. Neither Hubbard nor any one did redeem, and the title to the property became absolute in Montgomery.

Two days after Waters took from Montgomery a deed of the property, and now holds the title. The value of the property is no greater than the amount paid to Montgomery by Waters with the addition of interest and taxes. Waters told Hubbard, before he took the deed from Montgomery, that if he had it Hubbard might have the land by paying all the claims upon it, by which Waters meant all that he paid Montgomery, and the two notes, and interest on all, but Hubbard understood him to mean that he could have the Montgomery property by repaying what Waters paid for it. Hubbard has never offered to pay the notes to Waters.

Waters did not intend by any of the foregoing transactions to release Hubbard from payment of any part of the indebtedness, or to surrender any part of the security held by him for the same, and did not take the agreement of Wells to pay the notes in place of the obligation of Hubbard thereon, but as additional security for them.

Upon these facts the court passed a decree that if Wells should fail to pay to the petitioner the amount of the two notes, with interest and costs, on or before the first Monday of November, 1876, he should be foreclosed of all right to redeem the lands mortgaged by him to the petitioner; and that, he failing to redeem, if Hubbard should fail to pay the $6,000 note and interest and costs on or before the second Monday of November, 1876, he should be foreclosed of all right to redeem the lands mortgaged by him.

The respondent Hubbard brought the case before this court by a motion in error, assigning the following errors:

1. That the judgment ought to have been rendered in favor of both of the respondents for the insufficiency and multifariousness of the petition.

2. That the court ought to have decided that after the contract between Hubbard and Wells, by which Wells agreed to pay the debt to Waters, his relation to that debt was that of a surety, and that he was discharged from the payment of the same by the contract made between Wells and the petitioner.

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3. That the court ought to have decided that the debt for which the property was mortgaged, being as to Hubbard paid, he was entitled to redeem that part of the property which had been previously mortgaged to Montgomery, upon his paying the petitioner the amount of the debt due Montgomery, with the costs and interest.

4. That the court ought to have decided that the property mortgaged by Wells to the petitioner to secure the payment of the debt therein described, should be first appropriated to the payment of the debt, before taking for that purpose the property of the respondent Hubbard.

5. That the court passed a decree requiring Wells to pay one sum or be foreclosed, and requiring Hubbard to pay a different sum or be foreclosed.

E. Goodman and *R. Welles*, for the plaintiff in error.

1. The court below erred in not dismissing the petition on the ground of multifariousness. Story's Eq. Pl., § 271.

2. By the contract between Hubbard and Waters, made at the time the mortgage of six thousand dollars was given, when Hubbard sold any of the land mortgaged Waters was to receive the sum for which it was sold until his debt was paid. In pursuance of that agreement, Hubbard, when he sold to Wells, agreed with him to pay Waters so much of the sum he was to pay him as would pay his debt to Waters, and Waters took Wells's obligation and mortgage for the amount. By this contract between Hubbard and Wells it became the primary duty of Wells to pay the two notes that Hubbard had given Waters as they became due. If he did not, Hubbard, and no one but Hubbard, could sue Wells for the non-payment of those notes. *Mellen* v. *Whipple*, 1 Gray, 317; *Foster* v. *Atwater*, 42 Conn., 244. Wells being thus primarily liable to pay our debt to Waters, our relation to Waters was that of a surety for Wells. *Blyers* v. *Monholland*, 2 Sandf. Ch., 478; *Russell* v. *Pistor*, 3 Seld., 171; *Marsh* v. *Pike*, 10 Paige, 595; *Morris* v. *Oakford*, 9 Penn. S. R., 498; *Atwood* v. *Vincent*, 17 Conn., 575, 583; *Chapman* v. *Beardsley*, 31 id., 115. In the decree of the court, passed in this case, Wells was treated as the one primarily liable.

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3. The relation between Hubbard and Wells having thus become that of principal and surety, any alteration of the contract between Waters and Wells would discharge the surety. It makes no difference that the alteration might be beneficial to the surety. Burge on Suretyship, 216. The contract has been altered by Waters and Wells. By Wells's mortgage to Waters four of the lots were made liable to pay Hubbard's note for three hundred dollars that were not before that time liable. Waters has also taken Wells's obligation to him to pay the sum of six thousand three hundred dollars, not only with the interest, but with interest on the interest. Hubbard had delegated Wells to pay the debt, and when he, the person delegated, made this valid obligation to Waters, Hubbard was discharged. Burge on Suretyship, 167, 177. It is the acceptance of a new obligation which discharges the surety. *Simmons* v. *Guise*, 46 Geo., 473; *Dever* v. *Akin*, 40 Geo., 423. This is a novation; Waters takes a new creditor. *Heaton* v. *Auger*, 7 N. Hamp., 397; *Eylis* v. *Ellis*, 4 Bing., 112.

4. Hubbard being merely surety for Wells for the payment of the debt to Waters, and Waters having accepted a mortgage of property to secure the debt from Wells, he must first apply the property so mortgaged to him to the payment of that debt before he can take the property mortgaged to him by Hubbard. *Marsh* v. *Pike*, 10 Paige, 595; *Blyer* v. *Monholland*, 2 Sand. Ch., 478; *Halsey* v. *Reed*, 9 Paige, 446; *Russell* v. *Pistor*, 3 Seld., 171.

5. It is found that it was agreed between Montgomery and Hubbard that the time should be extended to pay the debt due Montgomery, and that Waters agreed to reconvey the land to him when his debt was paid. We claim therefore that the decree of the court should have included this Montgomery tract, and that Hubbard should have been allowed to redeem it with the rest, paying of course what Waters had been compelled to pay Montgomery with interest upon it. Waters's purchase of Montgomery was in equity a redemption and not a purchase.

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H. S. Barbour and *S. Barbour*, for the defendant in error.

1. The petition is not multifarious, or insufficient to sustain the decree. By the different conveyances the title to all the lots is so interlocked that the whole matter is a proper subject of one suit, and to bring several suits to effect the object sought by this bill would be vexatious and not allowable. 2 Swift Dig., 247; *Mix* v. *Hotchkiss*, 14 Conn., 31; *Cornwell* v. *Lee*, id., 524; Story's Eq. Pl., §§ 413, 530, 539; 4 Bouvier Inst., notes 4165, 4243; Adam's Equity, 614; *Oliver* v. *Piatt*, 3 How., 411; *Pettis* v. *Kellogg*, 7 Cush., 456; *Fuller* v. *Acker*, 1 Hill, 473.

2. Hubbard did not become surety nor was his liability to Waters changed or affected, and all the lots now held by him are liable for the $6,000 note. *Atwood* v. *Vincent*, 17 Conn., 582, 583; *Hammond* v. *Gilmore*, id., 487; *Bull* v. *Allen*, 19 id., 105; Story on Cont., § 481; Bouvier's Law Dict., "Surety" and "Novation."

3. Hubbard is not discharged from his liability on the notes by the agreement of January 28th, as nothing afterwards occurred between the parties to which the agreement can apply; nor does the mortgage of Wells to Waters have that effect, as it was not so intended. *Boswell* v. *Goodwin*, 31 Conn., 74; *Glazier* v. *Douglass*, 32 id., 400; Burge on Suretyship, 168, 174; *Tripp* v. *Vincent*, 3 Barb. Ch., 614; *Sent* v. *Morrill*, 25 Cal., 492.

4. As to the land mortgaged to Montgomery. That mortgage is foreclosed, and the interest of Waters is wholly by an independent purchase. Besides, the only request of the respondents by their answer was, that the value of the land above the debt of Montgomery be deducted from the petitioner's debt, and the court found that the value of the land does not exceed the Montgomery debt, including interest, costs and taxes.

5. As to the property mortgaged by Wells being first applied to pay the mortgage debt. It does not appear but that all the property mortgaged was needed for the payment of the notes. And besides, without a sale of the mortgaged property, which our practice does not allow, no such appropriation could have been decreed.

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6. The decree is right in requiring Wells to pay both notes, and Hubbard only one. If Hubbard were required to pay both notes to save the lots he now holds, when none of those lots are mortgaged to secure the $300 note, he might well complain. It is not unusual to decree the payment of different sums by different respondents. *Mix* v. *Hotchkiss*, 14 Conn., 31.

CARPENTER, J. This is a petition for a foreclosure. The petitioner holds three mortgages. The first is from the respondent Hubbard, and covers twelve lots of land, (including one subject to a prior mortgage, which was subsequently foreclosed, and from which the petitioner realized nothing,) to secure a note for six thousand dollars. The second is from Hubbard, and covers only two of the lots embraced in the first mortgage, and was given to secure a note for three hundred dollars. The third is from the respondent Wells, who purchased of Hubbard six of the lots described in the first mortgage, including the two described in the second mortgage, and assumed the payment of both the notes to the petitioner. This mortgage covers the lots so purchased by Wells, and was given to the petitioner to secure the payment of the two notes assumed by Wells as above stated. The decree forecloses Wells, in respect to the lots purchased and mortgaged by him, unless he pays within the time limited the full amount of both the notes. If he fails to redeem, Hubbard has an opportunity to redeem by paying the amount due on the large note, but he is not required to pay the small note. On a motion in error several objections are made to the validity of the decree.

The first is that the petition is multifarious. The rule on this subject is well stated by CHURCH, J., in *Mix* v. *Hotchkiss*, 14 Conn. R., 42, as follows:—"An objection to a bill in equity for multifariousness is well taken, when several plaintiffs by one bill demand several matters perfectly distinct and unconnected against one defendant; or when one plaintiff demands several distinct and unconnected matters against several defendants. But where one general right is claimed

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by the bill, though the defendants have separate and distinct interests, the bill is not multifarious."

In this case the petitioner has the legal title to all the land described in the mortgages, except the piece foreclosed by a prior mortgagee. The bill is brought to accomplish one object —the extinguishment of the equity of redemption. Both respondents are interested in that, and both are properly made parties. This objection ought not to prevail.

The second and third errors assigned are in substance the same—that by the contract between Hubbard and Wells, by which Wells assumed and agreed to pay the debt to the petitioner, Hubbard's relation to that debt became that of a surety, and that he was discharged from the payment of the same by the contract made between Wells and the petitioner, by which Wells gave, and the petitioner accepted, the third mortgage; and that the court ought to have so decided.

We think there was no error in this. Whatever may have been the relation which Hubbard and Wells sustained to each other as between themselves, as against the petitioner it is obvious that the relation of Hubbard to the mortgagee was not changed; he remained the principal debtor still. There was no novation; Hubbard's notes remained outstanding, and he alone was liable thereon in an action at law. The agreement of Wells to pay the same, and the mortgage given to secure performance, were accepted as additional security, with no intention to discharge Hubbard. On this point the finding is clear and conclusive.

In the fourth assignment of error it is objected that the court ought to have decided that, the mortgage debt being as to Hubbard paid, Hubbard was entitled to redeem that part of the property which was foreclosed by Montgomery, the prior mortgagee, upon paying the petitioner the amount paid by him, including costs and interest, to Montgomery.

This objection rests upon an assumption which is true neither in fact nor in law—that the mortgage debt as to Hubbard was paid. The taking of security from a third party, there being no substitution or novation, is not, in law, the payment of the debt. Nor is it easy to see upon what princi-

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ple Hubbard is entitled to redeem the land foreclosed by Montgomery. His equity of redemption was extinguished when the decree took effect. The subsequent purchase of that property by the petitioner was an independent transaction, in no way affecting Hubbard, and there was no contract by which he acquired a new right to redeem.

There was no error therefore in the ruling of the court that he was not entitled to redeem the Montgomery property.

The last claim that is made is, that the court ought to have decided that the property mortgaged by Wells to the petitioner to secure the payment of the debt therein described, should be first appropriated to the payment of the same, before taking for that purpose the other property of the respondent Hubbard.

The authorities cited in support of this claim are from the state of New York. In that state the process of collecting a mortgage debt is by a sale of the property and an appropriation of the proceeds to the payment of the debt. If that practice prevailed here it would be manifestly just and equitable that the Wells property should be first sold. But our practice is entirely different. Under that the petitioner is entitled to all the property mortgaged unless his debt is paid.

There is no error in the judgment of the court below.

In this opinion the other judges concurred.

CHARLES T. MARSTON AND OTHERS *vs.* EUGENE L. KENYON AND OTHERS.

GILES MANDEVILLE *vs.* THE SAME.

K purchased of one party a piece of land with a store upon it, and took of another party a lease for fifty years of a vacant lot next adjoining, both lots having a river frontage on one side and abutting on the same street on the other. *K* removed the division fence, constructed a wharf along the entire river front, erected coal sheds on the vacant lots, repaired the store and used a part of it for an office, and converted the whole into a yard for receiving and

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selling coal. Held that a lien for materials furnished and work done in building the sheds and repairing the store, under a single contract, covered both pieces of land as a single lien.

Where a lien for work and materials was filed and recorded as amounting to $4,270, when the amount actually due was only $1,544, but the error was made by including certain notes by mistake and omitting certain credits, and there was no intention to mislead, it was held that the lien was good for what was actually due, against a mortgagee who had taken his mortgage while the work and materials were being furnished, and before the certificate of lien had been filed.

BILLS to foreclose liens for work done and materials furnished in erecting and repairing certain buildings; brought to the City Court of the city of Hartford. The cases involving essentially the same facts were tried together. The following facts were found by the court.

The petitioners seek to foreclose liens for materials and work furnished for certain buildings situated upon certain real estate owned by E. L. Kenyon, and bounding upon the Connecticut River in the city of Hartford. The real estate consists of two adjoining pieces, one south of the other, on the west bank of the river, and bounded west by Commerce street. The boundaries and description of these pieces are correctly given in the certificates of lien, which were filed on the 12th and 13th of January, 1876. The southern piece is called the Crosby property. Kenyon bought it of the heirs of Thomas K. Brace, in April, 1875, and owns it in fee simple. A store about forty feet square and three stories high, called the Crosby store, stands upon this piece. The northern piece is called the Kilbourn slip property. It is owned by the town of Hartford, and on the 27th of September, 1873, the town leased it to Kenyon for fifty years. There were no buildings upon this piece until Kenyon erected the structure hereafter to be described. Kenyon has mortgaged all his rights in both pieces to the respondents G. B. Linderman & Co., as alleged in the petitions. Linderman & Co. appeared to defend in both suits, but Kenyon made no defence. The Kilbourn slip property was a piece of low ground sloping to the river and used as a landing. Kenyon filled up the slip and the entire property above the freshets, and during the summer and fall of 1875 built upon it a row of coal sheds, seven in number,

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extending from a point near the Connecticut river, west about a hundred feet, nearly to Commerce street. He began this work about May 24th, 1875. He also built upon the top of the sheds a railway for moving coal, and at the river a hoistway for hoisting coal from vessels to the railway. Both pieces he enclosed by fences from the coal-sheds to the Crosby store, and from the store to the river. He fitted up a coal office in one room of the Crosby store, and extended into this office the arm of a platform scale which stood near the store. This office was the only portion of the Crosby store used in the coal business. The rest of the building was used for storage, except one office which was rented for a short time, and upon which Kenyon made slight repairs. When Kenyon had filled up the river front, he built a continuous dock along the entire front, which was finished before May 24th, 1875. The property before these changes were made was not adapted to the coal business, and he made all these improvements for the purpose of transforming the whole into a coal yard. There was no division fence or other boundary between the two lots, and Kenyon used the whole as one coal yard except the Crosby store as above stated.

C. T. Marston & Co. commenced to furnish materials to Kenyon for buildings and repairs upon this property, on May 29th, 1875, and continued from time to time so to furnish, until the 1st day of December, 1875, when they ceased doing so. Mandeville commenced performing labor and furnishing materials for Kenyon, for buildings and repairs upon the property, on the 24th of May, 1875, and continued furnishing labor and materials until the 1st day of December, 1875, when he ceased.

The new buildings and repairs in respect to which these liens were claimed were all erected and made under a single contract between the petitioners respectively and Kenyon; C. T. Marston & Co. were to furnish the lumber, and Mandeville was to perform the labor and furnish other materials, and Kenyon was to pay them severally what the labor and materials should be reasonably worth. No separate account was kept by either petitioner of labor or materials expended upon

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each building or each of the two parcels of land. No one requested either of them to keep or render such separate accounts. All of the lumber furnished by C. T. Marston & Co. went into the coal sheds and Crosby store, and none of it into the fences. The liens were filed in each case as single liens upon the entire property.

C. T. Marston & Co. claimed a lien by their certificate for the sum of $1,292.78. The amount actually due them was $1,270.43, with interest from December 1st, 1875. The difference of $22.35 was a mistake caused by including two items of lumber which went to another coal yard, and a small item of interest. Mandeville claimed a lien by his certificate for the sum of $4,270.06. The amount actually due him was $1,544.56, with interest from December 1st, 1875. The difference between these sums, $2,725.50, was caused by mistakenly including the amount of certain notes given by Kenyon, and omitting credits to which he was entitled. Both mistakes were made without fraud or any purpose to deceive. It was not possible to determine from the evidence what amount was expended upon each lot, but of the whole labor and materials furnished by all the petitioners, not over $250 in value was expended upon the southern or Crosby lot.

No building on either lot is appurtenant to the other tract or the buildings thereon, unless, upon the facts found, the law makes it an appurtenance. Kenyon has paid Mandeville more than the whole amout of the expenditures of the latter upon the Crosby lot, and Mandeville has expended upon the Kilbourn slip lot more than the whole amount now due him. Upon the above facts, the petitioners respectively asked the court to hold that they had acquired valid liens each against both tracts and the buildings thereon, as one piece of real estate, and to pass decrees of foreclosure accordingly.

The respondents Linderman & Co. insist that neither Marston & Co. nor Mandeville have acquired a valid lien against the real estate or any part of it.

Upon these facts the cases were reserved for the advice of this court.

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E. Goodman and *E. B. Bennett*, for the petitioners.

1. The petitioners, under the statute, have acquired a valid lien to the entire property described in their certificates. Gen. Stat., Rev. of 1875, p. 359, sec. 9. The land and the buildings on it are designed for a united enjoyment, and must be treated as a unit. Phillips Mech. Liens, § 202. Under the contract the work of building and repairing was one job. *Bank of Charleston* v. *Curtiss*, 18 Conn., 348. The principle is well established that such quantity of land is subject to the lien as, under all the circumstances, is reasonably necessary and convenient for the enjoyment of the building according to the intention and design of the owner. Phillips Mech. Liens, § 200; *Bank of Charleston* v. *Curtiss*, supra. The record shows that all the land was actually used for one purpose.

2. The buildings having been treated in the contract as one estate, the land on which they stand and is used with them, and which is owned by the same person making the contract, must also be treated as one estate. *Wall* v. *Robinson*, 115 Mass., 430; *Brabazon* v. *Allen*, 41 Conn., 363. That the land was conveyed to the present owner by separate deeds, and that subsequent to the contract to furnish materials the land had been mortgaged in separate pieces; or that the buildings are separate, one standing on each piece, are not such conditions as in this case prevent the lien attaching to the whole property. *Bachelder* v. *Rand*, 117 Mass., 178. That the land is held part in fee and part by lease for term of years is not material. The lien attaches to whatever interest the owner of the building has in the land. *Hooker* v. *McGlone*, 42 Conn., 102; *Fitch* v. *Baker*, 23 id., 569; Phillips Mech. Liens, § 83.

5. The claim of Mandeville is not invalidated by the fact that a larger sum is claimed in his certificate than was actually due. This was not done fraudulently, but by a mistake. No one is injured by it. It is no objection to a person's collecting what is due on a just claim, that by mistake he stated the claim to be more than it was. *Bank of Charleston* v. *Curtiss*, supra.

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G. Collier, for the respondents G. B. Linderman & Co.

1. The land on which the petitioners claim a lien consists of two separate and adjoining lots, held by the respondent, Kenyon, by different titles, one lot in fee and the other under lease. The work done and material furnished were for building coal sheds on one lot, and for making slight repairs upon a building standing upon the other lot. Of the several thousand dollars expended, only the insignificant sum of $250 was expended upon the Crosby property; but the petitioners claim to hold this lot for the large amount expended upon the Kilbourn slip property. The court below finds that the premises were fitted up to be used as a coal yard, except the Crosby store; but it does not find that any part of the Crosby property was necessary to the convenient use of the coal sheds built upon the Kilbourn slip property. But the court does find that one lot of land was not as matter of fact appurtenant to the other, and that but a very small portion of the building on the Crosby lot, and on which the repairs were made, was used, or intended to be used, in the coal business; and that Marston & Co. furnished no material for use upon the Crosby lot except that used upon the Crosby store. The contract was, in effect, to erect on one lot certain buildings, and to make slight repairs upon a building already erected and standing upon another lot. The statute giving the lien is to be construed with reasonable strictness. *Chapin* v. *Persse & Brooks Paper Works*, 30 Conn., 474. The statute clearly contemplates that each building should be subject to a lien for the work or material done or furnished in its own erection or repair. Gen. Statutes, p. 359, sec. 9; *Larkins* v. *Blakeman*, 42 Conn., 292. This rule is necessary in order to do justice between different claimants. *Chapin* v. *Persse & Brooks Paper Works*, supra. The only distinction between the case at bar and that of *Larkins* v. *Blakeman*, is that in that case the contracts were made at different times. This distinction is immaterial, and was disregarded by this court in *Bank of Charleston* v. *Curtiss*, 18 Conn., 349.

2. The certificate filed by Mandeville is void as not properly stating the amount due him at the time of filing the certificate. The object of the certificate is to give notice of the

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amount of the claim as well as the description of the property. The statute requires that the amount be stated "as nearly as the same can be ascertained." Gen. Statutes, p. 359, sec. 9. Due care must be exercised in ascertaining what it is. The amount due Mandeville was $1,544.56; the amount claimed in the certificate is $4,270.06; and the error is $2,725.50. A small error will be overlooked or excused, if made without fraud; but such gross inaccuracy must vitiate the certificate if any error will.

PARDEE, J. E. L. Kenyon desired to establish a coal-yard into which he could receive coal from vessels and from which he could deliver it to purchasers. In furtherance of this plan he bought one of two adjoining pieces of land and took a lease for fifty years of the other; from the time of the purchase and lease he subjected both to one use; he built a continuous dock for the reception of coal along the entire river front of both; he erected an exterior fence enclosing both; no interior fence remained to indicate the line which had formerly separated them; and the platform scales were so located as to be partly in each purchase. Here was unity of title, of plan, and of use. The ancient divisional line ceased to perform any office or to have any place after the union of title in Kenyon; he acquired entire control over it, and, as he might do, obliterated it in law and in fact, for the purposes of this case, by placing a structure over it on both pieces, all of which structure contributed to one end, namely, the convenient receipt and sale of coal. Nothing remained to suggest to the material-man or to the mechanic any separation in fact or intent. The lumber and the labor furnished by them respectively might well seem to contribute to the furtherance of the plan to complete convenient structures for the storage and sale of coal. After the owner has thus destroyed the former line of separation we find neither warrant nor occasion for re-establishing it.

A store stood upon one of the pieces of property when Kenyon purchased it. A part of this he used as an office for the transaction of his coal business; a part of it, upon which he had made some slight repairs, he leased to others; but we

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do not think that this circumstance should affect the result; it is but an incident, and quite aside from the main design; in the eye of the law the whole property was still substantially devoted to one use.

The petitioner Mandeville filed his certificate of lien for the sum of $4,270.06; the sum really due to him was $1,544.56, and the difference was caused by erroneously including the amount of certain notes given by Kenyon and omitting credits to which he was entitled. The court finds that there was neither fraud nor intent to deceive. He continued to perform labor upon, and furnish materials for the structures upon the property from May to December, 1875, not under any special contract, but to receive a reasonable compensation therefor. Three months before he ceased to labor and furnish materials the respondents Linderman & Co. took their mortgage upon the property. Of course they could then have had no very accurate knowledge as to the amount to be included in his future certificate of lien. It is not found, nor is there any reason for believing, that they have been misled or have been induced to change their position to their injury by this subsequent mistake on the part of Mandeville. The point of their complaint is that they have now discovered that a lien, the amount of which was necessarily determined after their mortgage, but which reaches back and takes precedence of that, is about $2,700 less than the sum named in the certificate, and that their security is improved to that extent. While we do not intend to weaken the general rule that certificates of lien must speak the truth with reasonable accuracy, a rule in the interest of all persons giving subsequent credit upon the property, we do not think that a court of equity can be called upon to declare Mandeville's lien utterly void upon the motion of persons who have lost nothing by his mistake.

We advise the City Court of Hartford that the lien of Marston & Co. is valid for the sum of $1,270.43; and that of Mandeville for the sum of $1,544.56; each with interest from December 1st, 1875; and that decrees of foreclosure should be passed in favor of the petitioners respectively.

In this opinion the other judges concurred.

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HENRY A. OSBORNE AND WIFE *vs.* BUTLER B. WARREN.

The statute (Gen. Statutes, tit. 19, ch. 17, sec. 5,) provides that every person who "shall wittingly and unlawfully throw down or leave open any bars, gate or fence" belonging to any enclosure, shall pay to the party injured double damages and a sum not exceeding five dollars, to be recovered in an action of trespass. The defendant, in a controversy with the plaintiffs as to a right of way over their land, threw down their fence, claiming and believing that he had a right to do so, but the conrt found that he had no right of way. Held that his case fell within the intent of the statute.

TRESPASS for throwing down a fence upon land of the plaintiffs, brought under Gen. Statutes, p. 489, sec. 5, and appealed from the judgment of a justice of the peace to the Court of Common Pleas for Hartford County. In the latter court (*McManus, J.*,) the facts were found and judgment rendered for the defendant, and a motion in error to this court filed by the plaintiffs. The case is fully stated in the opipion.

C. E. Perkins, for the plaintiffs.

S. P. Newell, for the defendant.

PARDEE, J. The plaintiffs brought an action of trespass against the defendant, founded upon a statute which is to be found in section 5, chapter 17, title 19, page 489, of the Revision of 1875, and is in the following words: "Every person who shall wittingly and unlawfully throw down or leave open any bars, gate or fence belonging to any particular enclosure or common field, shall pay to the party injured double damages, and a sum not exceeding five dollars, according to the nature and aggravation of the trespass, to be recovered in an action of trespass." In their declaration they alleged that he had thrown down the fence enclosing their land, whereby they had suffered damages to the extent of ten dollars, and they asked for judgment for twice that sum, together with the additional sum of five dollars, in accordance with the provisions of the statute.

The writ was made returnable before a justice of the peace; the parties appeared and the defendant pleaded the general

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issue, with a notice in these words: "The plaintiffs will take notice that on the trial of the above entitled cause the defendant will claim and offer evidence to prove, should the same become necessary, that he with others has a right of way over and across the premises described in the plaintiffs' declaration and through the fence claimed in the plaintiffs' declaration to have been thrown down by the defendant. Also that the defendant is the sole owner of said fence, and that the same stands wholly upon his, the defendant's land." Upon the hearing the magistrate found the issue for the defendant, and ordered that he should recover his costs. From this judgment the plaintiffs appealed to the Court of Common Pleas for Hartford County at the January term, 1876, from which it came to, and was heard at, the term of said court holden in January, 1877. Upon the trial it appeared that in August, 1873, the plaintiffs became the owners of a piece of land adjoining premises then, and for some time previous thereto, in the ownership of the defendant. Before the purchase by the plaintiffs he and others had passed from his land through an opening in the dividing fence upon and across this lot. When the plaintiffs became the owners of it they closed the opening in the fence and forbade passage through it; on November 29th, 1875, they replaced boards which had been knocked off at the former place of passage, and subsequently, upon the same day, the defendant knocked them off, claiming that he had a right of way over the plaintiffs' land through the opening, and that he had a right to throw down the fence for the further reason that it was not upon the true line of division and stood wholly upon his land and therefore belonged to him. The court found that he believed he had the rights claimed by him and that he threw down the fence under such claim and belief; but found, also, that in fact he had no right of way and no right to throw down the fence, and that he intentionally did the act knowing it to be against the will and notice of the plaintiffs. Thereupon they asked the court to hold that the defendant "wittingly and unlawfully" threw down the fence, and to render judgment in their favor and assess the damages in accordance with the rule provided by

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the statute. But the court refused so to hold, and held as matter of law, upon the facts, that although the defendant had no right to throw down the fence, yet, having done it under the claim aforesaid, believing that he had a right so to do, he had not made himself liable to an action under the statute, but would be liable to ordinary damages in an ordinary action of trespass, and affirmed the judgment of the justice of the peace. Whereupon the plaintiffs filed their motion in error, assigning for reason that inasmuch as the facts bring the act within the statute, to constitute the offence mentioned therein it is not important or material whether the defendant believed that he had a right to do the acts complained of or not.

That we may know the precise force of the word "wittingly" we resort to the dictionary. Webster defines it thus: "Knowingly—with knowledge—by design." We must presume that in the common speech of the people it imported knowledge simply; that the legislature understood and used it in the same sense, and that the statute is aimed at persons who knowingly and by design throw down fences and leave open gates and bars, having no legal right so to do, excluding only cases which are the result of accident or forgetfulness. The legislature designed to punish to the extent of double damages all persons who, having controversies with adjoining owners as to dividing lines, take the law into their own hands, and render judgment and do execution in their own favor, thereby exposing enclosures to serious damage from incursions of cattle, in the absence and without the knowledge of the owner. The law intends that all persons shall adjust such differences through its appointed means.

The legislature has not been unmindful of the fact that men may commit trespasses ignorantly, and has provided a measure of relief in certain cases; for instance, section 4, page 489, of the Revision of 1875, the section immediately preceding the one under consideration, provides that whoever shall cut a tree standing upon the land of another shall pay the owner three times its value and two dollars in addition; but if the trespasser can satisfy the court that he did the act

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through mistake and believed the tree to be upon his own land, he shall pay only the real value of it. So too when the legislature has desired to punish trespasses prompted by malice it has been precise in the use of language; for instance, the seventh section, page 489, provides that when any person shall "willfully and without color of right commit a trespass on the land of another," he may be sent to jail in default of payment of damages. And section 31, page 505, provides in effect that whoever "shall willfully and without color of right" cut trees on the land of another shall be fined not more than twenty dollars or imprisoned not more than ninety days, or both; apparently using the expression "*without color of right*" in cases where it is intended to give the trespasser the benefit of a mistake as to his legal rights.

Not seeing therefore that the legislature has in fact or intent given to the word any force or meaning beyond that which it has in the common speech of the people, we must say that it imports knowledge only, and not knowledge and malice combined; and that the statute is applicable to persons who by design throw or leave down fences, bars and gates, irrespective of the question whether the act is done under a belief of right or is prompted by malice.

There is error in the judgment complained of.

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

TOWN OF WEST HARTFORD *vs.* THE BOARD OF WATER COMMISSIONERS OF THE CITY OF HARTFORD.

The Board of Water Commissioners of the city of *H.*, under authority of the legislature and at the city expense purchased a large tract of land in the adjoining town of *W. H.* for reservoirs for collecting and storing water for the use of the inhabitants of the city, the water being brought to the city and distributed by pipes. Held that the land so purchased and used was not subject to taxation by the town of *W. H.*

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And held that it did not affect the case that the water commissioners sold the water to consumers, and paid the interest on the investment and the incidental expenses by the water rents received.

As a matter of advantage in procuring the land required, the commissioners purchased a larger tract than was needed, so that a portion of the land so purchased was not used for the reservoirs. Held that this land was not exempt.

Most public property is in terms made exempt from taxation, but without any such statutory protection it would be exempt upon general principles.

Such public property is generally procured by taxation, and it is against principle that the product of one taxation should be made the subject of another.

AMICABLE SUBMISSION to the Superior Court in Hartford County upon the following agreed statement of facts.

The Board of Water Commissioners of the city of Hartford was made a corporation by an act of the General Assembly, and was empowered, for and in behalf of the city, to take from a brook in West Hartford known as Trout Brook, or any other stream or water course in West Hartford, and convey the same to the city, such supply of water as the convenience and necessity of the inhabitants of the city might require; and to take and hold, for and in behalf of the city, lands or other estate in West Hartford, which should be necessary for the construction of any canals, reservoirs, or other works for conveying or containing water, or for the erection and construction of any buildings or machinery, or for laying any pipes or conductors for carrying the water to the city, and to do any other act necessary or convenient for accomplishing the purposes of supplying the city with water. And in case water should be introduced into the city from any source in West Hartford, it was made the duty of the Board of Water Commissioners to supply the water to the inhabitants of the towns of West Hartford and Hartford, living within a reasonable distance from the line of main pipes, at the same rate of water rents, and upon the same terms and conditions, that the inhabitants of the city were supplied.

In pursuance of the power thus vested in the board it has purchased 327¼ acres of land situated in West Hartford, and has taken deeds conveying the legal title to itself, and has constructed upon the land three large reservoirs for the detention and storing of water from Trout Brook and its branches,

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and has laid pipes from the reservoirs to take the water therefrom into the city of Hartford, for the purpose of supplying the inhabitants, and has been and now is distributing the water through the city; and has, with the approbation of the common council of the city, established rates of prices or terms upon which the same is furnished to consumers, and has regulated the terms of payment, and has collected, and is still collecting, the rents for the use of the water from the consumers thereof, to the amount of more than one hundred thousand dollars annually, a sum greater than the annual expenses of the board and the annual interest of its outstanding debt. And the board has supplied and is still supplying the water to the inhabitants of the towns of West Hartford and Hartford, living near the line of main pipes leading from the reservoirs, at the same rate of water rents, and upon the same terms and conditions, as the inhabitants of the city are supplied.

In the purchase of the real estate and the construction of the three reservoirs, the board has expended more than $100,000 in the town of West Hartford, and the land and other estate in that town standing in the name of the board are of that value. A portion of the lands so purchased and held, being 140¾ acres, is not necessary for the construction or use of the reservoirs, and is of the value of two thousand dollars. This land was bought with other land used for the water works, and because the whole could be bought at a better rate than a part. The rest of the land is either covered with water a part of the year, or is used for dykes, or is necessary in making repairs on the reservoirs.

The town of West Hartford claims the right to assess and tax the property situated in the town, and to enforce the collection of the taxes, if necessary, by a sale of the property; and in the exercise of the right claimed, has laid taxes on the assessment lists of 1873, 1874, and 1875.

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

L. P. Waldo, for the plaintiffs.

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The right to impose taxes originates in the power of eminent domain, and in free governments they are laid only by the representatives of the people, and of course with the assent of those who have them to pay. The rule by which taxes are imposed and collected is, in this country, generally regulated by constitutional or statutory provisions. In our own state it has been held that the power of taxation is derived exclusively from the action of the legislature. *Thomas Manufacturing Co.* v. *Lathrop*, 7 Conn. R., 550. The statutes on this subject do not make any distinction between natural and artificial persons; and hence corporations are liable to be taxed as natural persons, excepting such as are excused by some provision in their charters. These statutes provide that "all property not exempted shall be liable to taxation as follows:" * * "Lands and separate lots, except house lots, to be set in the list at the average present and actual valuation by the acre." Gen. Statutes, 155, sec. 13. The only exemptions of lands owned by communities or corporations is in the following words: "All property belonging to the United States, or to this state; buildings with their appurtenances, belonging to any county, town, city or borough; buildings or portions of buildings exclusively occupied as colleges, academies, churches, or public school houses, or infirmaries; parsonages of any ecclesiastical society to the value of five thousand dollars, while used solely as such; buildings belonging to and used exclusively for scientific, literary, benevolent or ecclesiastical societies, not including any real estate conveyed by any ecclesiastical society or public or charitable institution without reserving an annual income or rent, or by a conveyance intended to be a perpetual alienation." Gen. Statutes, 155, sec. 12. The land in question stands in the name of the Board of Water Commissioners of the city of Hartford, and by force of the statutes above recited must be assessed and taxed unless it is included in some one of the exemptions. It is, to be sure, said that though the title to the land is vested in the corporation, yet it is held for the use of the city of Hartford, and is therefore equitably the property of the city. If this be con-

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ceded, it does not follow that the land is exempt from taxation. The language of the statute exempting the property of communities is in these words: "Buildings with their appurtenances, belonging to any county, town, city or borough." In this clause the word "land" is not used, and the exemption in words extends only to buildings with their appurtenances. This will doubtless include the land on which a building may stand, but can hardly be construed to include land entirely separate and distinct from the building. As this land is not in any way connected with any building belonging to the city, it is apparent that it cannot be included in any exemption in the statute, even by implication.

But it is claimed that, inasmuch as this land belongs to the city of Hartford, and is used for its benefit, it comes within the principle that exempts property designed and used for public purposes. It is not even claimed that the one hundred and forty acres that are not necessary or used for the water works come within this principle, for this land is not used for public purposes; and so far as this land is concerned it would seem that there can be no doubt as to its liability to be taxed. But in relation to the land covered by the reservoirs and their appendages, it must be confessed that this suggestion would be entitled to great consideration had the statute been silent upon this subject. But when we see that the attention of the legislature was given to property designed and used for public purposes, and that it directed that certain kinds of property so used should be exempt, and all other property taxed, it would seem that the force of this suggestion is somewhat impaired. For when the taxing power was exempting buildings and their appurtenances belonging to any city, it is a reasonable presumption that the exemption would have been extended to lands, unless it was intended that they should be taxed.

But is this land really designed and used for public purposes? The Board of Water Commissioners is empowered to establish rates of prices for which the water stored upon this land may be furnished to consumers, has exercised that power, and has regulated the terms of payment. It has col-

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lected and is still collecting rents for the use of this water to the amount of more than one hundred thousand dollars annually, a sum more than sufficient to pay all the expenses of the board, all necessary repairs, and the annual interest on its outstanding debt. There is no provision for any gratuitous use of the water, and it is only furnished to those who are able and willing to comply with the prescribed terms. The excess of the income over the expenditures is to be paid into the treasury of the city, and enures to the benefit of the city in its corporate capacity. Under these circumstances it is difficult for me to see how the public is benefited by the use of this land. But if the use of this land by the city of Hartford exempts it from taxation, on the ground that it is a public use, it must follow that all the land recently taken under the act relating to flowage must also be exempted, for no land can be taken under this act unless it be found that the flowing of it in the manner proposed is of public use. Gen. Statutes, 472, sec. 2; *Olmstead* v. *Camp*, 33 Conn., 550.

It will not be claimed that all property owned by a municipal corporation is exempt from taxation. The true distinction to be observed is believed to be this: All municipal property used for public purposes of local government, such as halls for municipal meetings, courts, prisons and the like, is exempt; but property which is not used for the purpose of carrying on the municipal government, but only for the convenience or profit of the citizens, individually or collectively, which is not specifically exempted, is liable to be taxed. *City of Louisville* v. *Commonwealth*, 1 Duvall, 297.

We are not aware that the questions now under discussion have ever been passed upon by the courts in this state. They have been considered by the courts in some of our sister states, and in Great Britain. Some of these cases will be found on the brief of the learned counsel for the defendant. An examination of all these cases will disclose the fact that judges do not stand on common ground or arrive at unanimous results. In some cases they have put the exemption upon the ground that the possessor had not the power to sell or charge the land with any recognizance or judgment; in some,

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that the particular tax was laid by the corporation owning the land on its own property; in some, that the public were to succeed to the property when all charges and expenditures had been reimbursed; and in some cases on the ground that the possessor had no authority to raise money to pay the tax. In a recent case in Great Britain, where trustees were incorporated to construct certain docks, and were, by the act of incorporation, empowered to borrow money on the credit of the tolls granted them, it was held that, assuming all the purposes for which the sums were raised to be public, yet as there was nothing in the act of incorporation to show that the trustees might not lawfully raise from the tolls a sum sufficient to meet such purposes and pay poor rates and other charges, they were liable to be assessed and taxed in respect to buildings on their land. *Regina* v. *Trustees of Birkenhead Docks*, 14 Eng. L. & Eq. R., 128; *S. C.*, 21 Law Jour. Reps. N. S., 209.

H. C. Robinson, for the defendants.

1. The tax laws of the state, so far as they refer to corporations, relate wholly to private corporations. The corporations subjected to taxation are spoken of as having stockholders. Gen. Statutes, 153, 156. Public corporations are nowhere taxed as such.

2. The general question of taxing property of municipal corporations for public purposes has been raised several times by courts and text writers, and the very strong current of authority is against its propriety. Cooley on Taxation, 131, 132; Dillon on Municp. Corp., §§ 445, 446, 614, 615; *People* v. *McCreery*, 34 Cal., 433; *People* v. *Doe*, 36 id., 220; *Doyle* v. *Austin*, 47 id., 353; *Nashville* v. *Bank of Tennessee*, 1 Swan, 269; *People* v. *Salomon*, 51 Ill., 37, 52; *Piper* v. *Singer*, 4 Serg. & R., 354; *Directors of the Poor* v. *School Directors*, 42 Penn. S. R., 21; *City of Louisville* v. *Commonwealth*, 1 Duvall, 295; *The Queen* v. *Commissioners of Harrogate*, 15 Queen Bench, 1012. Our own court, in a recently thoroughly considered case, (as in other earlier ones,) has held that a local assessment affecting parties specially bene-

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fited did not reach the property of a railroad company held for railroad purposes only. *N. York & N. Haven R. R. Co.* v. *City of New Haven*, 42 Conn., 279. *A fortiori* the property of the public held for public purposes owes no debt for taxation for other public purposes.

3. The gores of land left in the hands of the board and not immediately serviceable are mere incidents to their purchase, and their holding is included in the general purposes of the board.

PARDEE, J. This is an amicable submission under the statute by the Board of Water Commissioners of the city of Hartford upon one side and the town of West Hartford upon the other, of questions which have arisen between them, to the Superior Court upon an agreed statement of facts, and that court has asked the advice of this court as to the judgment to be rendered thereon.

The Board of Water Commissioners were authorized by the legislature to purchase and hold land in the town of West Hartford for the purpose of storing water and carrying it thence to the city of Hartford for the use of its inhabitants; they did purchase and now hold and use for such purpose three hundred and twenty-seven acres of land; upon this the town of West Hartford has assessed taxes and proposes to enforce payment thereof; the commissioners deny their right to subject the land to taxation.

Cities and towns are political corporations, local subdivisions of the state government by means of which, within specified territorial limits, public order is maintained, schools and highways are established, and public health preserved. They exist only for public purposes. It is contrary to the law of their being that they should by taxation acquire, hold and make profit from money, as do private corporations and individuals. They have but one method for obtaining it, namely, taxation; but one use for it, namely, the promotion of the public good; they hold it temporarily as stewards of the people until the public creditor demands it. Taxation implies tribute from the governed to some form of sovereignty; not

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the transfer of the property of the latter from one of its servants to another. A tax is levied by a town upon the property of its inhabitants; it is not a charge upon the property which itself already holds for the use of the public. Money in the keeping of a municipality as the result of the exercise of its power of taxation, for one public use, is not to be made to pay tribute to another public use. It has ceased to be taxable property in any legislative or judicial sense. The proceeds of one assessment must be protected against a second, else possibly the public money might be eaten up by the cost of successive assessments and collections, on its passage from the tax payer to the public creditor. So well established is this principle that, if the statute relative to the assessment and collection of taxes had contained no reservation whatever in favor of property held by cities and towns for public purposes, the courts would have assumed that the legislature did not include such in the term "taxable property," but that these words were used with such limitation as repeated judicial decisions and approved commentators upon law have put upon them. Inasmuch however as the assessment of taxes is entrusted to the towns to be made by men skilled in the valuation of property, but presumably unlearned in legal distinctions, the legislature from abundant caution has inserted an exemption of property belonging to the United States, or to this state, and of buildings with their appurtenances belonging to any town or city. And as the exemption of a court house belonging to the United States does not find its first recognition and sole support in this statute, no more does the exemption of town property devoted to the use of the public. Doubtless, when the exemption was first framed, the expression "buildings and their appurtenances" included all forms of investment of corporate property for public uses which up to that time had been found necessary. We do not know that any city in this state had then undertaken to furnish water to its inhabitants. The statute is to be read as if it exempted all property held by municipalities for public use. The legislature found in existence and recognized a well established exemption of such property; and that

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privilege is not to be considered as having been abridged, even if the statute failed to enumerate all forms in which such property may be used. The exemption stands upon principle, not alone upon the statute.

The introduction of a supply of water for the preservation of the health of its inhabitants by the city of Hartford is unquestionably now to be accepted as an undertaking for the public good in the judicial sense of that term; not indeed as the discharge of one of the few governmental duties imposed upon it, but as ranking next in order. For this purpose the legislature invested the city with a portion of its sovereignty, and authorized it to enter within the territorial limits of West Hartford and condemn by process of law certain lands therein for the purpose of storing water for its own inhabitants. It authorized the assessment of a tax upon property within the city of Hartford for money wherewith to pay for this land, because the taking and holding was for the public good. Those lands now represent the collected tax. And as the power now resident in the several towns into which the state is divided, in the aggregate represents the sovereign power of the legislature in the imposition of taxes, it is not to be presumed that this has been entrusted to one such corporation to be used as means for weakening a second by gnawing into the proceeds of one assessment by the power of another.

The city of Hartford, in order that it might more economically discharge its duty in this behalf, entrusted this matter of the introduction of water to an agency named the Board of Water Commissioners; and in the name of this agency these lands were purchased and are now held. But they are held merely as a trust; in substance the land was bought and paid for by, and clearly now is the property of, the city.

The Board of Water Commissioners, with the approbation of the city, sells the water which has been stored in West Hartford to consumers both in that town and in Hartford, preferring that method of raising money for interest and expenses to the imposition of a tax, and at the time of the submission thus collected a greater sum than the annual

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interest and expenses. West Hartford urges that by reason of this fact Hartford has ceased to be in this matter a municipality holding property for the public good, and has descended to the level of a pecuniary corporation using property for profit, and has thus placed itself within reach of taxation. But this again is rather in seeming than in reality. The legislature sanctioned this method of raising money at the time when it declared the undertaking to be one for the public good. Besides, the fact that the rents at the present time are sufficient to pay the annual charges may be only a fortunate occurrence; this state of things may not continue. And the town remains liable to taxation for annual deficiencies and for the ultimate payment of the principal expended in the purchase of the land and construction of the works.

Again, it is urged, inasmuch as the land taken under what is called the "flowage act" for the creation of water-power, and this land taken by the city, are each taken for a public use by virtue of the sovereignty inherent in the legislature, that as the former continues subject to taxation so should the latter. But the mere fact that a municipality and an individual are each allowed by the legislature to become the owners of land by the same process of condemnation does not prove that the same result as to taxation must necessarily follow. That question turns upon ownership, and not upon the manner in which ownership has been acquired. And the land taken under the flowage act passes from one private corporation or individual to another, and to the property of such no statute or judicial decision has ever accorded exemption; it remains taxable irrespective of the question whether the grantor conveyed it of his own will or upon legislative compulsion. The omission on the part of the legislature to add to the great privilege of purchasing land contrary to the will of the owner, the still greater one of having the land thus purchased exempted from taxation, is not to be held upon inferential construction as a restriction upon the principle which gives immunity to towns as to property held for public use. But beyond this, we are not called upon to be judicially blind to the characteristics of this latter use as compared with those

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of the use under the flowage act. Under that the land is always taken by private corporations or persons primarily and chiefly for the profit of the shareholder or individual; the good to the public is remote, incidental, uncertain. The town takes primarily and wholly for the public use and good; the profit to the municipal treasury is secondary, remote, uncertain.

The commissioners purchased the whole of certain tracts of which a part only was necessary for their purpose, for the reason that they could thus obtain the whole for a less price than a part, and they now hold one hundred and forty and three quarters acres, valued at $2,000, thus bought. Practically this land was a gift to the city. We cannot deny them the privilege of accepting it and turning it to their profit. But they cannot ask, and we cannot concede, the right thus unnecessarily to enlarge the municipal exemption and extend it over land which they did not buy and have never expected to use for the public good. They are under no obligation to hold it, and so long as they do they should pay the taxes assessed upon it.

We advise the Superior Court that no part of the land is taxable except the hundred and forty and three-quarters acres not used for reservoirs.

In this opinion the other judges concurred.

MAX ROSEN AND ANOTHER *vs.* MARK FISCHEL.

A magistrate issued a writ of replevin returnable before a justice of the peace and took a bond for the payment of costs to the defendant and the return of the property if the plaintiff should fail to prosecute his suit to effect. The writ was void on its face by reason of the demand in it being beyond the jurisdiction of a justice, but the goods were taken npon it and were not returned. Held that, the writ being void, the bond was also void.

DEBT on a replevin bond; brought to the City Court of the city of Hartford.

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On the trial to the jury in that court upon the general issue the plaintiffs offered in evidence the record of a process of replevin in favor of one Jacob Bincas against the present plaintiffs, who were a firm by the name of Max Rosen & Son, for the recovery of a quantity of cigars, claimed to belong to Bincas and to be unlawfully detained by the defendants in the suit, which record contained a writ of replevin and a recognizance entered into jointly and severally by Bincas as principal and the present defendant, Mark Fischel, as surety, in the sum of three hundred dollars, "for the payment of costs to the said Max Rosen & Son in case the said Jacob Bincas shall not prosecute his suit to effect and for the payment of all damages that shall be recovered by the said Max Rosen & Son in said suit, and for the return to them of the said goods and chattels that may be replevied by virtue of said writ if the said Jacob Bincas shall fail to establish his right to the same or to the possession thereof."

It appeared by this record that the writ of replevin was made returnable before a justice of the peace, and that the sum of two hundred and fifty dollars was claimed as damages. The defendant thereupon claimed that, as the jurisdiction of justices of the peace was limited to cases in which the matter in demand did not exceed one hundred dollars, the writ of replevin was void upon its face, and that, the writ being void, the replevin bond was also void, and requested the court so to charge the jury. The court however instructed the jury that the bond was valid.

A verdict having been returned for the plaintiffs, the defendant filed a bill of exceptions and brought the case by a motion in error before the Superior Court for Hartford County. That court (*Beardsley, J.*,) affirmed the judgment of the City Court, and the defendant brought the case before this court by a motion in error.

It appeared by the bill of exceptions that in the replevin suit before the justice the defendants in the suit had moved that it be dismissed on the ground of want of jurisdiction in the court, and that the plaintiff in that suit had abandoned it and immediately prayed out a new writ of replevin on which

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he had taken the same property before replevied, and that the property had never been returned to the present plaintiffs or the costs of the suit paid.

E. Goodman, for the plaintiff in error.

1. The writ in this case was void because not within the jurisdiction of a justice of the peace. 1 Swift Dig., 495; *Coit* v. *Haven*, 30 Conn., 190; *Fowler* v. *Bishop*, 32 id., 199, 206. The officer had no right to take the property under it. It being void, it was just the same as if no writ had been issued. The magistrate who issued it and the officer who served it were each liable to the party whose property was taken under it, for damages for taking the property. *Grumon* v. *Raymond*, 1 Conn., 40; *Hart* v. *Granger*, id., 169; *Luddington* v. *Peck*, 2 id., 702; *Case* v. *Humphrey*, 6 id., 139.

2. The writ of replevin being void, the recognizance must be void also. The writ is not good without the recognizance, nor is the recognizance without the writ. The statute provides that when the writ is issued the plaintiff must give a bond with surety. The bond must be given first. The bond is not to be of any validity unless a writ is issued. *Allen* v. *Gray*, 11 Conn., 102. In this case no lawful writ having been issued, it is the same as if there had not been any writ. The recognizance by itself would have no effect, nor would it attached to any piece of paper except a lawful writ. The defendant is no more liable on it than if it had been annexed to a writ of assumpsit. If the property was not taken by virtue of a lawful writ the surety is not liable. It could not be taken by virtue of a writ that did not authorize the officer to take it, but showed on its face that he had no right to take it. If the surety is liable here, he would be if the property had been taken without any process. A recognizance, taken by an officer not authorized to take it, is void. *Branham* v. *Commonwealth*, 2 Bush, 3; *Commonwealth* v. *Loveridge*, 11 Mass., 337. If taken by a justice who has not jurisdiction of the case, it is void. *Bridge* v. *Ford*, 4 Mass., 641; *Piper* v. *Pearson*, 2 Gray, 120; *Commonwealth* v. *Collins*, 11 id., 465; *Peck* v. *Thompson*, 5 Allen, 388; *Commonwealth* v.

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Green, 13 id., 251; *Learnard* v. *Bailey*, 111 Mass., 162; *State Treasurer* v. *Wells*, 27 Verm., 276; *Jordan* v. *McKenney*, 45 Maine, 306; *State* v. *Young*, 56 id., 219.

T. E. Steele, for the defendants in error.

1. The bond may be good, although the writ shows on its face that it is not within the jurisdiction of the court to which it is returnable. It was entered into pursuant to the statute and is in due form. It was a voluntary act of the defendant and founded on a good consideration. By virtue of it the plaintiffs delivered up their property to the principal in the bond, who then took possession of it and has ever since retained it. The bond is not necessarily a part of the writ, nor need it appear upon the face of it. The taking of it is not a judicial, but a ministerial act, an act too that precedes the issuing of the writ, and if good when entered into no irregularity or defect in the writ can affect its validity. Gen. Statutes, Rev. of 1866, p. 78, sec. 341; *Persse* v. *Watrous*, 30 Conn., 143.

2. The defendant is estopped from denying the validity of the bond. Bincas, the plaintiff in replevin, could not be allowed to say in his own defence that he sued out his writ against law, and that his direction to the officer and his obedience thereto were unlawful. He cannot thus be allowed to take advantage of his own wrong. The rule of estoppel proceeds upon the consideration that the author of an illegal act shall not himself escape the consequences and cast the burden upon another. If Bincas, the principal, is estopped, so is the surety, the defendant in this suit. *Flagg* v. *Tyler*, 3 Mass., 303; *Roman* v. *Stratton*, 2 Bibb, 199; *Sherry* v. *Foresman*, 6 Blackf., 56; *Fleet* v. *Lockwood*, 17 Conn., 233; *Persse* v. *Watrous*, 30 id., 139.

PARDEE, J. The writ which lies at the foundation of all these proceedings and upon which alone the bond of Bincas and the defendant rested, was utterly void, and the invalidity was apparent upon its face. The officer and all persons directing him were liable to an action of trespass at the suit

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of Rosen & Son for taking property under it; it could not afford to any of them either defence or justification. The magistrate who placed his signature upon this void instrument was incapable of taking a valid bond for the prosecution of the claim therein set forth to final judgment; practically, the writ was not returnable to any court; the signing of it, the entering into a recognizance, and the record of the same, were each and all nugatory acts; forms merely, without substance. The law will not recognize them as being within its pale even for the purpose of furnishing redress to Rosen & Son for the loss of their property. They have their action of trespass against the wrong-doers and their action against the sureties of the sheriff, both of which proceed upon the idea of the entire unlawfulness of the proceeding. It is true there is a possibility that they may suffer loss if they are confined to these modes of protection and are deprived of their action against the surety upon the bond; but this is a danger which they share with all other persons; for all are alike exposed to loss from acts of trespass committed by irresponsible persons and officers, and the law does not undertake to insure against all unlawful acts.

We are aware that courts have sustained suits upon replevin bonds in instances where it was found that there was no statutory foundation for the writ of replevin, the property being held by an officer upon an execution; in instances where the bonds, although not in the precise form dictated by statute, yet having been voluntarily given upon a lawful writ, were nevertheless holden to be good; in instances where the bond having been executed by the surety when the writ issued, but not by the principal until after the entry of the action in court, the latter was not permitted to take advantage of his own wrong; and in instances where the statute required the magistrate signing the writ to take the bond with two sureties and he took but one, the court not permitting the single surety to defend on the ground of this non-compliance with the statute after his principal had taken property by virtue of the writ. But in all of these cases the courts to which the writs were made returnable had jurisdiction of the several

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causes; none of the writs were absolutely void; and we have been unable to find any precedent for the judgment for the plaintiffs in the present action.

There is manifest error in the judgment.

In this opinion the other judges concurred.

THE NEW HAVEN & NORTHAMPTON COMPANY *vs.* THE STATE OF CONNECTICUT.

Under the rules of the English common law the granting of a peremptory mandamus was a mere award of the court and not a formal judgment; and no writ of error lay from such an award.

Under those rules the prosecutor could not demur to the return, and thus raise a question of law as to its sufficiency.

But under our statute (Gen. Statutes, tit. 19, ch. 17, sec. 2,) the relator is allowed to demur to a return, and the awarding of the mandamus becomes a formal judgment from which a writ of error will lie.

Where a case has been reserved by a lower court for the advice of this court, and the advice has been given and judgment rendered in accordance with it, the court will not afterwards consider, upon proceedings in error, questions on which the plaintiff in error has been heard, or might have been heard, when the case was before the court upon the reservation.

But where a statute upon which the right of action depends is drawn in question as being repugnant to the constitution of the United States, this court will entertain a writ of error, notwithstanding a previous reservation, for the purpose of affirming the judgment, that the case may be carried to the Supreme Court of the United States.

WRIT OF ERROR to this court from a judgment of the Superior Court in issuing a peremptory mandamus.

The proceeding upon which the mandamus was issued is fully stated in the report of the case of *The State of Connecticut* v. *The New Haven & Northampton Company*, 43 Conn. R., 351. The case had been reserved by the Superior Court for the advice of this court, upon a demurrer to the return of the respondents, and this court had advised the Superior Court that the return was insufficient. The Superior Court thereupon rendered the following judgment in the case:

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"It is ordered and adjudged that the return of the respondent is insufficient, and that a peremptory writ of mandamus do now issue, directed to the respondent named in said alternative writ, commanding it forthwith on service thereof to stop at said depot mentioned in said alternative writ, hereafter, its regular passenger and freight trains passing over said road of the respondent, for the purpose of receiving and discharging passengers and freight."

From this judgment the present writ of error was brought, the assignment of error being "that the court, in proceeding to and rendering said final judgment, manifestly erred and mistook the law in this, to wit, in holding that the said special plea or answer so filed in said cause was not sufficient in the law to answer the premises charged upon the respondent in said writ, and in sustaining the demurrer thereto, and rendering judgment thereon, as aforesaid."

In this court the Attorney for the State moved that the case be stricken from the docket, on the ground that a writ of error will not lie from a judgment in mandamus.

W. Hamersley, State's Attorney, and *J. R. Buck*, in support of the motion to strike the case from the docket.

1. The order of the Superior Court granting the return, and ordering a peremptory mandamus to issue, was final, and the law provides for no writ of error in such cases. Our statutes have never undertaken to define the nature and extent of writs of error. They may be brought from judgments of the Superior Court to the Supreme Court of Errors. Gen. Stats., p. 449, § 10; Revision of 1808, p. 218. What action of the Superior Court constitutes a judgment within the meaning of the statute, is to be determined by the rules of the common law. The question to be determined then, is whether, by the rules of the common law, a writ of error lies from the action of a court of competent jurisdiction overruling a return to an alternative mandamus and ordering the issuing of a peremptory mandamus? The proceeding of mandamus is the creation both of the common and statute law. The statutes relating to this proceeding, in England and in the various

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states of the United States, differ materially. In determining the nature of the proceeding in any particular state, regard must be had, first to the common law, next to the statute modifications. Therefore decisions of courts, and especially *obiter dicta*, are to be relied upon as authority only after careful examination of the statutes in force where the decisions are rendered. By the common law of England mandamus is a prerogative writ, issuable at the discretion of the court. The prerogative character of the writ continued after our separation from the mother country. The prerogatives of the king merely as sovereign, and which were exercised through the courts, passed from the king to his colonies and became vested in the governments of the several states. *United States* v. *Kendall*, 5 Cranch C. C., 264; *McBride* v. *Grand Rapids*, 3 Central Law J., 309. To the alternative writ a return could be made. The truth of it could not be questioned. If it was a legal answer to the alternative writ, no peremptory writ issued. If the return was false, an action at law for making a false return could be brought, and the truth of the facts ascertained in that action. Pending the trial of the action for false return, the court would delay action upon the return; upon being certified that a judgment had been obtained by the plaintiff in the action for false return, the court then might issue the peremptory writ. But under no circumstances could the action of the court in dealing with the alternative writ of mandamus be reviewed by writ of error. The main reasons for this rule are found in the peculiar nature of the proceedings. 1st. Mandamus is a prerogative writ to compel the performance of a clearly defined and certain legal duty. It never determines a right. 2d. The granting the mandamus lies in the discretion of the court. It is not every failure to perform an undoubted legal duty that justifies the granting of the writ. Questions of discretion are not reviewable. The discretion allowed in mandamus is more limited, more essential to justice, and far less liable to abuse, than the discretion allowed in cases of injunction, petitions for new trial, &c. It will be readily seen that the law

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did not treat the action of the court in granting or refusing a peremptory writ of mandamus as a judgment liable to review, not simply on account of a verbal technicality, but by reason of the essential nature and object of the proceeding. But in time mandamus grew to be used in cases where questions of fact must arise and rights be determined. To provide for these cases the expedient of an action for false return was devised. This method proving cumbersome, the statute 9 Anne was passed in 1711, modifying the proceeding of mandamus in those cases where questions of right might be involved, and in those cases providing for a trial and judgment. But this statute applied only to cases where the return contained disputed allegations of fact. Where no question of fact arose the proceeding remained precisely as it was before. The allegations of the return being admitted, no question of right would be presented. The only questions would be, do the suggestions of the writ and the allegations of the return disclose the neglect to perform a clear legal duty? and are the circumstances such as to demand the interposition of the discretionary power of the court? It is contrary to all the analogies of the law that such a question should be reviewed on error, and the law clearly forbids it. After the passage of the statute of Anne, the law recognized two distinct proceedings in alternative mandamus; first, under the statute, where a right was determined in the same way as formerly by action for false return; second, where the return raised no question of fact or right. The order of the court in the latter case was an act of discretion only, and furnished no foundation for a writ of error. That such is the common law of England is settled beyond all possibility of doubt. High's Ex. Leg. Rem., § 557; *Rex* v. *Dean & Chapter of Dublin*, 1 Strange, 536; *Dean & Chapter of Dublin* v. *Dowgatt*, 1 P. Wms., 348; *Rex* v. *Lord of Oundle*, 1 Ad. & El., 283, 297, 299. The English law prevails in states where there is no special legislation. High's Ex. Leg. Rem., § 557; *People* v. *President, &c. of Brooklyn*, 13 Wend., 130; *People* v. *Steele*, Edmond's Sel. Cas., 505; *Layton* v. *State*, 4 Dutch., 575. In Massachusetts the statute of Anne was not adopted,

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and the proceeding remained as at common law before that statute. *Howard* v. *Gage*, 6 Mass., 462; *Strong, Petitioner*, 20 Pick., 497. And was not changed until the practice acts of 1851 were passed. *Lunt* v. *Davison*, 104 Mass., 501. A similar view of the law is held in Canada. *Regina* v. *Wells*, 17 U. Can. Queen's B., 545. In Connecticut no statute on the subject of mandamus was passed until 1821. The rules of the English common law as modified by the statute of Anne, were recognized as the common law of the state. *Strong's Case*, Kirby, 345; *Meacham* v. *Austin*, 5 Day, 233. The statute of 1821, unless necessary to confirm the jurisdiction of the Superior Court after the adoption of the constitution, was declaratory of the common law. No statute affecting the question at issue has been passed since 1821. The law of the state at that time was the same as the common law of England. This claim is susceptible of demonstration. If the law has been altered since 1821, it must have been done by judicial legislation. But no case can be cited to prove any such legislation.

2. It appears from the record that the Superior Court declined to entertain the first motion of the counsel for the state, and compelled the filing a motion more analogous in form to a demurrer. This action of the court can not affect the legal effect of its order. It is a mere question of practice. Whether we test the legal sufficiency of the return by a motion technically in the form of a motion for a concilium or technically in the form of a demurrer, is immaterial except as it relates to accuracy in practice. And so the court intimated in the two cases cited above, *Rex* v. *Lord of Oundle* and *Regina* v. *Wells*.

3. Where the Superior Court reserves a case for the advice of the Supreme Court of Errors, upon questions of law involving the whole case, and the advice is given, leaving no room for any action on the part of the Superior Court, except to enter up judgment in accordance with the advice of the Supreme Court, the judgment so rendered is not a judgment within the meaning of the statute allowing writs of error. It is practically and for the purposes of the law a judgment of

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the Supreme Court of Errors. The allowance of the writ of error was therefore void, and the case should be stricken from the docket.

G. H. Watrous and *C. E. Perkins*, contra.

When this case was before this court on a reservation it advised that judgment should be rendered for the plaintiff, and the Superior Court, in accordance with that advice, rendered judgment in favor of the plaintiff. As it was a reservation no further proceedings from the decision of this court would lie, and as some of the questions therein arise under the constitution of the United States, and are of great importance, the counsel for the defendants filed this writ of error in order to take these questions to the Supreme Court of the United States. The plaintiff now excepts to the jurisdiction of this court, on the ground that in proceedings in mandamus no writ of error will lie; and this is the sole question for the consideration of the court.

A writ of error is a writ of right, and there is no discretion in relation to it. *Crosby's case*, 3 Wils., 188, 193; *Queen* v. *Paty*, 2 Salk., 503. The general principle will probably also be admitted that at common law writs of error lie from all judgments of courts. Lord Coke says: "This writ lieth when a man is grieved by any error in the foundation, proceedings, judgment, or execution, and thereupon it is called *breve de errore corrigendo*. But without a judgment, or an award in the nature of a judgment, no writ of error doth lie." Coke upon Littleton, 288 b., § 503. And it has been held in innumerable cases in England and this country, that at common law, whenever there is a *judgment* of a court of common law, a writ of error will lie. In this state, however, the issuing of writs of error is provided for by statute, as follows: "Writs of error may be brought to the Supreme Court of Errors, to be holden in any judicial district or county, from the *judgments and decrees* of the Superior Court, Common Pleas and District Court in such judicial district or county." The only question, therefore, in this part of the case is, was there a *judgment* in this action? It would seem that this question was settled by

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the papers themselves. The record says: "The court rendered the following *judgment*." "It is ordered and *adjudged* that the return of the respondents is insufficient, &c." In the reservation the question reserved was, what *judgment* shall be rendered upon the record, and this court advised that judgment be rendered for the plaintiff. The construction of this statute has always been that error would lie in mandamus. By Gen. Stat., p. 455, sec. 14, it is enacted, that "when a final judgment is rendered or decree passed in any cause in which a party *may be entitled to a writ of error* to the Supreme Court of Errors, he may, in the same term, and within twenty-four hours, file his motion in error." In all cases, therefore, where a motion in error will lie, it must be that a writ of error also will lie, for it is only *because* a writ of error lies that a motion will lie, and if this court has sustained motions in error in any case, it is the same exactly as if writs of error had been brought and sustained in that case. But since 1858 eleven cases of mandamus have been brought before this court by motion in error, and passed upon by this court without any intimation either by court or counsel that there could be any question as to the power of the court to entertain them. *Waterbury* v. *Hartford, Prov. & Fishkill R. R. Co.*, 27 Conn., 146; *Colt* v. *Roberts*, 28 id., 330; *State* v. *Hartford & N. Haven R. R. Co.*, 29 id., 546; *Freeman* v. *Selectmen of New Haven*, 34 id., 406; *Pratt* v. *Meriden Cutlery Co.*, 35 id., 36; *Seymour* v. *Ely*, 37 id., 103; *State* v. *N. Haven & Northampton Co.*, 37 id., 153; *State* v. *N. Haven & Northampton Co.*, 41 id., 134; *Lyon* v. *Rice*, 41 id., 245; *Farrell* v. *King*, id., 448; *State* v. *Hillard*, 42 id., 168. See also *Stonington* v. *States*, 31 Conn., 214. If anything was required to show the meaning of this statute it would seem that this must be sufficient. But the rule is the same elsewhere. High on Extr. Rem., § 557, says: "In this country the courts, *almost without exception*, regard the judgment of an inferior court awarding or refusing a peremptory mandamus as a final judgment on which error will lie." The statutes of the United States, on the subject of writs of error, are similar to our own. "All *final judgments* of any Circuit

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Court in civil actions may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error." U. S. Statutes, § 691. The U. S. Courts have always held that under this statute writs of error would lie in cases of mandamus. *U. States* v. *Columbian Ins. Co.*, 2 Cranch C. C., 266; *Columbian Ins. Co.* v. *Wheelwright*, 7 Wheat., 534; *U. States* v. *Kendall*, 5 Cranch C. C., 278; *Kendall* v. *U. States*, 12 Pet., 618; *Holmes* v. *Dennison*, 14 Pet., 566; *Ex parte De Groot*, 6 Wall., 497. And there are many other cases in the Supreme Court to the same effect. See also, 1 Redf. on Railways, 695; Moses on Mandamus, 232. And we believe that in all of the states where the remedy is by writ of error, it lies in cases of mandamus, except in New Jersey, and at one time in New York, when the courts of the latter state followed the English practice, and rendered no judgment in the proceeding, and for that reason held that no writ of error could lie. In those states where the remedy is by appeal, of course the matter is regulated by codes or statutes, but we believe that in almost all of them there is some method of reviewing the decision of the lower court in mandamus. What possible reason can be urged why decisions in mandamus should not be reviewed? They are considered now mere actions at law, like any others. *Gilman* v. *Bassett*, 33 Conn., 298; *State* v. *N. Haven & Northampton Co.*, 41 id., 137; *Kentucky* v. *Dennison*, 24 How., 97; High on Ext. Rem., § 4; 2 Dillon Municp. Corp., § 663. Questions arise in them of great importance and great difficulty, and it is certainly right and reasonable that they should be finally settled by this court. It is true that in England at one time it was held that writs of error would not lie in proceedings in mandamus, but this was solely on account of the peculiar form which was pursued in such actions at that time. There was literally nothing in the proceedings but the petition and answer; if that on its face set out a good defence no plea was allowed, nor any evidence as to matters of fact was taken, the petition was dismissed, and the real question was tried by an action for a false return, upon which a writ of error would lie. No demurrer ever was allowed, but they devised what was called

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a *concilium*, but no judgment could be rendered on that. By the statute of Anne it was allowed to traverse this return, and upon such traverse a judgment could be rendered, *and then a writ of error would lie*, but it was not allowed even then to file a demurrer, and it was expressly held in the leading case of *Rex* v. *Dean & Chapter of Dublin*, 8 Mod., 27, that if either party *could demur*, and there was a *judgment on a demurrer*, then a writ of error would lie. See High on Ext. Rem., §§ 556, 557, and notes, where this is fully considered and explained. But these old decisions and forms of practice have never been adopted in this state, and here by the express terms of the statute, as well as by the universal practice both of the bar and of this court, writs of error will lie in such cases.

HOVEY, J.* This case comes before us on a writ of error to reverse a judgment of the Superior Court for Hartford County. The proceedings below were by mandamus, to compel the plaintiffs in error, a railroad corporation created by the laws of this state, to perform a duty imposed upon them by an act of the General Assembly. The act referred to, which was passed upon the petition of Orson W. Stow and others, on the 15th of August, 1875, ordered and made it the duty of the plaintiffs in error, upon the performance by the petitioners of certain conditions, to stop their regular trains of cars at Plantsville in the town of Southington for the purpose of receiving and discharging passengers and freight. It also contained a provision that the order and duty so made and imposed might be enforced by mandamus by the State's Attorney for the county of Hartford or at the relation of any inhabitant of the town of Southington. The conditions prescribed were performed by the petitioners for the act, but the plaintiffs in error refused to stop their trains at Plantsville as the act required. The State's Attorney thereupon applied to the Superior Court sitting at Hartford, for a writ of mandamus to compel the plaintiffs in error to perform that duty.

* Judge HOVEY of the Superior Court sat in the place of Judge GRANGER, in this and the two following cases.

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Upon that application an alternative mandamus was issued, which was duly served. The plaintiffs in error made a return in which they admitted that they had not stopped their trains at Plantsville, and assigned various causes for not doing so, one of which was that the act of the General Assembly was in violation of the constitution of the United States. The attorney for the state, following the common law practice which prevailed in England before the statute of VI and VII Victoria, ch. 67, objected to the return as insufficient, and moved for a concilium, in order that the question of its sufficiency might be set down for argument on a certain day, and determined in a summary manner, without a formal demurrer and without pleadings. The court below, however, declined to entertain the motion, and then the attorney demurred to the return. But there was no entry upon the record of a joinder in demurrer. Overlooking this informality, or deeming it of no importance, as it was not excepted to, the court reserved the question as to the judgment which should be rendered for the advice of this court. And this court, after argument and deliberate consideration, advised the Superior Court that the return to the alternative mandamus was insufficient and that a peremptory mandamus should be granted. In pursuance of that advice the Superior Court adjudged that a peremptory writ should issue directed to the plaintiffs in error, commanding them, immediately upon the service thereof, and thereafter, to stop at Plantsville their regular passenger and freight trains for the purpose of receiving and discharging passengers and freight. The writ was accordingly issued, but before it was served the defendants below brought the present writ of error.

The defendant in error now moves that the writ of error be struck from the docket, which is equivalent to a motion to quash the writ, on several grounds. In the first place he insists that a writ of error does not lie on the award of a peremptory mandamus; and in support of this position he relies mainly upon the case of *The King* v. *The Dean and Chapter of Trinity Chapel in Dublin*, 1 Stra., 543; *S. C.*, 8 Mod., 27. That case was on a writ of error from the King's

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Bench in Ireland to the King's Bench in England on the award of a peremptory mandamus, and the question was whether a writ of error would lie on such an award. After two arguments it was determined that it would not lie, and it was accordingly quashed. The court in giving judgment said that it was against the nature of a writ of error to lie on any judgment but in causes where an issue might be joined and tried, or where judgment might be had on demurrer. This judgment was subsequently affirmed in the House of Lords, all of the common law judges being of opinion that a writ of error would not lie. 2 Bro. P. C., 554. The same point afterwards came before the House of Lords in the case of *Pender* v. *Herle*, 3 Bro. P. C., 178, and the like decision was made upon the ground that to grant or deny a mandamus was a mere award of the court and not a strict formal judgment. The doctrine of these decisions was recognized and enforced in the other cases referred to by the defendant in error.

In the case of *The King* v. *The Lord of the Manor of Oundle*, 1 Ad. & El., 283, the question of the sufficiency of the return to an alternative mandamus had been argued upon a motion for a concilium, and after argument a peremptory mandamus had been awarded. Whereupon the counsel for the defendants, with the purpose of having the question carried before a court of error, moved for and obtained a rule to show cause why an order should not be made requiring the prosecutor to demur to the return and the defendants to join in demurrer, and that judgment thereupon be entered on the record that the return be quashed for insufficiency and a peremptory mandamus awarded. It was argued in support of the rule that the effect of the statute of IX Anne, ch. 20, in allowing the prosecutor to plead to or traverse the return and the defendant to reply, take issue or demur, was to enable a party dissatisfied with the judgment in a mandamus proceeding to have it reviewed upon a writ of error; that although it was not expressly mentioned in the statute that the prosecutor might demur to the return, yet it was provided that he might plead to or traverse the facts contained in it, and therefore he might plead that they did not amount

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to a sufficient return in law, and a substantial demurrer would be an issuable plea. But the court discharged the rule; Patterson, J., saying that "the original practice was that the party objecting to a return made an application to the court to quash it, which was in the nature of a demurrer; if the application was sustained, a peremptory mandamus went, and there could be no proceeding in error." And he further stated that the statute of Anne "did not remove any difficulty in that respect." Littledale, J., said that "the concilium is the usual mode of demurring in such cases."

The case of *The People* v. *The President and Trustees of Brooklyn*, 13 Wend., 130, arose in the state of New York and was decided by the Court for the Correction of Errors in that state. The relators obtained an alternative mandamus from the Supreme Court against the defendants, requiring them to cause a report which had been made by certain commissioners of estimate and assessment in reference to the opening of a street, to be filed in the office of the clerk of King's County or to show cause to the contrary. On the coming in of the return the relators, instead of pleading thereto or putting in a demurrer, as under the New York statutes they might, applied by motion for a peremptory mandamus, which the court denied. The relators thereupon sued out a writ of error, and brought the record before the Court of Errors for revision; but the court dismissed the writ. The chancellor, in giving the reasons of the court for thus disposing of the case, said that he had not considered it necessary to examine the case upon its merits, having arrived at the conclusion that no writ of error lay upon the granting or refusing a mandamus upon a mere motion, where no plea or demurrer to the return had been filed.

In all of the cases referred to, except the last, the proceedings were regulated and controlled by the rules of the English common law. The prosecutor was not allowed by those rules to demur to the return if he conceived it to be insufficient in law, or traverse the allegations contained in it if he knew them to be false; nor was he permitted to plead to the return in any form whatever. If he wished to test the validity or

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sufficiency of the return in point of law, he could do so only by an application to the court that it be quashed, or, by objecting to it on the ground of its insufficiency and moving for a concilium, have the questions argued and determined. In either form of proceeding, if it appeared to the court that the return was insufficient in law, a peremptory mandamus was awarded; but if sufficient in law though false in fact, the proceedings by mandamus were suspended, and the prosecutor had no other recourse but to bring an action on the case against the defendant for a false return, though if he succeeded in that action a peremptory mandamus went as in cases where the return was held to be insufficient. *The King* v. *The Mayor and Aldermen of London*, 3 Barn. & Ad., 255. The award in every such case, being made upon motion and not upon issue joined, either of law or of fact, was considered by the courts to be a rule merely and not a formal judgment. And upon that ground, mainly, it was held in the cases cited that a writ of error would not lie.

These rules of proceeding were essentially modified in England in 1711 by the statute known as the statute of Anne. The effect of that statute was to assimilate the proceedings in cases by mandamus to ordinary actions at law, the prosecutor setting forth his right or cause of action in certain formal modes, to which the defendant set up his defence by way of return, the prosecutor being then at liberty to plead to or traverse the return. 3 Bla. Comm., 265. Such further proceedings were then authorized as might have been had at common law if the prosecutor or relator had brought his action on the case for a false return. But the statute did not abrogate the common law rules of proceeding, or, according to the interpretation it received from the English courts, authorize the prosecutor or relator to test the validity of the return by way of demurrer. *The King* v. *The Mayor and Aldermen of London*, supra; High on Extra. Rem., §§ 490, 491. If, however, the prosecutor or relator pleaded to or traversed the return, and, upon issue joined, judgment was rendered in his favor, the defendant was entitled to a writ of error to review the judgment. *The King* v. *Dean and Chapter of Trinity Chapel in Dublin*, supra.

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This summary method of testing the validity or sufficiency of a return to an alternative mandamus provided by the common law never received the sanction of the courts or was otherwise incorporated into the jurisprudence of this state. The first proceeding of which our reports furnish any account was had before the Superior Court sitting at Litchfield in 1788. An alternative mandamus had been issued to the town clerk of the town of Litchfield to record a deed which he had refused to record, and he had made his return to the writ. The court was thereupon requested to direct what should be the rule of proceeding in trying the sufficiency of the return—whether the rule provided by the common law as it stood before the statute of Anne, or that statute. And the court determined that the statute should be the rule of proceeding. *Strong's case*, Kirby, 345. No record of this case was made by the clerk of the court in which it was commenced, (the contest having been settled without the trial of the return, 1 Sw. System, 99,) and the original papers have been taken from the files of the court and cannot be found. But it is apparent from the report of the case that the court was of opinion that the proper mode of testing the sufficiency of the return under the provisions of the statute of Anne, was, not by a motion to quash or a motion for a concilium, but by a substantial demurrer. A similar opinion was expressed by the Supreme Court of the state of New York in the case of *The People* v. *Champion et al.*, 16 Johns., 61. That was a proceeding by mandamus to compel certain commissioners to lay out and establish a highway. The commissioners made a return to the alternative writ and there was a demurrer to the return. The statute under which the proceeding was instituted was, in respect to the form of the pleadings, like the statute of Anne. Counsel for the defendants objected that it was irregular for the relator to demur to the return. But the court directed the demurrer to be argued, and after argument held that the statute authorized the party prosecuting to demur to the return. Spencer, J., in giving the opinion of the court, said: "We ought to encourage and promote this method of testing the validity of a return, for

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if either party is dissatisfied with the judgment of the court he has his remedy on the record by a writ of error."

The rule of proceeding adopted in *Strong's case* continued to be the rule in like cases until 1821, when the present statute, except so much of it as gives jurisdiction in mandamus cases to the Courts of Common Pleas and the District Court, was enacted. Since that time the statute has furnished the rule of proceeding; and while it directs the courts upon which it confers jurisdiction to issue writs of mandamus, to proceed therein and render judgment according to the course of the common law, it has been uniformly and I think properly construed to authorize the prosecutor or relator to test the validity or sufficiency of a return by way of demurrer; and the practice, so far as I have been able to obtain information respecting it, has been in harmony with that construction. The court below, therefore, properly declined to entertain the motion of the State's Attorney to quash the return to the alternative writ or for a concilium, and directed him to answer further; and the Attorney having, in compliance with that direction, made further answer in the form of a substantial demurrer to the return, the peremptory mandamus was awarded by a formal judgment upon the demurrer. On such a judgment, the authorities all agree that a writ of error will lie.

But it is insisted by the defendant in error that the granting or refusing of a writ of mandamus is a matter resting in the sound discretion of the court, and that the exercise of that discretion is not the subject of review on a writ of error. It is undoubtedly a correct general proposition that the exercise of the jurisdiction to grant writs of mandamus rests to a considerable extent in the sound discretion of the court, and that where in the exercise of such a discretion the writ is refused, the judgment of refusal will not be reviewed on error. But I am not prepared to hold that where the writ is granted in a case in which the court might in its discretion have refused it, a revision of the legal question will be precluded. 1 Redf. on Railw., note 1, page 660. However this may be, no doubt can exist that in a case like the one in the

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court below, where the writ is applied for to enforce an act of the legislature for the public benefit and there is no other adequate remedy for its enforcement, the state or its attorney is entitled to the writ as of right, and there is no discretion in the court to refuse it. Tapping on Mandamus, 54, 56, 288; 2 Dil. on Mun. Corp., § 695.

Another point made by the defendant in error is, that the judgment below was, practically and for the purposes of the law, a judgment of this court and not a judgment of the Superior Court, within the meaning of the statute allowing writs of error. The decisions in the cases of *Smith* v. *Lewis*, 26 Conn., 119, *Nichols* v. *City of Bridgeport*, 27 id., 459, and *Fowler* v. *Bishop*, 32 id., 199, have established the rule that where a case has been reserved for the advice of this court, and the advice has been given, and judgment has been rendered in accordance with such advice by the court making the reservation, this court will not afterwards, upon proceedings in error, consider questions on which the party moving in error was fully heard or had an opportunity to be heard when the case was before this court upon the reservation. "It is quite obvious," says STORRS, C. J., in giving the reasons for the decision in *Nichols* v. *City of Bridgeport*, "that the allowance of a practice by which questions decided by us on a reservation of them for our opinion, might be afterwards raised again on a writ of error brought before us, would do away with the great advantages of such reservations, and render them not merely useless but very burdensome, as to both the increased expense and delay of the litigation. And there is not only no occasion for reviewing the questions decided by us on such reservations, since those questions, when so reserved, although brought before us informally, are considered and examined as deliberately and carefully as if they were presented by writ of error, but the allowance of such review would give the complaining party the benefit of a re-argument, to which he ought not to be entitled unless for special cause apparent to the court, and which it is in his power to obtain by a regular application for that purpose, if sufficient reasons for it be shown."

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In practice this rule does no injustice to the parties interested, as it places them in no worse situation than they would have been if the judgment had been rendered originally by the lower court and afterwards affirmed on error by this court. For where, in a case reserved, the validity of a treaty or statute of the United States is drawn in question and the judgment is against its validity, or where there is drawn in question the validity of a statute of this state on the ground of its being repugnant to the constitution, treaties or laws of the United States and the judgment is in favor of its validity, or where some title, right, privilege or immunity is claimed under the constitution or some treaty or statute of the United States and the judgment is against the title, right, privilege or immunity set up or claimed, the unsuccessful party is never refused the privilege of bringing a writ of error to this court and having the judgment, without re-argument or further hearing, affirmed. He may then, if he chooses, remove the record to the Supreme Court of the United States and have the judgment re-examined by that tribunal. U. S. Statutes at Large, 132, § 709.

As the statute upon which the proceedings in the court below were founded, was drawn in question on the ground of its being in violation of the constitution of the United States, and the judgment was in favor of its validity, jurisdiction of the present case is entertained by this court for the purpose of affirming the judgment, according to the usage and practice in similar cases.

Upon these grounds the motion of the defendant in error to strike the case from the docket is denied, and the judgment of the Superior Court is affirmed.

In this opinion the other judges concurred.

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MORRIS TYLER AND OTHERS *vs.* WILLIAM HAMERSLEY, STATE'S ATTORNEY.

An adjudication of contempt by a court of competent jurisdiction, where the proceeding is according to the common law practice, is final, and can not be reviewed by a court of error.

But when the question of contempt is tried upon an issue of law tendered by the party moving in the proceeding, and decided upon such issue, the decision must be regarded as a judgment upon which a writ of error may be brought.

A writ of error, though operating in ordinary cases as a supersedeas of execution from the date of its service, does not have that effect in the case of a peremptory mandamus.

Especially does it not have that effect where the errors assigned have already been before the court upon a reservation of the case for advice and have been passed upon by the court.

WRIT OF ERROR from a judgment of the Superior Court adjudging the plaintiffs in error guilty of contempt and ordering them imprisoned.

The petition to the Superior Court for the order for the commitment of the plaintiffs in error was made by William Hamersley, Esq., the defendant in error, as Attorney for the State for the county of Hartford, and set forth the refusal of the respondents, who were directors of the New Haven & Northampton Company, a railroad corporation, to obey a writ of peremptory mandamus issued by that court, requiring the company to stop its passenger and freight trains at the village of Plantsville. The facts with regard to the matter are fully stated in the report of the case of *The New Haven & Northampton Company* v. *The State of Connecticut*, next preceding, and in that of the case of the *State of Connecticut* v. *The New Haven & Northampton Company*, 43 Conn. R., 351.

To the petition for their commitment the respondents made the following answer:

And now the respondents for answer to the foregoing application say, that they admit and aver that this court, upon the 19th day of May, 1876, in a proceeding brought to the present term of this court, rendered judgment that a peremptory mandamus issue, and that thereupon a peremptory

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mandamus did issue from this court, as is alleged in said application, but they deny that the same was ever legally served upon the secretary of said company, because they say that immediately after the same had been signed and issued and placed in the hands of the sheriff for service, and before the said sheriff had served or commenced to serve the same, the corporation defendant in said action had in due form of law caused to be issued a writ of error upon said judgment so rendered in said action, returnable to the next term of the Supreme Court of Errors in this state for the first judicial district, which writ of error was, before the said sheriff had served or commenced to serve said writ of peremptory mandamus, actually served upon the defendant in error therein and the plaintiff in said action of mandamus, and the said sheriff then and there had full notice of said issuance and service of said writ of error. And these respondents aver that by operation of law the said issuance and service of said writ of error as aforesaid, operated as a stay and supersedeas of said writ of peremptory mandamus, and the same thereupon became null and void and of no effect, and that it thereby became the duty of said sheriff to proceed no further in the service of the same, but the respondents allege that the said sheriff, his said duty in the premises not regarding, did, upon said 19th day of May, and after the issuance and service of said writ of error as aforesaid, leave a copy of said writ of peremptory mandamus with the secretary of said company as aforesaid. And the respondents further allege, that immediately upon the receipt of the said paper by the said secretary, they, being desirous of performing their legal duty in the premises, held a directors' meeting, and caused their legal counsel to be inquired of as to the legal duty of these respondents in the premises, and received from their said counsel certain opinions hereinafter referred to, and the said respondents as directors, in reliance upon the authority of said opinions, passed a vote to accept and act upon the advice so given.* And they further say that, relying upon

* The opinion of the counsel of the railroad company annexed to the answer

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said opinions, they have not caused any trains to stop at the said Plantsville station, as stated in said application, but they aver that in so doing they have not been guilty of any intentional contempt of this court, or had any desire or intention to disobey any legal orders of this court, but believing from the said opinions of their counsel, upon whose knowledge of the law and of the duty of the respondents under these circumstances they have wholly relied, that said writ of peremptory mandamus was superseded, and that there was no legal duty or obligation imposed upon them by the leaving of said

of the respondents, was as follows:

HARTFORD, CONN., May 20th, 1876.

In the matter of the service of a mandamus upon the New Haven & Northampton Company, to stop its trains at Plantsville.

I am asked to give my opinion as to whether the peremptory mandamus issued by the Superior Court on the 19th day of May, commanding the company to stop its trains at Plantsville, and which was served on the secretary of the company about two o'clock on that day, was, when so served, a valid precept, which the company was bound to obey. The facts to my own knowledge are these:

The court at Hartford, about eleven o'clock on the 19th instant, gave judgment that a peremptory mandamus issue, and immediately thereupon such a mandamus was signed by the clerk and delivered to the sheriff, with instructions to serve the same upon the secretary of the company. Within five minutes thereafter a writ of error in the cause was duly issued and signed, and was delivered to the sheriff before he left the court room, with instructions to serve it upon the defendant in error, Mr. William Hamersley, the State Attorney, which the sheriff immediately did. The writ of error was therefore issued and served before the sheriff had commenced the service of the mandamus.

Upon these facts I am of the opinion that this writ of error by its issuing and service was a supersedeas of the process of mandamus so issued and in the hands of the sheriff, that that process became thereupon invalid and of no effect, and that it was the duty of the sheriff to proceed no further in serving it, in accordance with the principles laid down in *Dutton* v. *Tracy*, 4th Conn. Reports, 365, and many other cases. It is I believe universally held that service of a writ of error made before service of a final process, is a stay and supersedeas of that process.

Under this view of the law I do not hesitate to give it as my opinion that the mandamus when so served by the officer upon the secretary of the company had been legally superseded, and was a void process, that the act of the officer in serving it was illegal and invalid, and that the pretended service imposed no duty whatever upon the company or its officers.

CHAS. E. PERKINS.

We concur in the above.

R. D. HUBBARD,
JNO. S. BEACH,
GEO. H. WATROUS,
H. B. HARRISON.

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copy with the said secretary of said company, and for no other reason or reasons whatever, they have not stopped said trains at Plantsville as aforesaid. Wherefore they pray that they may be hence dismissed.

To this answer the Attorney for the State demurred, and prayed that an attachment might issue.

The court (*Granger, J.*,) held the answer insufficient, and made an order "that the respondents and each of them be attached of their bodies, and that they and each of them be therefor committed to the county jail in the town of Hartford in said Hartford County, and be therein confined and imprisoned till discharged by order of this court, or otherwise by due process of law, and pay the costs of this petition and the proceedings therefor; and that unless the said above-named officers and directors shall, forthwith and within twenty days after the day on which notice of this order shall be served on them or any of them, obey said peremptory mandamus, and make return of the same to this court, process to that end be duly issued by the clerk of this court against each of said officers and directors."

From this judgment the present writ of error was taken, the assignment of error being the holding that the writ of error referred to in the respondents' answer was not a supersedeas of the writ of peremptory mandamus.

G. H. Watrous and *C. E. Perkins*, for the plaintiffs in error.

1. Does a writ of error lie from the judgment of the Superior Court in a proceeding for contempt like the one at bar?

A proceeding for contempt is either a civil or a criminal proceeding. If it is a civil proceeding, being a judgment of the Superior Court, a writ of error lies under the statute, for the reasons referred to in our argument in the case of *The New Haven & Northampton Co.* v. *The State*. It is unnecessary to go over again all the points and authorities there presented. But we most confidently submit that a proceeding for punishment of a contempt of court is not a civil but a criminal proceeding, and in such case section 16th of Gen. Statutes, p. 539, gives the defendant the same right to a writ

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of error as in civil proceedings. Contempts may properly be divided into two classes. First, where they consist of acts done in the presence and within the actual knowledge of the court. In such cases there are no proceedings, no notice is required, but the matter being within the actual knowledge of the court, it issues its warrant and has it executed at once. *Ex parte Bradley*, 7 Wall., 373. In such cases, although a writ of error would probably lie, yet it would not be a supersedeas, because, it not being possible to bring and serve one before the process of commitment in contempt was executed, it would come under a well-settled rule that a writ of error issuing after execution executed is not a supersedeas. But it is entirely unnecessary to consider this class of cases. The proceedings in them are summary, intended only to protect the person of the judge or the actual administration of justice, and may or may not be different from such cases as the case at bar. The second class of cases are those like the present, not proceedings to punish acts done in the presence of the court, but really in the nature of process to enforce the orders of the court. They generally arise in cases of injunction, and it often depends on nice questions both of law and of fact, whether there has in fact been a violation of or refusal to comply with an order of court. Here is a distinct and independent proceeding, consisting of a petition duly issued, an order of notice issuing from the court, duly served and returned, an answer filed by the respondents, to which a demurrer was filed, and a hearing had, on which the court *adjudges* that the answer is insufficient, and that the defendants have been guilty of contempt, and it is further *adjudged* that the defendants be imprisoned, and that process to that end issue. Can there be any doubt that this is a *judgment* of the Superior Court in a separate and independent action, either civil or criminal? *Ex parte Langdon*, 25 Verm., 683; *Hill* v. *Rogers*, 2 Iowa, 69. It has been, we believe, uniformly held that these cases are *criminal prosecutions in fact*, though they may not be in form. The question first arose in the Supreme Court of the United States, in *Ex parte Kearney*, 7 Wheat., 38. That was an application to that court for

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a writ of habeas corpus to bring up the body of a person imprisoned for contempt of the Circuit Court. The court refused to issue it, on the sole ground that the proceeding in contempt was a *criminal* proceeding, and that they had no power given to them to revise any criminal proceeding either by writ of error or habeas corpus, or in any other way. Story, J., says, (p. 43:) "When a court commits a party for a contempt, their adjudication is a *conviction*, and their commitment in consequence is execution, and so the law was settled upon full deliberation in *Lord Mayor of London's case*, 3 Wils., 188. This has ever since been considered as the leading case on the subject, and is approved everywhere. In *Commonwealth* v. *Newton*, 1 Grant's Cas., 453, the court says, in a proceeding to punish a contempt: "There is no ground to doubt our jurisdiction in this case, because this is a proceeding for contempt, *which is a substantive criminal offense*, and of which we take cognizance on *certiorari* or writ of error, in the same manner and to the same extent as we do of any other public offense." In *Whittem* v. *The State*, 36 Ind., 210, in a very full and thorough discussion of the question, the court says: "In our opinion it is fully and completely demonstrated by the foregoing authorities, that a proceeding for contempt *is a criminal proceeding*, and our statute in plain and express language gives an appeal to this court *from all final judgments in criminal cases*, and we are therefore of the opinion that the appellant had a right of appeal." See *Stuart* v. *The People*, 3 Scam., 395. There are very many cases where it has been held that writs of error lie in contempt proceedings. *Androscoggin & Kennebec R. R. Co.* v. *Androscoggin R. R. Co.*, 49 Maine, 401; *Hundhausen* v. *Marine Fire Ins. Co.*, 5 Heisk., 702; *Remley* v. *De Wall*, 41 Geo., 460; *People* v. *Simonson*, 9 Mich., 492; *Romeyn* v. *Caplis*, 17 id., 448; *Vertner* v. *Martin*, 10 Sm. & M., 103. All our statutes relating to contempt speak of it as a proceeding to "punish." Gen. Stats., p. 61, § 15; p. 476, § 2; *Rogers Man'f'g Co.* v. *Rogers*, 38 Conn., 123. There is special reason why a writ of error should lie in cases like the present. As is said by Spencer, J., in *Yates* v.

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The People, 6 Johns., 406, which was a case of *habeas corpus* brought to test the validity of a commitment for contempt: "It appears to me to involve the highest absurdity to conceive that the framers of our constitution and our laws meant to erect this high tribunal to correct the errors of our highest court of judicature in civil cases, and to leave the still greater and more valuable rights of personal liberty unprovided for and unprotected by appeal to this high court, where in fact judgment has been given." But it is claimed that the power of a court to commit for contempts is absolute and unlimited, and will not be interfered with by any other court, and it is especially on this ground it is urged that a writ of error will not lie. But is this so? Do all citizens hold their liberty at the absolute disposal of any judge of any court, without redress or an opportunity of coming to this court to review that decision? No doubt this court will not review the *facts* found by the court below, but can it not say whether those facts constitute a contempt? In *People* v. *Hackley*, 24 N. York, 74 and 78, the court say: "As a general rule the propriety of a commitment for contempt is not examinable in any other court than the one by which is was awarded. But this rule is *of course* subject to the qualification that the conduct charged as constituting the contempt must be such that some degree of delinquency or misbehavior can be predicated of it, for if the act be plainly indifferent or meritorious, *or if it be only the assertion of the undoubted right of the party*, it will not become a criminal contempt by being adjudged to be so." Apply this principle to the case at bar. Assume that the defendants were correct in the view that the issuing of the writ of error in the mandamus case was a supersedeas, what an oppressive act it would be to imprison them because they did not obey a void and illegal process. What possible reason can be urged why this court should not have a revisory power over these questions? No doubt the power to commit for contempt is an indispensable power for courts, but it is not necessary that every inferior court in the land should have the final, absolute power to commit for everything they may please to call a contempt.

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2. If a writ of error will lie in mandamus, is it a supersedeas of final process if brought and served before such final process is served?

This question is one of great importance, and has never before been brought up in this state, though we believe that in practice a motion in error has always been a supersedeas; but upon the general principles applicable to all actions at law, we submit, most confidently, that there can be no doubt on this question. Swift states the rule as follows, Vol. 1, p. 794: "When a writ of error is a supersedeas. It is a rule that a writ of error after final judgment and before execution executed, is a *supersedeas* of the execution from the time of the service of the writ, or the time the party or officer has actual notice that the writ has been allowed and signed; and a proceeding after that time would be illegal." In England the mere issuing of a writ of error before service of the process was a supersedeas. 2 Bac. Abr., 448; *Bishop of Ossory's case*, Cro. Jac., 534; *Jaques* v. *Nixon*, 1 T. R., 279; *Somerville* v. *White*, 5 East, 145; *Meriton* v. *Stevens*, Willes, 272. In this state, and generally in the United States, it is held that the mere allowance of the writ of error is not of itself a supersedeas, but it is necessary that it be served upon the party or officer before the levy of final process is commenced; but if so served, it has invariably been held to be a supersedeas. *Phelps* v. *Landon*, 2 Day, 370; *Dutton* v. *Tracy*, 4 Conn., 365; *Arnold* v. *Fuller's heirs*, 1 Ohio, 463; *Beatty's Adm'r* v. *Chapline*, 2 Har. & Johns., 7; *Blanchard* v. *Myers*, 9 Johns., 66; *McDonald* v. *Gifford*, 1 Brews., 280; *Board of Commissioners* v. *Gorman*, 19 Wall., 661. In the United States courts the matter is somewhat modified by statutes, but they only lessen the common law effect. In *United States* v. *Dashiel*, 3 Wall., 701, Mr. Justice Clifford says: "The effect of a writ of error under the 22d section of the judiciary act is substantially the same as the writ of error at common law." And again: "Writs of error at common law, whether sued out by plaintiff or defendant, *operated in all cases as a supersedeas.*" In all these cases it is held that in actions at law a writ of error is a supersedeas, and

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we believe that no case can be found where a different decision has been made. But we suppose that this general rule will not be contested by the defendant in error; but it will be claimed that a mandamus is an exceptional case, and that this general rule does not apply. If it be claimed that a mandamus is not an action at law, but an exceptional kind of action, outside of the common rules of law, we reply that in *State* v. *N. Haven & Northampton Co.*, 41 Conn., 137, PARK, C. J., says: "The writ of mandamus is one of the proceedings at common law." And in *Kentucky* v. *Dennison*, 24 How., 97, TANEY, C. J., says: "It is equally well settled that a mandamus in modern practice is nothing more than an action at law between the parties." See also High on Extr. Rem., 8. If it be claimed that a mandamus is a prerogative writ, and that therefore the usual rules do not apply to it, we reply that in *Gilman* v. *Bassett*, 33 Conn., 305, this court says: "Doubtless the writ was originally a prerogative one, but it has ceased to depend upon any prerogative power, *and is now regarded in much the same light as other process.*" See also *Kentucky* v. *Dennison*, supra. It is claimed that a writ of error is only a supersedeas of an *execution*, and that an execution is only a final process for the collection of money or possession of land under a judgment. But the text books and authorities all speak of an execution as a process for enforcing the judgment whatever it is. Herman on Executions, 2; Jacob's Law Dict. *Execution;* Bla. Com., 412; Burrell's Law Dict., *Execution; U. States* v. *Nourse*, 19 Pet., 28. We believe no definition can be found where the meaning of the word execution is confined only to cases where money or land is to be recovered. When, therefore, it is said that a writ of error is a stay of *execution*, it clearly means a stay *of the final process issued to execute the judgment.* If we examine the reason of the rule it will clearly appear that it applies to mandamus. The reason is that where a party has had a case decided against him in an inferior court, and has a right to go to a higher court to test the legality of that decision, it is an unjust thing to allow that judgment to be enforced before it is decided whether it

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be legal or not. It is said that in England writs of error in cases of mandamus were not a supersedeas, but in England, under their peculiar proceedings, writs of error did not lie at all in cases of mandamus. It is also claimed that there are decisions to the effect that a writ of error is not a supersedeas in cases of mandamus. The only ones, we believe, that can be found on the subject are in New Jersey, New York, and South Carolina. In New Jersey no writs of error are allowed at all in such cases. *Layton* v. *The State*, 4 Dutch., 575. In New York the only case on the subject is *People* v. *Steele*, Edmonds' Sel. Cas., 505, where it was held that no writ of error would lie at all, and the question of supersedeas could not arise. In South Carolina the only case is *Pinckney* v. *Henegan*, 2 Strobh., 251. The court held that under their peculiar practice, which allowed *appeals*, (not writs of error,) from the decision of all questions, interlocutory as well as final, an appeal was not a stay. This was only applicable to their peculiar practice. But this question has directly arisen and been decided. In the case of *U. States* v. *Columbian Ins. Co.*, 2 Cranch C. C. R., 266, the question arose and was fully argued, and the court held that the writ of error was a supersedeas. The case was further reported in 7 Wheat., 534, and the Supreme Court then held that though a writ of error would lie, yet the amount in controversy was not sufficient to give them jurisdiction; but it was not even suggested that the writ of error was not a supersedeas. In *U. States* v. *Kendall*, 5 Cranch C. C. R., 278, the question again arose and was very fully argued, and the court again held that the writ of error was a supersedeas. The case went to the Supreme Court and is reported in 12 Peters, 524, where it was held that the writ of error would lie, but it was not claimed then that it was not a supersedeas. We believe these are the only cases to be found where this precise question has been decided. It is evident that it cannot often arise in the highest court, as it is an interlocutory question arising *after* the final judgment in the lower court, and one therefore upon which error would not lie. In other cases of a similar character a writ of error has always been held to

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be a supersedeas. In *Dutton* v. *Tracy*, 4 Conn., 365, it was held so in a case of forcible entry and detainer. In *Board of Commissioners* v. *Gorman*, 19 Wall., 661, it was so held in a case of quo warranto. It may be claimed that there would be cases where a writ of error was taken for purposes of delay, and it would be unreasonable to have it a supersedeas in such cases, but it is provided by statute that in such cases the Chief Justice may discharge the supersedeas at his discretion. It is apparent, moreover, that there would be very many cases where it would be most unjust and injurious that a defendant should be obliged to obey a mandamus while a writ of error was pending. Such process is often brought to obtain a delivery of moneys, bonds, notes, or other valuables, and as there can be no provision for any security for repayment if it should be afterwards held that the mandamus ought not to have issued, the defendant might lose the entire property. High on Extr. Rem., §§ 338, 356. The question however is not whether it is or is not desirable and proper that a writ of error should be a supersedeas in some or many cases of mandamus; it is a pure question of law whether it is or is not one in all cases. If it is in any, it is in the case at bar; if it be not here, it is not in any case. Much light may be thrown on the question, however, by the universal practice in this state. In all the cases reported, and especially those in the 37th and 41st Conn., the motion in error has always been in fact a supersedeas. We submit, therefore, that by law and by usage a writ of error in mandamus is a supersedeas, and that the decision of the Superior Court to the contrary is erroneous and should be reversed.

W. Hamersley, State's Attorney, and *J. R. Buck*, for defendant in error.

1. No writ of error lies to review the action of a court in ordering an attachment for contempt of court.

Attachments for contempt are of two kinds:—Criminal contempts, which may also be punished by indictment; and contempts committed by refusal or neglect to obey legal orders of the court made in the progress of a trial, and

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which can not ordinarily be punished by indictment. *Androscoggin & Kennebec R. R. Co.* v. *Androscoggin R. R. Co.*, 49 Maine, 401. The contempt in question is one of the latter kind. The power to punish such contempt is inherent in all courts, and of necessity is summary in its nature. At common law no writ of error lies to review a judgment or order punishing such contempt. *Lord Mayor of London's case*, 8 Wils., 188; *Yates* v. *The People*, 6 Johns., 406. And such must be the law of this state, unless altered by statute. Many cases cited from other states have no application here, because the right of review by appeal, writ of error, or *certiorari*, so often depends upon statutes, which vary in nearly every state. In some states the courts have no common law jurisdiction. In some, the power to punish for contempt is purely the creature of statute, regulated and limited by statute. In some, the powers of the appellate court, or court of errors, are defined by statute, or by the state constitution, in terms so broad as to leave no room for the operation of the common law. But in no state can a decision be found which holds that a writ of error lies to review the action of a court in enforcing obedience to its own orders, unless in pursuance of state legislation. The reasons commonly given for this rule of law are two: First, that a finding any one in contempt of court is in the nature of a conviction of crime, and no writ of error lies in criminal cases. This reason is rather an analogy than a reason. Second, and mainly, that the necessities of the case require each court to be the sole judge of contempts against itself; and the main object of vesting this power in courts, (to enable them to compel obedience to their lawful orders during the progress of a trial,) would be defeated, if a writ of error could be sued out each time it was exercised. *Ex parte Kearney*, 7 Wheat., 38; *Crook* v. *The People*, 16 Ill., 534; *In re Hummel*, 9 Watts, 416, 431; *Passmore Williamson's case*, 26 Penn. S. R., 9; *Vilas* v. *Burton*, 27 Verm., 56. In this state the rule of the common law has not been modified by any statute. The constitution provides that the powers and jurisdiction of the Supreme Court of Errors and Superior Court shall be defined by law. It has

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always been held that the common law of the state is a part of the law defining these powers and jurisdiction. The power of the Superior Court to punish crimes at common law rests upon this construction. The statute allowing writs of error to be brought to the Supreme Court of Errors does not pretend to define the cases where such writs are proper. Gen. Stats., 449, 450. Error lies in those cases where it is allowed by the common law. The common law clearly providing for no writ of error in cases of commitment for contempt, and the power of commitment for contempt being derived in this state from the common law, and the legislature having never seen fit to alter the common law in this respect, it is plain that this writ of error was issued without authority of law. Our construction of the statute law is strengthened by the fact that the power of commitment for contempt can be exercised by a judge in vacation, and by the grand-jurors of a town in secret session. Of course in these cases no writ of error lies. It would be strange if the Superior Court had less power to enforce its orders than a judge in vacation or the grand-jurors of a town.

2. But if a writ of error would lie, it would not operate as a supersedeas of the writ of peremptory mandamus.

The nature of the writ forbids a different conclusion. Generally a writ of error, in ordinary actions at law, supersedes the judgment, as in the case of *Dutton* v. *Tracy*, 4 Conn., 365; but this is an extraordinary action—a rare remedy which the law gives when the ordinary action has become powerless. Rules applicable to ordinary actions at law do not apply to such exceptional remedies. The writ of peremptory mandamus was introduced into the English system of jurisprudence to prevent disorders from a *failure of justice*. The very word *peremptory* suggests something that must be done *speedily*. How does this accord with being subjected to a writ of error and dragged through the courts for years, as in the present case? Writs of error are optional with the parties bringing them. Now if a peremptory mandamus can be superseded at the option of the party against whom it is aimed, how can it prevent disorders from a failure of justice?

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Under such a construction of the law the incumbent of any office held for one year could easily retain his place by filing a writ of error to a peremptory mandamus ordering him to yield his place to his successor. This would be a manifest wrong; yet this is the logical result of the construction of the law claimed by the plaintiffs in error. Where this remedy is used to right a wrong which *time* may carry past any power to right, can a writ of error stop its operation? Two other questions here suggest themselves: 1st. Is it in accordance with the letter and spirit of our law, that a party to a writ of peremptory mandamus may, at his own option, suspend its operation until it has ceased to be a remedy, although the writ of error fails? 2d. Is it in accordance with the letter and spirit of our law, that a party obtaining a writ of peremptory mandamus, may have it enforced, so that a writ of error can be of no avail as a remedy, although it is sustained by the higher courts? The answer to both of these questions is, that the court which issues the peremptory order will consider the nature of the case, and will not permit irreparable damage to be done either by issuing or refusing to issue the writ. It will consider all the circumstances and grant the proper relief. Even in an ordinary action at law a writ of error will not be a supersedeas if issued manifestly *for delay*. *Dutton* v. *Tracy*, 4 Conn., 365. This construction of the effect of a writ of error upon a peremptory mandamus has been sustained in several cases. In the case of *Pinckney* v. *Henegan*, 2 Strobh., 251, the court held that, although an appeal lies from an order of peremptory mandamus, yet it is no supersedeas. In the case of *People* v. *Steele*, 2 Barb., 554, (Edmonds' Select Cases, 505,) it was held that after a peremptory mandamus had issued, there was no power to stay the proceedings. It was also held in the case of *Wright* v. *Sharp*, 11 Mod., 175, that a bill of exceptions will not prevent the issuing of a peremptory mandamus. In Willcock's Law of Municipal Corporations, 446, it is said that neither a bill of exceptions nor a writ of error stays a peremptory mandamus. It is also held in the case of *The People* v. *Steele*, supra, that no writ of error would lie, and that

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if it would, it would not be a supersedeas. The case of *U. States* v. *Columbian Ins. Co.*, 2 Cranch C. C. R., 266, stands alone in holding that a writ of error supersedes a writ of peremptory mandamus. But in that case the return of the defendants was traversed. An analogy has been suggested between these proceedings and criminal proceedings, and it has been claimed that since a writ of error supersedes a criminal judgment it would for the same reason supersede this judgment. But it will be seen that there is no analogy between the two cases. The party accused is *compelled* to answer in contempt, but in criminal proceedings the party accused cannot be compelled to answer. In a criminal proceeding no one can be found guilty, and judgment rendered, except after a trial by jury. A proceeding for contempt is a *civil* execution for the benefit of the injured party, carried on *in the shape* of a criminal process. 4 Bla. Com., 285; 2 id., 232. The process is on the criminal side of the court, for the court's own protection. Common Pleas courts have only civil jurisdiction, yet they can punish for contempt by an arbitrary power given them in order to enforce their authority. It does not follow that, because this proceeding is like a criminal proceeding, it is therefore criminal. The case of *Chester* v. *Conn. Valley R. R. Co.*, 41 Conn., 348, decided that the decision of the railroad commissioners was *judicial in character*. But this court has held that that does not mean that their decisions are *judicial*. Authorities to this point are numerous. In *Peyton's Appeal*, 12 Kans., 405, the court held that the proceedings of contempt were "quasi criminal." In *Crook* v. *The People*, 16 Ill., 534, it was held that it was "not, strictly speaking, a criminal action." In *Pitt* v. *Davison*, 37 N. York, 235, it is held that a proceeding of this character is a "civil contempt." In *Baltimore & Ohio R. R. Co.* v. *Wheeling*, 13 Gratt., 57, it is held to be "in the nature of a criminal offense." In *Stuart* v. *The People*, 3 Scam., 395, it is held to be "in the nature of a criminal proceeding." In *State* v. *Matthews*, 37 N. Hamp., 450, it is held to be "of a criminal character." In the *Passmore Williamson case*, 26 Penn. S. R., 9, it was held to be a "special

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criminal offense." In *Dunham* v. *The State*, 6 Iowa, 245, it is held that it is "not a criminal case." In *Haight* v. *Lusia*, 36 Wis., 355, it is held that the proceeding is "criminal in character."

HOVEY, J. This writ of error is founded upon an adjudication of a contempt in refusing obedience to a peremptory writ of mandamus. The writ of mandamus was awarded and issued by the Superior Court sitting at Hartford, in accordance with advice given by this court, after a full hearing and argument, upon a reservation. It was directed to the New Haven & Northampton Company, a railroad corporation created by the laws of this state, of which the plaintiffs in error were directors and officers, and commanded them forthwith and thereafter to stop their regular passenger and freight trains at the dépôt at Plantsville on their railroad, for the purpose of receiving and discharging passengers and freight. Before it was served a writ of error was brought to this court to reverse the judgment by which the mandamus was awarded. The writ of mandamus was afterwards served upon the railroad corporation, and the plaintiffs were duly informed thereof, and also had due notice of the contents of the writ. But they refused to obey its mandate, on the ground that counsel had advised them that it was superseded by a writ of error. Proceedings were then had in the Superior Court against the plaintiffs in error to enforce their obedience to the writ of mandamus, and upon those proceedings they were adjudged guilty of contempt and ordered to be attached and committed to the county jail in Hartford, and to be confined and imprisoned therein till discharged by order of the court or otherwise by due process of law. It was also adjudged that they should pay the costs of the proceedings, and that unless they should forthwith and within twenty days after notice of the order was served upon them, obey the writ of mandamus and make return of the same to the court, process should issue against them. Notice having been served upon them, they brought the present writ of error to this court. And the defendant in error moves that it be struck from the docket.

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Upon this motion the question which presents itself is, whether a writ of error will lie upon an adjudication of a contempt. Writs of error may, by statute, be brought to this court upon judgments of the Superior Court, and such writs, in all cases in which they will lie at common law, are writs of right, unless the questions raised by the assignments of error have been already determined by this court upon a reservation. But at common law no writ of error lies except upon a judgment or an award in the nature of a judgment. Co. Litt., 288; 2 Tidd, 1062. It was accordingly held in the case of the City of London, 8 Co., 288, that upon a return to a habeas corpus no issue could be joined or a demurrer taken and that no writ of error would lie thereon. In the case of *The King* v. *The Dean and Chapter of Trinity Chapel in Dublin*, 1 Stra., 586, (*S. C.*, 8 Mod., 27,) the doctrine of the case of the City of London was fully recognized. In the opinions given by the judges it was declared that error would not lie on the award of a procedendo or on the return of a rescue; and Fortescue, J., stated his belief that on a conviction for contempt error was never brought. In *Groenwelt* v. *Burwell*, 1 Salk., 144, (*S. C.*, 1 Ld. Raym., 454,) Lord Holt, who gave the opinion, admitted it to be good law that no writ of error would lie upon the award of a fine and imprisonment for a contempt. These cases are sufficient to show that at common law adjudications of contempts by courts of competent jurisdiction are final and cannot be reviewed in a court of error. And the doctrine is strongly supported by numerous other authorities, English and American. *Earl of Shaftsbury's case*, 2 St. Tri., 615; 1 Mod., 144; *The Queen* v. *Paty et al.*, 2 Ld. Raym., 1105; *The King* v. *Crosby*, 3 Wils., 188; *Carus Wilson's case*, 7 Ad. & El. N. S., (53 E. C. L.,) 984; *Ex parte Fernandez*, 10 Com. Bench, N. S., (100 E. C. L.,) 3; *S.C.*, 6 Hurlst. & Norm., 717; *Ex parte Pater*, 5 Best & Smith, (117 E. C. L.,) 299; *Ex parte Kearney*, 7 Wheat., 38; *State* v. *Towle*, 42 N. Hamp., 540; *Yates* v. *Lansing*, 9 Johns., 395; 4 id., 317; *In re Williamson*, 26 Penn. St., 9; *Ex parte Summers*, 5 Ired., 149; *State* v. *Woodfin*, id., 199; *State* v. *White*, T. U. P. Charlt., 123; *Gates* v.

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McDaniel, 4 Stew. & Port., 69; *Moore* v. *Clerk of Jessamine*, Litt. Select Cas., 104; *State* v. *Tipton*, 1 Blackf., 166; *Kernodle* v. *Cason*, 25 Ind., 362; *Clark* v. *The People*, 1 Breese, 266; *State* v. *Mott*, 4 Jones Law, (N. C.,) 449; *Johnston* v. *Commonwealth*, 1 Bibb, 598; *Ex parte Adams*, 25 Miss., 883; *Martin's case*, 5 Yerg., 456; *Watson* v. *Williams*, 36 Miss., 331; *First Cong. Church* v. *Muscatine*, 2 Clarke, (Iowa,) 69. If, therefore, the petition for the attachment in this case had been proceeded with and the adjudication complained of by the plaintiffs in error had been made in the form and according to the rules of the common law, we should feel compelled to strike the case from the docket, because, by those rules, there would have been no judgment or award in the nature of a judgment upon which a writ of error would lie. But the parties and the court proceeded with the petition as though it was an original suit, distinct from and independent of the proceedings upon which the peremptory mandamus was awarded, and accordingly, on the coming in of the return, the defendant in error formally demurred to the matters contained in it, and the court made the adjudication upon the demurrer. In view of these circumstances, the counsel for the plaintiffs in error contended that the adjudication must be regarded and treated as a judgment, and that a writ of error lies upon it. And the claim is strongly supported by a decision of the Supreme Court of Vermont. *In re Jesse Cooper*, 32 Vt., 253. That case arose upon a habeas corpus. Cooper, the relator, had been fined by a justice of the peace for a contempt in his presence while holding a court and had been committed to jail for non-payment of the fine. He brought a habeas corpus before the county court to test the validity of his imprisonment. The jailor made a return, to which the relator demurred; and the county court decided that the imprisonment of the relator was not unlawful and remanded him. The record was then brought before the Supreme Court for revision, and that court held that as the return was demurred to and issue joined upon the demurrer, the decision could be revised on habeas corpus. The ground upon which this decision was made is indeed technical, but

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it does not differ in that respect from the decision in the case of *The King* v. *The Dean and Chapter of Trinity Chapel in Dublin.* That case was twice argued before it was decided. Upon the first argument the judges were divided upon the question whether the award of a peremptory mandamus upon motion, and without pleadings or demurrer joined, was a judgment of which error could be predicated. The Chief Justice was in doubt about it. Fortescue, J., thought it hard to maintain that an award which did not contain the words "*ideo consideratum est,*" was a judgment on which a writ of error would lie. Powis, J., seemed to be of the same opinion; and Eyre, J., thought that the award was a judgment on which error would lie because the writ recited that the return was held insufficient, "*per quod consideratum fuit, quod fierit breve de peremptorie mandamus, tam in complemento judicii quam in executione ejusdem.*" On the second argument all the judges agreed, but for different reasons mostly technical, that a writ of error would not lie. It was, however, admitted that if the mandamus had been awarded upon an issue joined, either of law or of fact, the result would have been different. With such a precedent as that case furnishes, the decision *In re Jesse Cooper* cannot well be discarded because of the technical character of the reasons assigned for it by the court. And while I would not adopt it as a rule of procedure and thus open the way to this court for writs of error in cases of contempts generally, because, in general, every court must be allowed to judge of its own contempts; yet where parties proceed as the parties proceeded in this case and try the question of contempt upon an issue of law tendered by the party moving in the proceeding, and the court decides the question upon that issue, the decision must be regarded and treated, not as an award merely, but as a judgment upon which a writ of error will lie. The motion to strike the case from the docket must, therefore, be denied.

This disposition of the motion of the defendant in error brings before us the proceedings in the court below and imposes upon us a delicate and important duty. In performing that duty the first question to be considered is, how are

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the rights of the plaintiffs in error affected by the writ of error, and to what extent can the proceedings upon which the writ is founded be considered and reviewed in this court. The answer seems to me to be obvious. Brought here as this writ of error is by an unusual method of procedure and for the double purpose of staying execution and obtaining a revision of questions which are not ordinarily revisable in a court of error, it should give to the plaintiffs in error no right and secure to them no benefit or privilege to which they would not have been entitled, after commitment, upon a writ of habeas corpus. In the first place, the writ of error should not have the effect of staying execution upon the judgment. Should such an effect be given to it, parties guilty of the grossest and most aggravated contempts may set the courts at defiance, obstruct the regular course of justice, and suspend if not totally elude punishment at their own will and pleasure. Contempts are offences at common law against the court as an organ of public justice. The right of punishing them is inherent in all courts and is essential for their protection and existence. From their very nature the punishment, to be effectual, must be immediate and peremptory, and not subject to suspension at the mere will of the offender. Sentences for contempts would amount to nothing if the offenders could supersede them by writs of error, and the authority of courts would be contemptible indeed if it could be thus eluded and prostrated. 4 Bla. Comm., 286; 2 Sw. Dig., 358; *Ex parte Maulsby*, 13 Md., 625; *Ex parte Summers*, 5 Ired., 149; *Johnston* v. *Commonwealth*, 1 Bibb, 598.

In the second place, the proceedings upon which the judgment was rendered should not be reviewed except so far as may be necessary to determine whether the court in rendering the judgment acted within the sphere of its jurisdiction. Every court must of necessity possess the power to enforce obedience to its lawful orders and judgments, and punish contempts of all kinds against its authority. It is only when it acts without its jurisdiction that its proceedings in such cases will be interfered with or questioned by a superior tribunal. The principle upon which courts proceed in such cases is

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clearly stated in the celebrated case of *Burdett* v. *Abbot*, 14 East, 1, 150, and the case of *The People* v. *Sturtevant*, 5 Seld., 263. In the former case Lord Ellenborough, in the course of an able and interesting opinion, observed that if a commitment appeared to be for a contempt of the House of Commons generally, he would neither in the case of that court or of any other superior court inquire further; but if it did not profess to commit for a contempt, but for some matter which could by no reasonable intendment be considered as a contempt of the court committing, but a ground of commitment palpably and evidently arbitrary, unjust and contrary to every principle of positive law or natural justice, he would look at it and act upon it as justice might require, from whatever court it might profess to have proceeded. In the case of *The People* v. *Sturtevant*, the rule laid down by the court was that "a party proceeded against for disobedience to an order or judgment is never allowed to allege as a defence for his misconduct that the court erred in its judgment. He must go further and make out that in point of law there was no order and no disobedience, by showing that the court had no right to judge between the parties on the subject."

The question then arises whether the proceedings in the court below were within the jurisdiction of that court. The record shows that before those proceedings were commenced a writ of error had been brought upon the judgment by which the writ of mandamus was awarded and was then pending in this court. And it was urged in argument by counsel for the plaintiffs in error that that writ of error was a supersedeas of the writ of mandamus and operated as a stay of all proceedings for the enforcement of that writ. If this claim is sustainable the court below had no jurisdiction of the proceedings in which the contempt was adjudicated, and its entire action, including the judgment rendered thereon, was *coram non judice* and therefore void. *Kendall* v. *Wilkinson*, 4 El. & Bl., 680. And it would follow as a necessary consequence that no obligation rested upon the plaintiffs in error or upon the corporation to which the writ of mandamus was directed, to stop their trains at Plantsville as the writ commanded;

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and their refusal to obey the mandate was an innocent and a justifiable act. But the claim is entirely without foundation. It is undoubtedly a rule of the common law, well settled and established, that a writ of error after final judgment and before execution executed is, in ordinary cases, a supersedeas of the execution from the time of its allowance, and by our law it is a supersedeas from the date of the service of the writ. But it is no supersedeas of a peremptory mandamus. In the first place, no return to such a writ is allowed, the courts exacting implicit obedience to its mandate; and such obedience is required during the entire period that the judgment by which it was awarded remains in force and unreversed. High on Extr. Rem., § 567; *Kaye* v. *Kean*, 18 B. Monr., 839. In the second place, the judicial decisions in England and in this country, generally, expressly hold that a writ of error does not operate as a supersedeas to stay the execution of a peremptory mandamus. *Anonymous*, 1 Vent., 266; *Strode* v. *Palmer*, Trin. T., 2 Geo. I; Lill. Ent., 248; *The Dean and Chapter of Trinity Chapel in Dublin* v. *Dowgatt*, 1 Peere Williams, 349; *Wright* v. *Sharpe*, 11 Mod., 175; *Lord Montague* v. *Dudman*, 2 Ves. Sr., 396; *The People* v. *Steele*, Edm. Sel. Cas., 505; 2 Barb., 554; *Pinckney* v. *Henegan*, 2 Strobh., 250. But we do not choose to rest our decision of this question upon these grounds alone. There is another reason which is perfectly conclusive in this case why the writ of error cannot be allowed to operate as a supersedeas. A writ of error is never allowed to have that operation after the questions raised by the assignment of errors have been determined. *Arnold* v. *Fuller*, 1 Ohio, 458; *Bishop of Ossory's case*, Cro. Jac., 534. See also *Hartop* v. *Hislop*, 1 Ld. Raym., 97, 98. In this case all the questions raised by the assignment of errors had been determined by this court upon a reservation by the Superior Court, before the writ of error was brought. By the rules of this court that determination settled and established the law of the case and was final; and the judgment which followed in the Superior Court was as conclusive and as binding upon the parties as if it had been rendered originally by the Superior Court and

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afterwards affirmed on error by this court. *Smith* v. *Lewis*, 26 Conn., 110; *Nichols* v. *Bridgeport*, 27 id., 459; *Fowler* v. *Bishop*, 32 id., 199. The peremptory mandamus was, therefore, wholly unaffected by the writ of error and was in full force from the moment it was issued. The plaintiffs in error, as officers of the corporation to which the mandamus was directed, were bound to see that the mandate was obeyed. They chose a different course, and in so doing were guilty of a gross contempt of the authority of the court. The reasons assigned in their behalf furnish no excuse for their misconduct, and cannot under the circumstances be received in palliation of their contempt.

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

In this opinion CARPENTER, PARDEE and LOOMIS, Js., concurred.

PARK, C. J., dissenting. The writ of mandamus was originally a strictly prerogative writ, and issued only in certain clear and unquestionable cases. No pleadings were allowed and no judgment was rendered, and consequently no foundation was laid for a writ of error. But in modern practice the proceeding by mandamus has substantially lost its prerogative character. Pleadings are allowed, judgments are rendered, and writs of error are brought to try the validity of the judgments. In *Kentucky* v. *Dennison*, 24 Howard, 66, Chief Justice Taney says, "It is equally well settled that a mandamus in modern practice is nothing more than an action at law between the parties." In *Gilman* v. *Bassett*, 33 Conn., 298, Judge BUTLER says, "Doubtless the writ was originally a prerogative one, but it has ceased to depend upon any prerogative power, and is now regarded in much the same light as other process." See also High on Extraordinary Legal Remedies, 8.

It must be conceded that in other proceedings at the common law a writ of error is a supersedeas of the execution of the judgment upon which it is based. It is so in England;

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it is so in this state; and it is generally so in all the states of this country. It is unnecessary to cite authorities upon this subject, for it will be conceded.

Now if in modern practice writs of error will lie in cases of mandamus, why should they not operate in those cases in the same manner as in other actions, and suspend the execution of the judgments they call in question, *pendentibus litibus?* Certainly there is as much cause for a suspension of the execution of the judgment in this form of action as in any other. A writ of error is the same in its nature in every respect whether the judgment it calls in question was rendered in one form of action or another. If in one form of action a writ of error, *ipso facto*, suspends the execution of the judgment, what reason can be given why it should not do so in another?

A distinction is attempted to be made growing out of the fact that the judgment upon which the writ of error under consideration is based, was rendered in accordance with the advice of this court given upon a reservation of the case by the Superior Court for our advice; and it is said that, however it may be in other cases of mandamus, the execution of a judgment thus rendered should not be stayed by a writ of error. This distinction applies as much to other actions at the common law where judgments are rendered under like circumstances, as to proceedings by mandamus. The claim seems to regard it as derogatory to the dignity of this court, and as conflicting with its decision, that a writ of error should stay the execution of a judgment rendered in accordance with its advice. But this court simply advised the court below in regard to the judgment which should be rendered. It never advised that court, (and never does,) to carry the judgment, when rendered, into immediate execution, whether a writ of error should be interposed or not. It is plain therefore that a suspension of the execution of the judgment can not conflict with the advice of this court. The object of this writ of error is to take the case to the Supreme Court of the United States for final adjudication regarding the legality of the judgment; and why, if the case be one that falls within

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the jurisdiction of that court under the constitution, is it any more derogatory to the dignity of this court that the writ of error should stay the execution of the judgment till that court shall have an opportunity to hear the case, than it is to the dignity of the Superior Court that a writ of error to this court should stay the execution of a judgment rendered by it? It seems to me far more in accord with the dignity of this court that parties should have full and untrammeled opportunity to resort to all the means afforded by the law and the constitution, to test the legality of any judgment rendered by it or rendered in accordance with its advice.

I am therefore unable to discover any substantial reason why this writ of error, or any other in cases of mandamus, should not have the same effect to suspend the execution of the judgment it calls in question, that it has in all other proceedings at the common law. In other cases at the common law it is considered unjust that the judgment should be carried into execution while process is pending to test its validity. The reason is obvious. The law gives to parties the right to review the decisions of the lower courts, and if the decisions are to be carried into effect before a review can be had the right would in many cases be worthless. Take, for instance, cases where a peremptory mandamus is issued to compel the guarantee of negotiable instruments, like the case of *The New Haven, Middletown & Willimantic R. R. Co.* v. *The Town of Chatham*, 42 Conn., 465, where the proceeding was brought to compel the town to guarantee forty thousand dollars of bonds belonging to the railroad company, what would the right of review have been worth in that case if the court below had erroneously granted the mandamus, and no stay of proceedings had been had?

But it is said that a court would always order a stay of proceedings in cases where irreparable injury might accrue. The same might be said with equal propriety in all cases where a writ of error is unquestionably a supersedeas of the execution of the judgment, and why leave cases of this character to the discretion of the court any more than others? In other cases the danger is that a court may err in its dis-

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cretion. A judgment might appear to the court rendering it manifestly correct, in which case a stay of proceedings would be refused. The law therefore allows no discretion in the matter, but makes the service of a writ of error suspend the execution of the judgment.

But the court rendering a judgment has no jurisdiction over a writ of error brought to review it. Writs of error are independent proceedings. They may be brought in vacation as well as during the session of the court. They are brought directly to the higher court, and the lower court can do nothing that will interfere in any way with its operation or effect. What jurisdiction has the Superior Court over this writ of error brought directly to this court to determine whether or not the execution of the judgment upon which it is based should be suspended? If the writ *ipso facto* suspended proceedings in that court, there is no power known to the law by which the suspension can be vacated during the pendency of the proceeding except that vested by statute in the judges of the Supreme Court of Errors. Gen. Statutes, p. 452. This statute recognizes the fact that a writ of error suspends the execution of the judgment it calls in question in all cases whatsoever, and is tantamount to a direct declaration to that effect; and by necessary intendment denies the right of any court or judge except those specified to vacate the suspension.

I might cite the long practice which has been pursued in the state in relation to proceedings by mandamus. A large number of cases of this character have come before this court within a few years, by motions in error, and by writs of error, and it is believed execution of the judgments has been stayed by them without exception, and without objection by counsel. I might also refer to the practice in relation to the analogous process of quo warranto, concerning which a similar procedure has been pursued, thus tending to show a common law of our own on the subject. But I do not care to discuss the matter further. I am of the opinion that the writ of error in the case of *The State* v. *The New Haven & Northampton Company*, was a supersedeas of the execution

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of the judgment rendered in that case, and consequently that the court below had no jurisdiction of the contempt proceedings in this case.

I think the judgment of contempt should be reversed.

MORRIS TYLER AND OTHERS *vs.* WILLIAM HAMERSLEY, STATE'S ATTORNEY, AND ANOTHER.

Injunctions to restrain proceedings at law do not operate as prohibitions to the courts in the exercise of their jurisdiction, but only prevent the parties enjoined from availing themselves of some undue advantage which they may have obtained by fraud or accident.

Where therefore a petition for an injunction against the execution of an order of the court for the commitment of the petitioners for a contempt in disobeying a peremptory writ of mandamus, prayed merely that the State's Attorney be enjoined from praying out and the clerk of the court from issuing any process for their commitment, it was held that the petition, even if otherwise good, could not be entertained.

But a court of equity has no jurisdiction to grant an injunction to stay the execution of such an order.

If such an injunction should be granted it would be the duty of the court which ordered the commitment to disregard it, and to protect its officers in proceeding without regard to it.

PETITION for an injunction to restrain the respondents, as State's Attorney and Clerk of the Superior Court, the one from praying out and the other from issuing any process for the execution of an order of the court for the commitment of the petitioners for a contempt in disobeying a peremptory writ of mandamus issued by the court; brought to the Superior Court in Hartford County, and reserved, upon a demurrer to the petition, for the advice of this court. The facts, which are sufficiently stated in the opinion, are the same with those of the next preceding cases of *New Haven & Northampton Company* v. *The State*, and *Tyler* v. *Hamersley*.

W. Hamersley, State's Attorney, and *J. R. Buck*, in support of the demurrer.

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G. H. Watrous and *C. E. Perkins*, contra.

HOVEY, J. Courts of equity are clothed with jurisdiction to restrain, by injunction, proceedings at law in all cases where, by fraud, accident, mistake or otherwise, a party has obtained an advantage in a court of law, which must necessarily make that court an instrument of injustice. In cases of that description the restraint may be imposed to stay trial, and after trial and verdict to stay judgment, after judgment to stay execution, and after execution to stay money in the hands of the officer. But after a judgment an injunction will not be granted to stay its execution, unless there has been fraud or collusion in obtaining it or the verdict upon which it was founded, or where the party has been unable to defend himself effectually at law, without any fault or negligence of his own, or where the plaintiff has possessed himself of something by means of which he has obtained an unconscientious advantage. When an injunction is granted to stay proceedings in the courts of law, it is in no just sense a prohibition to those courts in the exercise of their jurisdiction. It is not addressed to them and does not even affect to interfere with them. The process is directed only to the parties. It neither assumes any superiority over the court in which the proceedings are had, nor denies its jurisdiction. It is granted on the sole ground that from certain equitable circumstances of which the court granting the process has cognizance, it is against conscience that the party inhibited should proceed in the cause. The object, therefore, really is to prevent an unfair use being made of a court of law, in order to deprive another party of his just rights or subject him to some unjust vexation or injury which is wholly irremediable by a court of law. Mitf. Eq. Plead., by Jeremy, 127, 128, 131; Eden on Injunct., ch. 2, p. 4; 2 Danl. Ch. Prac., 1623; *Earl of Oxford's case*, 1 Ch. Rep., 1; 3 Lead. Cases in Equity, by Hare & Wallace, 3d Am. ed., 155.

The case stated in the bill before us does not come within either of these principles. The bill states that the Superior Court sitting at Hartford, issued upon motion of the State's

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Attorney for Hartford County, a peremptory writ of mandamus against the New Haven and Northampton Company, a railroad corporation created by the laws of this state, commanding them, upon service thereof, to stop at the Plantsville depot in the town of Southington, their regular passenger and freight trains, for the purpose of receiving and discharging passengers and freight; that before the writ was served a writ of error was brought to this court to reverse the judgment by which the writ of mandamus was awarded; that regarding the writ of error as a supersedeas of the writ of mandamus, the plaintiffs, who were the directors of the New Haven and Northampton Company, did not stop their trains at Plantsville as the writ of mandamus commanded; that afterwards the Superior Court which awarded and issued the writ of mandamus, on the petition of the State's Attorney for Hartford County, adjudged the plaintiffs to be guilty of contempt in refusing to obey that writ, and ordered them to be committed therefor to the county jail in Hartford and to pay the costs of the proceedings; and that process of attachment should be issued against them by the clerk of the court unless they should, within twenty days after notice of the order was served on them, obey the writ of mandamus. The bill further states that afterwards the plaintiffs brought a writ of error to this court from the judgment by which they were convicted of contempt, which is now pending, and that that writ of error was and is a supersedeas of the order for their commitment and of all process to be issued thereon; and the bill concludes with a prayer for an injunction to restrain the State's Attorney from taking out or causing to be issued any process for the attachment or commitment of the plaintiffs under said judgment, and also to restrain the clerk of the court from issuing or allowing his assistant to issue any such process, until otherwise ordered in due course of law. There is no allegation in the bill that there was any fraud or collusion in obtaining the judgment by which the peremptory writ of mandamus was awarded, or the order directing an attachment to issue for the commitment to prison of the plaintiffs for their contempt in disobeying that writ, nor is there any

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allegation that an unconscientious advantage was obtained by the state or its attorney in either of those proceedings. The sole ground upon which the injunction is prayed for is that the judgment in the proceedings by mandamus and the order in the contempt proceedings were superseded by writs of error.

In the case of *Morris Tyler & others* v. *William Hamersley, State's Attorney*, in error, which was argued at the present term of this court, we held, after much deliberation, that the writ of error brought upon the judgment awarding the peremptory writ of mandamus against the New Haven and Northampton Company, was not a supersedeas of the latter writ; and we also held in the same case that the writ of error brought upon the judgment by which the plaintiffs were adjudged guilty of contempt in disobeying the writ of mandamus and ordering them to be committed to jail therefor, did not operate as a supersedeas. These determinations took away from the plaintiffs the only grounds upon which they rest their right to the relief sought by the present bill, and entitle the defendants to a decree of dismissal with costs. But aside from those determinations, the facts charged in the bill show no title whatever in the plaintiffs to equitable relief, and are not even within the jurisdiction of a court of equity. It is an established rule that courts of equity will grant no injunction, or order in the nature of an injunction, to stay proceedings in any criminal matter. If they should do so, said Lord Holt, C. J., the court of Queen's Bench would break it, and protect any that would proceed in contempt of it. *Holderstaffe* v. *Saunders*, 6 Mod., 16. And Lord Hardwicke allowed a demurrer to a bill for an injunction to stay proceedings on a mandamus issued to the lord of a manor to hold a court. "The court," he said, "has no jurisdiction to grant an injunction to stay proceedings on a mandamus, or on an indictment, or on an information or a writ of prohibition." *Lord Montague* v. *Dudman*, 2 Ves. Sr., 396; Eden on Injunct., 41, 42; 3 Wooddes., Lect. 56, p. 413; Jeremy on Eq. Jurisd., book 3, ch. 2, § 1, p. 309; 1 Sto. Eq. Jur., § 893. It follows, therefore, that a court of equity has no jurisdiction to stay

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the execution of an attachment for the commitment of a party adjudged guilty of a contempt in disobeying a peremptory writ of mandamus; for the attachment then becomes an essential part of the mandamus proceedings, and affords the only means at the command of the court for enforcing obedience to its authority. High on Extr. Rem., § 567. It has already been shown that injunctions to stay proceedings in courts of law are not addressed to those courts and do not even affect to interfere with them. But the bill before us, in disregard of this principle, prays that the process may be directed not only to the party who instituted the contempt proceedings, but to the clerk of the court by which the contempt was adjudicated. It is, therefore, in effect, a bill for an injunction to restrain the Superior Court, as a court of law, from enforcing obedience to a writ granted by the advice of this court, and from punishing the plaintiffs for their contempt in disobeying the mandate of that writ. Should such an injunction be granted, it would be the duty of the court which ordered the punishment to be inflicted to disregard it and to protect its clerk and the State's Attorney in proceeding in contempt of it. That would lead to a conflict of jurisdiction which would produce great confusion and disorder, and tend in a serious degree to subvert the administration of justice.

For these reasons the Superior Court is advised to dismiss the plaintiffs' bill.

In this opinion the other judges concurred; except PARK, C. J., who dissented for the reasons given in his dissenting opinion in the case of *Tyler* v. *Hamersley*, next preceding.

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SUPREME COURT OF ERRORS.

FAIRFIELD COUNTY.

JANUARY TERM, 1877.

Present,

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

HENRY SUPPLES *vs.* CHARLES CANNON.

The plaintiff had paid the amount of a judgment to save his property from being sold on execution, and brought suit to recover back the money, claiming to have paid the judgment before the levy, and the whole question in the case was whether he had so paid. The defendant offered in evidence the record of a judgment in his favor in an action of replevin brought by the plaintiff to recover the property levied on, with parol evidence that upon the trial of that action the plaintiff introduced evidence to prove that he had paid the amount of the judgment before the levy, but it did not appear by the record whether the court decided the case against him on that point or on some other of several points involved. Held that the plaintiff was not estopped by the judgment.

To render a former judgment a bar, it must either appear by the record of the prior suit, or be shown by extrinsic evidence consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter sought to be concluded.

A notice under the general issue puts nothing in issue, and adds nothing to the effect of a judgment.

ASSUMPSIT for money had and received; brought to the Court of Common Pleas of Fairfield County, and tried to the jury on the general issue, with notice of a former adjudication of the same matter between the parties, before *DeForest, J.* Verdict for the plaintiff, and motion for a new trial by the defendant for error in the rulings and charge of the court. The case is fully stated in the opinion.

H. S. Sanford and *W. F. Taylor*, in support of the motion.

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I. M. Sturges, contra.

PARDEE, J. In 1864 one Patchen obtained a judgment in the Superior Court for Fairfield County against Henry Supples, the present plaintiff, of which Charles Cannon, the present defendant, became the owner by purchase. On the 18th day of February, 1870, execution issued on this judgment, which on the 30th day of March, 1870, was placed in the hands of Alfred A. Heath, a deputy sheriff, for service, who on that day levied it upon a pair of oxen as the property of Supples, and by virtue thereof took the same into his possession. On the 1st day of April, 1870, Supples prayed out a writ of replevin, in which Cannon and Heath were made defendants, and on the next day caused service thereof to be made, by which the oxen were taken from the possession of Heath and were restored to Supples. On the sixth day of April, 1870, Heath legally recovered possession of them, whereupon Supples paid to him, as such deputy sheriff, the sum of $128.56, being the amount due upon the execution, together with the sum of $14.72, being the amount of his fees thereon, and he then delivered the oxen to Supples, who has ever since held them in his possession.

In his declaration in the action of replevin Supples averred that the oxen belonged to him and that Cannon and Heath unlawfully detained them in their possession. They denied the truth of these averments by their plea of the general issue, and under that filed a notice setting forth, in effect, that they lawfully held the oxen upon the execution, and were proceeding to sell them in satisfaction thereof in lawful manner, when they were taken by Supples without law or right. Upon this plea, with this notice, the parties were heard by the Court of Common Pleas for Fairfield County in February, 1871, and judgment was rendered in favor of the defendants, Cannon and Heath, that they recover their costs of the plaintiff. On the 5th day of April, 1876, Supples instituted this present action of assumpsit against Cannon, which contains the common counts, and was made returnable to the Court of Common Pleas for Fairfield County at the

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May term, 1876, in which he sought to recover the money paid to Heath in 1870, filing the following bill of particulars: "The plaintiff in this case will claim to recover from the defendant the sum of $143.28, and interest thereon from the 6th day of April, 1870, for money paid to the defendant by the plaintiff, and had and received by the defendant to and for the use of the plaintiff." To this the defendant pleaded the general issue, and with it filed a notice to the effect that he should claim and offer evidence to prove that upon the trial of the action of replevin the plaintiff had claimed and offered evidence to prove that he had fully paid and satisfied the Patchen judgment before execution had issued, and that solely for this reason the oxen were illegally taken and held thereon; and that the court heard testimony concerning this claim of payment, considered it and adjudged as a matter of fact that such payment had not been made. Upon the trial the plaintiff offered evidence to prove, and claimed to have proved, that the judgment had been fully paid and satisfied by him long before the levy of the execution, to wit, in August, 1865, and that the execution was wrongfully and fraudulently procured to be issued by the defendant and was void, and that he, the plaintiff, so informed Heath when he took the oxen, and therefore claimed the right to recover from the defendant the aforesaid sum of $128.56 and interest thereon. For the purpose of estopping the plaintiff from proving in this suit that he had paid and satisfied the Patchen judgment before the taking of the oxen, the defendant offered in evidence the record in the replevin suit, consisting of the writ, plea of general issue with notice, and the judgment of the court thereon, and in connection therewith the oral testimony of the judge rendering the judgment that he had received testimony upon the trial for and against the claim of Supples as to payment of the judgment in 1865, that he had found that the judgment had not been fully paid but had not found what part remained unpaid, and that he had determined as a matter of law that the action of replevin could not be maintained for the oxen as they had been taken by virtue of an execution, and that he had ren-

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dered judgment for the defendants in the action. The court below received the record and oral testimony thus offered subject to exception, but at the close of the trial, in the course of his charge, the judge gave the jury the following instructions upon this point:

"This is not a case where parol evidence would be admissible to rebut any presumption arising out of the record, and such evidence is certainly not admissible to create a presumption which does not arise out of the record. We are therefore confined to the record itself, and unless it appears from it, directly or by necessary inference, that this question was necessarily raised, tried and decided in the trial and decision of that case, then upon this point the defendant has failed to establish his defence."

The jury having returned a verdict for the plaintiff the defendant asks for a new trial for error in these instructions of the court.

The rule of law that in order to constitute a former judgment an estoppel, or in other words to render it conclusive on any matter, it is necessary that it should appear from the record itself that the precise point was in issue and decided, refers, and can only be practically applied, to instances of special pleading, where there is a precise averment on one side and an equally precise denial on the other. Our own system of practice admits of a declaration containing several general counts in which distinct causes of action may be sued for, and this may be met by a general denial, and the proceeding conclude with a general judgment. And even when the statutory notice accompanies this general denial there is no less uncertainty as to the precise point upon which the judgment rests, for the notice puts nothing in issue, and inasmuch as the defendant is not bound to follow it up by proof, the judgment does not conclude the parties in respect to the averments therein; its presence only makes it possible that some one of them was proven. If thereafter one of the parties to such judgment shall make a claim the subject matter of an action at law against the other, and the latter desires to plead that judgment as an estoppel or to rely

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upon it as evidence, the severe strictness of the foregoing rule has been so far modified by modern decisions in different jurisdictions as to permit him to show by parol evidence that the former judgment involved, and in fact was based upon, the determination of the subject matter of the second action; or, if this last claim might properly have been adjudicated in the first action and would legally have supported the judgment therein and that judgment is pleaded in bar of the second action, the plaintiff is permitted to rebut a legal presumption by showing by parol that this last claim has not been adjudicated; firstly, because the policy of the law is on the one hand that if a claim has once been passed upon by a court of competent jurisdiction it shall not thereafter be controverted between the same parties, and this in the interest of peace; and on the other, that no artificial presumption shall bar the recovery of a debt justly due, and this in the interest of truth; and secondly, because of the impossibility of proving otherwise than by parol the basis upon which the general judgment stands.

In *Dutton* v. *Woodman*, 9 Cush., 255, the court says: "Parol evidence is admissible to show that the same fact was submitted to and passed upon by the jury in the former action, because in many cases the record is so general in its character that it could not be known, without the aid of such proof, what the precise matter in controversy was at the former trial." In *Bigelow* v. *Winsor*, 1 Gray, 299, the court says: "To render a former judgment between the same parties admissible in evidence in another action pending between them, it must appear that the fact sought to be proved by the record was actually passed upon by the jury in finding their verdict in the former suit. It is not necessary that it should have been directly and specially put in issue by the pleadings; but it is sufficient if it is shown that the question which was tried in the former action is again to be tried and settled in the suit in which the former judgment is offered in evidence, and parol evidence is admissible to show that the same fact was submitted to and passed upon by the jury in the former action; because in many cases the record is so general in its

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character that it could not be known, without the aid of such proof, what the precise matter in controversy was at the trial of the former action." In *Phillips* v. *Berick*, 16 Johnson, 136, the plaintiff had recovered a judgment against the defendant in a former action of general assumpsit for work and labor; this was a second action of the same character for work and labor; the defendant pleaded the first judgment in bar; the plaintiff was allowed to prove by parol that the second suit was for work and labor performed before the first action was brought, and that it was not included in the first judgment. In *Gardner* v. *Buckbee*, 3 Cowen, 127, the court says: "The record shows that it was competent on the trial to establish the fraud of the plaintiff. Whether fraud was made out and whether that was the point upon which the decision was founded must necessarily be proved by evidence extrinsic the record. To do so is not inconsistent with the record, nor does it impugn its verity." In *Washington Packet Co.* v. *Sickles*, 5 Wall., 592, the rule is said to be substantially this: that to render the judgment conclusive it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined; that is, that the verdict in the suit could not have been rendered without deciding that matter; or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter.

Therefore when Supples brought his present action against Cannon for $143, and based his right to recover that sum upon the fact that he had twice paid to him the amount of an execution and now sought to recover the second payment, Cannon had the right to meet this claim by parol evidence tending to show that on the trial of the action of replevin, and as the basis of his right to recover judgment therein, Supples had presented proof of such double payment; that Cannon had denied it and supported his denial by counter-proof; and that the court passed upon and found it to be untrue, and on such finding had based the judgment for Cannon in that suit.

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The offered evidence was at first received subject to the plaintiff's objection, but was at a later stage of the trial withdrawn by the court from the consideration of the jury. The record discloses that the judge who tried the action of replevin testified that he received evidence for and against Supples's claim of previous payment and satisfaction of the execution upon which the cattle were taken, and that he found that it had not been fully paid, but did not find what part remained unpaid; but that he decided as a matter of law that replevin could not be maintained for property taken and held upon execution, and therefore rendered judgment for Cannon. The record itself is silent as to the particular point, either of fact or law, upon which the judgment was made to rest, and under the plea of the general issue with the accompanying notice it had three possible foundations, namely, that Supples neither owned nor had any right to the immediate possession of the cattle, that Cannon did not wrongfully detain them, and that the execution had been fully paid and satisfied before the taking. It is clear therefore that the course adopted by the court worked no injury to the defendant; for, if the evidence be only that testimony was received in support of and against Supples's claim of previous payment, there would then stand the same three possible foundations for the judgment; the truth of his claim would not be at all necessary to its existence; and there would have been established only a possibility, not even a probability, that it rested thereon, and from a possibility courts will not raise up an estoppel; and the evidence introduced by Cannon from the judge as to the secret operations of his mind has made it doubly certain that the judgment did not rest upon that claim; for, first, negatively, he did not find any fact concerning it; second, positively, he rendered judgment for Cannon solely upon the point of law presented. Therefore, instead of withdrawing the evidence from the consideration of the jury, it was the duty of the court below to have instructed them that as a matter of law it was admissible, but that the legal effect of it went no further than to show a mere possibility that the former judgment was based upon a finding that Supples's claim of

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prior payment was untrue; and that the law will not permit the judgment to operate as a bar in this action until it is proven that the claim is necessary to, and in fact is the only basis of its existence; and that their verdict must be for the defendant. There was error therefore in the manner of reaching the result, but none in the result itself. That should stand. And a second trial is not granted unless the court can see that real injustice was or might have been done upon the first.

A new trial is not advised.

In this opinion the other judges concurred.

NOTE.—It was formerly held that a judgment was evidence against a party of any fact involved in it only when that fact was specially put in issue and tried, and the authorities generally concurred in this view. *Sintzenick* v. *Lucas*, 1 Esp., 43; *Manny* v. *Harris*, 2 Johns., 24; *Church* v. *Leavenworth*, 4 Day, 277; *Smith* v. *Sherwood*, 4 Conn., 276. The later authorities, however, and especially the most recent ones, fully sustain the position taken by the court in the foregoing case, that where the record leaves the matter in doubt whether the precise question made in a later case was made and decided in a former one between the same parties, the fact that it was so made and decided, or was not, may be shown by parol evidence. Thus, in *Russell* v. *Place*, 94 U. S. Reps., 606, decided in 1876, the court, (per Mr. JUSTICE FIELD, p. 608,) says: "It is settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record, *or be shown by extrinsic evidence*, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment passed—the whole subject matter of the action will be at large and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible." And even where the pleadings show that the precise fact now in question was put in issue in a former trial between the same parties, it has been held that parol evidence was admissible to show that the fact thus put in issue was not submitted to the jury. *Wright* v. *Butler*, 6 Wend., 289. In *Hooker* v. *Hubbard*, 102 Mass., 242, FOSTER, J., says: "The rule of estoppel by a former verdict and judgment between the same parties is not confined to matters appearing on the record, but extends to every fact which can be shown by evidence to be necessarily involved in the first adjudication." And COLT, J., says, (p. 245,) "If the pleadings present several distinct propositions of fact, the judgment is not conclusive upon any

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one of them, unless it appears, *from the record or aliunde*, that the issue upon which it was rendered was upon that proposition. See also 2 Smith Lead. Cas., H. & W. ed., 474; *McDonnell* v. *Langdon*, 3 Gray, 513; *Sawyer* v. *Woodbury*, 7 Gray, 503; *Jennison* v. *West Springfield*, 13 Gray, 544; *Burlen* v. *Shannon*, 14 Gray, 433; *Johnson* v. *Morse*, 10 Allen, 540; *Packet Co.* v. *Sickles*, 5 Wall., 592; *Phillips* v. *Berick*, 16 Johns., 136; *Gardner* v. *Buckbee*, 3 Cowen, 120.

The authorities are all agreed that the fact determined in the former suit must have been essential to the judgment in that case. And it makes no difference whether the fact was a part of the plaintiff's case or of the defendant's. In *Jennison* v. *West Springfield*, 13 Gray, 545, BIGELOW, C. J., says: "The real point is, was the fact in issue the subject of judicial controversy, relied upon either in the support or defence of the action, and comprehended within the verdict at the former trial."

And it would seem to make no difference that the fact, not essential to the former judgment, has been expressly found in that case, by a special finding of the court, by the report of a committee or by a special verdict. So long as it was not essential to the judgment the parties are not concluded by the finding of it. Thus if, in an action upon a note, where the question was whether the defendant executed the note, a committee had found that the defendant bought a piece of land and gave a certain price for it, in two notes, describing them, which he executed together and delivered to the vendor, one of which was the note in suit, this finding, although express upon the point of the execution of both the notes, would not conclude the defendant in a suit upon the second note. If however the two notes had been executed by an attorney under a power, and the sole question made was as to the execution of the power of attorney by the defendant, and the committee had found that it was executed by him, this finding would conclude the defendant in a suit upon the second note. In the latter case the proof of the execution of the power was essential to the judgment in the case, while in the former the proof of the execution of the two notes was not essential, that of the one in suit being alone so.

The point being settled that parol evidence may be admitted to show that a matter within the issue in the former suit was not in fact submitted to the jury, or that a fact submitted to the jury within the issue was not in fact decided by them, a question of much interest arises with regard to the limitation of such evidence. May a judge be called upon to state, in a later case, what particular facts he found or failed to find in the operations of his own mind, in arriving at a general result upon an issue of fact submitted to him? And if so, may jurors in a former case be called on to make the same statement with regard to their own conclusions in the jury room? And may each juror testify to his own separate conclusions or only as to conclusions which were expressed by the jury as a body, by a vote or otherwise?

It is an established rule that a juror will not be allowed to testify to irregularities of conduct on the part of the jury in the jury room. The practice was formerly otherwise, both in England and in this country, (*Norman* v. *Beaumont*, Willes, 487; *Aylett* v. *Jewell*, 2 W. Bla., 1299; *Warner* v. *Robinson*, 1 Root, 194; *Grinnell* v. *Phelps*, 1 Mass., 541; *Smith* v. *Cheetham*, 3 Caines, 57,) but for many years has been settled in accordance with this rule. 1 Greenl. Ev., § 252*a*; *Boston & Worcester R. R. Co.* v. *Dana*, 1 Gray, 83; *State* v. *Freeman*, 5 Conn., 348; *Meade* v. *Smith*, 16 id., 356; *Haight* v. *Turner*, 21 id., 596. In *Howard* v.

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Cobb, 3 Day, 309, it was held by the U. S. Circuit Court, that neither the jurors nor the officer who had them in charge could be compelled to testify to the fact that they had separated before returning their verdict, (then held to be a good ground for setting aside the verdict,) but that they might testify to the fact if they pleased. In all these cases the evidence related to misconduct on the part of the jurors themselves. But in *Regina* v. *Gazard*, 8 Car. & P., 595, it is held that a judge can not be called on as a witness to testify what took place before him on another trial. A bill of indictment for perjury was before the grand-jury, and the judge before whom the perjury was claimed to have been committed was summoned before the grand jury, but expressed a desire not to be examined as a witness, and the grand jury asked the advice of the court on the point. PATTESON, J., said: "It is a new point, but I should advise the grand jury not to examine him. He is president of a court of record, and it would be dangerous to allow such an examination, as the Judges of England might be called upon to state what occurred before them in court." Mr. *Lee*, as *amicus curiæ*, referred to a case in which Sir Sydney Smith had been examined before the grand jury at Worcester in support of an indictment for perjury charged to have been committed at the Worcestershire Quarter Sessions, at which he was chairman. But PATTESON, J., replied, "I think it is wrong and that it ought not to be done." In *Ellis* v. *Saltau*, 4 Car. & P., 327, note, decided in 1808, it was held by Lord MANSFIELD that an arbitrator could not be compelled to testify as to the grounds on which he had made up his award, but might testify if he chose. The suit here was on the award, and the object was to show that the arbitrator had exceeded the limits of the submission. In *Habershon* v. *Troby*, 3 Esp., 38, decided in 1799, Lord KENYON held that an arbitrator ought not to be permitted to depose as to what transpired before him upon the hearing. The suit in which the evidence was offered was an action for a vexatious suit, which latter suit had been referred to the arbitrator, with authority to hear the testimony of the parties and examine the defendant's books, and he had awarded that the plaintiff in that suit had no cause of action. Lord KENYON now put the inadmissibility of the arbitrator's evidence upon the ground that as the parties themselves could not have been examined in the former case nor the books shown, the arbitrator ought not to testify to matters which he determined from that evidence. The case does not therefore go the whole length of deciding that an arbitrator would not be allowed, nor that he might not be compelled, to testify as to the facts found in making up his award. In *Martin* v. *Thornton*, 4 Esp., 180, an arbitrator was called to testify that upon a reference before him of all matters of difference between the parties, upon which he had made a written award, a claim had been made for compensation for the injury for which the present suit was brought. This evidence was objected to, but Lord ALVANLEY allowed the arbitrator to be examined. In *McLellan* v. *Richardson*, 13 Maine, 82, it is held that a prosecuting attorney can not be allowed to testify as to what took place in the grand jury room. To the same effect is *Commonwealth* v. *Tilden*, cited in a note to the Am. ed. of Starkie's Ev., Vol. 2, p. 400. The same rule applies to a clerk of a grand jury. Vin. Abr. *Evidence*, 38. In *Freeman* v. *Arkell*, 1 Car. & P., 137, a grand juror was allowed to testify who was the prosecutor; and the reporter in a note says, "a grand juror may be called to prove any substantive fact within his knowledge, but not anything which he hears as a grand juror or which comes within his oath of secrecy."

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In *Hindekoper* v. *Cotton*, 3 Watts, 56, it is held that a grand juror is a competent witness to prove who the prosecutor was; HUSTON, J., remarking that under the English rule grand jurors are not allowed to disclose who agreed to find the bill and who did not agree, but that their oath of secrecy was not intended to obstruct the course of justice. Starkie, in a note to his work on Evidence, Vol. 1, p. 169, says, "A juror can not be examined and sifted as to the grounds of his verdict; the ancient rule of law was otherwise." In *Manny* v. *Harris*, however, (2 Johns., 24,) KENT, C. J., trying a case on the circuit, admitted a juror to prove how a verdict was made up. The report says, (p. 26): "One of the jurors on the former trial, being sworn as a witness, testified that the jury, in making up their verdict in the former cause, allowed the present plaintiff all the money he now claims in the present suit." The case was carried up upon the question whether any evidence could be admitted to show that fact, but neither in the arguments of counsel, nor in the opinion of the court, is any remark made about allowing the juror to testify, nor is the matter referred to in the head note.

In the principal case the judge who tried the former action was allowed to testify as to his finding upon a certain point in his own mind in making up a general judgment. The question was not made as to whether he could have been compelled to testify to the same matter if he had been disinclined to do so—nor was objection made to the admissibility of the evidence.

There would seem to be no good reason, if the finding of a judge or jury on a particular point becomes important in a later case between the same parties, and that finding may be shown by parol evidence, why the testimony of the judge and the jurors should not be admitted, as being not only all the evidence that could ordinarily be obtained, but as being the most satisfactory in its nature. If there be a rule of policy that would ordinarily protect them from a compulsory disclosure of the details of their findings, there is yet another policy operating in the case of great importance and requiring such evidence. This is the interest of the public that there should be an end of litigation over any particular matter. If the courts have once heard parties and adjudicated their controversies, it is against public interest to have the time of the courts and jurors and witnesses taken up again with a re-trial of the same matter. To this very important consideration is to be added the further no less important one, that justice to a party who has once established his case in a court of justice requires that he should keep the benefit of the adjudication that he has once obtained.

It is of course very plain that in allowing individual jurors, perhaps after the lapse of several years, to testify as to their recollection of the details of the action of the jury, of which no record has been preserved, evidence of a very unreliable and really unsafe character is brought into a case. This consideration must necessarily detract from its weight, but can not be a sufficient reason for its exclusion. The party who seeks to establish the fact that the former jury did or did not consider and pass upon certain facts, is bound to satisfy the present triers of the fact of such finding or omission to find; and therefore, if the evidence is vague and unreliable, it will, as it ought to, go for nothing with the triers. Their judgment must be trusted with the evidence, as it has to be with other cases of vague and unreliable evidence. R.

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TIMOTHY H. FOSTER AND ANOTHER *vs.* ELIZABETH BALMFORTH.

The defendant had accepted sundry orders drawn on her by a contractor who was building a house for her. In a suit brought upon an accepted order the question was whether she had accepted it conditionally or absolutely. It appeared that in accepting it she had said to the payee that she must accept it conditionally as she had the orders of the other creditors. Held that this was a conditional acceptance, without reference to the question whether she had in fact, or had not, accepted the other orders conditionally.

The defendant testified that her acceptance was conditioned upon her owing the builder, and offered in evidence her contract with him. Held that, upon her claim as to the conditional character of her acceptance, the contract might be admissible as showing the amount which she was to pay the builder and the terms of payment; but that, upon the plaintiff's claim that the acceptance was absolute, and upon a declaration describing it as absolute, the evidence was not admissible.

Held however that if inadmissible, its admission was not important enough to be made a ground for granting a new trial.

ASSUMPSIT, upon an acceptance of an order; brought to the Superior Court in Fairfield County, and tried to the court, before *Beardsley, J.* Judgment for the defendant, and motion for a new trial by the plaintiffs. The case is sufficiently stated in the opinion.

W. F. Taylor and *W. Burke*, in support of the motion.

L. D. Brewster, contra.

CARPENTER, J. This is an action on an order drawn by C. J. Seaman on the defendant, payable to the plaintiffs, and accepted by the defendant by writing upon it the word "Accepted," with her signature. The principal question on the trial was whether the acceptance was conditional or absolute. The defendant testified that when the order was presented for acceptance she stated "that she must accept this conditionally as she had the orders of the other creditors." The plaintiffs thereupon offered to prove that the orders of the other creditors were not in point of fact accepted conditionally. This evidence was objected to by the defendant and excluded by the court. The motion for a new trial presents this as the first question.

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The matter of accepting other orders was not pertinent to the issue and the reference to it by the witness did not make it material. The acceptance of each order was an independent transaction and had no relation to any other acceptance. What the defendant did and said at the time she accepted one order could not tend to prove what she said and did when accepting another. The material inquiry was, how was the order sued on accepted? To introduce on the trial an inquiry in relation to other orders would raise as many distinct and independent issues as there were orders, and would tend to divert the mind of the trier from the real issue without subserving any useful purpose.

It will be remembered that the witness is testifying to what she told the plaintiffs' agent at the time she accepted the order —"I must accept this order conditionally as I have the orders of the other creditors." Admitting that she was mistaken in respect to other orders, or even that she intentionally stated what was not true, still, if she actually said it, the vital fact remains that this order was accepted conditionally, or at least that she said at the time she would only accept it conditionally. The reason which she then gave for it, true or otherwise, sufficient or insufficient, is wholly immaterial. If not true the offer to prove it was an attempt to impeach the witness by showing that she had uttered a falsehood out of court in a single instance, and in respect to an immaterial matter; which is never allowable.

The defendant further testified that the condition was, that whatever was due Seaman on his contract for building a house when the house was completed she would pay to his creditors. In connection with this she offered in evidence the written contract between herself and Seaman for building the house, to which the plaintiffs objected, but the court admitted it.

Had the declaration been framed upon a conditional acceptance, such as was proved in this case, this evidence would have been admissible as tending to prove or disprove a compliance with the condition. As the declaration stands, and upon the plaintiffs' theory of the facts, the evidence was not required, and strictly speaking was not admissible. But upon

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the defendant's theory—that her liability depended upon her indebtedness to Seaman—it would have some bearing as tending to show the equities of the case, and, irrespective of any technical question of pleading, might have been admissible. It was in fact admitted "as bearing on the question of the consideration of the acceptance." By this we understand, not that the defendant was permitted to prove a want of consideration for the acceptance and to avoid her liability on that ground, but she was permitted to show the business relations subsisting between herself and Seaman as a part of the circumstauces connected with the acceptance, and in which it originated. The object doubtless was to show that the contingency upon which, according to her claim, the acceptance was to take effect, had never happened, and therefore that she had an equitable as well as legal and technical defense.

In this view of the case we cannot say that the evidence was improperly received. At all events we think there is not enough in this question to justify us in granting a new trial.

In this opinion the other judges concurred.

Cyrus A. White vs. Martin H. Griffing.

Where there is a leasehold estate among the assets of a bankrupt, the assignee is not bound to take the property unless it is for the interest of creditors that he should do so.

And he is to be allowed a reasonable time, before making his election, in which to ascertain whether the lease has any value.

If he accepts the lease he is bound by its covenants.

And his acceptance takes effect from the time when the bankrupt proceedings were instituted.

A sale of the assignee's interest in the lease and the receipt by him of a considerable sum of money for it, would seem to involve an acceptance of the lease by the assignee.

Where a party had given a guaranty for the payment of the rent by the lessee, and the assignee had sold the leasehold property to the lessor, it was held, (assuming the assignee to have accepted the lease and the sale to have carried the assignee's interest in it,) that the sale extinguished the lease and dis-

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charged the guarantor from all liability accruing after the institution of the bankrupt proceedings.

In a suit brought by the lessor upon the guaranty the defendant offered evidence to show that the assignee employed counsel to defend a suit brought by the lessor against the lessee, after the proceedings in bankruptcy had been instituted, to obtain possession of the premises. The assignee testified that he had no recollection of employing counsel, but thought he did not assume the responsibility of defending the suit. The defendant then offered a witness to testify that he heard the assignee engage the counsel. Held that this evidence, though properly admissible in chief, was yet admissible in rebuttal for the purpose of discrediting the testimony of the assignee.

ASSUMPSIT, upon a guarantee of the performance by a lessee of his covenants in a lease; brought to the Superior Court in Fairfield County, and tried to the jury, upon the general issue with notice, before *Beardsley, J.*

Upon the trial the plaintiff introduced in evidence a written lease made by himself to one Charles E. Griffing and the guarantee of the defendant thereon, with evidence of the due execution of the same, and also evidence to prove that upon the execution of the lease the lessee entered into possession of the leased premises, and continued in possession up to the 1st day of August, 1875, when he was ejected from the same under an execution issued upon a judgment against him in a suit of summary process in favor of the plaintiff. The plaintiff claimed to recover upon the guarantee a portion of the rent from the 1st of November, 1874, to May 1st, 1875, which was unpaid, and also claimed to recover damages for waste, which he claimed, and introduced evidence to prove, that the lessee had committed upon the premises in violation of his covenants, during the year commencing May 1st, 1874, and ending May 1st, 1875.

The lease was dated April 27th, 1874, and was for the term of eight years from November 1st, 1873, for a yearly rent of $575, payable on the first day of January in each year; the rent to commence May 1st, 1874, and the first payment to be made for the rent from May 1st to November 1st, 1874; the subsequent rent to be paid from November 1st to November 1st, during the term. The guarantee was of the same date with the lease, was endorsed upon it, and was "for the punc-

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tual payment of the rent and performance of the covenants in the within agreement mentioned."

The defendant introduced evidence to prove, and it was not denied, that upon proceedings instituted by certain of his creditors, under the United States bankrupt act, the lessee was on the 13th day of February, 1875, adjudicated a bankrupt, and F. S. Wildman of Danbury appointed assignee of his estate, which estate was now in process of settlement.

The defendant also offered evidence to prove, and it was not denied, that on the 7th day of October, 1875, Wildman, as such assignee, offered for sale at public auction such title and interest as he, as such assignee, had in the leased premises, which was bid off by one Taylor, at whose request the assignee executed to the plaintiff a quit-claim deed of such interest. The plaintiff claimed, and introduced evidence tending to prove, that Wildman as assignee never assumed the ownership of the lease, nor of any interest in the leased premises, nor any possession of the same, but that from the time of his appointment as assignee up to the sale he refused to assume any rights or responsibility in respect thereto, and that the sale was merely experimental to ascertain whether the lease had any value, and that at the time of the sale he declared that he would sell such interest as he had in the premises, if he had any. The defendant denied that the facts upon this point were as claimed by the plaintiff. He also claimed that Taylor in fact acted as agent of the plaintiff in buying the lease at the auction, which was denied by the plaintiff.

The defendant claimed, and it was not denied, that on January 1st, 1875, rent due from May 1st, 1874, was paid, and that the rent from November 1st, 1874, to November 1st, 1875, was not payable under the contract till January 1st, 1876. He also claimed, and offered evidence to prove, that the plaintiff purchased the lease with full knowledge of its terms, and paid $225 to the assignee for it.

The defendant requested the court to charge as follows:—

1st. That if the jury should find a purchase of the lease by the lessor from the assignee, and that it was purchased

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with full knowledge of its condition and the amount of rent paid thereon, the defendant was not liable as surety in this action for rent due after the purchase.

The judge charged, *pro formâ*, that the defendant might be liable, though the assignee sold the lease, and that such liability would extend to May, 1875, unless the assignee assumed ownership of the lease, in which case he would be liable only till February 13th, 1875, but was liable to that time. And that whether the assignee assumed ownership or not was a question of fact for the jury.

2d. That the surety could not be held liable for waste committed on the premises when in legal possession of the assignee.

The judge, *pro formâ*, charged the jury that the law was so, but that it was for the jury to say whether the premises were ever in the legal possession of the assignee. That if he never assumed the ownership or possession of the same, this principle of law had no application to the case.

3d. That the legal possession of an assignee when he sells a lease relates back to the commencement of proceedings in bankruptcy.

The judge charged that this, as a proposition of law, was correct, if the assignee assumes the ownership of the lease or sells as owner. That it was for the jury to say whether the sale in this case was made by the assignee as owner, or was merely experimental, to ascertain what, if anything, would be paid for such interest, if any, as the law cast upon him as assignee, without any assumption by him of any interest in the same.

4th. That a sale of the assignee's interest was in law an acceptance of the lease, and a taking of the possession of the premises by the assignee under the lease.

But the court charged that it was a fact for the jury to find, whether or not the assignee did take possession of the premises, or assume the lease, by such offering at public vendue, and such quit-claim deed of his interest, or whether the offering of the same at public vendue was only intended by the assignee to ascertain what, if anything, could be obtained for

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such interest, if any, as he had in the lease, without assuming the lease or rendering himself liable to perform any of its covenants; and that if the jury should find that the assignee had not taken possession of the premises or assumed the lease, then the defendant would be liable as surety for the performance of the covenants of the lease for such time, according to the terms of the guarantee.

5th. That the taking of the quit-claim deed from the assignee by the plaintiff, paying the purchase money, retaining possession thereafter, and claiming damages in this action for the amount of money so paid, estopped the plaintiff from denying that the sale was a complete sale.

But the court did not so charge.

6th. The plaintiff offered evidence of waste during the first year of the lease. The defendant objected to any evidence of waste between the 13th day of February and 1st day of May, 1875, but the court admitted it, subject to direction in the charge.

And the court charged the jury that such evidence might be taken into consideration by them, provided they should find that the assignee did not take possession of the premises or assume the lease. But that if they should find that the assignee had taken possession of the premises or assumed the lease, they could not take into consideration any evidence of waste committed after the 13th day of February, 1875.

The defendant claimed that the assignee had employed the law firm of Brewster & Tweedy, to defend the suit of summary process brought against the lessee by the plaintiff. In reply to this the plaintiff offered the assignee as a witness, who testified that he had no recollection whether or not he hired counsel to defend in the suit, but that he thought he had not assumed the responsibility of a defence of the case. The defendant then offered his own testimony that the assignee had in his presence so employed said law firm, but the court refused to admit the evidence.

The jury having returned a verdict for the plaintiff, the defendant moved for a new trial for error in the rulings and charge of the court.

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L. D. Brewster, in support of the motion.

1. The defendant asked the court to charge that "the taking of the quit-claim deed from the assignee by the plaintiff, paying the purchase money, retaining possession thereafter, and claiming damages in this action for the amount of money so paid, estopped the plaintiff from denying that the sale was a complete sale." But the court did not so charge, but on this, and on all the other requests, assumed that it was still a question of fact for the jury to say whether or not the assignee had accepted the lease. We claim here a treble estoppel. 1st. An estoppel in pais. 2d. An estoppel by record. 3d. An estoppel by an admission in the pleadings. The plaintiff admits, affirms and adopts the sale in all the ways in which a vendee can. He can not now repudiate it. "A party by actually affirming a contract or purchase, as by suit or the reception of money upon it, is estopped thereafter to deny its force and effect." Bigelow on Estop., 584, and note 1. "Whatever is admitted on the record need not be proved and cannot be disproved." Roscoe on Ev., (12th ed.,) 80. But irrespective of the question of estoppel, the court below erred in leaving it to the jury to decide as a question of fact whether or not the assignee ever assumed possession of the lease. The sale of the lease and receipt of money therefor was, of itself in law, an assumption of the lease. 1 Smith Lead. Cas., (H. & W. ed., 1872,) 1243, and cases there cited; Taylor Land. & Ten., § 456; 3 Parsons on Cont., 490; *Thomas* v. *Pemberton*, 7 Taunt., 206. In *Turner* v. *Richardson*, 7 East, 343, the court held that a mere *offering* to sell was simply an experiment to test value, but the spirit of the whole decision is that if a sale had been actually made, as was here the case, that act would have been an assumption of the lease. Possession is not the test of acceptance, it is only an incident. *In re Ten Eyck*, 7 Bank. Reg., 26. If we are right in the foregoing positions we are entitled to a new trial, since the whole case was put to the jury on a false issue, and it is evident from the verdict that the jury were misled by the charge.

2. There was no rent in arrear for which the defendant was liable. His guarantee was for the payment of rent "for

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one year." It was signed April 27th, 1874. According to its terms this guaranty is only good for one year. It may be construed to cover a year between November, 1873, and November, 1874, or a year from the signing of the same, or from May 1, 1874. But however the question of the duration of the guaranty is viewed, there was no rent due according to the terms of the lease when the guaranty expired, nor till January 1st, 1876, eight months after the latest possible term of the suretyship had expired, and three months after the landlord had bought in the lessee's right. Rent is not a debt until it is due. *Perry* v. *Aldrich*, 13 N. Hamp., 350, and cases there cited; *Russell* v. *Fabyan*, 28 id., 545; *Wood* v. *Partridge*, 11 Mass., 493; *Fitchburg Factory* v. *Melin*, 15 id., 270; *Van Wicklen* v. *Paulson*, 14 Barb., 654; *Jacques* v. *Short*, 20 id., 269, 279. But if the covenant to pay rent on a specified day creates no debt until the day of payment arrives, how can there be any breach of the covenant before that time? At most the surety only guaranteed that the tenant should perform the covenants from May to November. It is only by construction and implication that he can be held longer. "The contract is not to be extended to any other time than is expressed, or necessarily included in it." Burge on Suretyship, 40; 3 Addison on Cont., § 1119.

3. The voluntary purchase of the lease by the landlord put him in the place of the first lessee as regards the surety and released the latter from all rent not then due. When the greater and less estate meet in the same person at law the less estate is annihilated, whether they met by his own act or the act of the law. "*Nemo potest esse et dominus et tenens.*" *Hughes* v. *Robotham*, Cro. Eliz., 302; Woodfall on Land. & Ten., 132, 274, 338; *Reed* v. *Latson*, 15 Barb., 9; *York* v. *Jones*, 2 N. Hamp., 454; 3 Sugden on Vendors, 23. In a lease so merged, rent not due at the time of merger passes as an incident of the reversion and is extinguished. 1 Furlong Land. & Ten., 547; *York* v. *Jones*, supra; *Stout* v. *Keen*, 3 Harring., 82; *Webb* v. *Russell*, 3 T. R., 393; *Roach* v. *Wadham*, 6 East, 289.

4. It was for the jury to find when the lease was delivered

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—when the parties went into possession—what practical construction they had put upon the contract by their actions at the time—whether there had been any possession by the first lessee previous to April 27th, 1874; all of which facts might bear materially on the liability of the defendant. When no such facts are taken into consideration, the lease "in computation of time" takes effect from the day in which the term is by the contract to commence, although it be a day in the past. Taylor's Land. & Ten., § 70; *Enys* v. *Donnithorne*, 2 Burr., 1192; *Bird* v. *Baker*, 1 Ellis & Ellis, 2, 3, 12.

5. The assignment by act of the law worked no forfeiture of the lease, however the rule may be in case of voluntary bankruptcy. Taylor on Land. & Ten., § 408; 3 Parsons on Cont., 492; 2 Greenl. Ev., § 245; *Starkweather* v. *Cleveland Ins. Co.*, 4 Bank. Reg., 344; Hilliard on Bankruptcy, 141.

6. The surety defends in this action as well for the bankrupt's creditors as for himself. Whatever he has to pay as surety he can present as a claim against the bankrupt's estate. Their equities fully balance any supposed equities of the plaintiff on the questions of merger and apportionment.

7. The rejected evidence should have been admitted. *Crowley* v. *Page*, 7 Car. & P., 789; *Yeaton* v. *Chapman*, 65 Maine, 126.

O. A. G. Todd and *W. F. Taylor*, contra.

1. The objections to the charge of the court are all based upon the sale of the interest of the assignee in the lease, the defendant claiming, and asking the court in various ways to charge the jury, that such sale was in law an assumption of the lease and a taking possession of the leased property by the assignee. The court made substantially the same charge as to all the requests, that if the assignee assumed the lease and took possession of the property, with the intention of assuming the responsibility of the covenants in the lease, then the surety would be discharged of his liability as surety under the lease; but that if the assignee did not so assume the lease and take possession of the property then the defendant would not be so discharged; that it was a fact for the jury to find

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whether or not the assignee had assumed the lease and taken possession; that if they should find that he had done so the defendant would be discharged from his liability after the 13th of February, 1875, otherwise he would not be discharged as such surety. This charge was more favorable to the defendant than he was entitled to. An assignee is not obliged to assume a lease of property given to the bankrupt. He has his election to assume the lease or not, and has no interest in it until he makes such election to assume the lease and takes possession of the property, and until such election is made by him the lease and property remain in the bankrupt. 3 Parsons on Cont., 467, note *t*.

2. Such election must be made in a reasonable time. *Tuck* v. *Fyson*, 6 Bing., 321; 3 Parsons on Cont., 467, note *t;* 2 Smith Lead. Cas., (7th Am. ed.,) 1243. The motion finds that the bankrupt remained in possession of the property described in the lease until August, 1875, and until he was ejected by virtue of an execution in a judgment of summary process. The sale was not made until the month of October following, and when the lessor was in possession of the premises. If possession was taken by the assignee by this sale, it was not within a reasonable time.

3. The bankrupt lessee, by the terms of the lease, only had the right to possess and enjoy the use of the property, without any power to assign it to a third person without the written permission of the lessor. Consequently no estate passed to the assignee by the bankruptcy of the lessee. *In re O'Dowd*, 8 Bank. Reg., 451; Bump on Bankruptcy, 9th ed., 490. Voluntary and involuntary bankruptcy stand upon the same ground in their effect upon such a lease. Bump on Bankruptcy, 491; *Starkweather* v. *Cleveland Ins. Co.*, 4 Bank. Reg., 341; *S. C.*, 2 Abbott C. C., 67; *Perry* v. *Lorillard Ins. Co.*, 14 Bank. Reg., 339; *S. C.*, 61 N. York, 214.

4. Under the bankrupt law the discharge of the bankrupt does not discharge, release, or affect the defendant as surety or guarantor in this lease, but he is holden in the same manner as if no proceedings in bankruptcy had been commenced. U. S. Statutes, sec. 5, 118; Bump on Bankruptcy, 732; *In re*

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Levy, 1 Bank. Reg., 327; *S. C.*, 2 Bened. R., 169; *Claflin* v. *Cogan*, 48 N. Hamp., 411; *Jones* v. *Russell*, 44 Geo., 460; *Payne* v. *Able*, 7 Bush, 344; *Morse* v. *Waller*, 1 A. K. Marsh., 488.

PARK, C. J. It was an important question, in this case, whether Wildman, the assignee in bankruptcy, had elected to appropriate the lease in question for the benefit of the creditors of the bankrupt, and had performed some act of ownership over the property in pursuance of such election. He was not bound to take the property and appropriate it for such purpose unless the lease was valuable. His duty required him to determine whether the lease would or would not be beneficial to the creditors of the bankrupt, and to act accordingly.

In *Turner* v. *Richardson et al.*, 7 East, 336, Lord Ellenborough says: "It has been decided that assignees of a bankrupt are not bound to take what Lord Kenyon called a *damnosa hæreditas;* property of the bankrupt which, so far from being valuable, would be a charge to creditors; but they may make their election. If however they do elect to take to the property, they cannot afterwards renounce it because it turns out to be a bad bargain." Gross, J., says, in the same case: "They were assignees of a bankrupt's estate for the benefit of his creditors, and they were to consider whether it were for the benefit of the creditors that they should take to the property or waive it. On the one hand, if they entered and were possessed, they became liable to be sued upon the bankrupt's covenants for rent and non-repair, which might amount to more than the value of the lease; on the other hand, if the lease were valuable, and they did not take to it, the creditors would have had a right to call upon them for neglect of their duty."

Chitty, in his work on Contracts, page 240, says: "It is clear that the interest of the bankrupt in any such land, or under any such conveyance or agreement for a conveyance, or lease or agreement for a lease, does not vest in his assignees absolutely by virtue of the fiat; but such interest remains

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in the bankrupt until the assignees do some act amounting to an acceptance thereof."

In *Copeland* v. *Stevens*, 1 Barn. & Ald., 593, the court says: "The assignees of a bankrupt are not bound to accept a term of years that belonged to the bankrupt, subject to the rents and covenants, for the object of the statute and of the assignment being the payment of the bankrupt's debts, and the assignees under the commission being trustees for that purpose, the acceptance of a term which, instead of furnishing the means of such payment, would diminish the fund arising from other sources, cannot be within the scope of their trust and duty."

Parsons, in his work on Contracts, Vol. 3, page 489, says: "If the assignee elects not to take, the lease remains in the bankrupt, with all its advantages and all its burdens, and free from all claims or right either of the assignee or of the creditors."

Washburn, in his work on Real Property, Vol. 1, page 340, says: "And in cases of general assignment by insolvents, or by proceedings in insolvency, the assignee will have a reasonable time in which to ascertain whether the lease can be made available for the benefit of creditors, before he will be obliged to make his election," (whether he will claim the lease under the assignment or not.)

It follows, therefore, if Wildman the assignee did not accept the assignment of the leasehold estate of the bankrupt, that the lease remained the property of the bankrupt, and consequently the defendant would be liable on his guaranty, inasmuch as it appears that the rent which had accrued during a part of the time covered by the guaranty is in arrears.

If Wildman accepted the assignment, then it follows that he sold the interest of the bankrupt in the lease to the plaintiff, who was the lessor of the property to the bankrupt, and both the lease and the guaranty thereby became extinguished before the year covered by the guaranty had expired; for the acceptance of the assignment of the lease took relation from the time when the bankrupt proceedings were instituted, which

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was before the year covered by the guaranty had expired, and consequently there could be no liability on the part of the defendant.

Hence the liability of the defendant turns upon the question whether or not Wildman accepted the assignment of the lease.

During the trial of the case in the court below, the defendant, in order to show that Wildman did in fact accept the assignment of the lease, offered evidence to show that he employed counsel to defend an action of summary process brought by the plaintiff against the bankrupt. The plaintiff offered Wildman as a witness, who testified that he had no recollection whether he employed counsel to defend the bankrupt in the suit or not, but thought he did not assume the responsibility of defending the case. The defendant in rebuttal offered a witness to prove that he heard Wildman engage counsel to defend the suit.

The plaintiff objected to the reception of this evidence, and the court excluded it, and we think the court erred in so doing. The suit was brought after Wildman had been appointed assignee, and if he then had accepted the assignment of the lease it would be expected of him to defend the bankrupt. This evidence therefore was pertinent and important evidence upon the question whether he had accepted the assignment.

It does not appear upon what ground the objection to the evidence was based, but probably upon the ground that it was evidence in chief, and was not proper rebutting testimony. But after Wildman had testified that he thought he did not assume the responsibility of defending the suit, the evidence was proper to disparage his testimony, and thereby support the evidence which had been offered in chief. His testimony tended to establish the fact that he did not employ counsel to defend the suit, although he did not testify positively on the subject. Doubtless the evidence offered in rebuttal might have been given in chief; still, inasmuch as it was not done, it was properly admissible in rebuttal to discredit the testimony of Wildman.

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We have refrained from deciding whether the court below erred in omitting to charge the jury, as the defendant requested, that the sale of the assignee's interest in the lease, and the acceptance of quite a sum of money as the proceeds of the sale, were in law an acceptance of the lease under the assignment, for if the question of acceptance is one of fact, a new trial must be advised, on account of the ruling which we have just been considering, the evidence rejected by the court being admissible upon the question of acceptance as one of fact; and if the question be one of law, and the court therefore erred in refusing so to charge the jury, we could do no more than grant a new trial.

We will say, however, that it is difficult to see how an assignee in bankruptcy can sell the lease of the bankrupt, and receive therefor a large sum of money for the benefit of creditors, without accepting the assignment of the lease.

In *Turner* v. *Richardson*, supra, the assignees advertised the lease for sale at public auction, in order to ascertain whether it had any value; and this was done without stating that the leasehold estate belonged to them; and afterward, in accordance with the advertisement, the lease was put up for sale, but no bidder appearing the estate was not sold; and it was held that the assignees might thus experiment in order to ascertain whether the lease had any value, without committing themselves to an acceptance of the lease. But the court strongly intimate that if a bidder had appeared and the premises had been sold, the assignees would have been holden to an acceptance of the assignment.

In *Hastings* v. *Wilson*, 1 Holt N. P. C., 290, the assignees put up the premises at public auction, and there was a purchaser, and a deposit paid, but the contract of sale went off without the assignees showing why they did not enforce the sale. It was held that the assignees were liable.

In *Welsh* v. *Myers*, 4 Camp., 368, the bankrupt was lessee of pasture land, and the assignee suffered his cows to remain on the land for two days, and ordered them to be milked there. Lord Ellenborough was of the opinion that this was an adoption of the lease by the assignee.

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So, intermeddling with the farm land of the bankrupt has been held sufficient to establish an acceptance by the assignee. *Thomas* v. *Pemberton*, 7 Taunt., 206. So also carrying on business upon the premises. *Clarke* v. *Hume*, 1 Ry. & Mood., 207. These cases, and many more which might be cited, seem to go as far as the defendant requested the court to go in this case.

A new trial is advised.

In this opinion the other judges concurred.

SAMUEL PIKE *vs.* FREDERICK W. THORP, ADMINISTRATOR.

A claim against the estate of a deceased person, not represented insolvent, ought properly to be presented to the administrator in writing. While such a presentation is not positively required by the statute, yet this is the only safe mode, as furnishing proof both of the fact of presentation and of the exact claim presented.

A person holding a claim against the estate of a deceased person casually met the administrator, who was a brother of the deceased, and said to him, "I have an account against your brother of about $100;" to which the administrator replied, "I am going to pay up all the bills, but cannot do it just now;" to which the creditor rejoined, "I am in no hurry about it, do it when you get ready." Four months afterwards the creditor again casually met the administrator and spoke of the account, and showed him a bill of items partly made out embracing about a third of the account. The administrator then told him to finish up the bill. Nothing more was done by the creditor until after the time for presenting claims had expired. Held not to be a legal presentation of the claim.

ASSUMPSIT for goods sold to the defendant's intestate; brought, by appeal from a justice of the peace, to the Court of Common Pleas for Fairfield County, and tried to the court, on the general issue, with notice of a claim that the demand was barred by non-presentation within the time limited by the court of probate, before *De Forest, J.* The court found the following facts:

The defendant on the 25th day of September, 1875, was

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appointed administrator on the estate of his brother, Andrew B. Thorp, and the period of six months from that day was limited by the court of probate for the exhibition by creditors of claims against the estate.

At the time of his decease Andrew B. Thorp was indebted to the plaintiff in the sum of $100, for goods sold. About the 1st of November, 1875, the plaintiff met the defendant in the store of the former in Southport, and informed him that he had a bill against his deceased brother amounting to about one hundred dollars, to which the defendant replied, "I am going to pay up all the bills, but cannot do it just now." The plaintiff replied, "I am in no hurry about it; do it when you get ready." About the 1st of March, 1875, at an interview in the plaintiff's store, the bill was again spoken of, and the plaintiff then showed the defendant a bill of items of the account partly made out, embracing about one-third of the whole amount. The defendant thereupon told him to finish up the bill. The plaintiff did not then know that the defendant was administrator on the estate, and did not know that any administrator had been appointed, nor did he make any inquiry or effort to ascertain whether the estate was being settled in probate until some time in June, 1876, when the defendant informed the plaintiff that the estate had been settled, at which time the plaintiff went to the judge of probate, and ascertained that the defendant had been appointed administrator, and that the settlement of the estate had been completed and the administrator discharged on the 21st of April preceding. The plaintiff never presented his claim against the estate otherwise than as above.

The plaintiff claimed on the foregoing facts, as matter of law, 1st, that he had not "neglected to exhibit his claim" within the time limited, and was not therefore "debarred of his demand against such estate," either in whole or in part; and 2d, that the defendant was estopped from denying that the claim had been exhibited.

The court overruled these claims of the plaintiff, and on the facts found rendered judgment for the defendant. The plaintiff thereupon moved for a new trial for error in these rulings of the court.

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C. Thompson, in support of the motion.

The statute points out no mode of exhibiting claims; therefore it may be done by a verbal or written statement of the nature and amount of the claim; and no formality is required. *Mills* v. *Wildman*, 18 Conn., 124, 131; *Am. Board of Commissioners' Appeal from Probate*, 27 id., 344, 352; *Mathes* v. *Jackson*, 7 N. Hamp., 259; *Little* v. *Little*, 36 id., 224. To exhibit is to make known. It is not denied that the nature and amount of the claim were made known to him on the first of November; and on March 1st a bill of items of a part of the amount was shown him, and he told the plaintiff then to finish up the bill. But he recognized its exhibition in November, by promising, in substance, to pay the bill, only asking for delay. Thus he had a distinct knowledge of the claim and promised to pay it. And if he had desired to inquire more about it, and he did not, it was his own fault. It can make no difference that the plaintiff did not know that the defendant was administrator so long as he was in fact such, and the claim was exhibited. It would be unjust to put such a construction upon the statute, and would give to an artful administrator the power to defeat just claims. The statute is not designed to cheat creditors, but to ascertain the solvency of an estate and close it up. It is penal in its character, works a forfeiture, and should not be used to impale a creditor who is not clearly guilty of a "neglect to exhibit." Here was a debt known, and as it was the duty of A. B. Thorp in his lifetime to pay it, so it was after his death the duty of his administrator. 1 Swift Dig., 450. We further claim that the administrator ought not to be allowed to set up such a technical defence, if defence at all, after his conduct towards the plaintiff. It does not affect the legality of the claim, but the exhibition of it, and he should be estopped from denying that.

A. B. Beers, contra.

PARK, C. J. It is the duty of an executor or administrator in settling an estate not represented insolvent, to examine all

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claims against the estate, and pay such of them as are found to be valid; and to disallow such as are not found to be so, and give due notice of such disallowance to the person presenting the claim, in order that he may have an opportunity to test the same in the manner provided by law. To enable the administrator to perform these duties, the statute provides that "courts of probate may direct executors and administrators to cite the creditors of the deceased to bring in their claims against his estate, within such time as they shall appoint, not exceeding eighteen months, nor less than six months," and that "if any creditor shall neglect to exhibit his claim within such time as shall be limited, he shall be forever debarred of his demand against such estate." The statute further provides, that "when the creditor of an estate not represented insolvent shall present his claim to the executor or administrator within the time limited by the court of probate, and he shall disallow and refuse to pay it, if such creditor shall not within four months after he has been notified by him that his claim is disallowed, commence a suit against him for the recovery thereof, he shall be debarred of his claim against such estate." Gen. Statutes, p. 388.

These are a part of the provisions of the statute with regard to the settlement of estates not represented insolvent. In the first instance the administrator must pass upon all claims against such estates. He is not presumed to know what they are, and in a great majority of cases he can not know, until they are presented to him by the creditors. He must pass upon every item of every account. He must obtain information on the subject from the books and papers of the deceased, and from parties interested in the estate, as well as from the parties presenting the claims, and, from all the knowledge thus obtained, determine what claims to allow and what to disallow.

Such are the duties of the administrator, and it is obvious that they cannot be performed if such a presentation of a claim as that made by the plaintiff in this suit is held sufficient. The finding on this subject is that about the first of November, 1875, the plaintiff met the defendant in the store

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of the former, and informed him that he had an account against his deceased brother, amounting to about one hundred dollars; to which the defendant replied, "I am going to pay up all the bills, but cannot do it just now;" and that the plaintiff answered, "I am in no hurry about it; do it when you get ready." That about the first of March, 1876, at an interview in the plaintiff's store the bill was again spoken of, and that the plaintiff then showed the defendant a bill of items of the account partly made out, embracing about one-third of the whole amount, and that the defendant thereupon told the plaintiff to finish up the bill. That the plaintiff did not then know that the defendant was administrator nor that one had been appointed, and took no measures to inform himself on the subject until after the estate had been settled.

These are the facts, and the question is, was there a presentation of the plaintiff's claim against the estate at either of these interviews? Very little need be said in relation to what transpired at the first interview, as it clearly falls short of a presentation of the claim. The interview was a casual one. The plaintiff knew that the defendant was a brother of the deceased, and that fact led him to speak of his claim against the estate. No account whatever was shown, nor did the plaintiff give the defendant any information regarding his claim except in stating that it amounted to about one hundred dollars. This clearly did not amount to a presentation of the claim, and would not if the plaintiff had known the defendant to be the administrator. At the second interview, which also appears to have been a casual one, the plaintiff showed the defendant a part of the items of his account, in the form of a bill not completed. The defendant then told him to finish the draft of his bill; and the parties then separated. They separated with the understanding that something more was to be done; that the plaintiff should finish the making out of his claim, and afterwards present it to the defendant. Neither of the parties then understood that the claim was being formally exhibited to the administrator, even supposing the plaintiff to have known that the defendant was administrator, but both understood that the

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presentation of the account was to be afterwards made when the draft of it had been completed. The defendant manifestly had no sufficient opportunity to examine even that part of the account which was shown to him. It is fair to presume from what transpired between the parties, that he in fact made no examination of this part of the account, but postponed all attention to the matter until he should have the full account before him and could examine it at his leisure.

Every claim against an estate not represented insolvent ought properly to be presented to the administrator in writing, that he may be fully apprised of its character and have an opportunity to examine it thoroughly; and although the statute does not in express terms require that claims should be so presented, yet this clearly is the only safe course, as furnishing proof both of the fact of presentation and of the exact claim presented. For the protection of the estates of deceased persons we think it would be well that the statute should require that claims be so presented in all cases.

A new trial is not advised.

In this opinion the other judges concurred.

GEORGIA V. ALDEN *vs.* HARRIET A. TRUBEE AND ANOTHER.

A purchaser of real estate gave no consideration beyond a mortgage back for the price, with a stipulation in the mortgage deed that the mortgage debt was not to be paid any further than it could be obtained from the mortgage. Held not to be a bonâ fide purchaser, as against a party who had taken a prior voluntary conveyance.

Where a deed is void upon its face it is a well settled rule that a court of equity will not set it aside as a cloud upon a title.

But the rule is otherwise where the invalldity of the deed is not apparent on its face, but depends upon extrinsic evidence.

Where equitable relief is sought in a cross-bill, and all the facts are brought out on the hearing of the petitioner's bill, it is not a valid objection to a decree in favor of the respondent on his cross-bill, that he would have adequate remedy at law, for, the court having rightfully taken jurisdiction of the case upon the petition, can retain it for the purpose of doing justice upon the whole case.

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BILL IN EQUITY to set aside a conveyance and remove a cloud from the petitioner's title; brought to the Superior Court in Fairfield County. Harriet A. Trubee, the principal respondent, filed a cross-bill praying that the deed of the same property to the petitioner might be set aside as a cloud upon her own title. The following facts were found by a committee:

The petitioner was formerly the wife of Stephen H. Alden, one of the respondents, from whom she was divorced upon her own petition in March, 1873, she obtaining from him alimony to the amount of about $60,000. Harriet A. Trubee, the other respondent, is a daughter of said Alden. Mr. Alden, prior to September, 1873, was, and for several years had been, the owner of the property described in the petition, a country seat in Westport in this state called "Compo Place," which was of the value of $50,000. At this time he was a man of large wealth, and had previously made large gifts of property to his daughter, Mrs. Trubee, and to his other children; but during the panic of 1873 he suffered severe losses and became embarrassed financially, but about the 24th of October, 1873, he had settled with substantially all his creditors, and was then the owner of Compo Place in fee.

On the 24th of October, 1873, Mr. Alden executed a deed of Compo Place to Mrs. Trubee, which deed was delivered by him to her on the 25th of October, and on the 27th she had it recorded. This deed was given for the consideration of one dollar, paid by Mrs. Trubee, and as she understood from him, and believed to be the case, for the affection he bore her and her children; but it was also executed for the purpose, on the part of Mr. Alden, of preventing his creditors, if any there were, whose claims he was unable to meet, from attaching the same, of which purpose however Mrs. Trubee was ignorant. Neither at the time of this conveyance, nor at any subsequent time, was there any agreement on the part of Mrs. Trubee to hold the property in trust for Mr. Alden.

Mrs. Trubee, with her father, occupied Compo Place prior to the conveyance, and subsequently to the conveyance they remained in possession until the 17th day of February, 1874,

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when the house was closed and they removed to the city of New York.

Previous to April, 1874, the petitioner and Mr. Alden became reconciled and intimate with each other, and on the 2d day of April, 1874, he executed and delivered to her a deed of Compo Place, which deed was recorded on the 4th day of April. At the time of this conveyance she had full knowledge of all the facts connected with the conveyance by Mr. Alden to Mrs. Trubee, and that Mrs. Trubee claimed the property as her own.

The only consideration for the conveyance by Mr. Alden to the petitioner was a mortgage back of the same premises to him by her, dated the 2d of April, 1874, which mortgage has never been recorded. This mortgage contained the following clause: "Provided always, and these presents are upon this express condition, that if the said Georgia V. Alden, party hereto of the first part, shall well and truly pay, or cause to be paid, to the said Stephen H. Alden, his executors and administrators, the said sum of fifty thousand dollars, on or before the 2d day of April, which will be in the year 1876, without interest, and without personal liability on the part of the said Georgia V. Alden further than this mortgage is concerned, and without personal liability for any deficiency in case a sale of the premises hereby mortgaged should be made under foreclosure of the same, then this indenture is to be void, otherwise to remain in full force."

After the conveyance of Compo Place by Mr. Alden to the petitioner, the latter on the 3d of April, 1874, entered upon and took possession of the premises, without the knowledge or consent of Mrs. Trubee, and has continued to reside there, with Mr. Alden, since that time.

All allegations in the petition and cross bill, not herein found to be true, are not proved and are untrue.

Upon these facts the court (*Hitchcock, J.*,) dismissed the petitioner's bill, with costs, and granted the prayer of the cross-bill, the decree upon the latter being as follows: "And it is further decreed that said deed from Stephen H. Alden to Georgia V. Alden, in said petition set forth and dated

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April 2d, 1874, be and the same is hereby set aside, vacated, and declared void and of no effect, and that the full title to said premises in said petition set forth be, and the same is hereby declared to be, vested and established in said Harriet A. Trubee; and said deed of Stephen H. Alden to her, the said Harriet A. Trubee, dated October 24, 1873, be and the same is hereby fully confirmed."

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

J. B. Curtis and *C. G. Child*, for the plaintiff in error.

W. K. Seeley and *E. W. Seymour*, with whom was *G. Stoddard*, for the defendant in error.

PARK, C. J. We think it clear the petitioner has failed to make out an equitable claim against Harriet A. Trubee, the principal respondent. She bases her prayer for relief solely on the ground that when the deed of Stephen H. Alden was given to Mrs. Trubee in October, 1873, it was expressly agreed between the parties to the deed, both by parol and in writing, that the grantee should receive the deed in trust for the benefit of the grantor, and should re-convey the property to him or his appointee on demand; which Mrs. Trubee subsequently refused to do.

The Superior Court has found all these allegations untrue; which seems to dispose of the petitioner's bill.

But she insists that she has a right to claim under her bill that the deed of Alden to Mrs. Trubee was voluntary, and was fraudulent and void, not only as against his creditors, but also as against subsequent bonâ fide purchasers for value. But she is equally unfortunate in this claim, for it appears, among other difficulties which might be suggested, that she was not a subsequent bonâ fide purchaser for a valuable consideration, within the meaning of the law upon this subject. She took her deed with full knowledge of all the circumstances attending the giving of the deed to Mrs. Trubee, and paid no value in fact as the consideration of her deed, and no con-

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sideration whatever except a mortgage of the same property conveyed to her, which she made to her grantor to secure the purchase money. The mortgage contained a stipulation that she should not be bound to pay the purchase price of the property farther than it could be obtained from the mortgage. She took her deed and gave a mortgage of the property in return, and that was all. If her deed was invalid her mortgage was invalid also, and she would be left in the same condition as when she took her deed, no better and no worse.

She was in no sense therefore a bonâ fide purchaser. Perry, in his work on Trusts, page 218, says: "A bonâ fide purchaser is defined to be one who at the time of his purchase advances a new consideration, surrenders some security, or does some other act which leaves him in a worse position if his purchase should be set aside." In *Spicer* v. *Waters*, 65 Barb., 227, the court say: "To constitute one a bonâ fide purchaser it is not enough to show a conveyance good in form, but payment of the consideration must be made out. It must be actually paid, not merely secured to be paid; merely giving security for the purchase money is not enough to entitle the party to the character of a purchaser for a valuable consideration. A bonâ fide purchaser is one who buys property of another without notice that some third party has a right to or interest in such property, and pays a full and fair price for the same at the time of such purchase, or before he has notice of the claim or interest of such other in the property." See also *Kimball* v. *Hutchins*, 3 Conn., 450. Many other cases might be cited to the same effect if it were necessary.

But it is said that the court below erred in granting Mrs. Trubee relief under her cross-bill, on the ground that a court of equity will not sustain a bill under the circumstances of this case, and that, besides, she has adequate remedy at law in an action of ejectment against the petitioner; and we are referred to the case of *Munson* v. *Munson*, 28 Conn., 582, as supporting the claim. The distinction between that case and the present will be readily seen upon an examination of

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the cases. Judge ELLSWORTH, in giving the opinion of the court, seems to regard that case as among the class of cases where deeds and other instruments sought to be canceled or delivered up by proceedings *quia timet*, are void upon their face. In such cases it has been the settled practice of the courts of England and of this country to deny relief to petitioners, on account of the unnecessary expense and trouble to respondents that might be caused by a contrary rule, when lapse of time could not possibly deprive them of their full means of defence. 1 Story Eq. Jur., § 700. *Piersall* v. *Elliott*, 6 Pet., 95; *City of Hartford* v. *Chipman*, 21 Conn., 488. In the case at bar the deed to the petitioner is not void upon its face. It required a long and expensive trial to ascertain whether it was invalid, the fact depending on evidence *aliunde*. If the petitioner had been successful in proving the allegations of her bill, she would have established the validity of her deed.

There is no necessity for considering the objection that Mrs. Trubee has adequate remedy at law, for there is another reason which is decisive of the point that there is no error in the decree of the court in this part of the case. It is a principle of equity that if the court has jurisdiction of the case for one purpose, it will retain it for all purposes, and grant such relief as the parties show themselves entitled to receive. *Downes* v. *Bristol*, 41 Conn., 274; 1 Story Eq. Jur., § 699; *City of Hartford* v. *Chipman*, supra.

In this case the court had jurisdiction of the petitioner's bill. The facts which were proved on the trial of her case, and which showed that she was not entitled to relief, establish the case of Mrs. Trubee under her cross-bill. The cross-bill is an answer to the petitioner's bill, as well as a cross-bill. The petitioner in her bill sets forth the validity of her deed, and denies the validity of Mrs. Trubee's deed. The latter by way of answer and cross-bill sets up the validity of her deed, and denies the validity of the petitioner's deed. The facts establish the validity of Mrs. Trubee's deed, and the invalidity of the petitioner's; and it would be strange if, when the facts are all before the court, the court is unable to

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do justice to Mrs. Trubee, as well as to the petitioner, and settle the rights of all the parties. The principal reason why a court of equity will not sustain a bill of *quia timet*, where the instrument sought to be canceled is void upon its face, is, as we have said, because of the useless expense and trouble to which it would subject respondents, and the unnecessary consumption of the time of the court. This reason does not exist in a case like the present, where all the facts are before the court upon the petitioner's bill.

There is no error in the decree of the court.

In this opinion the other judges concurred; except CARPENTER, J., who dissented as to the granting of the prayer of the cross-bill.

ANDREW W. SANFORD, JUDGE OF PROBATE, *vs.* CHARLES M. GILMAN AND ANOTHER.

The statute (Gen. Statutes, tit. 18, ch. 11, sec. 18,) provides that when a life estate in any personal property is given by will to one and the remainder to another, and no trust is created, the court of probate may, upon the request of the legatee for life, order the executor to deliver the property to him, on his giving bond for its safe-keeping and delivery at the termination of the life estate, to the legatee in remainder. Held that this statute was intended to apply to all cases in which a life estate was so given, and that no legatee for life, where there were no directions to the contrary in the will, was entitled to the possession of the property, except upon such application to the court of probate and such giving of bond.

A bond given by an executor "well and truly to administer" an estate, covers the duty of the executor to pay over to a legatee for life of personal property, the interest and dividends received by him from the property.

DEBT on a probate bond; brought to the Superior Court in Fairfield County, and tried to the court before *Beardsley, J.* Judgment for the defendants, and motion for a new trial by the plaintiff for error in the rulings of the court. The case is sufficiently stated in the opinion.

I. M. Sturges, in support of the motion.

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W. K. Seeley, contra.

PARK, C. J. The facts found in this case, so far as they relate to the questions we have considered, are briefly as follows:

Sally Ogden by her will, made in 1857, bequeathed all her estate, after having made a single small legacy, to her sister Angeline Ogden, to use for the term of her life; and after her death gave the estate to certain other relatives, and upon certain contingencies to sundry charitable institutions. The defendants are obligors of a bond to the judge of probate for the faithful discharge by the defendant Gilman of his duties as administrator with the will annexed of the estate of the testatrix, and the present suit is brought in the name of the judge of probate upon the bond, charging, among other breaches, that the administrator has refused to deliver to Angeline Ogden the personal property of which she has under the will the life use. It is also charged as a breach that the administrator had neglected to pay over to her certain dividends and interest received by him from the personal estate in question. On the trial to the court upon the issue of performance or non-performance, the defendants contended that Angeline Ogden was not entitled to the possession of the personal property until she had given a bond with surety for the safe keeping of the property during her life and its delivery after her death to the persons interested in remainder; relying upon the statute, (Gen. Statutes, tit. 18, ch. 11, sec. 18,) which provides that "when a life estate in any personal property shall be given by will to one and the remainder to another, and there shall be no trustee named for such estate during the continuance of the life estate therein, the court of probate having cognizance of such will may, upon the request of the person entitled to such life estate, order the executor to deliver said personal property to such person, upon his giving bond to the state, with surety, in a sum equal to double the value of said estate, conditioned that said estate shall be safely and properly kept, to be delivered to the person entitled to receive it on the determination

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of the life estate therein." The plaintiff contended that it was to be inferred from other provisions of the will that the testatrix did not expect bond to be given by the legatee for life, and that there was no reason here why it should be required, as she did not live out of the state, and was not shown to be pecuniarily irresponsible or in any respect an unfit person to have the possession of the property. The motion finds that the defendants did not claim that she was an improper person to have the possession, or that there was any danger that she would waste, remove, or secrete the estate, and also finds that she resided and had always resided in this state. It also finds that she had never requested the court of probate to make an order that the administrator should deliver the property to her and had never offered to give any bond under the statute. The court held that in the circumstances the refusal of the administrator to deliver the property to her was not a breach of the bond.

We think there was no error in this ruling. The only reasonable construction of the statute that has been recited is, that in all cases a legatee for life, who desires to obtain possession of the property, shall apply to the court of probate for an order for its delivery by the executor, and shall upon such application offer bond with surety for the safe keeping of the property for the persons interested in remainder. If the legatee for life had a right to demand and receive it without such an application, it is very clear that he would always insist upon the right and obtain possession of the property without giving bond. This would render the statute entirely nugatory. It can practically have no application unless it has a general one. It was intended for the protection of the persons interested in remainder. Before the act was passed they were left to move in the matter and bond was required only at their instance. *Langworthy* v. *Chadwick*, 13 Conn., 42. This remedy was often inadequate by reason of the number of persons ultimately interested, some of them perhaps contingently, and perhaps all living remote from each other and unable to act promptly and in concert. By such a general law as this these parties are protected,

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however remote or contingent their interests, or however widely they may be scattered over the country. As the bond is required for the benefit of legatees in remainder, an executor would undoubtedly be justified in delivering the property to the legatee for life upon their consent that he should do so, and without doubt a testator, who can dispose of his property as he pleases, could direct that the possession should be given to the legatee for life without bond. But where neither of these facts exists the statute seems to have intended that any legatee for life, desiring to obtain possession of the property, should apply to the court of probate for an order to that effect, and should give bond for its safe keeping.

Upon the claim of the plaintiff that the non-payment to the legatee for life of certain interest and dividends received by the administrator was a breach of the bond, the court ruled that it was not such breach. We think the court erred in this ruling. The counsel for the defendant contends that the administrator under his bond owed no duty to the legatee for life beyond receiving and safely keeping the property, and paying it over as the court of probate should order—that is, that whatever right the legatee for life might have to the property, or however enforceable that claim may have been against the administrator by a suit brought by her in her own name, yet that no *condition of the bond* was violated by his neglect or refusal to pay the income to her. The bond it is said was only that he should "well and truly administer the estate," "make a true account of his administration" on or before a certain day, and "deliver all the residue of said estate which should be found remaining unto such person or persons as said court by decree pursuant to law should appoint." But it is clear that the distribution of the remainder left upon the settlement of the account, and which was to be made to such persons as the court should order, was intended for the *final* distribution of the estate, to distributees named in the order of distribution, and that no order was intended or can be necessary in the case of mere income to which a legatee for life may be entitled. This payment is necessarily made from time to time, as dividends or interest

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are received, and it surely can not have been intended that it should accumulate in the hands of the executor. The counsel for the defendant does not carry his claim so far as this, but contends merely that the rights of the legatee for life, so far as the income is concerned, are not protected by or enforceable through the bond. But if this is so, then an executor who should allow a large amount of dividends and interest to accumulate in his hands would hold these accumulations entirely on his personal responsibility and unprotected by his bond. It is true that they might remain in his hands until the settlement of his administration account, perhaps several years, and then be included in the final order of distribution and so be brought within the bond. But this would be unreasonable, and might be directly contrary to the express provisions of the will, which may have directed that the income should be paid over as it accrued to the legatee for life. In such a case—one we are sure of frequent occurrence—can it be that the right of the legatee for life to these payments is not protected by the bond? We think it is, and that the executor who neglects his duty in this respect commits a breach of that part of his bond which requires him well and truly to administer the estate. The will of a testator is the law of the estate, and no testate estate can be well and truly administered by proceedings which violate the legal provisions of the will.

We think the court clearly erred in its ruling on this point, and that a new trial must be granted on account of it. Other questions were made in the case which it has become unnecessary to consider.

In this opinion the other judges concurred.

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JOHN GREGORY *vs.* ARTHUR SHERMAN AND ANOTHER.

In a suit upon a recognizance, a certificate of which was annexed to a writ of replevin and signed by the magistrate signing the writ, the defendants claimed that the magistrate inserted their names without authority, and that he signed the certificate without intending to make a record of a recognizance. Held—

1. That the certificate was to be received as a record.
2. That it was competent for the defendants to contradict it, and show that they never entered into the recognizance.

The magistrate in taking the recognizance on issuing the writ was acting in a ministerial capacity.

A certificate of such a ministerial act, though it becomes part of the record, is only primâ facie evidence of the facts which it states.

DEBT on a recognizance upon a writ of replevin; brought to the Court of Common Pleas of Fairfield County. The case was tried to the court, on the general issue, before *De Forest, J.*

On the trial the plaintiff offered in evidence, to prove the taking of the recognizance of the defendants, the original writ of replevin in which the recognizance was claimed to have been taken. The plaintiff obtained the writ among the files of the Court of Common Pleas, to which it was returnable. The defendant in that suit, now the plaintiff, had obtained judgment in the action by nonsuit for costs and damages. When the writ was issued the justice had it presented to him already filled out as it now appeared, except his signature, and he signed the same without knowing its contents and not supposing that there was any certificate of the taking of a recognizance in it or attached to it. In signing the writ the justice neither intended to make, nor supposed that he was making, a record. All the evidence offered to prove the circumstances attending the signing of the writ by the justice was received subject to objection, by consent of parties.

The plaintiff claimed that the certificate on the writ was the record of the justice of the taking of the recognizance, and that, if it were not the record of the justice, it had become, by being returned to the Court of Common Pleas, a part of

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the records of that court, and as such was competent record evidence of the taking of the recognizance, and that being such record evidence no evidence could be admitted to explain or contradict it.

The defendants claimed that the certificate was not a record of either the justice or of the Court of Common Pleas, and was not competent evidence of the taking of the recognizance; and that, if it were so, yet that they could show by parol in contradiction of it that they never did in fact appear before the justice and enter into the recognizance.

The court, *pro formâ*, admitted the evidence offered to show the circumstances attending the signing of the writ by the justice, for the purpose of ascertaining whether the certificate was made by the justice as a record of the taking of the recognizance; and decided, *pro formâ*, that under the circumstances the certificate was not a record, either of the justice or of the Court of Common Pleas, of the taking of the recognizance; and refused to admit the certificate in evidence, and rendered judgment for the defendants.

The plaintiff moved for a new trial for error in this ruling of the court.

W. H. Noble, in support of the motion.

1. A record "is a written memorial, made by a public officer authorized by law to perform that function, and intended to serve as evidence of something written, said or done." Bouvier's Law Dict., *Record*. "It is an authorized testimony in writing contained in rolls of parchment and preserved in a court of record." Tomlin's Law Dict., *Record; Davidson* v. *Murphy*, 13 Conn., 218.

2. A recognizance is an obligation of record. *Starr* v. *Lyon*, 5 Conn., 540; *New Haven* v. *Rogers*, 32 id., 224; *Green* v. *Ovington*, 16 Johns., 58. Is in the nature of a judgment. *Jefferson* v. *Morton*, 2 Wms. Saund., 7, note 4. Is a record. *Buston* v. *Ridley*, 11 Mod., 228.

3. The bond in question is a record. 1st. Because it is the acknowledgment of an obligation in full compliance with statute requirements in replevin, certified by the justice on

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issuing the writ. 2d. Because it is the bond in replevin, given by statute as a proper form therefor, certified by said justice. Rev. of 1866, p. 78. 3d. Because having been in such form and certificates sent up on the process in replevin, it has become a part of the record in the Court of Common Pleas. Freeman on Judgments, § 78; *Gaylord* v. *Couch*, 4 Day, 374; *Huntington* v. *Birch*, 12 Conn., 151; *Nichols* v. *Bridgeport*, 27 id., 466; *Green* v. *Ovington*, 16 Johns., 58.

4. It being such a record, its production in court is the highest evidence of the taking of such recognizance. 1 Stark. Ev., 189; *Gray* v. *Davis*, 27 Conn., 447; *State* v. *West*, 3 Ohio S. R., 519.

5. As such record, while it stands, it imports absolute verity and cannot be contradicted by parol or in any way collaterally impeached. *Rogers* v. *Moor*, 2 Root, 159; *Holcomb* v. *Cornish*, 8 Conn., 380; *Huntington* v. *Birch*, 12 id., 151; *Fox* v. *Hoyt*, id., 491, 497; *Burgess* v. *Tweedy*, 16 id., 42; *Douglass* v. *Wickwire*, 19 id., 492; *Hawley* v. *Middlebrook*, 28 id., 534; *Coit* v. *Haven*, 30 id., 196; *Spaulding* v. *Chamberlain*, 12 Verm., 538; *Barnard* v. *Flanders*, id., 657; *Pike* v. *Hill*, 15 id., 184; *Leighton* v. *Leighton*, 1 Stra., 210. Evidence is inadmissible to contradict a recognizance certified of record. *Cook* v. *Berth*, 108 Mass., 76; *State* v. *Daily*, 14 Ohio, 91; *Calvin* v. *State*, 12 Ohio S. R., 60; *State* v. *Williams*, 14 id., 140; *Green* v. *Ovington*, 16 Johns., 58.

C. Thompson, contra.

1. The certificate is not a record of either the justice or the Court of Common Pleas. The court finds that "in signing the writ the justice neither intended to make, nor supposed that he was making, a record." A record importing verity cannot be made unintentionally, nor by having a writ returned to another court. "In most cases the original process with the officer's return accompanies the record, yet neither the process nor the indorsement constitutes in truth any part of the record of *the court*, in any sense in which records import verity." *Fox* v. *Hoyt*, 12 Conn., 498. "Neither the minutes of the justice, nor the execution signed by

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him, nor both, constitute such a record." *Davidson* v. *Murphy*, 13 Conn., 213; *Wales* v. *Smith*, id., 217, note.

2. If, however, as seems to be implied in *Fox* v. *Hoyt*, there may be a record which does not import verity, and if a recognizance may be proved by such a record, then said certificate may be "proper evidence of said recognizance," and parol evidence would be admissible to disprove it. Gen. Statutes, 1875, p. 423, sec. 9, seems to allow it after notice given, as in this case. *Sears* v. *Terry*, 26 Conn., 273.

CARPENTER, J. This is an action on a recognizance claimed to have been entered into by the defendants on suing out a writ of replevin by one of them. On the trial in the Court of Common Pleas the defendants denied that they ever entered into the recognizance, and when a certificate thereof was offered in evidence objected to its admission. The court thereupon went into an inquiry and heard parol evidence, (what it was does not distinctly appear,) for the purpose of ascertaining whether the certificate was a record and admissible in evidence. Upon such hearing the court held and decided that under the circumstances the certificate was not a record of the taking of the recognizance, and refused to admit it in evidence.

A majority of the court are of the opinion that there was error in that ruling.

Two questions appear to have been made: 1. Was the certificate of the recognizance admissible in evidence? 2. If admissible, was it competent for the defendants to impeach it by parol evidence? The first question was determined in the negative.

We entertain no doubt that the certificate in question should have been received. Its admissibility did not and could not depend upon the intention of the justice in signing it; nor could it be affected by his ignorance of the nature and character of the documents which he signed. Whether it was a record or not was a question of law, and its solution could not be aided by any parol evidence whatever.

But even that question does not seem to be very important

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in this branch of the case; for whether the certificate is to be regarded as a record, or as legal evidence of an obligation on which the suit is brought, the result must be the same. If it is to be regarded as strictly and technically a record, and, as such, importing verity, it was clearly admissible. If it is merely a certificate of a ministerial act by a magistrate, appended to and accompanying a judicial process, still we think it was admissible.

A bond or recognizance was required by statute, and without it no writ could lawfully issue. The certificate was regularly signed by the magistrate, was in the usual form, was appended to the writ, upon the strength of it the writ issued, and by virtue of the writ one of the defendants obtained the possession of the goods which he claimed; and the defendant in the replevin suit was not only called into court to answer to a charge of trespass, but the goods in question were taken from his possession. A document or obligation so important, and upon which such consequences depend, should not exist merely in the recollection of the magistrate. Written evidence of its existence is, and should be, required. We know of no legitimate way of proving that the required bond was taken except by the official certificate of the magistrate who signed the writ. This document purports to be that, and is primâ facie evidence of the truth of the facts therein stated, and should stand as satisfactory proof until the contrary clearly appears. In rejecting that evidence we think the court manifestly erred.

The second question, whether it was competent for the defendants to contradict the certificate, does not appear to have been directly and distinctly decided by the court below. Indeed the rejection of the evidence rendered such a decision unnecessary. Nevertheless we are inclined to think that both court and counsel considered it as involved and practically decided in the affirmative in the decision to admit parol evidence on the question of the admissibility of the certificate. At least counsel have argued the case upon that assumption; and as it is the most important question in the case we will decide it.

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It is quite clear that in a certain sense, and for some purposes, the certificate under consideration is a record. In Swift's Digest, Vol. 1, p. 376, a recognizance is defined to be a "bond of record." The same definition is given in *Starr* v. *Lyon*, 5 Conn., 538. In *New Haven* v. *Rogers*, 32 Conn., 221, Judge HINMAN defines a recognizance to be "an obligation of record." In this it is not intended to assert that it is a record in the highest sense, as when we say of a record that it imports absolute verity. It is not the record of a judgment, not being the result or conclusion of a judicial proceeding. Even such records bind only parties and privies, and not them even if the want of jurisdiction appears on the face of the proceedings; and in case of tribunals of limited and special jurisdiction, jurisdictional facts may always be inquired into. Whether this record can stand on any higher ground than the records of such tribunals is at least questionable. The right and power of the justice to act are confined within narrow limits. He has no compulsory power. He can take the obligation of such persons and such only as voluntarily enter into it. Perhaps they should appear in person; but certainly he has no power to take the bond of any one who does not in some way authorize him to do so. Whether such authority is conferred or not is in the nature of a jurisdictional fact; so that, if in any sense this may be regarded as a judicial record, it does not follow that the party whose name appears in it as an obligor is precluded from showing that he never authorized it, and consequently that the act of the justice was void.

But the act was not judicial. The duty performed by the justice was not in its nature a judicial duty. There was no previous process to bring the parties before him, no plaintiff, no defendant, and no subject matter to be judicially determined. In no sense can it be said that the magistrate was administering justice to the parties under the forms of law; therefore he was not acting as judge.

It has been decided in this state that justices of the peace act in a ministerial capacity in the following cases:—In appointing appraisers to appraise land set off on execution.

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Fox v. *Hills*, 1 Conn., 195. In the administration of a legal oath to a poor imprisoned debtor. *Betts* v. *Dimon*, 3 Conn., 107. In issuing warrants for the removal of paupers. *Stratford* v. *Sanford and others*, 9 Conn., 275. In appointing freeholders to assess the damages sustained by the owners of land through which a highway is laid out. *Crane* v. *Camp*, 12 Conn., 464.

We think that the act now under consideration is of the same nature and character, and that magistrates in taking bonds on issuing writs act purely in a ministerial capacity.

This certificate therefore is the record of a ministerial act, and, like an officer's return, is primâ facie evidence of the facts therein stated, but is not conclusive.

Our conclusion is—1, that this certificate should have been received in evidence; 2, that it was competent for the defendants to show, if the fact was so, that they did not enter into this recognizance.

If the course here indicated had been pursued in the court below, the inquiry would have been, not as to the intention of the magistrate in signing the certificate, but what relation did the defendants or either of them sustain to this transaction? Did they, or either of them, expressly or by implication authorize the magistrate to insert their names as recognizors? Suppose upon such inquiry that it had appeared that Arthur Sherman, one of the defendants, and the plaintiff in the replevin suit, had appeared before the justice with the writ and certificate prepared, knowing their contents, and had requested him to sign them, can any one doubt that he would be liable on this recognizance? Suppose both defendants under like circumstances had made the request, would not both be liable? It is true this record does not show that they did appear; neither does it show that they did not. That was not the point of the inquiry, and the finding does not touch that matter at all. Their presence before the justice, as above indicated, is consistent with every fact stated in this finding. The finding shows that the writ was presented to him, but does not state by whom; and wholly omits to state that it was not presented by the defend-

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ants or one of them. It does appear that on the trial the defendants *claimed* that they "never did in fact appear before the justice and enter into the recognizance;" but it nowhere appears, not even inferentially, that that claim was sustained by proof, or that any proof to sustain it was offered.

It is manifest therefore that there was a mis-trial, that the inquiry related to an immaterial matter; and as injustice may have been done, it is right that a new trial should be granted.

In this opinion the other judges concurred; except PARK, C. J., who, while assenting to the principles of law stated, yet was inclined to give a different construction to the record.

NOTE.—While it is an established rule that judicial records import absolute verity, it is not entirely clear from the authorities what constitutes the judicial record that has this attribute. The distinction drawn in the present case, between those parts of a record that are merely incidental, even though necessary, to the judgment, like the officer's return of service or the certificate of the magistrate taking a recognizance, and those which record the action of the court, is believed to be the proper one. This distinction is well stated by CHURCH, J., in *Fox* v. *Hoyt*, 12 Conn., 498. He says: "Neither the original nor any intermediate process, nor the endorsement or attestation of service, constitutes in truth any part of the record of the court in any sense in which records are understood to import verity. They prove nothing more than their own existence, except so far as the facts stated in them are established by the finding of the court, either directly or by reference to them. Even the officer's return of service affords only *primâ facie* evidence of the facts stated therein."

It is indispensable to the validity of any judgment that the court should have jurisdiction, both of the subject matter, and of the person of the party against whom it is rendered. In the case of a domestic court of general jurisdiction there is a conclusive presumption in favor of its jurisdiction in both respects, unless it appears upon the record, directly or by necessary implication, that there is a want of jurisdiction. In the case of a domestic court of limited and special jurisdiction, this presumption does not exist, and although the record may find in terms that service was made upon the defendant, the fact may be shown that no such service was made. In the case of a judgment of a court of general jurisdiction of a sister state the presumption of notice to the defendant does not exist, but the fact of want of notice may be shown even against an express finding of the court rendering the judgment. A strictly foreign judgment, (that is, a judgment of some other country than the United States), is only *primâ facie* evidence even of the indebtedness found by it, and *nil debet* may be pleaded to an action of debt upon it. *Coit* v. *Haven*, 30 Conn., 90; *Sears* v. *Terry*, 26 id., 273; *Landes* v. *Brant*, 10 How., 348; *Granger* v. *Clark*, 22 Maine, 128; *Cook* v. *Darling*, 18 Pick., 393. The rule that jurisdiction is conclusively presumed in the case of a judgment of a domestic court of general iurisdiction is however

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subject to this qualification—that where the court is acting under special authority and upon a matter outside of its ordinary jurisdiction, the presumption does not apply. *Denning* v. *Corwin*, 11 Wend., 648; *Granger* v. *Clark*, 22 Maine, 128; *Williamson* v. *Berry*, 8 How., 495; *Webster* v. *Reid*, 11 id., 437. But see *Harvey* v. *Tyler*, 2 Wall., 328; *Hahn* v. *Kelly*, 34 Cal., 391.

But where the jurisdiction actually exists the record of the court imports verity in the lowest as well as in the highest court. *Fox* v. *Hoyt*, 12 Conn., 491; *Raymond* v. *Bell*, 18 id., 89; *McLean* v. *Hugarin*, 13 Johns., 184; *Clark* v. *McComman*, 7 Watts & Serg., 469; *Billings* v. *Russell*, 23 Penn. S. R., 189; *Wright* v. *Hazen*, 24 Verm., 143.

This conclusive presumption of jurisdiction, where it exists, is entirely a different thing from the presumption that all things are rightly done—*omnia presumuntur ritè acta*. This presumption applies to all the acts of a court of mere *competent* jurisdiction, whether it be general or limited, and may always be rebutted by proof to the contrary. *Voorhees* v. *U. States Bank*, 10 Pet., 449.

This rule, with regard to a conclusive presumption of jurisdiction over the person of the defendant in the case of a court of general jurisdiction, is repudiated or seriously questioned in several of the states; (*Cline* v. *Gibson*, 23 Ind., 11; *Glidewell* v. *Spaugh*, 26 id., 319; *Illinois Central R. R. Co.* v. *Goodwin*, 30 Ill., 117; *Gwin* v. *McCarroll*, 1 Sm. & Marsh., 351; *Edwards* v. *Toomer*, 14 id., 75; *Steen* v. *Steen*, 25 Miss., 513; *Hargis* v. *Morse*, 7 Kan., 417; *Howard* v. *Thornton*, 50 Misso., 291; *Rape* v. *Heaton*, 9 Wis., 328; *Pollard* v. *Wegener*, 13 id., 569; and in *Starbuck* v. *Murray*, 5 Wend., 157, MARCY, J., says that it is reasoning in a circle and assumes the very fact to be established, assuming that the paper is a conclusive record because the defendant was served with notice, and that the defendant was served with notice because the paper is a conclusive record;) but the rule is supported by so great a preponderance of authorities that ELLSWORTH, J., says in *Coit* v. *Haven*, 30 Conn., 198, that he considers the point no longer open to dispute. It is very clear that it must be taken as the settled law of this state.

There would seem to be room for a serious question whether in giving the judgments of our own courts the benefit of such a conclusive presumption and denying it to those of the courts of a sister state, we are not violating that provision of the constitution of the United States which provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state;" but the point has been fully considered in a number of cases; (see the elaborate opinion of HOSMER, C. J., upon it in *Aldrich* v. *Kinney*, 4 Conn., 382, and the numerous authorities there referred to; also *Pearce* v. *Olney*, 20 Conn., 544;) and it is held that the rule does not conflict with that provision.

The persons affected by the presumption of legal notice are of course only the parties to the judgment and their privies. Their remedy in case no legal service had been made is only by some direct proceeding to open or set aside the judgment, or by injunction to restrain the party holding it from using it against them. The direct proceeding would seem to be either by a writ of error *coram nobis*, (1 Swift Dig., 790,) or by a petition for a new trial, (Gen. Stat., tit. 19, ch. 15, sec. 1,) both of which must be brought to the same court that rendered the judgment, and within three years after it is rendered; while a bill for an injunction can be brought in any court having the requisite equity jurisdiction, after the three years have expired, or, in case of emergency, before, and with no

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limitation as to time except that the party would not be allowed to sleep upon his rights after notice of the judgment against him. And it seems that it is necessary for the injured party to resort to these modes of redress even though the judgment has been obtained by fraud. *Granger* v. *Clark*, 22 Maine, 128; *French* v. *Shotwell*, 5 Johns. Ch., 555; *Morris* v. *Galbraith*, 8 Watts & Serg., 166; 1 Smith Lead. Cas., C. & H. notes, 6th ed., 995.

The books do not make it clear precisely what is meant by a court of "general jurisdiction," and what by a court of "limited or inferior jurisdiction." Under the common law meaning of the terms a court was held to be one of general jurisdiction where the jurisdiction extended to all actions recognized by the common law, without limitation as to the place where the cause of action arose or as to the persons to be made parties. Thus a palatinate court was held to be a court of general jurisdiction, because, though limited in territorial jurisdiction, it yet had jurisdiction of causes of action wheresoever arising. 2 Bac. Abr., 106; *Peacock* v. *Bell*, 1 Wms. Saund., 74. Freeman, in his work on Judgments, sec. 122, regards the distinction as substantially that between courts of record and courts not of record, and it is so laid down in *Hahn* v. *Kelly*, 34 Cal., 414; but this proposition can not be sustained. In *Simons* v. *De Bare*, 4 Bosw., 547, the City Court of the city of Brooklyn is held to be an inferior court, because limited in its jurisdiction to the case of defendants residing or served with notice within the city. And the county courts of the state of New York were held to be inferior courts for a like reason. *Frees* v. *Ford*, 2 Seld., 176. The Court of Common Pleas of that state is held to be a court of general jurisdiction because it has power by statute to try "all transitory actions, wherever the cause of action may arise." *Foot* v. *Stevens*, 17 Wend., 483; *Hart* v. *Seixas*, 21 id., 40. And it is held in *Harvey* v. *Tyler*, 2 Wall., 328, that where a statute gave to county courts jurisdiction to hear and determine all causes at common law or in chancery within their respective counties, they were courts of general jurisdiction. The terms "superior" and "inferior" seem to be used with reference to the character of the jurisdiction rather than the grade of the court. Thus it is held that a court is not an inferior one by reason of an appeal lying from it to a higher court. *Grignon's Lessee* v. *Astor*, 2 How., 319. In *Simons* v. *De Bare*, before referred to, BOSWORTH, C. J., says, (p. 553:) "To constitute a court a superior court as to any class of actions, its jurisdiction of such actions must be unconditional, so that the only thing essential to enable the court to take cognizance of them is the acquisition of jurisdiction of the persons of the parties." And on p. 555, "If the court had a general jurisdiction of an enumerated class of actions, without reference to the place where they arose or the parties to them resided or to the amount sought to be recovered, being a court of record, it might be *quoad hoc* a superior court within the meaning of the rule." In Speers's Eq. R. (So. Car.), 151, HARPER, Chancellor, says: "My own opinion, founded on very mature reflection and examination of authorities is, that if any [every ?] question of civil right may be directly or indirectly brought before a court, this constitutes it a superior court of general jurisdiction." See also remarks of Mr. Justice BALDWIN, in *Grignon's Lessee* v. *Astor*, 2 How., 319; also cases cited in 1 Smith Lead. Cas., C. & H. notes, 6th ed., 1034.

Whatever may be the proper definition of the terms we have been considering, it is very clear that under our practice, and that of our sister states, the higher courts of a state are considered as courts of general jurisdiction. All the courts of this country are strictly courts of limited jurisdiction; (*Griswold* v. *Mather*,

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5 Conn., 439; *Perkins* v. *Perkins*, 7 id., 565; *Raymond* v. *Bell*, 18 id., 88; *Kempe's Lessee* v. *Kennedy*, 5 Cranch, 185;) but it is not held in any case that the superior courts are not entitled to the same presumptions in favor of their jurisdiction that any court could have. And in *Coit* v. *Haven*, 30 Conn., 197, ELLSWORTH, J., speaking of a judgment then under consideration by the court, and which had been rendered by the Superior Court of this state, says: "This judgment was recovered before one of our own courts of general jurisdiction, and so is distinguishable from the judgment of a foreign court or one of a limited and special jurisdiction." And STORRS, C. J., in *Sanford* v. *Sanford*, 28 Conn., 12, speaks of the Court of Common Pleas of the state of Ohio as a court of general jurisdiction. The term "limited" where applied to jurisdiction is generally used, as above, in connection with the term "special"—indicating that it relates less to the limitation of the amount that may be recovered than to the character of the subject matter of the jurisdiction; and it seems very doubtful whether the limitation of amount enters into the distinction between courts of limited and those of general jurisdiction, unless it be in the case of courts of such actual inferiority as those of justices of the peace, which are classed with inferior courts in *Hahn* v. *Kelly*, before cited, and so treated in 2 Am. Lead. Cas., 633. But see remarks of BOSWORTH, C. J., before cited, where he speaks of the absence of limitation as to amount as one of the incidents of a court of general jurisdiction.

A distinction that, for the purpose of presumptions in favor of judgments, rests wholly upon the character of the subject matter of the jurisdiction, and not upon the character or quality of the court itself, seems to be unreasonable, and unworthy of an age that is discarding technicalities and seeking to make its administration of justice practical and sensible. And while it seems absurd to give a higher credit to one of our lower courts, because it has, in a technical sense, a general jurisdiction, than is given to a court of special jurisdiction which may yet be one of importance and dignity, as a city court, it seems unreasonable to make the presumption as to jurisdiction over the person rest upon and coincide with the presumption as to jurisdiction over the subject matter. The two have no natural relation whatever. The service of notice on a defendant is an act done, not implied, and done with the same formality, and by as important an officer, and is evidenced by the same return, in the case of one court as in that of the other. The necessity of the fact is no greater in one case than the other; in both it is fundamental and absolutely essential to the jurisdiction. Why then should it be conclusively inferred that it exists in one case more than in the other? If the presumption is allowed in favor of a court of general jurisdiction, it would seem as if the same considerations would allow it in every other, except so far as the actual (not mere technical) inferiority of the court might make it unreasonable. Would it not however be more consonant with our modern ideas of justice to allow any defendant against whom an action of debt on a judgment should be brought, to aver in his plea, and prove if he is able, that he never had notice of the suit; the presumption in favor of the judgment being, like an officer's return, *primâ facie* evidence of the service, and requiring clear proof to the contrary to overthrow it? If however the doctrine of conclusive presumptions of notice be maintained, there would seem to be no good reason why it should not be applied to every court of sufficient dignity and importance, whose procedure is according to the course of the common law. A change of the law in either of the directions suggested would probably have to be effected by legislation, but it is one of those subjects that legislation might profitably deal with. *R.*

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SUPREME COURT OF ERRORS.

COUNTIES OF NEW LONDON AND WINDHAM.

MARCH TERM, 1877.

Present,

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

DAVID K. LEWIS *vs.* THE TOWN OF EASTFORD.

The board of relief of the town of *E* added to the plaintiff's tax list "$1,264" in a column headed "Additions," but with nothing to indicate the property intended. The plaintiff had however money at interest and a draft due for more than that amount, which he had not put into his list, and had been notified by the board of relief to appear and show reason why their amount should not be added to his list, but had failed to appear. Held that the addition was legally made and sufficient in form.

A statute was passed healing certain defects in assessment lists, and making all taxes *theretofore* as well as thereafter collected under them legal. At the same session a later act was passed healing the same and several other defects in assessment lists and making legal all taxes *thereafter* collected on them. Held that the later act did not by implication repeal the prior one as covering the same subject matter.

The prior act by its terms took effect on its passage. Held that the assessment list in question became thereby at once validated, and could not be invalidated by a later repeal of the act.

ASSUMPSIT to recover a tax claimed to have been illegally assessed; brought by appeal from a justice of the peace to the Superior Court in Windham County. Facts found and case reserved for advice. The case is sufficiently stated in the opinion.

J. Halsey and *J. J. Penrose*, for the plaintiff.

L. F. S. Foster and *G. W. Phillips*, for the defendants.

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PARK, C. J. The plaintiff seeks to recover of the defendant town the sum of $49.71 paid by him as a tax to the collector of taxes of the town, which tax he claims to have been illegally assessed, and to have been paid under compulsion.

It appears by the finding that the board of relief of the town added to the plaintiff's list for the year 1872 the sum of $1,264, which addition was made under no particular head, but simply in a column at the top of which stood the word "Additions." This addition was made on account of a draft owned by the plaintiff on the first day of October, 1872, which was payable at sight, and of a sum of money loaned by the plaintiff to a resident of the town, and then due with interest; the draft and loan exceeding the sum added to the list and not having been in the list in any form before. The plaintiff was duly notified by the board of relief, before making the addition, to appear before them and show cause why it should not be made; but he neglected to appear. He now insists that the addition was illegally made, because it did not sufficiently describe the property added; and the case of *Adam* v. *Litchfield*, 10 Conn., 127, is relied upon in support of this claim.

The property was unquestionably taxable. It therefore made no difference to the plaintiff under what head it was added to his list, so long as he was not misled in the matter. It was not added under an incorrect name, but simply under no particular name. It was merely a certain amount in dollars added to his list. He knew by the notice sent him that the board of relief proposed to add to his list the draft and debt before mentioned, and must have known that the addition when made was made on account of these two items of property. Besides, this court held in the case of *Adam* v. *Litchfield*, relied upon by the plaintiff's counsel, that the addition there made of "5,000 dollars" was to be taken as importing that sum in money, and that as money, merely as such, was not taxable, it did not appear by the list that the property added was taxable property. Money being now taxable, the principal point decided in that case is not applicable here, while the rule there laid down that the tax list must

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show with certainty what the property taxed is, is essentially qualified by the recent case of *Monroe* v. *Town of New Canaan*, 43 Conn., 309, where it was held that an addition to a tax list by the assessors of "20 Bank Stock, $2,000," was legal, although the list did not show that it might not have been bank stock that was exempt from taxation. It is to be noticed too that in *Adam* v. *Litchfield*, CHURCH, J., dissented, and in the cases of *Goddard* v. *Seymour*, 30 Conn., 374, and *Hamersley* v. *Franey*, 39 Conn., 175, the rule as to certainty given by Judge CHURCH in his dissenting opinion is cited with approval. We think the addition to the plaintiff's list in the present case was lawfully made.

It is further claimed that the assessment was illegal because an abstract of the assessment list was not lodged in the town clerk's office within the time prescribed by law. But the act of 1873, approved June 5th of that year, in terms validates such assessments and legalizes all taxes theretofore collected on such lists, as well as all taxes that should thereafter be collected upon them. There would be no question about this, were it not for a later act passed at the same session of the legislature on the same general subject, approved on the 11th day of July, which it is claimed repealed by implication the act approved on the 5th of June, by embracing in its provisions the whole subject matter of the preceding act. But the two acts do not cover the same ground. It is true that the later act deals with the same defect which the prior act was intended to cure, but it also deals with numerous other defects in proceedings with regard to taxes, and what is of more importance, it merely validates such lists and provides that "all taxes which have been or shall hereafter be laid and imposed according to such assessment lists, *may be* levied and collected;" while the prior act not only confirms the assessment lists, but provides "that all taxes imposed *and collected* according to such assessment lists shall be held to have been received according to law, and all taxes hereafter laid and imposed according to such assessment lists, may be levied and collected." The later act therefore is limited to the legalizing of taxes thereafter collected; the prior one legalizes

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the actual collection of taxes that had been made before the act was passed. This would be enough to settle the point that the later act does not assume to deal with the same precise matter that was the subject of the prior one and therefore does not repeal it by implication. But the difference in the statutes is of special importance in the present case inasmuch as the tax here in question was in fact collected on the 5th of May, 1873, before the passage of the first of the two acts.

But if the later act be regarded as repealing the earlier one, the repeal could not affect the present case. The first act was by its terms to take effect on its passage. Thus taking effect it at once cured the defect in the assessment list here in question. The defect being cured it could not be affected by a later repeal of the validating act, no matter how formal and complete the repeal might be.

We advise judgment for the defendants.

In this opinion the other judges concurred.

JAMES WALLER *vs.* JAMES B. SHANNON.

W and *F*, having a controversy as to a claim of indebtedness, submitted the matter to an arbitrator, by a written submission which provided that the award should be "final and conclusive, *and made to be executed within ten days after the award.*" The award as made merely directed that *F* should pay *W* sixty-five dollars. Held to be void as not following the submission.

DEBT on a bond for the performance of an award; brought to the Superior Court in Windham County, and tried to the jury on the general issue, before *Carpenter, J.*

On the trial it appeared that the plaintiff and one James Farrell, previous to the 22d day of January, 1876, had had a controversy with regard to a claim of the plaintiff that the said Farrell was indebted to him, and that on that day they submitted the matter to arbitration by the following written submission:

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"Whereas James Waller and James Farrell have a dispute about a claim of said Waller against said Farrell for work and labor, and said Farrell claims to owe nothing for the same, said parties to determine said question of claim on the part of each as above, agree to submit said matter to the arbitrament and award of Samuel Hutchins, to be heard and determined before the tenth day of February next. The first hearing shall be at the office of E. L. Cundall in Killingly, on the 28th day of January inst., at 10 o'clock, forenoon, and may be adjourned from time to time, so the matter be awarded on or before February 10th, proximo. Said Waller shall furnish, in writing, a statement of his claim to said Cundall, attorney for said Farrell, on or before the 24th inst., and said Farrell shall at said delivery to said Cundall, deliver to said person who shall deliver said account to said Cundall, his, the said Farrell's, claims against said Waller, and the claims so made out shall be the matters to be determined under this submission. The award in the premises to be final and conclusive, and shall be made to be executed within ten days of the award, and the parties agree each with the other to keep and abide the award made as aforesaid. Dated at Killingly this 22d day of January, 1876.

JAMES WALLER,
JAMES FARRELL."

The bond now in suit was given by Farrell as principal and the defendant as surety, jointly and severally, for the performance of the award on the part of Farrell. The award was made on the 4th day of February, 1876, and was as follows:

"The undersigned, Samuel Hutchins, having been duly appointed arbitrator as to certain claims, matters and differences between James Waller and James Farrell, by a submission in writing, duly executed and delivered by the said parties, bearing date the 22d day of January, 1876, reference thereto being herein had for the terms, conditions and subject matter of said submission; having heard said parties and examined their claims, and fully heard their proofs and counsel, and duly considered the same, do find that there is now

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due upon the claims existing between said parties embraced in said submission, from said James Farrell to the said James Waller, the sum of sixty-five dollars. I do therefore award, determine and order that the said James Farrell shall pay to the said James Waller the sum of sixty-five dollars as his just claim and demand, and shall also pay the arbitrator's fee, amounting to ten dollars. In witness whereof I have hereunto set my hand this fourth day of February, 1876.

SAMUEL HUTCHINS."

Farrell failed to pay the amount awarded within ten days after the award was made, and demand was thereupon made upon the defendant upon the bond and the present suit brought. The defendant upon the trial claimed, and asked the court to rule, that the award was void because not required by its terms to be performed within ten days after it was made, according to the terms of the submission. The court did not so rule, but held the award to be valid, and so instructed the jury.

The jury having brought in a verdict for the plaintiff, the defendant moved for a new trial for error in this ruling of the court.

W. H. Shields in support of the motion.

By the submission it is expressly provided that "the award shall be made to be executed within ten days after the award." The arbitrator in making the award to be performed immediately, transcended this express limitation of his powers, and the award is therefore void. 1 Swift Dig., 468, 471.

T. E. Graves, contra.

The submission fixes the time for the performance of the award and nothing that the arbitrator should say or should omit to say in the award could change it. If there had been no provision in the submission that the award should not be payable until the end of ten days, it would have been payable immediately. It becomes payable now, by the agreement of the parties, as expressly made in the submission, in ten days. The defendant stands therefore in precisely as good a position

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as if the award itself had provided for the ten days. A new trial will not be granted in such circumstances.

GRANGER, J. The question made in this case is, whether the award for the performance of which the bond in suit was given is void, for the reason that it is not within the terms of the submission.

This question depends upon the construction to be given to the language used in the last clause of the submission, and what the true intent and meaning of the parties was as gathered from the words of the instrument. It provides that the award in the premises shall be "final and conclusive, and *shall be made to be executed within ten days after the award.*" It seems very clear that the parties intended, and that the only proper construction of their language is, that the award should in terms provide that it should be executed within ten days after the award was made.

It is not so made, but, on the contrary, is entirely silent as to the time within which it is to be executed. Its language is as follows: "I do therefore award, determine and order that the said James Farrell shall pay to the said James Waller the sum of sixty-five dollars." This language in no particular follows the terms of the submission as to the time when the award is to be executed. The plaintiff under it might demand the money as soon as the award was published. Although the court might say, if the submission was silent on the subject, that Farrell should have a reasonable time to pay under all the circumstances, yet as the parties have made their own terms as to the time when the money is to be paid or the award executed, no court can change those terms. Courts cannot make contracts for parties, but can only enforce the contracts which they themselves have made. In this case the parties have agreed that the award shall be made to "be executed within ten days." That is to say, they intended that the arbitrator, when he made his award, should say in so many words, that the money to be paid, or thing to be done, should be paid or done "within ten days" from the date or publication of the award, and it was essential that the award

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should in terms provide that the sum awarded to be paid by Farrell should be paid within ten days after the award was made. As it was not so provided we think the award clearly void.

A new trial is advised.

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

CHARLES E. MILLS'S APPEAL FROM PROBATE.

The heirs at law of a testatrix contested her will on the ground that she was of unsound mind and unduly influenced. The party claiming under the will offered in evidence, for the purpose of showing on the part of the testatrix an actual dislike of the heirs at law and a determination to give them nothing, certain declarations made by her to that effect, among which were several as to the lewd character of the wife of one of them. Held that, for the purpose of showing that she was under a mental delusion, evidence was admissible that the character of the woman in question was perfectly good.

And held that the fact that counsel for the heirs at law, at the close of the trial before the jury, abandoned the claim that the testatrix was of unsound mind, was not a sufficient reason for refusing to grant a new trial for the error of the court in excluding evidence previously offered by them to prove such unsoundness.

The heirs at law were allowed to prove certain declarations of the testatrix to the effect that the father of the party claiming under the will had induced her to come to his house to reside and had prevented her from returning by threats. Held that evidence was admissible on the part of the party claiming under the will, that these statements were not true.

APPEAL from the decree of a court of probate rejecting the will of one Mary Morse; brought to the Superior Court in Windham County, and tried to the jury before *Foster, J.* Verdict for the appellant, sustaining the will, and a motion for a new trial by the appellees, for error in the rulings of the court. The case is sufficiently stated in the opinion.

J. J. Penrose, in support of the motion.

T. E. Graves and *C. E. Searls*, contra.

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CARPENTER, J. The appellant sought to establish a document purporting to be a will, as the last will and testament of Mary Morse, deceased. The appellees resisted it on the ground that the deceased had not the mental capacity to make a will, and on the further ground that it was made under the effect of undue influence.

The appellant, to whom all the property was given by the supposed will, is a nephew of the deceased, and the appellees are her brothers and heirs at law.

On the trial, for the purpose of showing an alienated state of feeling between the deceased and her brothers, growing out of questions respecting her share in their father's estate, the appellant offered in evidence divers declarations of the deceased, made at different times, as to several or all of them, expressing her dislike, and her intention that they should not have any of her property. Connected with testimony of this description were the depositions of William Mills and Olive P. Segur, who, among other things, deposed to certain declarations of the deceased respecting the character of the wife of one of her brothers—that it was bad, and that she was a lewd, lascivious woman. At a subsequent stage of the trial, and after the appellant had closed his testimony, the appellees, for the purpose of showing that the deceased was laboring under a delusion, offered testimony to prove that the reputation of the woman in question was good, and that she was virtuous and respectable. To this testimony the appellant objected and the court excluded it.

We are unable to see any good reason why this testimony should not have been received. The appellant had introduced evidence to prove that the deceased had asserted that the lady in question was a woman of bad character, and that she was in fact a lewd and lascivious woman. This was offered for the purpose of showing an alienated state of feeling between the deceased and her brothers, and to account for her giving all her estate to her nephew. The rejected testimony was offered by the appellees, not for the purpose of contradicting this evidence, but for the purpose of adopting it as their own, and using it in support of their claim of mental incapacity.

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One form of mental incapacity is insanity; and a prominent and the most usual symptom of insanity is delusion. Now if the appellees could have shown that the deceased believed that her sister-in-law was a woman of bad character, and that there was in reality no ground for that belief, it seems to us that it was competent for them to do so. The fact, if established, tended directly, and with considerable force, to prove delusion. The objection that it introduced a collateral issue is not valid. Insanity is usually, if not always, established by proving a great variety of facts and circumstances similar in character to the one now under consideration; and every fact, circumstance and act relied on for that purpose may be the subject of proof and controversy on the trial. Such proof is strictly within the issue.

The fact that the counsel for the appellees substantially abandoned the claim of want of capacity, at the close of the trial, is not a sufficient reason for refusing a new trial. There is no ground for believing that counsel thereby intended to waive their right to except to the ruling which had previously been made. Indeed it is quite possible that the ruling induced or compelled counsel to abandon the claim.

The appellees proved the declarations of the deceased tending to show that Ashley Mills, the father of the appellant, had influenced her against her will to change her residence, and had prevented her return by threats and violent language. To meet this the appellant offered Ashley Mills as a witness to prove that he never compelled or in any way induced the deceased to move into his house, and never in any way or manner sought to prevent her from returning to the house from which she came. To the admission of this evidence the appellees objected, but the court admitted it. Assuming that the evidence offered by the appellees was admissible, we think the evidence offered in reply was properly received. The appellees had offered the declarations of the deceased for the purpose of showing that she was subject to the influence and control of Mills; and his testimony was responsive to that.

A new trial must be granted on the first point considered.

In this opinion the other judges concurred.

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MATTHEW R. MEAD *vs.* THOMAS W. NOYES.

Whether there has been such a change of possession accompanying the sale of personal property as to render the sale valid against the creditors of the vendor, is a mixed question of law and fact.

In replevin by a vendee of personal property against an attaching creditor, the judge found the facts in detail with regard to the sale and delivery, and concluded the finding as follows: "Upon these facts I find that the sale was made in good faith, that possession followed it, and that at the time the property was attached the plaintiff was the owner and entitled to the immediate possession of it." Held that the finding of the court could be reviewed, as to whether the possession described was such as to render the sale valid against attaching creditors.

And held upon all the facts that there had not been a sufficient change of possession.

REPLEVIN for articles of personal property attached by the defendant. The action was brought to the Court of Common Pleas for New London County and tried before *Mather, J.*, who rendered judgment for the plaintiff. The court made the following finding of facts:

In May, 1874, the plaintiff loaned $100 to Benjamin P. Hewitt, who was his son-in-law, and took his note for the amount. On 23d of July, 1875, Hewitt, being still indebted to the plaintiff for the amount of the note, agreed to sell him the horse, wagon and harness, then belonging to him, which are the subject of the present suit, for the sum of $100, and the plaintiff then agreed to receive the same and give up the note. Hewitt was then engaged in the grocery business at Mystic River, some three miles from the residence of the plaintiff at Mystic. His family occupied a part of the house of the plaintiff, and the horse, wagon and harness were then, and for a short time previous had been, kept in the barn of one Schoonover at Mystic. On the morning of the said 23d of July, the parties, having agreed upon the purchase and sale, drove the horse and wagon to Lower Mystic to the office of an attorney, when a bill of sale of the horse, wagon and harness was drawn up by the attorney and delivered to the plaintiff, and the note was given up to Hewitt, and the plaintiff then took possession of the horse, wagon and harness as

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owner, and drove to his house. Previous to going to Lower Mystic the plaintiff had engaged of Schoonover room in his barn to keep the horse and wagon in, and also purchased of him hay to feed the horse. On his return he placed the property in the premises so hired for that purpose. He used the horse and wagon to carry Hewitt to and from his business, and on the 26th day of July gave him permission to drive the horse to Mystic River, which he did. At the time of the sale Hewitt was in fact insolvent, but this was not known to the plaintiff. On the day of and after the sale, Hewitt made a statement to his creditors by letter of his inability to pay in full and asked their directions. A meeting of his creditors was held at his store on the 26th of July, when a compromise was effected and Hewitt gave up his stock of goods and retired from business. He was permitted by the plaintiff to take the horse and wagon occasionally, and use the same in collecting his accounts, and in taking his wife, who was sick, to ride. The plaintiff used the horse and wagon in his business, and in carrying his workmen to and from their work. Hewitt was occasionally employed by the plaintiff and used the horse and wagon in his business, hauling lumber, coal, and other materials. The property was during this time kept in the barn leased by the plaintiff of Schoonover, and kept at the expense of the plaintiff. Hewitt sometimes fed and took care of the horse as compensation for the occasional use which he had of it. Whenever used by him it was returned to the barn and into the possession of the plaintiff. In October, 1875, the horse, wagon and harness were attached in the barn, as the property of Hewitt, by the defendant as deputy sheriff, on a writ of attachment in favor of one Gates against Hewitt, and taken away. The officer was at the time informed that the property belonged to the plaintiff and was shown his bill of sale of the same, but stated that he had been directed to attach them.

Upon these facts I find that the sale was made in good faith, for a fair value, to pay a pre-existing debt, and that possession accompanied and followed the sale, and that the

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property when attached was taken from and out of the possession of the plaintiff, and that when the writ of replevin was brought the plaintiff was then owner of the property and was entitled to the immediate possession of the same.

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

T. W. Swan and *J. B. Grinnell*, for the plaintiff in error.

J. Halsey and *A. P. Tunnar*, for the defendant in error.

PARK, C. J. The court below, after giving a detailed statement of all the facts with regard to the sale of the property in question, and as to the change in the possession of the same after the sale, so far as there was any, concludes its finding as follows: "Upon these facts I find that the sale was made in good faith, for a fair value, to pay a pre-existing debt, and that possession accompanied and followed the sale, and that the property when attached was taken out of the possession of the plaintiff, and that when the writ of replevin was brought the plaintiff was the owner of the property and entitled to the immediate possession of the same." This conclusion of the court is derived from the facts previously stated. The judge says, "Upon these facts I find," that is, from these facts—these facts are the basis of my conclusion.

Now, whether there has been a change of possession of personal property following a sale in any case, so that the sale will be valid as against the creditors of the vendor, is a mixed question of law and fact. After the facts are all ascertained the law determines whether or not there has been such a change of possession. It is not enough that the sale was bonâ-fide. It is not enough that there was a formal change of the possession of the property accompanying the sale. The law requires an open, visible, permanent change of the possession, to make the sale good as against the vendor's creditors, except in certain cases for which the law has provided.

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We think the court erred in applying the law to the facts of this case. The facts do not warrant the conclusion to which the court came. A vendee may be in possession of property as between himself and the vendor, and still his possession may not be sufficient to protect the property from the vendor's creditors. In the case of *Kirtland* v. *Snow*, 20 Conn., 23, which was a case tried by the court, and in which all the facts were found regarding the sale and change of possession, without any special finding whether or not there was a change in the possession, this court assumed the duty of determining from the facts found whether there was such a change of possession as would make the sale valid against the vendor's creditors; which it could not properly have done if the question was one of fact merely. The court say:—"This court has repeatedly said, that the rule of law which requires the vendee of personal property to take and retain the possession of it, in order to protect it from the vendor's creditors, is a rule of policy as well as of evidence, its object being to prevent fraud by taking away the temptation to commit it." * * "The rule is founded upon the presumption that a purchaser will naturally perfect his purchase by taking possession. The enjoyment of the thing purchased is generally, if not always, the object the purchaser has in view; and his neglect to take possession is, therefore, so unusual and contrary to general experience, as to be very strong evidence that the purchase was only colorable and not real. And the reason of extending it from a mere rule of evidence, calling it a badge of fraud only, and arbitrarily declaring, as matter of law, that it renders the sale void as to creditors, notwithstanding the highest evidence of the honesty of the sale, is, because it has been thought better to take away the temptation to practice fraud, than to incur the danger arising from the facility with which testimony may be manufactured to show that a sale was honest." And the court held that there was no such change of possession as the law required to make the sale good as against the vendor's creditors. In the case of *Norton* v. *Doolittle*, 31 Conn., 405, which was another case tried by the court, and

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in which all the facts regarding the sale and change of possession were found by the court, without any special finding whether or not there was a change in the possession, this court again decided the question as matter of law on the facts found, and held the sale void as against the vendor's creditors. The court say:—"The rule of law which requires a change of possession is one of policy. Its object is the prevention of fraud." * * "The policy which dictates it, and the prevention at which it aims, require its rigid application to every case where there has not been an actual, visible, and continued change of possession." * * "And as in applying the rule we must look beyond the good faith, or the secret, technical features of the transaction, so purchasers must learn and understand that if they purchase property, and without legal excuse permit the possession to remain, in fact, or apparently and visibly, the same, or if changed for a brief period, to be in fact or apparently and visibly restored, and thereafter in fact or apparently and visibly continued as before the sale, they hazard its loss by attachment for the debts of the vendor, as still, to the view of the world, and in the eye of the law, as it looks to the rights of creditors and the prevention of fraud, his property."

Applying this rule to the case in hand, we think it is clear that there was no such open, visible and continued change of the possession of this property as the law requires to make the sale good as against the attaching creditor. Indeed, there were some circumstances attending the sale which tend strongly to show the existence of actual fraud. The transaction was a family one, made by a son-in-law to his father-in-law, both residing in the same house. Such sales are regarded with great suspicion when made by parties in failing circumstances. The son-in-law was insolvent, and on the day of the sale informed his creditors that he was unable to pay their claims in full. The parties took the precaution to go through with the formality of procuring, executing and delivering a bill of sale of the property; conduct unusual in respect to property of this character where the sale is honestly made. But the court has found that the sale was made in

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good faith, and such we are bound to consider it; still these circumstances require that it should clearly appear that there was an actual, visible, and permanent change in the possession of the property.

Was there such a change in the possession? As said Judge HINMAN in the similar case of *Potter* v. *Payne*, 21 Conn., 377, we are to consider the possession as a stranger to the sale would regard it. Whom would a stranger have considered in possession in this case? He would have seen the horse, harness and wagon continuing to remain in the same place where they had previously been kept. He would have seen the vendor using them about his business and for the benefit of his family, apparently in the same way as before. He would have seen him feeding the horse and caring for the property, using it in the transportation of lumber, coal and other materials, precisely as if he was the owner of the property. He would have seen these acts repeated, and continued down to the time of the attachment. We are unable to discover anything which would lead a stranger to the sale to suppose that there had been a change in the possession and ownership of the property. We must therefore regard the sale, under the rule we have stated, as void against the attaching creditor. The excuse of the vendee for permitting the vendor to use the property apparently as his own after the sale, is clearly insufficient. Such excuses in similar cases have been repeatedly declared insufficient to satisfy the law.

It may seem that some remarks of the judge in giving the opinion of the court in the case of *Bird* v. *Andrews*, 40 Conn., 542, are somewhat in conflict with the conclusion to which we have come in this case. What was said by the judge in that case in relation to the conclusive character of the finding of the court below, that the property had been in the sole and exclusive possession of the vendee from the time of the sale to that of the attachment, was said solely in reference to the facts of that case. There was nothing in those facts which conflicted, as matter of law, with the finding of the court in this particular; but everything tended to show that

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the possession of the vendee had been actual, open, visible, permanent and exclusive. Hence there was nothing to show that the court below mistook the law, in coming to the conclusion that the vendee had been in the "sole and exclusive possession" of the property, if that phrase was intended to mean such a possession as protected the property from the creditors of the vendor, as the judge giving the opinion of this court seemed to regard it.

There is manifest error in the judgment complained of.

In this opinion the other judges concurred.

ROGER W. MOWRY *vs.* JEREMIAH SHUMWAY.

A note on which the interest is payable quarterly at the legal rate, is not usurious.

WRIT OF ERROR from a judgment of the Superior Court in Windham County. The original action, which was brought by the defendant in error, was assumpsit on a note, and was tried to the court before *Carpenter, J.* The note was for $1,650, was dated July 31, 1873, and was payable in three years, with interest payable quarterly at the rate of seven per cent. per annum. The defendant pleaded the general issue with notice of usury. The suit was brought before the principal of the note was due and for interest only, and the court rendered judgment for the full amount of the interest in arrear. By statute at the time the note was given seven per cent. per annum was lawful interest, and all interest was forfeited if usurious interest was reserved or taken.

T. E. Graves and *J. M. Lyon*, for the plaintiff in error.

H. Johnson, contra.

GRANGER, J. We think it clear, upon principle and author-

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ity, that there is no foundation for the claim made by the plaintiff in error. The interest reserved in the note was the legal rate according to the statute then in force, and the fact that the defendant agreed to pay the interest quarterly could not make the interest usurious. The whole interest on the note would amount to $115.50 per year. One quarter of it would be $28.87, and of course at the end of the year the defendant would only have paid $115.50; and although it might be true that the plaintiff, by putting the quarterly payments at interest, might thereby make the whole amount received more than seven per cent. at the end of the year, yet it makes no difference with the defendant. He pays only seven per cent. in the whole. We see no reason why he should complain, and we think the cases of *Bridgeport* v. *Housatonic R. R. Co.*, 15 Conn., 503, *Rose* v. *Bridgeport*, 17 Conn., 247, and *Brooks* v. *Holland*, 21 Conn., 388, fully sustain our opinion.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

JACOB B. BATCHELDER *vs.* GEORGE M. BARTHOLOMEW AND OTHERS, TRUSTEES.

Upon a hearing in damages after a default, in an action on the case charging an injury by the negligence of the defendants, the defendants may show, for the purpose of reducing the damages to a nominal sum, that they were not guilty of negligence.

And it makes no difference whether the injury charged is one to the person of the plaintiff or to his property.

Nor that the damages are entire and indivisible.

[Two Judges dissenting.]

CASE for an injury to the property of the plaintiff by the negligence of the defendants, who were trustees of the Hartford, Providence & Fishkill Railroad, and as such were operating the road; brought to the Superior Court in New

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London County. The defendants suffered a default and the case was heard in damages. Upon the hearing the court found the following facts:

The defendants, while running a train of cars over their railroad, communicated fire to the wood-land of the plaintiff by means of sparks from their locomotive engine, and about seventy acres of land, covered to a great extent with wood and young forest trees, was burned over, and damage to the extent of four hundred dollars was done to the property of the plaintiff. The defendants offered evidence to prove that they were guilty of no negligence whatsoever in the matter; that the engine had all the latest improvements for the prevention of the escape of sparks of fire, and consequently that the damage done to the property was the result of inevitable accident. This evidence was offered for the purpose of reducing the damages to a nominal sum. The plaintiff objected to the reception of the evidence, on the ground that the defendants, by their neglect to traverse the declaration, and by suffering a default, conclusively admitted that they were guilty of negligence sufficient for the plaintiff to maintain his action against them; and that in a case like this of damage to property, which damage was incapable of division, the least sum the court could assess as damages consistent with the declaration, was the actual damage done to the property.

The court received the evidence subject to the objection. If it was proper to be received for the purpose intended, and, if sufficient, should have the effect claimed, then the court found that the defendants were guilty of no negligence, and assessed the damages at $50 as a nominal sum; otherwise, at the sum of $400.

The questions of the admissibility of the evidence and for which sum judgment should be rendered, were reserved for the advice of this court.

J. Halsey and *T. M. Waller*, for the plaintiff.

The defendants, for the purpose of reducing the damages to be awarded to the plaintiff below *actual compensation for*

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his injury, and for no other purpose, offered evidence tending to prove that they were not guilty of negligence in the premises. The evidence was received subject to objection, and it is found that if the evidence was admissible for this purpose there was no negligence on the part of the defendants, and that if this deprives the plaintiff of a right to actual damages then they are to be nominal. The plaintiff made claim only for *compensatory* damages. He offered no evidence to prove negligence, relying upon the effect of the default for his right to recover such damages. It is respectfully submitted that the evidence offered by the defendants was inadmissible for the purpose stated, and that the plaintiff is entitled to judgment for his actual damage.

1. Letting judgment go by default is an admission of the cause of action. The rule on this subject is stated by Mr. Tidd, a writer of great authority, in his work on the "Practice of the Court of King's Bench," vol. 1, p. 508, 1st Am. ed., as follows:—"A judgment by default is *interlocutory* or *final*. When the action sounds in damages, as *assumpsit*, *covenant*, *trover*, *trespass*, *etc.*, the judgment is only interlocutory—that the plaintiff ought to recover his damages, leaving the amount of them to be afterwards ascertained." And on page 523, he says:—"Letting judgment go by default is an admission of the cause of action. And, therefore, where the action is founded on a contract, the defendant cannot give in evidence that it was fraudulent." Citing *East India Co.* v. *Glover*, 1 Stra., 612. Roscoe, in his work on Evidence, p. 36, says:—"Suffering a judgment by default is an admission on the record of the cause of action." The same rule is fully recognized by this court. Judge BUTLER in *Lamphear* v. *Buckingham*, 33 Conn., 252, says:—"The defendant by his demurrer and his omission to deny the facts, admitted *the cause* of action and *every material element* of it, and negligence was one of them." And again: "It is of no importance that the court has found there was no negligence in fact. The existence of sufficient negligence to give a right of recovery on the statute was a material fact, a material element of the cause of action, and was conclusively admitted."

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So we say in this case, that the default admitted the existence of sufficient negligeuce to sustain our action, and our right to recover compeusatory damages, which is the rule of damages if there was negligence at all.

2. In this action the *extent* of the injury was not admitted by the default. *Lamphear* v. *Buckingham*, 33 Conn., 237. Proof of the extent of the injury devolves upon the plaintiff. After he has offered evidence on that subject, the defendants offer rebutting testimony. Their evidence for this purpose is, not that the injury was not sustained, but that they are not responsible for it. A bare statement of the proposition is sufficient to show it illogical and absurd. If the plaintiff claimed punitive damages, and offered evidence for that purpose, tending to prove recklessness or gross negligence, the defendants would have the right to offer evidence to the contrary, because this was not necessary to sustain the action, and was not admitted by the default, and the plaintiff could only recover such damages by proving such degree of negligence. But in order to recover compensatory damages, no evidence of negligence is necessary upon an inquest of damages after default. Logically stated the defendants' proposition stands thus: A default admits the cause of action, but not the extent of the injury. Upon an inquiry into the extent of the injury we may defeat a right to recover compensation for the injury by showing that we were not negligent, and so not liable for the injury. It is submitted that such a proposition is not sanctioned by any of the cases in this state, from *Havens* v. *The Hartford & New Haven R. R. Co.*, 28 Conn., 69, to *Carey* v. *Day*, 36 Conn., 152.

3. Our damages are entire and indivisible, and arising from a single act of the defendants. The *minimum* of damages is compensation. Beyond that the *degree* of negligence would be a material inquiry. As only minimum damages were claimed "it is of no importance that the court has found there was no negligence in fact." BUTLER, J., 33 Conn., 252.

4. It is immaterial whether our cause of action is admitted by default, or found by a jury. The same *legal consequences* follow in one case as in the other—a right to compensation

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for the injury. If the claim of the defendants in this case is sustained, the constitutional right of the plaintiff to have his cause of action tried by a jury is defeated. A defendant who chooses to pay fifty dollars for the privilege, can transfer that question from the jury to the court. An inquest of damages by the court is a matter of practice, and is not a trial of a cause, but merely ascertaining the damages arising from an *admitted* cause of action, and is not therefore in violation of the constitution. *Raymond* v. *Danbury & Norwalk R. R. Co.*, 43 Conn., 596.

J. C. Day, for the defendants.

First. The course taken by the defendants in submitting to a default and then showing in mitigation of damages that there was no negligence on their part, was in accordance with a practice followed in this state for many years in similar cases, and their right to introduce the evidence in question is plainly established by the following cases: *Havens* v. *Hartford & N. Haven R. R. Co.*, 28 Conn., 69; *Daily* v. *N. York & N. Haven R. R. Co.*, 32 id., 356; *Lamphear* v. *Buckingham*, 33 id., 237; *Daniels* v. *Town of Saybrook*, 34 id., 377; *Carey* v. *Day*, 36 id., 152. There appears to be some conflict among the English cases, but it is submitted that while the exact question so clearly decided in Connecticut does not appear to have been raised there, the following cases are in support of the doctrine of this court, and are of at least equal weight with any other that bear on the question. *Cox* v. *Perry*, 1 T. R., 464; *Williams* v. *Cooper*, 3 Dowl., 204; *Booth* v. *Howard*, 5 id., 438; *Cook* v. *Hartle*, 8 Car. & P., 568. See also 1 Chitty Pl., 662.

Second. But the plaintiff's counsel seek to distinguish the case at bar from the above cases, and

1st. It is claimed on behalf of the plaintiff, that in a case like this of damage to property, which damage is indivisible, the least sum the court could assess as damages consistently with the declaration, was the actual damage done to the property. As the damages in this case are claimed for injury done to wood, trees, fences, grass, and other material and

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growth, being on seventy acres of woodland, they would seem to be as capable of division as the damages in any of the above cases, in all of which damages were sought either for injuries to the person or for loss of life by reason of the alleged negligence of the defendants. On the hearing in this case, the injury might have been shown to be an injury to the wood alone, or to the trees alone, or some of them, or to the fences alone, or to any part of the growth on the seventy acres of land, and such proof would have been sufficient under the general issue, and consistent with all the material allegations of the declaration. "A default in such a case would admit no more than what would be sufficient to decide the case in favor of the plaintiff upon the plea of the general issue." *Rose* v. *Gallup*, 33 Conn., 338. In actions of tort for unliquidated damages, a default or demurrer only admits that which it is necessary to prove in order to recover under the general issue. The only classes of cases in which by suffering a default the defendant admits a liability for the whole damages claimed, is a certain class of actions founded on contracts in writing, such as debt on bond for a sum certain, or assumpsit on a note or bill, or the class of actions on statutes or by-laws for definite penalties, etc. This distinction is clearly pointed out in *Lamphear* v. *Buckingham*, 33 Conn., 250. The same distinction is also pointed out less fully in 1 Swift's Dig., 784, and again by Judge Redfield in *Hyde* v. *Moffat*, 16 Verm., 271, in a dissenting opinion, the doctrine of which was afterward adopted by the court as correct in the case of *Webb* v. *Webb*, id., 636. His language is quoted with approbation by this court in *Havens* v. *Hartford & N. Haven R. R. Co.*, 28 Conn., 92. The case of *McAllister* v. *Clark*, 33 Conn., 253, is an instance of the second class abovenamed, being for a definite penalty given by a city by-law.

2d. On the hearing below it was suggested that there might be a distinction made between the case at bar and the case of *Carey* v. *Day*, on the ground that in the latter case there was a statutory limitation as to the amount of damages, fixing a definite maximum and minimum; but we submit that there is no possible distinction in principle as to the admission

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of evidence in mitigation of damages, whether the lowest limit be strictly nominal damages or a statutory minimum. The sole effect of the statute in this respect is to arrest the reduction of damages at the sum of $1,000 instead of permitting the reduction to reach the point of merely nominal damages.

3d. Nor is there any validity in the distinction suggested below between the case at bar and the class of cases to which *Carey* v. *Day* belongs, on the ground that the present case was based upon an injury to property while the other cases referred to are based upon an injury to the person. The question at issue being whether the defendants may show that there was no injury done to the plaintiff *through the fault or negligence of the defendants*, it is plainly immaterial to the point in dispute whether the injury were done to the person or to the property of the plaintiff.

4th. Nor is there any validity in the claim that the defendants may offer evidence showing absence of negligence on their part, for the purpose of reducing the damages from punitive damages to compensatory damages, but may not offer such evidence for the purpose of reducing the damages from compensatory damages to nominal damages. On the contrary, in all the cases of the class relied upon by the defendants the decisions have been that the damages may be so reduced from compensatory damages to nominal damages, except where there is a statutory minimum, and in cases where there is a statutory minimum that the damages may be reduced to that minimum.

PARDEE, J. In 1876 a locomotive engine in the use of the defendants communicated fire to the plaintiff's woodland, destroying trees, wood and fences of the value of $400; he brought an action for the recovery of damages, alleging that the defendants' negligence occasioned his loss; they suffered a default and asked to be heard in damages; the court made the inquiry; upon the hearing, for the purpose of preventing the plaintiff from recovering a judgment for more than nominal damages, the defendants offered evidence to prove that

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they were not guilty of any negligence in the use of the engine; to the reception of this the plaintiff objected, on the ground that they, having suffered a default, had "conclusively admitted that they were guilty of negligence sufficient for the plaintiff to maintain his action against them; and that in a case like this, of damage to property, which damage cannot be separated into parts, but is all one thing incapable of division, the least sum the court could assess as damages consistently with the declaration was the actual damage done to the property." The court received the evidence subject to the objection, and found that the defendants were guilty of no negligence on the occasion complained of, and in this view of the case assessed the damages at a nominal sum, to wit, at fifty dollars; otherwise the court assessed the damages at the sum of four hundred dollars. The question of evidence, and for which sum the judgment shall be rendered, are reserved for the advice of the Supreme Court.

From a time early in the history of the jurisprudence of this state the law has been, that where, in an action on the case for the recovery of unliquidated damages, the defendant has suffered a default, that is, has omitted to make any answer, the assessment of damages has been made by the court without the intervention of a jury; also, that by his omission to deny them, the defendant is held to have admitted the truth of all well pleaded material allegations in the declaration, and the consequent right of the plaintiff to a judgment for a limited sum, that is, for nominal damages and costs, without the introduction of evidence. The defendant standing silent, the law imputes the admission to him; but it does it with this limitation upon its meaning and effect, it does it for this special purpose and no other; and our courts have repeatedly explained that the admission found in a default is not the admission of which writers upon the law of evidence treat. The silent defendant having been subjected to a judgment for nominal damages from which no proof can relieve him, the default has practically exhausted its effect upon the case; for, if the plaintiff is unwilling to accept this judgment, evidence is received on his part to raise the damages above,

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and on the part of the defendant to keep them down to, that immovable base of departure, the nominal point, precisely as if the general issue had been pleaded; and although the evidence introduced by the latter has so much force that it would have reduced them to nothing but for the barrier interposed by the default, it cannot avail to deprive the plaintiff of his judgment; in keeping that, the law perceives that he has all that the truth entitles him to, and therefore refuses to hear any objection from him. Of course the court might have said that if the defendant thus defaults he shall not thereafter be heard in proof or argument upon any other than the single question as to the extent of the injury inflicted; but it has contented itself with saying that if he stands silent the law will pronounce judgment upon him for nominal damages; in either form the rule, like all other rules of practice, is arbitrary in its nature; but in neither is there any inconsistency or want of logic. If in our courts the admission in a default had ever been used in the broadest sense of which that word is capable, then of course any limitation thereafter put upon it would have been an inconsistency; but from the earliest use the narrower meaning went with it. *Havens* v. *Hartford & N. Haven Railroad Co.*, 28 Conn., 69, was an action on the case for injuries to the person, alleged to have been occasioned by the negligence of the defendants; they interposed a demurrer, the admission in which has the same legal effect as has the admission in a default; that having been overruled, they were permitted, for the purpose of keeping the damages at a nominal sum, to prove, after this limited admission of their negligence, that the plaintiff's injuries were due to his negligence. *Carey* v. *Day*, 36 Conn., 152, was an action upon the statute for negligence in the management of a locomotive engine, whereby the plaintiff's intestate was killed; the defendants demurred; the demurrer having been overruled, after this limited admission of their negligence they were allowed to prove, for the purpose of keeping the damages at the statutory nominal point, that the intestate's death resulted wholly from his own negligence. In each of these cases the admission was precisely the same as that imputed to

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the present defendants. The plaintiff argues that his case differs from these and all others which have gone before it, in that his damages are entire and indivisible and arise from a single act of the defendants. But the destruction of a life would seem to be an entire and indivisible wrong in as complete a sense as is the destruction of the plaintiff's grass, fence and wood; a single blow killed the man, a single spark fired the grass. The rule cannot be at all affected by the question as to whether the injury is inflicted upon person or property. In either case at the outset the damages are uncertain; in both they are made certain by the same tribunal, governed by the same rules, informed by evidence of the same character, received in the same order. An injury to the person may be the breaking of a finger or the tearing of both arms from the body; an injury to property may be the destruction of a tree or of a forest. It is of course a much more difficult and delicate task to reduce to the standard of coin the value of a leg or an arm, than to determine the market price for a cord of wood or for a standing tree of given dimensions; nevertheless, probably in every week some one of the numerous courts of the country finds for some plaintiff, presumably the money value of a lost limb. The judicial system has but one balance; in this is weighed every loss, even that of life.

And we are not without precedent for the application of the rule to actions for injury to property. *Merriam* v. *The City of Meriden*, 43 Conn., 173, was an action of trespass *qu. cl. fr.;* the defendants demurred; upon demurrer overruled they asked for a hearing in damages; upon such hearing they claimed that they were not guilty of trespass, for the reason that certain acts and contracts of the plaintiff constituted as a matter of law a license to enter upon the premises; the plaintiff denied that his acts gave such license; the Superior Court adopted his view of the law and assessed his damages at $2,000. Upon the motion for a new trial he urged that, inasmuch as the court had assessed them upon evidence offered by both parties as to their extent, there remained no power of review. But this court, PARK, C. J., giving the

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opinion, said:—"We think the court erred in rendering judgment for more than nominal damages in this case and therefore a new trial must be advised." In principle, the admission of the city of Meriden would seem to have been the admission of the present defendants.

Nor can the plaintiff well object that the rule is an unfair one; in his case the court having heard all the evidence upon both sides has found that the defendants were not guilty of any negligence in the management of their engine; he came therefore into court with a baseless claim; under the general issue he would have gone out justly punished with a bill of costs; but, under the law as it is, he receives fifty dollars damages and costs. He cannot reasonably complain.

Upon a default in these open actions for damages there must of necessity be an inquest as to the amount of them, if more than a nominal sum is asked for. No good reason can be given why that inquiry should not be full and fair on both sides. The office of the trial should be the discovery of truth and the administration of exact justice as in all other cases. Surely, the judgment for fifty dollars and costs sufficiently punishes the defendants for their silence; justice does not require any greater sacrifice to this formal default. Indeed, if the question had come to us as one of first impression, and with it the privilege of saying what the law shall be instead of the duty of declaring what it is, all considerations would unite in bringing us to the result reached by our predecessors.

We advise the Superior Court to render judgment for the plaintiff for nominal damages.

In this opinion CARPENTER and LOOMIS, Js., concurred.

PARK, C. J., dissenting. If, when this hearing in damages was had, there had been a statute which provided that in cases of damage to property like the present one, the cause of action should be submitted to one jury to determine, and if they should find the issue for the plaintiff, then the damages should be assessed by another jury; and, under such a statute, the cause of action in this case had been submitted to the first

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jury, and had been determined in favor of the plaintiff, and the hearing in damages was being had before the second jury, would the defendants be permitted to say to the jury, as they said to the court, that they did not cause the fire which did the injury—that if the act was theirs, they were guilty of no culpable negligence in doing it—that the plaintiff himself was guilty of negligence which contributed substantially to produce the injury of which he complains? Manifestly, these questions would have been determined by the first jury, and no court in the state would have permitted them to be controverted again before the second jury to reduce the actual damages to a nominal sum. The second jury would have jurisdiction over the amount of the damages and nothing else, and the first over the cause of action and nothing else. Whether or not the defendants caused the fire or were or were not guilty of culpable negligence in causing it, would be questions the determination of which would not tend to show, in any respect whatsoever, how much mischief was done by the fire. The question whether property was destroyed to the value of a penny, or to the value of thousands of dollars, would remain as much an uncertainty after these questions were determined as it was before. The verdict of the first jury would merely determine the cause of action; and if decided in favor of the plaintiff, it would entitle him to recover nominal damages, and nothing more. The case would then stand precisely as a case of this character always stands upon a default, or a demurrer overruled. Is it possible to suggest a distinction? It must be conceded that there would be no difference whatsoever. Judge BUTLER, in *Lamphear* v. *Buckingham*, 33 Conn., 237, says that a defendant, by suffering a default or demurring to a declaration, conclusively admits every element of the cause of action. It is manifest that the verdict of the first jury, in the case supposed, could not more conclusively establish the existence of the same elements.

Suppose that a defendant should suffer a default, in a case like this, under such a statute as I have suggested. Clearly the default would dispense with the trial of the cause of action by the first jury; showing that nothing more and nothing

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less would be established by a verdict at their hands than would be established by the default.

Now, if in the case first supposed the defendants would not be permitted again to controvert on the hearing in damages the claim that they caused the fire or were guilty of negligence in the matter, in order to reduce the damages to a nominal sum, how can it be done in the case under consideration, where the defendants have suffered a default, thereby admitting the cause of action as conclusively as it could have been established by the verdict of a jury? The claim that it may be done in cases of this character is based on the fact that in such cases the default simply admits a cause of action, which carries with it a nominal sum in damages; the argument being, that on the inquest in damages the defendant may prove any fact tending to show that in justice the plaintiff ought not to recover a greater sum in damages than the default admits, that is, a nominal sum. But the reason why a default in such cases carries with it a nominal sum in damages, is, that it cannot be judicially known before the inquest in damages whether the plaintiff has in fact suffered to a greater extent than that amount. The law never knows the existence of a fact until it is duly admitted or regularly proved in due course of trial. Every trial has regular stages of progression. Take, for instance, the case under consideration. The defendants are charged with setting fire to the plaintiff's wood-lot, which did him a large amount of damage. On the trial the questions first in order are—was the wood-lot set on fire—did the defendants set the fire—were they guilty of negligence in so doing. These questions must be settled in favor of the plaintiff, before the law will hear any thing whatever concerning the damages. They may be so settled by a default, which admits the allegations to be true; they may be so settled by the verdict of a jury, or by the inquest of a court. When these questions are determined in favor of the plaintiff in some one of these modes, and it matters not which, the law still knows nothing about the damages, farther than what necessarily follows from the settlement of these questions in favor of the plaintiff, to wit, that some damage must be

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awarded the plaintiff. Whether the fire was immediately extinguished after it commenced, or whether it burned over a large extent of territory and did the plaintiff great damage, the law is in utter ignorance. Consequently, if nothing more appears in the case, the law will award the plaintiff such damages only as it knows to have been sustained, namely, nominal damages, but it will give the plaintiff an opportunity to show what damage he has in fact suffered at the hands of the defendants. When this stage in the trial has been reached, may the defendants go back and controvert again the questions which have just been settled in favor of the plaintiff, and which necessarily must be settled before the hearing in damages can be had? The absurdity of holding that the defendants set the fire in one part of the case, and did not set it in another; that the defendants were guilty of negligence in one part of the case, and were not guilty of it in another; that the plaintiff was free from negligence in one part of the case, and brought the mischief upon himself in another; ought to be sufficient in itself for the rejection of the doctrine, if there was no other objection. But, suppose the questions are settled again, and settled in favor of the defendants, would they be settled more conclusively than they were before? If so, how? and which settlement shall we take? Both settlements are said to be conclusive. Shall we take the last? If so, why? It would seem that one settlement ought to balance the other, and leave nothing settled; which would require another settlement in order to determine the questions. Again, it is everywhere held that a default admits the cause of action alleged in the declaration. The cause of action alleged is liability in damages for the actual injury done by the fire. The default therefore admits a liability coëxtensive with the actual injury committed, whatever it may be found to be on the inquest in damages. It conclusively admits a nominal sum, because the damage can never be less; but inasmuch as it may be more, it leaves the question of how much more to be determined by the proof. Now the acts of the defendants alleged and admitted did actual damage to the plaintiff to the extent of

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four hundred dollars. It follows, therefore, that if the defendants are liable at all, their liability cannot stop short of the entire amount.

Again, the defendants committed one wrongful act, and the damage resulting from it is one entire sum. Every part of it is like every other. No distinction whatever can be made. It is one integral thing, indivisible and indisseverable, as much so as a note of four hundred dollars. Where can one draw a line through this sum, and say with any reason that liability is on the one side and non-liability on the other. One might as well draw a line through the note and say the liability of the defendant extends to fifty dollars of it but not to the rest. This would be as consistent as to say, when one fire did the entire mischief, that the defendants caused the fire to the extent of fifty dollars of the damage and no more.

Again, whatever damages are awarded in cases of this character, must be awarded within the cause of action alleged. The damages must be consistent with the declaration. What are the fifty dollars in this case awarded for? Not for the damage done by the fire, for that was a much larger sum. What then is this sum for? It is said that the defendants were not in fact liable for the fire; but, inasmuch as they admitted liability to the extent of a nominal sum, therefore they must pay that sum, not as damages resulting from their liability for the fire, for that would make them liable for the entire amount, but because of their admission of liability when in fact they were not liable. It follows then that the damages awarded are not consistent with the cause of action alleged, which charges the defendants with liability for the fire, and seeks only to recover damage done by the fire, resulting from such liability.

But it is said that, however this case may stand upon principle, the rule claimed has been well established in this state ever since the case of *Havens* v. *The Hartford & New Haven R. R. Co.*, 28 Conn., 69. The declaration in that case charged the defendants with the commission of many wrongful acts, whereby the plaintiff was injured in his person and property. Proof of any one of the wrongful acts would have

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sustained the declaration. The demurrer therefore only admitted some one of them, and on the inquest in damages the others manifestly could have been denied. Judge ELLSWORTH, in giving the opinion of the court, and while enumerating the wrongful acts, says:—"The tearing of the plaintiff's coat, the putting the hands violently upon his person, the raising him from the seat, or the attempt to eject him from the car; each would sustain the action; and therefore only one is proved by the verdict or demurrer, and not even that specifically." What would have been the decision of that case if there had been but one wrongful act charged, which injured the plaintiff's property a certain amount? The case of *Daily, Admr.*, v. *The New York & New Haven R. R. Co.*, 32 Conn., 356, is distinguishable from the present case in this; that was an action for an injury to the person of the plaintiff's intestate, and this is for an injury to the plaintiff's property. It is true the distinction in this respect is not very marked. But property has a market value, and when it is destroyed money can make good the damage; it is merely a substitution of one kind of property for another. This is not the case with an injury to the person. In such cases the question is never asked, how much value was destroyed by the personal injuries inflicted. The loss of an arm or a leg can never be made good by a sum of money, like injuries to property. Therefore any sum awarded in damages in such cases would be consistent with the cause of action alleged. But where property is destroyed worth ten thousand dollars, if the defendant is liable at all, his liability extends to the entire amount. Nominal damages would not be consistent with the declaration, for the declaration asks damages for the injury inflicted. It is not pretended that the nominal damages awarded in the case under consideration, are awarded for the damage done by the fire. The court has found that those damages are four hundred dollars. The nominal sum was awarded after it was judicially known how much the actual damages were, and cannot possibly therefore have been awarded as compensation for the fire, which the declaration only seeks to recover. I think the principle of the case last

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cited ought not to be extended, as it necessarily will be in some degree, by applying it to the present case.

The principle of the case of *Lamphear* v. *Buckingham*, before referred to, is in accordance with the doctrine herein expressed. The defendants sought, on the hearing in damages in that case, to reduce the damages to a nominal sum, by showing that they were not in fault in the acts which caused the injury. The action was brought upon the statute, which fixed the damages to be recovered in cases coming within its provisions at a sum discretionary with the court, from one thousand to five thousand dollars. The court held that nominal damages would not be consistent with the cause of action alleged, which the demurrer conclusively admitted. The only difference between that case and the present one is, that in that case the damages were liquidated to the extent of one thousand dollars at the time the demurrer was filed, while in this case the damages were wholly unliquidated at the time the default was entered. But does it make any difference in principle at what stage of a trial the damages become liquidated? When the demurrer and default were entered the cause of action in either case was alone before the court. Can it make any difference whether or not the defendant knows what the damages will be at the time he suffers a default? If he knows, the case cited declares that he conclusively admits the amount. If he does not know at the time, but knows there will be a hearing in damages by which the amount will be determined, does he not admit the amount to be determined, as much as he would if the amount was then known? A defendant by suffering a default merely chooses between two modes of assessing the damages. If he does not suffer a default the jury will assess the damages. If he does the court will do it. And this is all the difference it makes in this part of the case.

According to the doctrine proposed to be established in this case, nominal damages should have been awarded in the case last cited. The case did not come within the provisions of the statute when it appeared on the hearing in damages that the defendants were not in fault in the matter complained of,

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and they should not therefore have been visited with the statutory damages. But it is said that the defendants admitted that the case was within the statute and could not withdraw the admission. Very true. So they admitted in the case under consideration, that the case was within the common law requiring damages for the injury committed; and how can they withdraw the admission? If the actual damage can in one case be reduced from a fixed and definite sum required by the common law, to a nominal amount, by showing that the defendants were not in fault, why cannot the damage in like manner be reduced to a nominal sum in the other?

These remarks apply with equal force to the case of *Carey* v. *Day*, 36 Conn., 152.

The case under consideration is the first in our reports, where the principle adopted by the court has been applied to a case of injury to property, which is in the nature of a money demand. Property has been destroyed which has a market value in money, and the object of the suit is to replace the lost property by its equivalent in money—one species of property for another. Actual damage is the lowest estimate of damage known to the law which can be assessed, where there is liability at all. The defendants by their default admitted their liability for the damage done. And I am unable to see how a nominal sum can be awarded in the place of the four hundred dollars which is found to be the actual damage.

In this opinion GRANGER, J., concurred.

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SUPREME COURT OF ERRORS.

COUNTIES OF HARTFORD, MIDDLESEX AND TOLLAND.

MAY TERM, 1877.

Present,

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

WILLIAM H. REMINGTON, ADMINISTRATOR, *vs.* THE AMERICAN BIBLE SOCIETY AND OTHERS.

In case of a lapsed devise, the real estate devised goes to the heir at law and not to the residuary devisee.

The statute (Gen. Statutes, tit. 18, ch. 11, sec. 28,) provides that executors and administrators shall, during the settlement of the estate, have possession and control of the real estate, where the same is not specifically devised, and that all the products and income therefrom shall vest in them in the same manner as personal property. Held that such possession and control were for the benefit of the persons entitled to the real estate, and that the rents and profits received from it were to be regarded as an incident of the real estate, and if not needed for the payment of debts were to go with it, and did not go to the residuary legatees.

PETITION to the Superior Court in Hartford County for advice as to certain questions arising under the will and in the settlement of the estate of Betsey Hanchett. The petitioner was administrator with the will annexed.

The testatrix resided at Suffield, in this state. By her will, which was executed on the 15th of October, 1869, she gave a farm in Suffield to one Silas Adams, with such farming utensils, stock and furniture as might be in her possession at the time of her decease, and after making numerous pecuniary legacies, among which were one of twelve hundred dollars to the American Bible Society, one of one thousand dollars to

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the American Board of Commissioners for Foreign Missions, one of five hundred dollars to the Mount Holyoke Female Seminary, and one of one thousand dollars to the First Congregational Church of Suffield, she made these four institutions residuary legatees of her estate, to share it in proportion to their several prior legacies.

The petition represented that Silas Adams, the devisee of the farm, died in 1871, before the death of the testatrix, which occurred in 1873, and that he was not a child or grandchild of the testatrix and that the devise therefore lapsed, and that no provision was made in the will for such an event; that the farm was of the appraised value of $9,000; that the petitioner had had under the statute the possession, care and control of the farm since his appointment as administrator, and had in his hands about one thousand dollars which he had received as rents and profits from the farm; that neither the land nor this money were needed for the payment of debts; that there was in his hands a quantity of household furniture, belonging to the house on the farm, inventoried at about three hundred dollars; that the personal property belonging to the estate was of the value of about nine thousand dollars; that the four institutions named had received their legacies in full and as residuary legatees about twenty-five per cent. in addition; and that the residuary legatees claimed that, by reason of the lapsing of the devise to Adams, the farm fell into the residuum of the estate, and that the rents and profits received from the farm, and the household furniture, came to them as personal estate.

The residuary legatees and the heirs at law of the testatrix were made respondents, and the petition prayed that they might be required to interplead, and that the court would adjudicate between them and settle their respective rights, and advise the petitioner as to his duty in the matter.

The court found the allegations of the petition to be true and reserved the case for the advice of this court.

S. Barbour, for the petitioner.

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A. P. Hyde and *E. Hall*, for the residuary legatees.

H. S. Barbour, for the heirs at law.

PARDEE, J. Formerly in England the rule prevailed that a lapsed legacy of personal property fell into the residuary estate, and a lapsed devise of real estate went to the heirs at law. The reason usually assigned in the books for this distinction is, that a devise of real estate operated only upon land whereof the testator was seized when he made his will, inasmuch as that instrument was deemed to be in the nature of a conveyance or appointment of a specific estate; whereas a bequest of personal property refers to such as he might own at the time of his death. Some of the courts in this country, in adopting and affirming this rule as to lapsed devises of real estate, have also adopted and affirmed this reason as their own. Others have reached the same result acting upon another principle which obtains in the construction of wills, namely, that the heir at law takes all real estate unless the testator has effectively disposed of it to some one else; that when the devisee dies after the making of the will and before the death of the testator, the latter is held to have designed the estate for the particular person and to have made no disposition of it beyond that; and that from the fact of such omission an irresistible presumption arises that he did not intend to take it away from the heir at law upon the happening of such an event; for if such had been his intention he would have provided in his will for such a contingency. Our own court adopted the rule for the reason that the intent of the testator at the time of making must govern, and that where there is a general devise of the residue and a lapsed devise, so far as the latter is concerned, the testator when making his will intended to dispose of it specifically and did not design that it should fall into the residuum. In *Greene* v. *Dennis*, 6 Conn., 304, HOSMER, J., speaking for the court, said: "In relation to real estate, it is an established principle that in case of a lapsed devise the estate does not vest in the residuary devisee, but descends to the heir at law of the tes-

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tator. Wills must be construed by the intent of the devisor at the *time of making them*. Of consequence, when property is given to a person incapable of taking, and there is a general devise of the residue, so far as respects the estate specifically devised at the time of the will's being made, there is an intentional disposition, and it never was designed that it should fall into the residuum. The law respecting the bequest of personal estate is different, but as to the realty the decisions have been uniform and unquestioned. *Wright* v. *Hall*, Fortes., 82; *Roe* v. *Fludd*, Fortes., 182; *Doe d. Morris* v. *Underdown*, Willes, 293; *Watson* v. *Earl of Lincoln*, Amb., 338, 9; *Attorney General* v. *Johnstone*, Amb., 580; *Gravenor* v. *Hallum*, Amb., 643, 645; 2 Madd. Ch., 81."

In 1831 our own legislature enacted a law which provides that "any person having power to dispose of real estate by will or testament, may by such will devise real estate not owned by him at the time of making the same, but acquired afterwards." In 1838 in England an act of Parliament was passed containing substantially the same provision. Similar statutes exist in Massachusetts, New York, Virginia, New Hampshire, Pennsylvania, Maine, Vermont, and several other states. Doubtless some of the courts which had previously affirmed the old English rule upon principles laid down and reasons given by English courts, have now abolished the distinction between lapsed devises and lapsed legacies, inasmuch as the enactment of these statutes has destroyed the original reason for its existence; and it would appear that these courts have given to their respective statutes more power over the rule of law referred to than did the courts in England; for there the act of Parliament made the new rule as to lapsed devises of real estate which several of our own courts have established upon reasoning and upon analogies.

But, as in our own state the rule has stood from the first upon another principle, and as that principle remains unaffected by the change in legislation, the rule itself stands unchanged by our own court. In *Brewster* v. *McCall's Devisees*, 15 Conn., 275, STORRS, J., said: "The devise to the Cornwall school having failed, a question is made whether that portion

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of the estate vests in the last mentioned society, which is the residuary devisee, or in the heirs of the testator. That point was deliberately settled in the case of *Greene* v. *Dennis*, 6 Conn. Rep., 292, where it was held that the subject of the devise descended to the heirs at law, and did not go to the residuary devisee. The same question has since undergone an elaborate examination in the state of New York, and been similarly decided, in the case of *Van Kleick* v. *The Dutch Church of New York*, 20 Wend., 457. The authorities and reasoning on the subject are so fully gone into in those cases, and also in *Lingan* v. *Carroll*, 3 Harris & McHenry, 333, that it is only necessary to refer to them. As to that part of the estate, therefore, of which the devise is void, it is to be distributed to the heirs as intestate estate."

This case was determined in 1842; the will there in question was made, it is true, in 1826, five years prior to the enabling act of 1831; and while the court determines that for that reason the land acquired after the execution of the will did not pass by a devise therein, yet the plain import of the decision, derived as well from what it says as from what it does not say, is, that the rule of law which carried lapsed devises of real property to heirs at law, as laid down in *Greene* v. *Dennis*, for reasons there given, remains and still is the law of Connecticut. It is not suggested by the court that it was abolished or even affected by the statute of 1831.

The statute, (Revision of 1875, title 18, chap. 11, sec. 28,) provides that the executors and administrators of deceased persons shall, during the settlement of the estates of such decedents, have the possession, care and control of their real estate; and all the products and income of such real estate during such time shall vest in the executors and administrators in the same manner as personal property, if such real estate shall not have been specifically devised, nor any directions given by will with regard to it, inconsistent herewith." Upon this the residuary legatees insist that, even if the real estate passed to the heirs at law, the rent which that estate earned after the death of the testatrix belongs to themselves.

We cannot accede to this proposition. When a decedent

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has omitted to control by will the destination of his property, in certain cases the realty takes a line of descent different from that taken by the personalty. For instance, by our common law a lapsed devise goes to the heirs at law, while a lapsed legacy goes to the residuary legatee if there be one; again, if a man dies childless and intestate, having brothers both of the whole and half blood, and leaves real estate inherited from a kinsman, and personal property, our statute of distribution carries the former to such of the brothers as are of the whole blood of the person from whom it came, and the latter to such of them as are of the whole blood of the intestate. In each of these instances the presentation of disputed claims against the respective estates might delay the work of the administrator for several years; when the time comes for final settlement he may have in his hands rent earned by the realty; he has stood as the representative, in a certain sense as the trustee, of the persons to whom the law would carry the land when it had been judicially determined that it was not needed for the payment of debts; the law has made him the temporary recipient of the title for the purpose of enabling him to defend the land from acts of trespass, to enforce payment of rent, and to hold the income until it shall be known whether it is to go to heirs or creditors. Now, leaving out of view for the moment the statute relied upon by the residuary legatees, we think that in the case at bar, when it is settled that the farm belongs to the heirs at law, and in the supposed case when it is known that the real estate is not needed for the payment of debts, and it goes to those whom the law points out as the owners, there would go with it in each case as its proper incident the rent earned by it during the period of litigation, and that they are to profit by the earnings of the land as fully as if no unfounded claim had prevented them from taking possession upon the death of the intestate. We cannot see that any other person can rightfully ask for this money. It is true, the statute says that the income of such real estate "shall vest in the executors and administrators in the same manner as personal property;" but we think this expression is descriptive simply of the man-

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ner in and the extent to which the administrator is to be vested with the right to enforce payment of this rent money and thereafter hold it against all claimants while the true ownership remains uncertain and until his final settlement; that it does not, and was not intended to, put a statutory stamp upon it as personal property for the mere purpose of separating it from its principal and sending it away upon the diverging line of descent, which, in the case at bar, the law gives to personal as distinguished from real property. There being in its language no explicit reference to that subject, we cannot upon mere inference say that it is a change of either the common or statute law of distribution. All considerations compel us to say that the residuary legatees, who by their effort to establish a groundless claim to this farm have hitherto barred the rightful owners from the possession thereof, should not now be rewarded with the rent which it had earned during the period of litigation; it would be as inequitable as it is unnecessary thus to invite litigants into court. We advise the Superior Court that the devise to Silas Adams having lapsed, the realty descended to the heirs at law of the testatrix; that they are entitled to the accumulated rents; and that the residuary legatees are entitled to such farming utensils, stock and furniture as were in her possession at the time of her decease.

In this opinion the other judges concurred.

EDWARD J. DARCY, TRUSTEE, *vs.* CORNELIUS RYAN AND ANOTHER.

It is settled in this state that in the absence of fraud and where creditors are not prejudiced a man may make a valid transfer of personal property to his wife.

Such transfers operate to vest an equitable title in the wife, whereby she becomes the real owner, leaving the legal title in the husband as trustee.

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A woman was married in 1871, and lent to her husband $350, which he used in his business from that time till 1876, when, on leaving for Ireland, he executed to her a bill of sale of most of his personal property, of which she took possession. A part of the property was soon after attached by a creditor of the husband. No fraud was shown in the transaction, nor that existing creditors were injured, nor that there was any intent to defraud subsequent creditors, nor that the debt on which the property was attached was due at the time of the transfer. Held that the money lent by the wife to the husband, together with his obligation to provide for her support, constituted a meritorious consideration, and that the bill of sale vested an equitable title to the property in the wife, which was good against the attaching creditor.

REPLEVIN for a horse and wagon; brought to the Court of Common Pleas for Hartford County, and tried to the court before *McManus, J.* Facts found and judgment rendered for the defendants, and motion in error by the plaintiff. The case is fully stated in the opinion.

C. J. Cole and *R. McCloud*, for the plaintiff.

F. Eberle, for the defendants.

CARPENTER, J. In May, 1871, the plaintiff with small means commenced keeping a saloon. In July following he married Ann Darcy, who had between three and four hundred dollars, which she allowed him to use in his business without any agreement or understanding as to terms. In 1874 he commenced the grocery business, investing in that the avails of his saloon business, and carried it on in his own name. On the 12th day of July, 1876, his health failing, and being desirous of going to Ireland, he executed and delivered to his wife a bill of sale of all or nearly all his visible property, including the property in controversy. On the 6th day of October following the defendants attached the property to secure a debt of the defendant Ryan, and the plaintiff replevied it.

On the trial in the Court of Common Pleas the plaintiff claimed, first, that the horse and wagon, the property attached, were at the time of the purchase the property of the wife; and secondly, that by the bill of sale the title of Darcy, if any, was transferred to the wife, and that thereafter, if not before, he held the same as trustee for her, and that the bill

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of sale would operate as a declaration of trust in favor of the wife; and asked the court so to rule. The court declined so to rule and rendered judgment for the defendants. By a motion in error the cause is brought before this court.

We pass by the first claim of the plaintiff without deciding it, and confine our remarks to the bill of sale.

It seems to be settled in this state that, in the absence of fraud, and where creditors are not prejudiced, a man may transfer personal property to his wife; and such transfers will be upheld by the courts. They operate to vest an equitable title in the wife, whereby she becomes the real owner, leaving the legal title in the husband as trustee. *Riley* v. *Riley*, 25 Conn., 154; *Deming* v. *Williams*, 26 Conn., 226; *Underhill* v. *Morgan*, 33 Conn., 105.

We are unable to see why these authorities do not abundantly support the plaintiff's claim. The money which the plaintiff received from his wife, together with his obligation to provide for her support, constitutes a meritorious consideration. The bill of sale is not attacked for fraud, and it does not appear that existing creditors were thereby prejudiced. Neither does it appear that there was any intention to defraud subsequent creditors. The defendant's claim on which the suit was brought was for rent. It does not appear that it was due when the bill of sale was executed, and we presume that it was not. In any event there seems to be no ground on which a claim of fraud, actual or constructive, can be made, and we must presume that the transaction was bonâ-fide. Viewed in that light we think that the bill of sale vested the real title in the wife, the husband as trustee retaining the legal title, and that judgment should have been rendered for the plaintiff.

The judgment must be reversed.

In this opinion the other judges concurred.

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TOWN OF SUFFIELD vs. LOUISE E. HATHAWAY.

The selectmen of a town have no right, as against an owner of land on the highway, to divert the water from a spring on such owner's side of the highway, to a public watering trough on the other side.

As a general rule courts will not interfere with selectmen in the exercise of their judgment as to the mode of making a highway safe for public travel, but will do so where their object is merely to promote the comfort of travellers, and in so doing they invade private rights.

PETITION for an injunction to restrain the respondent from digging up water pipes laid under a highway by the selectmen of the petitioners and from filling up an excavation made by them by the side of the highway; brought to the Superior Court in Hartford County. The court found the following facts:

For a long period prior to the commencement of the present suit there was a public highway in the town of Suffield running in a westerly direction from High street in the village of Suffield to West Suffield. Prior to October, 1874, the respondent was, and ever since has been, the owner of certain land on the southerly side of and adjoining this highway, and of the soil from the southerly line of the highway to the center of the same, subject only to the easement of the public therein as a public highway. Upon that part of the land covered by the highway, there is a small spring of water which, prior to the year 1851, rose to the surface of the highway and rendered it at that place wet, soft and inconvenient for public use. Some time in that year one of the highway-surveyors of the town, who had charge of this highway, constructed a stone drain beneath the surface of the highway, which carried off the water from the spring into the ditches on the sides of the traveled path and made the highway dry and convenient for public use. This drain was continued until some time in the year 1873 or 1874, when, from the unauthorized acts of individuals and the want of proper care on the part of the town, the drain became obstructed, and by reason thereof the water of the spring rose, at times, to the

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surface of the highway, as it had risen before the drain was constructed. On the third of October, 1874, the first selectman of the town and another of the selectmen, partly for the purpose of draining the highway, but mainly for the purpose of creating a reservoir to collect the water from the spring and conveying the same from the reservoir to a watering-trough on the opposite side of the highway for public use, dug a hole from two to three feet in depth and from eighteen to twenty-four inches in diameter, in the land of the defendant covered by the highway, and walled up the same with stones and cement, and then laid a pipe beneath the surface of the highway and across the same, to the watering-trough, and by means thereof conveyed the whole of the water of the spring to the trough. The respondent by her agents the next day removed the stone and cement-work of the reservoir and filled up the excavation made for the same, but left the highway in good condition for public use.

The highway cannot be kept in good and sufficient repair unless it is drained; but the drain which was laid by the highway-surveyor in 1851, if unobstructed, and in a proper state of repair, would be sufficient to effect such drainage. The works removed by the respondent were useful only for the purpose of collecting the water of the spring, and supplying the watering-trough with water.

The respondent offered witnesses who claimed to be acquainted with the business of making and repairing roads, and who were experts in that business, and conversant with the highway in question, to testify that in their opinion the well was not necessary for the purpose of draining the highway, and was of no benefit to the highway. To the admission of this testimony the petitioners objected, on the ground that the selectmen were the sole judges of what was necessary for the proper drainage of the highway, and that their judgment could not be reviewed by this court. But the court overruled the objection and admitted the testimony.

Upon these facts the court (*Hovey, J.*,) dismissed the petition. The petitioners thereupon brought the record before this court by a motion in error.

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

1. It will be agreed that the highways of a town are under the special care of the selectmen. They are the only persons who are to decide what is necessary or desirable to keep them in proper repair and in suitable condition for public use. This being so, can any person destroy drains or other things deemed necessary by the selectmen for keeping the road in repair? And if any one does so, is the court upon the trial to decide the case upon its own views of what would be a proper mode of keeping the road in repair? Can an adjoining proprietor change the grade of a road, the depth of a gutter, a railing, or a bar across the road to turn water, and justify on the ground that it was not necessary? In *Benjamin* v. *Wheeler*, 8 Gray, 409, an action was brought against a person for digging a ditch in the highway, and he justified by showing that he did it under the direction of the proper officers of the town. The plaintiff offered evidence to prove that the ditch was unnecessary, but the court held the evidence inadmissible, and say: "The question of the necessity of the repairs must be determined by the proper officers of the town, and their judgment and action upon the subject cannot be revised by the jury in an action at law. If the construction of the water-course was with the approbation of the selectmen legally given, it cannot be left to the jury to say whether the making of such water-course was necessary for the highway." This decision was affirmed in *Benjamin* v. *Wheeler*, 15 Gray, 486, and in *Turner* v. *Dartmouth*, 13 Allen, 291. See also *Mills* v. *City of Brooklyn*, 32 N. York, 489, 495; *Yealy* v. *Fink*, 43 Penn. S. R., 212; *Hovey* v. *Mayo*, 43 Maine, 322; *Plum* v. *Morris Canal & Banking Co.*, 10 N. Jersey Eq. R., 256. There is a class of cases where necessary public work is done in such a negligent and careless manner as to do injury to others, and in such cases courts can give damages; but no such question arises here. If this question of propriety and necessity is to be decided by courts, why would not the selectmen be liable in an action of trespass for any act done on highways whenever a jury might think the acts done were not necessary? It is not pretended that this method

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was adopted with any intent to injure any one, or that in fact it did injure any one. The water collected by the drain would be discharged into a gutter somewhere and run off. Instead of having it run into the ditch at the side of the road, it was thought best to lay a pipe and discharge it at a distance. There was certainly nothing illegal or improper in this, and the selectmen were better judges of whether this was the best way of managing the drainage than a court could be. The mere fact that at the end of the drain the pipe terminated in a public watering-trough would not affect the right of the town to have the end of the drain at that spot instead of another.

2. But even if this evidence was admissible, upon the facts found the court should not have dismissed the bill. It is found that the highway at this place was full of springs, and a drain was necessary to collect and carry off the water. We submit that when water upon a highway is so properly collected and carried off, the town has a right to utilize the water so collected to fill a public watering-trough. It is well settled that supplying water is a public use; lands may be taken for it, and towns and cities may use their highways for locating water-pipes. It will hardly be claimed also that towns have not the power to provide public fountains, pumps and watering-troughs for the use of their citizens and the public generally. *Baxter* v. *Commonwealth*, 3 Penn., 253; *Tompkins* v. *Hodgson*, 4 Thomp. & Cook, 435, 437. There is not a town in the state where public watering-troughs along the roads will not be found, and the legislature has approved it, by authorizing towns to make an annual payment to any public-spirited individual who provides one at his own expense. Gen. Statutes, p. 235, sec. 26. If the town can establish a public watering-trough, why can they not fill it by using the water coming from a drain in the highway, and which would be otherwise wasted? We submit, therefore, that this use of the water was proper, and that an interference with it by the respondent by destroying it should be restrained by injunction.

A. P. Hyde, for the defendant in error.

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1. The public acquire no right in the land of a proprietor, over which a public highway is laid, except that "of passing over the land, and, as an incident of such right, that of using the soil, and the materials upon it, in a reasonable manner for the purpose of making and repairing it." *Woodruff* v. *Neal*, 28 Conn., 167. "The former proprietor still retains his exclusive right in all mines, quarries, *springs of water*, timber, and earth, for every purpose not incompatible with the public right of way." *Jackson* v. *Hathaway*, 15 Johns., 447, 453. See also Angell on Highways, §§ 301 to 304; Washb. on Easements, 228.

2. The fact that the watering-trough to which this water was diverted was *for public use*, can make no difference. It is no more a part of the duty of the town, in maintaining a highway, to construct within its limits places for watering teams passing thereon, than it is for them to construct within such limits, at suitable intervals, inns or other structures for the accommodation and refreshment of travellers on such highways.

3. The evidence offered by the respondent, and objected to by the petitioners, was properly admitted. In the petitioners' bill it is alleged as a ground for asking the interference of the court, and, as we submit, the only ground, "that the continuance of said works for drainage is necessary for the proper management of said highway." The evidence offered by the respondent was for the express purpose of disproving this allegation. If the allegation in the bill was proper, and necessary to be proved, it is clear that the respondent had a right to disprove it. But the plaintiffs insist that the selectmen of Suffield were the sole judges whether or not these works were necessary for the purposes of drainage. Even if this were so, would it not be proper for the court to enquire whether the works were constructed by the selectmen in good faith for the purposes of drainage, or for some other and improper purpose? If so, the fact that the works were not necessary for the purpose of drainage would clearly be an important fact, to enable the court to come to a proper result.

4. Selectmen and highway-surveyors are liable to have

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their conduct questioned by the court whenever they exceed their authority, or act improperly to the injury of others, although they may be doing what they judge necessary in keeping a highway in repair. *Munson* v. *Mallory*, 36 Conn., 173; *Radcliff's Exrs.* v. *Mayor, &c., of Brooklyn*, 4 Comst., 195, 199; *Anderson* v. *Van Tassel*, 53 N. York, 631.

PARDEE, J. In *Woodruff* v. *Neal*, 28 Conn., 167, STORRS, C. J., said as follows: "It is well established in this state, in conformity with the principles of the common law, that a highway is simply an easement or servitude, conferring upon the public only the right of passing over the land on which it is laid out, and as an incident of such right that of using the soil and the materials upon it in a reasonable manner for the purpose of making and repairing it. The title of the owner of the land is not extinguished, but is simply so qualified that it can only be enjoyed subject to the easement. He retains the fee and all rights of property in the land not incompatible with the public enjoyment of the right of way, and whenever the highway is abandoned or lost, the entire, exclusive and unincumbered enjoyment reverts to him. Subject to this right of the public he may take trees growing upon the land, occupy mines, sink water-courses under it, and generally has a right to every use and profit which can be derived from it consistent with the easement, and when disseized (as he may be) can maintain ejectment, and recover possession subject to the easement, and can also maintain trespass for any act done to the land not necessary for the enjoyment of the easement, which would be an actionable injury if the land was not covered by a highway." In *Jackson* v. *Hathaway*, 15 Johnson's Reports, 447, the Supreme Court of New York said as follows: "When the sovereign imposes a public right of way upon the land of an individual, the title of the former owner is not extinguished, but is so qualified that it can only be enjoyed subject to that easement. The former proprietor still retains his exclusive right in all mines, quarries, springs of water, timber and earth, for every purpose not incompatible with the public right of way."

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Upon the other hand, inasmuch as the law places upon towns the duty of constructing and repairing all necessary highways within their respective limits, it is the corresponding right of the officers representing towns in this behalf to dispose of water flowing from springs upon a public way, by such methods as will in their judgment most economically and completely establish its safety. So long as they confine themselves to this single, overruling purpose, courts will not, as a rule, attempt to control or even interfere with them in the exercise of their discretion as to the manner in which they will effect this result; but this supremacy does not extend beyond this one point. In the case before us, as between the public and the respondent, the owner of the spring, the latter is entitled to any and all uses of it which do not interfere with the public safety, do not obstruct or hinder public travel, and do not increase the public burden of making repairs. If therefore the officers can at the same cost make and keep the way equally safe and convenient, and still allow the water to flow from the spring over and upon the land of the owner of it, it is their duty so to do. The right of the owner to the use of the spring under these limitations takes precedence of the right of the officers to divert it to the lands of others, if in so doing their sole motive is to establish a public watering place. Of course, such places afford great relief to man and beast; but, commendable as is the act of establishing them, towns have no right to take private property without compensation for that purpose.

In passing upon the question of evidence made in the court below, we must distinguish an enquiry as to *purposes* from one as to *methods*. We think the court had a right to enquire as to the *purpose* for which the selectmen diverted the flowing water from the owner. If that purpose should prove to be simply drainage for public safety, the court would ordinarily refrain from enquiring as to the methods by which it had been effected; but, if the purpose should prove to be solely to supply a watering trough, then the court, leaving aside the entire question as to *methods*, might enquire whether in so doing they had destroyed any private right. It is not true that

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every act done by officers within the limits of the way is beyond the reach of judicial investigation; if it is done in the line of governmental duty, solely to secure the proper degree of safety to the traveler, they are entitled to immunity; if beyond this line, they are not necessarily. The court having found that the works removed by the respondent were useful only for the purpose of collecting the water from the spring and diverting it from her for the supply of a public watering-trough, this ceases to be a question as to when, if ever, a court will interfere with selectmen in the exercise of their discretion in repairing ways. They had ceased to act for that purpose; had ceased to provide for public safety; had become ministers to the public comfort. In this last capacity, as against this respondent, they had no power to act at all; therefore we think there is no place for a discussion as to their mode of action.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

Alfred E. Ely *vs.* Monroe Stannard.

The plaintiff having bought land of the defendant gave him in part payment his negotiable note. Subsequently, desiring to exchange the land so purchased, with a mortgage upon it, for other land belonging to one *H*, he executed a mortgage to the defendant to secure the note, and delivered it to the town clerk for the defendant's use. The defendant never in fact took it into his possession. The plaintiff then exchanged lands with *H*, the amount of the mortgage note being taken into account and being part of the consideration of his deed. The defendant afterwards transferred the note before maturity to a bonâ-fide holder. The plaintiff having paid the note requested the defendant to transfer the mortgage to him, which he refused to do. The defendant afterwards, for two hundred dollars paid him by *H*, released the mortgage to *H's* grantee, who took both *H's* deed and the release in good faith, supposing that the note was paid. In an action on the case for fraud in releasing the mortgage, it was held—that the defendant's release to *H's* grantee operated as an acceptance of the plaintiff's mortgage, that the plaintiff by paying the mortgage note became equitably entitled to the mortgage, and that the defendant by releasing it had committed a fraud on the plaintiff.

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A release deed is one of the regular modes of conveying property, and it makes no difference whether or not the releasee has an existing estate in possession.

ACTION ON THE CASE for fraud in releasing a mortgage to which the plaintiff was equitably entitled; brought to the Superior Court in Hartford County, and tried to the jury on the general issue before *Beardsley, J.*

Upon the trial it became a material question whether a certain mortgage executed by the plaintiff to the defendant, had ever been legally delivered to the latter.

The plaintiff offered evidence to prove, among other things, that, being indebted to the defendant for the purchase of the land so mortgaged by a negotiable promissory note, for the sum of $1,200, dated July 9, 1873, payable eighteen months from date, and being desirous to exchange the land, with a mortgage upon it to secure the same, for an equity of redemption owned by one Lester S. Hills, he executed the mortgage in question and delivered it to the town clerk for the use of the defendant, intending thereby to render it a valid conveyance; and that on the same day he conveyed the property so mortgaged to Hills by a quitclaim deed; that the amount of the mortgage, and the amount of the mortgages upon Hills's property so given in exchange, were taken into account by them in making the exchange, but it was agreed between them that neither should assume the payment of the other's mortgage; that afterwards the defendant, before the maturity of the note, sold it to a bonâ-fide holder for value, and that upon the note becoming due, the plaintiff was called upon to pay it, and that he afterwards, after the commencement of the present suit, but before the trial, paid the amount of the note to the holder thereof; that the plaintiff, after knowing that the note was so outstanding and unpaid, requested the defendant to assign the mortgage to him or to some third person for his benefit, to protect him upon his payment of the note, which the defendant refused to do; that afterwards Hills applied to the defendant to release the mortgage to one White, to whom Hills had contracted to sell the property; that the defendant at first refused to release it, but finally agreed to do so, and

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did in fact execute and deliver to Hills a quitclaim deed of his interest, describing it as follows: "All such right and title as I, the said Stannard, have or ought to have in or to a certain piece of land situated in said Hartford, and bounded and described in a certain mortgage deed executed by Alfred E. Ely, dated March 9th, 1874, and recorded in Hartford land records, vol. 153, page 513, hereby intending to release said mortgage;" and that Hills thereupon paid him the sum of two hundred dollars therefor; that White thereupon purchased the property of Hills in good faith, supposing that the mortgage was properly released, and not knowing that the note to secure which the same was given was then outstanding and unpaid; and that the defendant, when he so released the mortgage, knew that the note was still outstanding and unpaid.

The defendant claimed, and introduced evidence to prove, that he disclaimed the mortgage deed to himself as soon as he knew of it, and that he signed the release deed by advice of counsel, to remove a cloud from the title, after he had refused to accept the mortgage, without any particular knowledge of the contents of the release.

The plaintiff thereupon requested the court to charge the jury that if they found that the defendant, knowing that the mortgage deed had been executed, executed and delivered the release deed to Hills, he thereby accepted the mortgage, and that his conveying to a third person the interest so conveyed to him by the mortgage, constituted in law an acceptance of it; but the court charged the jury that the law required a delivery and acceptance to render a mortgage valid, but that a personal delivery to the grantee was not necessary, or a formal assent by the grantee; that if the deed was beneficial to the grantee, his assent would be presumed unless he dissented and repudiated it; and left it to the jury to say upon all the evidence in the case, whether the defendant assented to the deed or repudiated it.

The jury having returned a verdict for the defendant, the plaintiff moved for a new trial for error in the charge of the court.

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

1. The court in its charge treated the case as turning entirely upon the question of the validity of the mortgage as a deed *inter partes*, and, waiving for the present the question whether this was the proper view, we submit that the court erred in laying down the rule on this subject. The validity, or rather the existence, of a deed depends on its *delivery*, and though acceptance either express or implied is necessary, it is only because there can be no delivery without an acceptance. This delivery need not be to the grantee, it may be to any person for him; the delivery to a third person for the use of the grantee removes the title from the grantor, and as the title must be somewhere, it goes by the act into the grantee, and can be nowhere else. This principle is most clearly set forth in *Merrills* v. *Swift*, 18 Conn., 257. See also *Woodward* v. *Camp*, 22 Conn., 461. The same doctrine has been held in innumerable other cases, of which we will cite only a few. The only question here is, what is the law of this state. *Fisher* v. *Hall*, 41 N. York, 416, 423; *Everett* v. *Everett*, 48 id., 218; *Mather* v. *Corliss*, 103 Mass., 568; *Tompkins* v. *Wheeler*, 16 Pet., 106, 119; *Henrichson* v. *Hodgden*, 67 Ill., 179; *Burkholder* v. *Casad*, 47 Ind., 418; *Gould* v. *Day*, 15 Albany Law Jour., 389.

2. But if it were necessary to prove more than this, the fact that Stannard afterwards sold this mortgage to a third person for two hundred dollars, describing the mortgage deed correctly in his quitclaim, is sufficient evidence of his assent. Any act which shows that the grantee knows of the conveyance, and recognizes it as an existing deed, is sufficient, and how can he show it more strongly than by selling it to a third person? If this had been an absolute conveyance to Stannard, and he had quitclaimed it to a third person for two hundred dollars, there could not be any doubt of his assent.

3. But we submit that, besides this, the position of Stannard towards Ely was such, after he knew of the existence of the mortgage, and that the note was outstanding in a third person's hands, who had called on Ely to pay it, that he was bound at least to let it remain as it was, and his conduct in

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releasing it for a bribe was a fraud upon Ely, and a breach of his duty as trustee, for which an action will lie, irrespective of the technical question whether such a legal delivery of a deed had been made as to make it valid against third persons or attaching creditors.

G. G. Sill, contra.

1. The release deed executed by Stannard, so far from being an acceptance, showed clearly that he did not regard the mortgage as received.

2. The mortgage deed executed by Ely operating to create a cloud upon the title of the land described in it, Stannard did no more than a court of equity would compel him to do.

3. The court ought not to have charged the jury as the plaintiff requested, for the request assumed that Stannard by his quitclaim deed conveyed his interest in the premises to White. But there is a plain distinction between conveying and releasing an interest; no interest was conveyed to White. Stannard simply extinguished whatever interest he had.

4. The court properly told the jury what constituted a delivery and acceptance, and left it to them to determine whether in fact there was an acceptance.

PARK, C. J. In the recent case of *White* v. *Griffing*, (*ante*, p. 437,) we said that it was difficult to see how an assignee in bankruptcy could sell the lease of the bankrupt for a large sum, and appropriate the money for the benefit of the creditors, without accepting the assignment of the lease. The finding in that case was, that the assignee put up the lease for sale at public vendue, and that it was sold for a considerable sum of money, which the assignee received and appropriated for the benefit of the bankrupt's creditors. The question was whether, as matter of law, the assignee by so doing accepted the conveyance of the lease, and we strongly intimated that his acts amounted in law to an acceptance of the conveyance. It was said by the assignee that, in selling the lease at public vendue, he was merely experimenting to ascertain whether the lease had any value. It is said by the defendant in this

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case that in selling and releasing the mortgage title he was merely removing a cloud on the property, created by a deed, which had never been accepted, and consequently had never been delivered, for delivery includes an acceptance. These claims are equally untenable.

The defendant insists that he sold nothing, for he had nothing to sell; still he went through the form of a sale, for he took a price and for it gave a release which he knew the plaintiff would regard as a great injury to himself, while Hills showed that he considered it of great benefit to himself, by being willing to pay the sum of two hundred dollars to induce him to give it, and he probably would have paid much more rather than have failed to get the release. By the release the defendant admits in terms that he parted with a mortgage title. After particularly describing the mortgage deed, in his deed to White, he says, "hereby intending to release said mortgage." If the mortgage had never been accepted by him, how did it happen that he had a mortgage to release? He says he releases the mortgage described in his deed, which could not be true unless he had accepted the deed.

We think the court below erred in not complying with the plaintiff's request, to charge the jury that if they should find that the defendant, knowing that the mortgage deed had been executed, executed the release, he thereby accepted the mortgage; and that his conveying to a third person the interest so conveyed to him by the mortgage constituted in law an acceptance of it. The defendant criticises this request, because it assumes a conveyance of the mortgage title by the defendant, and insists that there is a clear distinction between conveying and releasing property to a third person. We are unable to see the force of this distinction, so far as it applies to the case in hand. A quit-claim, or release deed, is one of the regular modes of conveying property known to the law, and it is almost the only mode in practice, where a party sells property and does not wish to warrant the title. Dr. Webster says in his dictionary, "In law a release or deed of release is a conveyance of a man's right in lands or tenements to another who has some estate in possession." This is a strictly

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technical definition; but by long established practice it makes no difference whether the releasee has an existing estate in possession or not. The release will convey to him, in any circumstances, whatever interest the releasor has in the property. But in the present case the releasee had an interest in the property in possession, namely, the equity of redemption.

We see no substantial distinction between the case under consideration and that of *White* v. *Griffing;* and for the reasons there given, and upon the authorities there cited, we think there was error in the charge of the court, and a new trial is advised.

In this opinion the other judges concurred.

GEORGE L. ROCKWELL, TRUSTEE, *vs.* MERLIN F. CLARK.

Under the statute (Gen. Statutes, tit. 19, ch. 5, sec. 11,) which provides that "when any married woman shall carry on any business, and any right of action shall accrue to her therefrom, she *may* sue upon the same as if she were unmarried," a suit can be brought only in her name.

ASSUMPSIT, brought to the City Court of the city of Hartford, and tried to the court before *Sumner, J.* Facts found and judgment rendered for the plaintiff. Motion in error by the defendant. The case is sufficiently stated in the opinion.

T. E. Steele, for the plaintiff in error.

H. O'Flaherty, for the defendant in error.

PARDEE, J. In July, 1875, Oscar Holcomb and Julia H. Rockwell, then and now the wife of the plaintiff, formed a co-partnership at Hartford under the name of Holcomb & Rockwell, for the purpose of engaging in the slate-roofing business. The said Julia furnished the capital in money and slate, and was to have two-thirds of the profits; Holcomb

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was to give his services. In October following the partnership was dissolved, and the said Julia purchased Holcomb's interest therein, and continued the business alone some little time thereafter for the purpose of completing unfinished contracts, although she substantially abandoned slate-roofing as a business after the retirement of Holcomb.

In November, 1875, she sold to the defendant all of her stock of slate, her tools and other materials used in the business which she then had on hand, for the sum of two hundred dollars and upwards, he knowing that the articles were her property, and promising to pay her therefor. Since this sale she has not engaged in any business.

The plaintiff and said Julia were married in 1863, and she acquired said property since the marriage. This suit was brought by the plaintiff as trustee of the personal property of his wife to recover the value of the stock and tools sold to the defendant. The defendant claimed that the suit should have been brought either in the name of the said Julia alone or by herself and husband jointly. The court did not so decide, and rendered judgment for the plaintiff. The defendant brings the case before us by a motion in error.

The statute, title 14, chapter 2d, section 3d, page 186, of the Revision of 1875, provides that all of the personal property of any woman married since the 22d day of June, 1849, and all the personal property thereafter acquired by a married woman, and the avails of any such property if sold, shall vest in the husband in trust for the following uses:—to receive and enjoy the income thereof during his life, subject to the duty of expending from such income so much as may be necessary for the support of his wife during her life and of her children during their minority; and to apply any part of the principal thereof, which may be necessary for the support of the wife or otherwise, with her written assent. Hereby the wife's property is placed under a statutory protectorate; is shielded from her husband's debts and devoted primarily to the support of herself and her children; the legal title is vested in him in a fiduciary capacity, and in that capacity he can institute legal proceedings for its protection.

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If however the wife, with the husband's consent, becomes a sole trader, the statutory protection is withdrawn from herself as to so much of her property as she invests and uses in such business. To meet the necessities of this change the legislature has declared in what manner payment of debts which may accrue to her in her new capacity shall be enforced. Title 19, chap. 5, sec. 11, page 417, of the Revision of 1875, provides as follows:—"When a married woman shall carry on any business, and any right of action shall accrue to her therefrom, she may sue upon the same as if she were unmarried."

The plaintiff insists that the use of the word "may" therein makes the statute permissive only, and that there is therefore no suspension of the right of the husband to institute suits in his own name as trustee for the enforcement of such rights. But we think that the legislature intended to establish a well defined line of separation between money invested by the wife with the husband's consent in her sole business and money retained and invested by him as statutory trustee; and between the forms of action respectively applicable to the collection and protection of funds under these different conditions; that it confers a right to sue which did not exist before; not in addition to the right of the trustee, but in exclusion of it; and that it is a statute for simplification. The wife, who in the progress of her business receives a note, can convert it into money for the continuation thereof; can sell, assign, transfer and give good title to the same without the concurrence of the husband; and as in his capacity as trustee he has no present right to or control over the note or the avails thereof, in that capacity he cannot bring suit upon it.

There is error in the judgment complained of.

In this opinion the other judges concurred; except LOOMIS and GRANGER, JS., who did not sit.

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STATE *vs.* ANTON BANTLEY.

If one person intentionally inflicts upon another a wound calculated to destroy life, and death ensues therefrom within a year and a day, the offence is murder or manslaughter, as the case may be; and he is none the less responsible for the result although it may appear that the deceased might have recovered if he had taken proper care of himself, or that unskillful or improper treatment aggravated the wound and contributed to his death.

A charge of the court, claimed to be erroneous, is to be considered, not in the abstract, but with reference to the actual facts of the case.

INFORMATION for manslaughter; brought to the Superior Court in Hartford County, and tried to the jury, on the plea of not guilty, before *Hitchcock, J.* Verdict guilty, and motion for a new trial for error in the charge of the court. The case is fully stated in the opinion.

G. G. Sill and *T. E. Steele*, in support of the motion.

W. Hamersley, State's Attorney, contra.

PARDEE, J. On the night of June 11th, 1876, the accused inflicted a severe gun-shot wound upon the arm of one March, between the elbow and shoulder. March died eleven days thereafter of lock-jaw. The prosecution claimed that death resulted from the wound; the accused claimed that it resulted from the treatment of the case by the attending physicians. The wound was dressed in the first instance by one surgeon, afterwards to the time of death by another; these differed radically as to the manner in which the case should have been treated.

The counsel for the accused claimed, and asked the court to charge the jury, that if they should find that the death of March was the result or consequence of willful mismanagement or gross carelessness on the part of the attending surgeons, they could not find the accused guilty of manslaughter, as charged in the information. The court charged the jury, that unless they should find that March died from a wound inflicted on him by the accused, as charged in the information,

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they could not convict him of manslaughter; but that if they should find that the accused willfully, and without justifiable cause, inflicted on March a dangerous wound, from which death would be likely to ensue, and if they should find also that his death did in fact ensue from and was caused by the wound, and not from any other cause, carelessness and mismanagement of whatever character on the part of the attending surgeons would be immaterial, and the treatment of the case by them, whatever it may have been, could not avail the accused as a defense. The jury having returned a verdict of guilty, the accused moved for a new trial for error in the charge.

As to the law applicable to this case, Roscoe says: "The law on this point is laid down at some length by Lord Hale. If, he says, a man give another a stroke, which, it may be, is not in itself so mortal but that with good care he might be cured, yet if he dies within the year and day, it is a homicide or murder as the case is, and so it has been always ruled. But if the wound be not mortal, but with ill application by the party or those about him of unwholesome salves or medicines the party dies, if it clearly appears that the medicine and not the wound was the cause of the death, it seems it is not homicide; but then it must clearly and certainly appear to be so. But if a man receive a wound which is not in itself mortal, but for want of helpful applications or neglect it turn to a gangrene or a fever, and the gangrene or fever be the immediate cause of the death, yet this is murder or manslaughter in him that gave the stroke or wound; for that wound, though it was not the immediate cause of the death, yet if it were the mediate cause, and the fever or gangrene the immediate cause, the wound was the cause of the gangrene or fever, and so consequently *causa causans*." Roscoe's Criminal Evidence, 7th ed., 717; 1 Hale P. C., 428. In *Rex* v. *Rews*, Kelynge, 26, it was holden that neglect or disorder in the person who receives the wound will not excuse the person who gave it; that if one gives wounds to another who neglects the care of them and is disorderly, and does not keep that rule which a wounded person should do, if he die it is

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murder or manslaughter according to the circumstances of the case, because if the wounds had not been given the man had not died. In *Regina* v. *Holland*, 2 Mood. & Rob., 351, the deceased had been severely cut with an iron instrument across one of his fingers, and had refused to have it amputated; at the end of a fortnight lock-jaw came on and the finger was then amputated, but too late, and the lock-jaw ultimately caused death. The surgeon expressed the opinion that early amputation would probably have saved his life. MAULE, J., held that a party inflicting a wound which ultimately becomes the cause of death is guilty of murder, though life might have been preserved if the deceased had not refused to submit to a surgical operation. In *Commonwealth* v. *Pike*, 3 Cush., 181, it was held that where a surgical operation is performed in a proper manner and under circumstances which render it necessary in the opinion of competent surgeons, upon one who has received a wound apparently mortal, and such operation is ineffectual to afford relief and save the life of the patient, or is itself the immediate cause of the death, the party inflicting the wound will nevertheless be responsible for the consequences. Greenleaf says (Greenleaf's Ev., 3d Vol., sec. 139, 5th ed.,) "If death ensues from a wound given in malice, but not in its nature mortal, but which being neglected or mismanaged the party died, this will not excuse the prisoner who gave it; but he will be held guilty of the murder unless he can make it clearly and certainly appear that the maltreatment of the wound or the medicines administered to the patient or his own misconduct, and not the wound itself, was the sole cause of his death, for if the wound had not been given the party had not died." In *Rex* v. *Johnson*, 1 Lewin C. C., 164, the deceased died from a blow received in a fight with the prisoner; a surgeon expressed an opinion that a blow on the stomach, in the state in which the deceased was, arising from passion and intoxication, was calculated to occasion death, but not so if the party had been sober. HALLOCK, B., directed an acquittal, observing that where the death was occasioned partly by a blow and partly by a predisposing circumstance, it was impossible to apportion the operation of the

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several causes and to say with certainty that the death was immediately occasioned by any one of them in particular. Of this case Roscoe remarks that it may be doubted how far this ruling of the learned judge was correct. Roscoe's Crim. Ev., 7th ed., 718. In *Rex* v. *Martin*, 5 Car. & P., 130, where the deceased, at the time when the blow was given, was in an infirm state of health, PARKE, J., said to the jury: "It is said that the deceased was in a bad state of health, but that is perfectly immaterial, as, if the prisoner was so unfortunate as to accelerate her death, he must answer for it." In *Commonwealth* v. *Hackett*, 2 Allen, 136, it was held that one who has wilfully inflicted upon another a dangerous wound, with a deadly weapon, from which death ensued, is guilty of murder or manslaughter as the evidence may prove, although through want of due care or skill, the improper treatment of the wound by surgeons may have contributed to the death.

Upon these authorities we may state the rule as follows: If one person inflicts upon another a dangerous wound, one that is calculated to endanger and destroy life, and death ensues therefrom within a year and a day, it is sufficient proof of the offence either of manslaughter or murder as the case may be; and he is none the less responsible for the result although it may appear that the deceased might have recovered if he had taken proper care of himself, or that unskillful or improper treatment aggravated the wound and contributed to his death.

There is no such defect in the law as that the person who intentionally inflicts a wound calculated to destroy life, and from which death ensues, can throw responsibility for the act upon either the carelessness or the ignorance of his victim; or shield himself behind the doubt which disagreeing doctors may raise as to the treatment proper for the case.

Indeed counsel for the defendant do not really deny the force of the rule. Their complaint is rather in the nature of a verbal criticism of the charge. The judge said to the jury that if the death of March resulted from the wound and from no other cause, carelessness and mismanagement of whatever character on the part of the attending surgeons would be

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immaterial. It is to be presumed in favor of a charge that it refers to matters concerning which witnesses have testified and to points concerning which counsel have presented arguments; and it is not to be presumed that it includes within its scope all possibilities. From this record we cannot perceive that any witness suggested even that the attending surgeons caused the death of March by an intentional misapplication or withholding of remedies, or that counsel in argument intimated any such thing. The motion states that the two doctors differed radically regarding the treatment proper for the case; the claim of each as to the other was that he had erred through ignorance, not by criminal intention; and when the judge used the expression complained of in this case, we are to presume that he referred, and that the jury understood him to refer, to that kind of mismanagement alone of which witnesses had testified and concerning which counsel had argued in their hearing. With this limitation the defendant has no occasion for complaint.

A new trial is not advised.

In this opinion the other judges concurred.

JOSIAH S. POTTER *vs.* BARTON M. DOUGLASS.

Where a debt is unliquidated the acceptance by the creditor of money tendered by the debtor as "in full of all account," precludes the creditor from recovering more.

And this although the creditor declares at the time that he receives it only to apply on the debt, so long as the debtor does not assent to his so receiving it.

ASSUMPSIT for work done; brought to the Court of Common Pleas in Hartford County. The following facts were found by a committee.

The plaintiff in May, 1873, moved a building for the defendant, with no agreement as to the price to be paid him, but his services were worth $325. The defendant had an account

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against the plaintiff of $156.36 for certain ferriages of the plaintiff and his teams and men. In addition to this the defendant paid him $100 on account, prior to December 11th, 1874, and on that day paid him $45 more, under the following circumstances. The plaintiff and defendant met at the office of an attorney on that day, and the defendant then tendered the plaintiff $45, saying to the plaintiff that he tendered it in full of all debts and accounts. The plaintiff at first refused to receive the money, upon the ground that it was not enough, and so stated to the defendant, but the attorney said to him in the presence and hearing of the defendant, that it was always safe to receive money upon account, and thereupon the plaintiff received the money, intending to apply it on account, and signed the following receipt: "Rec'd, East Windsor, December 11, 1874, of B. M. Douglass, forty-five dollars to apply on account. J. S. POTTER." The plaintiff handed the receipt to the defendant, but he refused to receive it because it was a receipt on account, and went away leaving the receipt in the office of the attorney. The committee found the sum of $23.64 due the plaintiff unless the acceptance of the $45 barred him from recovering anything more, in which case it was found that nothing was due the plaintiff.

The defendant claimed in court, upon the acceptance of the report of the committee, that the payment and acceptance of the $45 was, upon the facts found, an accord and satisfaction between the parties and a payment in full of the plaintiff's claim, and that the defendant was entitled to judgment. The court, (*McManus, J.*,) overruled the claim and rendered judgment for the plaintiff to recover the sum of $23.64 and interest. The defendant brought the record before this court by a motion in error, assigning as error this ruling of the court.

J. W. Johnson, for the plaintiff in error, cited *Donohue* v. *Woodbury*, 6 Cush., 150; *Reed* v. *Boardman*, 20 Pick., 441; *McGlynn* v. *Billings*, 16 Verm., 330; *McDaniels* v. *Lapham*, 21 id., 235; *Cole* v. *Champlain Transportation Co.*, 26 id., 87; *McDaniels* v. *Bank of Rutland*, 29 id., 230; *Preston* v. *Grant*, 34 id., 201; *Towsley* v. *Healey*, 39 id., 522; *Jennings*

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v. *Major*, 8 Car. & P., 61; *Gordon* v. *Cox*, id., 172; *Sutton* v. *Hawkins*, id., 259; *Hastings* v. *Thorley*, id., 573; *Wilkinson* v. *Byers*, 1 Adol. & El., 113.

E. Johnson and *S. O. Prentice*, for the defendant in error. It is essential to an accord and satisfaction that there should be both an accord and a satisfaction. There must be an offer upon the one side and an acceptance upon the other, both of which must be full, complete, and executed. 1 Swift Dig., 299; 2 Parsons on Cont., 682; *Clark* v. *Dinsmore*, 5 N. Hamp., 136. An accord and satisfaction is a new agreement or contract between the parties, and it must have all the essentials and requisites of a contract. It is in the nature of a compromise, whereby, by mutual assent, a different obligation is substituted, or a different performance undertaken or had. Nothing results until there is this mutual assent, and this assent is determined and ascertained as in the case of any other contract. The same rules of interpretation and certainty are applicable. 1 Swift Dig., 299; 2 Parsons on Cont., 681; *Miller* v. *Holden*, 18 Verm., 340. To constitute an agreement or contract, there must be an assent by both parties to the same thing in the same sense. This assent must be unconditional, unequivocal, and the acceptance must be without variance from the proposal. 1 Parsons on Cont., 475; *Hartford & N. Haven R. R. Co.* v. *Jackson*, 24 Conn., 514. If an offer is accepted with modifications, it amounts to a rejection. 1 Parsons Cont., 476. To constitute an acceptance there must be an act of the will in the party receiving or accepting. *Hardman* v. *Bellhouse*, 9 Mees. & W., 596, 600; *Hartford & N. Haven R. R. Co.* v. *Jackson*, 24 Conn., 518. The question then arises whether, judged by these universal tests, the facts disclose an agreement, express or implied, on the part of the plaintiff to receive the $45 in full satisfaction and liquidation of his claim. 1st. There was no *express* assent. 2d. There was no *implied* assent. The statements and conduct of the plaintiff throughout show, and at the time must have shown the defendant, that nothing was farther from his purpose than to accept the amount in full. The committee

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finds as a fact that such was not his intent. The law can imply nothing which contradicts the statements and conduct of the party at the time, especially when these statements and conduct were known to the other party in interest. The law raises implications only in the absence of that which is express. 3d. The modification of the defendant's offer by the plaintiff operated as a rejection of the offer as made. The minds of the parties therefore never met upon any terms, and there could have been no agreement, assent or satisfaction, either in fact or in law. The $45 remained in the plaintiff's hands subject to the call of the defendant, or, if not called for, to apply in reduction of the plaintiff's claim *pro tanto*. In none of the books, so far as we are aware, can a case be found which goes to the extreme asked by the defendant in this case. The Vermont decisions stand alone in the ultra position they have taken. But there is a wide distinction between even those cases and the claim here. The facts upon which the Vermont cases have found an accord and satisfaction, are widely different from the facts before us, and the decisions are so qualified as to be altogether inapplicable to the present case. This becomes apparent when we compare certain other cases in the same state, in which, upon facts almost identical with the present, the same court has held that there was no accord and satisfaction. *Miller* v. *Holden*, 18 Verm., 340; *Gassett* v. *Andover*, 21 id., 342; *Preston* v. *Grant*, 34 id., 201. In our own state there have been no decisions which give any countenance to the claims of the defendant. On the contrary the whole tenor of our law is opposed to them. It has always been held and considered safe to receive money on account. 1 Swift Dig., 291.

PARK, C. J. There is a material difference between receiving money duly tendered, and receiving it when offered in full of an unliquidated claim. In the one case there is no condition attending the tender, and in the other there is a condition, which the party receiving the money must comply with, or he has no right to receive it. In the one case the party receiving the money may sue for more, if more is due

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him, but in the other case, the offer being in full of the claim if the money is received, the law regards it as in full, and the party cannot recover more, even if more is due him. In the one case it is always safe to receive the money, for no hazard is incurred in doing so, but it is not so in the other case, if the party taking the money claims a greater amount due him. In the case of *Gordon* v. *Cox*, 7 Car. & P., 172, Coleridge, J., in summing up said to the jury, "With respect to the question of tender, I should tell you that a party may do one of two things—he may resist a claim altogether, or tender a less sum; but if he take the latter course he must not encumber his tender with the condition that the other party shall accept the money in full discharge of the debt, because that is putting the person who receives the money under the disadvantage of never being able to claim more, even if he is entitled to a larger sum." In the case of *Sutton* v. *Hawkins*, 8 Car. & P., 259, Alderson, B., held that if a person offers a sum "as all that is due," he does not make a good tender. A party by accepting a sum properly tendered does not thereby compromise his future claim to a larger sum, which he would do, if he took a sum offered "as all that is due." In the case of *Hastings* v. *Thorley*, 8 Car. & P., 573, where a tender was made in these words, "I tender you £21 in payment of the half year's rent due at Lady-day last," the court said, "We are of the opinion that this was not a lawful tender, because, if the party had received this money, he would, by receiving it, have admitted that that sum was the amount of a half year's rent." There are several cases in Vermont to the same effect.

It appears in this case that the parties were in controversy in regard to the amount due the plaintiff from the defendant, growing out of the removal of a certain building for the defendant. There was no special agreement between the parties in relation to the amount the plaintiff was to receive for his services, and he was therefore entitled to receive what they were reasonably worth. In this state of things there was of course room for disagreement as to what was justly due the plaintiff, and the parties in fact disagreed with regard

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to it. The defendant, after paying the plaintiff something on account, and applying a debt due him from the plaintiff in part satisfaction of his claim, offered the plaintiff the sum of forty-five dollars in full of his account. The plaintiff at first refused to receive the money, on the ground that it was not enough, but after being advised by a person present that it was always safe to receive money on account, received it, intending to apply it on his account, and wrote a receipt to that effect and offered it to the defendant. The defendant refused to receive it because it stated that the money was received on account. The plaintiff however kept the money, and the parties separated.

There seems to be little room for question as to what the law is upon these facts. The money was offered by the defendant in full of the plaintiff's claim, and there is nothing whatever in the finding tending to show that he consented to its being received on account. Indeed his last act at the interview, as stated in the finding, was a refusal to accept the receipt written by the plaintiff, because it stated that the money was received on account. It would not be claimed that the plaintiff could compel the defendant to accept such a receipt and acquiesce in his keeping the money on account, and it is equally clear that he could not keep the money on account without the defendant's consent. The plaintiff kept the money, and he kept it when offered in full of his claim. It must therefore be regarded as taken in full, notwithstanding any mental reservation to the contrary, or even express declaration, on the part of the defendant. He did not offer to return the money at the time, nor has he offered to return it since. Doubtless the object which the defendant had in view in making the offer, was to avoid the present controversy. He would rather buy his peace by paying a sum of money that he did not owe, than to defeat the plaintiff at the end of an expensive and irritating lawsuit. At the time the offer was made it was wholly uncertain what the balance of the account would be, inasmuch as the claim of the plaintiff was unliquidated. Doubtless the probabilities were as favorable to the defendant for a balance in his favor as they were

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to the plaintiff. But however this may be, the inquiry is, how did the plaintiff receive the money? He has had it a number of years. Did he receive it on account, in spite of the defendant's claim that he should take it in full? This will hardly be claimed. But he has appropriated it to his own use, as his own money, and how could this lawfully be done when there are but two ways in which the money could become his—one by receiving it on account with the defendant's consent, and the other by receiving it in full satisfaction of his claim? It follows, therefore, if the money was not received on account, that it was received upon the condition attending the offer, and the plaintiff is therefore debarred from recovering the remainder of his claim.

There is manifest error in the judgment complained of.

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

[The cases of this term will be continued in the next volume.]

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SUPPLEMENT.

DARIUS H. JOHNSON AND ANOTHER *vs.* THREE HUNDRED AND EIGHTEEN TONS OF COAL.

A railroad company, doing a large business in transporting coal from a seaport to the interior, and owning docks and hoisting apparatus, the coal being shoveled into tubs which were swung over the freight cars by a derrick, adopted a rule that masters of vessels should employ as shovelers on board their vessels only such men as the railroad company should provide, the masters paying their wages at a fixed rate, which was intended to be and generally was the market price for such work. This rule was adopted for the purpose of securing steady and reliable shovelers and a greater despatch of the business, and was one of general convenience, except that masters of vessels were able at times to hire men for less than the prescribed wages; but the rule was not made necessary by the state of the coal traffic at that port. Held that the railroad company had no right to make and enforce the rule.

The duty of the master of the vessel was to deliver the coal to the railroad company with no unnecessary delay, but so long as he did this he had a right to employ such men as he pleased to do the work.

Whether, if a traffic through connecting lines should become so large as to require, for its reasonable despatch, such a rule as this, the rule might not become a proper one: *Quære.*

And held that the rule in this case was not to be regarded upon the facts as a rule made by the railroad company as a wharf-owner.

LIBEL of a quantity of coal, in the United States District Court for the District of Connecticut, heard before *Shipman, J.*, at the February term, 1877. The case is fully stated in the opinion.

S. E. Baldwin and *W. K. Townsend*, for the libellants.

J. T. Platt, for the claimants.

SHIPMAN, J. The New Haven and Northampton Company is a railroad corporation duly incorporated by the legislature of the state of Connecticut, and owning and operating a line of railroad for the transportation of persons and goods from New Haven, Connecticut, to Northampton, Massachusetts.

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Said corporation is a common carrier, and a considerable portion of its regular business is the transportation of coal from New Haven to the various places upon the line of its railroad. This coal is brought from different coal ports to the port of New Haven in coal barges or in coal vessels, and is delivered to said railroad company upon its dock in said city, commonly called the Canal Dock. About 140,000 tons of coal are annually received at this dock. By the universal custom of the port of New Haven, which custom was known, understood and assented to by the libellants, and in conformity with which custom the contract evidenced by the bill of lading hereafter recited was entered into by them, coal consigned to a railroad company, or to consignees upon the line of a railroad company, and which coal is to be transported by the railroad company as an intermediate carrier, must be delivered to said company in its coal cars, unless some other place of delivery is expressed in the bill of lading. The said New Haven and Northampton Company, for the convenient, speedy and economical delivery of said coal, has erected upon the Canal Dock derricks, furnished with buckets or tubs, which derricks and buckets are operated by steam power. The buckets being lowered upon the deck of a coal barge lying alongside of the dock are filled with coal by shovelers upon the vessel, who are paid by the owners of the barge, and the buckets are moved by steam power over the coal car and the contents are dumped into the car. For the use of this machinery and these appliances the railroad company receives ten cents per ton from the barge owner. This method of delivery is the ordinary one, and is the method which the railroad company has provided both for its own accommodation and for that of the barge owners. In the present condition of the wharf, which is traversed on one side with railroad tracks, which are being occupied with cars and engines, the only practicable method of delivery is by the use of the derricks, and the only practicable place from which delivery can be made is under the derricks. The duty of the shovelers is simply to fill the buckets from the vessel. Prior to September 4th, 1871, the shovelers were always selected by the

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captains of the barges, and were paid directly by them. On that day said railroad company established the following rule, printed copies of which were posted conspicuously upon the wharf.

"NEW HAVEN AND NORTHAMPTON COMPANY.

Special Notice.

"All coal vessels discharging at the dock of the New Haven and Northampton Company will be under control of the dock master from time of arrival till discharged, and he will furnish men to discharge their cargoes.

CHAS. N. YEOMANS, *Vice-Prest. & Supt.*
M. C. PARKER, *Gen. Freight Agt.*"

Under this notice the railroad company has claimed the exclusive right to furnish at the regular price shovelers to discharge coal cargoes, and to refuse to receive coal unless these shovelers, so furnished at such regular price, were employed by the barge captains; and if this latter rule is not embraced in the notice, there has been such a rule in addition to the notice well understood by the owners of barges generally and by the libellants. The libellants have known that the railroad company would not allow coal to be discharged at their wharf except by shovelers whom they selected and furnished to the captains.

The company has derived no pecuniary benefit from furnishing the shovelers, who were paid nothing except for shoveling, and who performed no service for the company. They were paid from September 4th, 1871, to the date hereafter mentioned, uniformly ten cents per ton, which sum was paid by the captains of the barges to the dock master with the amount of the bill for hoisting and dumping, and by him paid to the shovelers. This rule was adopted by the company because they deemed its adoption to be a convenience and benefit to the freighting public. Previous to the time of its adoption a strike had occurred among the shovelers, and delays had occurred arising from the shovelers absenting themselves, or deserting after they had been hired. Since the adoption of the rule delivery of coal has been more rapidly

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conducted, and fewer delays have occurred. The consignees of coal deem the rule a reasonable one. From September 4th, 1871, until a short time prior to April 22d, 1876, the uniform price for shoveling in New Haven had been ten cents per ton. In the spring of that year this price began to break, and coal was shoveled at other wharves at eight cents per ton and good shovelers could easily be obtained at that price. The general and customary price in New Haven had not however then dropped to eight cents, and had not been lowered at the Canal Dock. The officers of the railroad company were not aware of this breakage in the market. The Derby Railroad Company has a similar rule. The New York, New Haven and Hartford Railroad Company, which receives about 250,000 tons of coal annually at its wharf, does not have such a rule. All the companies have similar facilities for hoisting and dumping, for the use of which compensation is paid by the barge owners. No question is made in regard to the reasonableness of requiring this compensation.

On April 19th, 1876, the libellants, who are the owners of the barge Joseph Wilkins, received on board said boat at Brooklyn, N. Y., 318½ tons of coal for delivery to the Glasgow Company at the Canal Dock at New Haven. The agreed rate of freight was sixty cents per ton. The Glasgow Company is a manufacturing corporation at South Hadley Falls in Massachusetts, a place upon the line of said railroad. Said coal was to be delivered to said railroad company as an intermediate carrier, and was by said company to be there carried and delivered to the owners. A bill of lading in the usual form was signed by the captain of the Wilkins.

The libellants were aware of said rule of the railroad company in regard to shovelers, and were also aware that shoveling could be hired at eight cents per ton. Said barge arrived at the Canal Dock on April 22d, 1876, and the agent of the libellants informed the railroad company of its arrival, and his readiness to deliver the coal. He also said that he should employ his own shovelers unless the railroad company would furnish laborers at eight cents per ton. He was willing to employ the shovelers whom the company might furnish if

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they would furnish at eight cents. The boat was placed under the derrick designated by the company. The libellants' agent hired his shovelers at eight cents, and was ready and offered to enter upon the discharge and delivery of the coal into the coal cars of the company upon its wharf. The company refused to put on steam, or to receive the coal at that place, unless the barge employed its shovelers at ten cents per ton. The barge was removed to another point, so as to accommodate an incoming barge, and after various interviews between the libellants' agent and one of the libellants, with the proper officers of the company, and a delay until May 1, 1876, the stipulation mentioned in the 12th article of the libel and the 12th article of the answer was entered into, and the vessel was discharged on May 2d, 1876. Five days are allowed for discharging a three hundred ton coal vessel in New Haven. The ordinary demurrage for coal vessels is six cents per ton. The said rule of the company is an unnecessary one in the present condition of the coal traffic in the port of New Haven.

I find that the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 11th and 12th articles of said libel, and the 5th and 12th articles of the answer are true. The amount of freight upon said coal, less the amount which was paid, is $171.55.

In the above finding I have omitted to enter into the details of various conversations between said parties, or the details in regard to the removal of the barge from one point to another, believing the same not to be necessary to the decision of the point in issue between the parties, which is the validity and reasonableness of the rule of the railroad company, which requires that coal should be unloaded from vessels lying at its wharf by shovelers selected and furnished by the company at the ordinary price which is paid for the same service at other wharves in the harbor. If the rule is valid and reasonable, there was no delivery of the coal. If the rule is invalid or unreasonable, there was a delivery, or its equivalent, an offer and tender of delivery to the persons entitled to receive the coal at the usual and reasonable time and place and in the reasonable manner of delivery, and a refusal to accept on the part of the railroad company. In the latter event the con-

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tract of affreightment was complied with by the libellants and freight was earned.

No question was made as to the liability of the defendants, under the bill of lading, for freight, in case the railroad company improperly refused to receive the coal. The bill of lading required delivery to the defendants at the Canal Dock.

It is admitted that the company upon notification that the coal was ready to be discharged, replied that the cargo might be forthwith discharged, and would be received by it for the defendants.

The railroad company is not merely an owner of a private wharf, having restricted duties to perform towards the public. Such a wharf owner may properly construct his wharf for particular kinds of business, and may make rules to limit and to restrict the manner in which his property shall be used, (*Croncher* v. *Wilder*, 98 Mass., 822,) but the railroad company is a common carrier, and its wharf, occupied by railroad tracks, is the place provided by itself for the reception of goods which must be received and transported in order to comply with its public obligations. The coal was to be received from the vessel by the railroad company as the carrier next in line, and thence carried to its place of destination. The question which is at issue between the parties depends upon the power of a common carrier to establish rules which shall prescribe by what particular persons goods shall be delivered to him for transportation. "Common carriers undertake generally, and not as a casual occupation, and for all people indifferently, to convey goods and deliver them at a place appointed, for hire as a business, and with or without special agreement as to price. * * * As they hold themselves out to the world as common carriers for a reasonable compensation, they assume to do and are bound to do what is required of them in the course of their employment, if they have the requisite convenience to carry, and are offered a reasonable or customary price; and if they refuse without some just ground they are liable to an action." 2 Kent's Com., 599. A common carrier is under an obligation to accept, within reasonable limits, ordinary goods which may be tendered to

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him for carriage at reasonable times, for which he has accommodation. *Crouch* v. *L. & N. W. Railway Co.*, 14 C. B., 255. The carrier cannot generally discriminate between persons who tender freight, and exclude a particular class of customers. The railroad company could not establish the rule that it would receive coal only from certain barge owners, or from a particular class of barge captains. It carries "for all people indifferently." But, while admitting this duty, the company has declared that for the convenience of the public, and in order to transport coal more expeditiously, and to avoid delays, it will receive such coal only from barges at its wharf as shall be delivered through the agency of laborers selected by the company. This rule is a restriction upon its common law obligation. The carrier on its part is bound to receive goods from all persons alike. The duty and the labor of delivery to the carrier is imposed upon the barge owner who pays for the necessary labor. The service, so far as the shoveling is concerned, is performed not upon the property of the railroad company, but upon the deck of the vessel. The company is virtually saying to the barge owner, You shall employ upon your own property, in the service which you are bound to render, and for which you must pay, only the laborers whom we designate, and though our general duty is to receive all ordinary goods delivered at reasonable times, we will receive only those goods which may be handled by persons of our selection. The law relating to carriers has not yet permitted them to impose such limitations upon the reception or acceptance of goods. The carrier may properly impose reasonable restrictions in regard to the persons by whom he shall deliver goods to the consignee or the carrier next in line. The delivery of goods is the duty of the carrier for which he is responsible, and should be in his own control. *Beadell* v. *Eastern Counties Railway Co.*, 2 C. B., (N. S.,) 509. It would not be contended that the railroad company could designate the crew upon the barge, or could select the barge captains, and I am of opinion that it has no more authority over the selection of the other employees of the barge owners.

The fact that the barge owners are using for a compensation

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the derricks and tubs of the railroad company is not material. The berths under the derricks have been designated by the company as proper places where coal is to be received, and under reasonable circumstances as to time, and freedom from interference with prior occupants, the incoming barges properly occupy such positions. Delivery is impracticable at the place designated by the company for delivery, without the use of the railroad company's machinery.

It is true that under this rule the delivery of coal into the cars of the railroad company has been more expeditiously performed and has been attended with fewer delays than formerly, and that the rule has been a convenience to the consignees, but the convenience of the practice is not of itself an adequate reason for compelling its enforcement, if it interferes with the legal rights of others. I am not prepared to say that, for the orderly management of an extensive through freighting business by means of connecting lines, and for the systematic and efficient transportation of immense quantities of goods, it may not hereafter be found a necessity that one or the other of the connecting lines shall be furnished with the power which is now sought by the railroad company, but in the present condition of the coal traffic at the port of New Haven this necessity does not exist. The power is a convenience to the railroad company; it is not a necessity for the transaction of business.

It is not necessary to consider the inconvenience which may flow from the rule, but the case discloses one practical inconvenience which may arise. The rule pre-supposes that the same price is to be charged by the employees furnished by the railroad company which is generally paid by others for the same service. When prices are unvarying no serious trouble results. There is no alternative however for the barge owners but to pay the price which the railroad company declares to be the general price, or else submit to a refusal on the part of the railroad company to accept the coal. The barge captain may be able to obtain the service at a reduced rate, as he could have done in this case, but he must pay his own employees the regular tariff which the company has established, and

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then have the question of rates determined by litigation. The result would be that annoying litigation or vexatious altercations would ensue. If the barge owners are to make the payment they should have an opportunity to make their own contracts, and to take advantage of changes in the price of labor.

As a matter of law it is held that the rule is invalid, and that a valid delivery was made of the coal, whereby freight was earned in accordance with the terms of the contract. "Damages in the nature of demurrage are recoverable for detention beyond a reasonable time, in unloading only, and where there is no express stipulation to pay demurrage. *Worden* v. *Bemis*, 32 Conn., 268.

The libellants are entitled to a decree for the freight at the rate mentioned in the bill of lading, less $19.55 the amount paid, to wit, the sum of $171.55, and for damages in the nature of demurrage for a detention for six days, being $114.66.

The case was appealed by the railroad company to the Circuit Court of the United States, and was heard before *Blatchford, J.*, at the April term, 1878, and judgment again rendered in favor of the libellants. The following opinion was given in that court.

BLATCHFORD, J. The decision of this case in the District Court was placed upon the ground that the New Haven and Northampton Company, as a common carrier, had no right to impose on the canal boat the requirement that it should, as a condition of the right to place the coal in the tubs of the company, attached to the company's derrick, employ to place it there shovelers designated by the company, and pay such shovelers the rate of compensation fixed by the company for such service. It is contended, in this court, by the claimants, that the District Court ignored the status of the company as a wharf owner; that the company, as the owner of the wharf, had the right to make reasonable rules in regard to the use of the wharf; that the company had a right, by statute, to exact

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seven cents per ton for coal discharged at its wharf as wharfage; that the libellants' boat was not charged any such wharfage; that the use by the boat of the facilities provided by the company in the way of derricks, hoisting engines, &c., is the use of the wharf; that all which the company did was to refuse to allow the boat to use those facilities, and thus use the wharf, unless it would permit the coal to be shoveled into the tubs by men designated by the company; and that this was only a reasonable regulation made by the company as a wharf owner. The difficulty with this view of the case is that the regulation was not sought to be enforced, in fact, as a regulation of wharfage, or of the use of the wharf by the boat. There was no charge made against the boat for the privilege of making fast to the wharf; and if any payment was to be made for the use of the wharf by depositing the coal on the wharf, it was to be made by the claimants, who were the owners of the coal and the employers of the company. According to the well understood acceptation of a bill of lading such as the one in question here, where the coal was deliverable "to Glasgow Co., Canal Dock, New Haven," the Glasgow Company being a mill owner at a place on the line of the railroad company, and the latter company being the owner of the Canal Dock at New Haven, with its tracks running to and on the dock and having derricks and engines for hoisting the coal in tubs from the deck of the boat to the cars on the tracks—the coal was delivered by the boat into the tubs and the boat paid the company so much per ton for hoisting the coal and dumping it into the cars. The boat had nothing to do with paying anything for the use or occupation of the wharf by the coal, and it paid separately for the hoisting. If the company had a right to charge the boat for tying up to and using the spiles on the wharf, no such charge was made. There was, therefore, no foundation for the requirement as to the shovelers, in any relation between the company as a wharf owner and the boat.

The imposition of the requirement by the claimants' agent, as a common carrier, was not a reasonable one. In regard to this I concur entirely with the views of the district judge in

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his decision in the court below. He found that the regulation was not a necessary one. If it had been necessary and indispensable it would have been reasonable. It might, indeed, have been reasonable without being necessary. But to be reasonable it must be reasonable as respects both parties. In the present case the effect of the requirement was to impose on the boat an unnecessary expense of two cents per ton of coal for shoveling it into the tubs.

There must be a decree for the libellants, in affirmance of the decree below, with costs.

George E. Terry, Receiver, *vs.* Leopold Bamberger.

A manufacturing corporation located in the state of Connecticut consigned to the firm of *C & Co.* in the city of New York a quantity of goods to be sold on commission, it being agreed that the firm should have a lien on them for outstanding acceptances of the firm for the accommodation of the corporation. *C & Co.*, becoming insolvent, made an assignment of all their property, for the benefit of their creditors, under the insolvent laws of the state of New York, to the defendant, who as such assignee took possession of these goods and proceeded to dispose of them without regard to the rights of the corporation. The latter soon after took up all the acceptances and made demand on the defendant for the goods, which demand was refused. The plaintiff was afterwards appointed receiver of the corporation under the statute (Gen. Statutes, tit. 17, ch. 1, sec. 23,) and after making demand, brought an action of trover in his own name against the defendant, in this state, service having been made upon him here. Held—

1. That *C & Co.* having been entrusted with the sale of the goods, that trust was a personal one, which could not be delegated to another, beyond the usual course of business, without the consent of the consignors.
2. That all that *C & Co.* could transfer to their assignee for the benefit of their creditors was their lien on the goods.
3. That while therefore the assignee had lawfully come into possession of the goods, his sale of them had been a tortious conversion.
4. That though the title to the goods did not become vested in the receiver on his appointment, he yet could sue for them in his own name under the statute.
5. That it did not alter the case that the lien had not been discharged when the conversion took place. It was enough that it was discharged before demand was made and suit brought.

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TROVER, United States Circuit Court, District of Connecticut, April term, 1877. The case is fully stated in the opinion.

S. W. Kellogg and *G. E. Terry*, for the plaintiff.

H. B. Munson and *C. W. Gillette*, for the defendant.

SHIPMAN, J. This case was tried by the court, the parties having, by written stipulation duly signed, waived a jury. Upon said trial by the court both parties appeared by their counsel and with their witnesses, and were fully heard respecting the controverted questions of law and of fact. The facts which are found to have been proved are as follows:

On or about August 12th, 1875, the firm of S. A. Castle & Co. of the city of New York, consisting of Samuel A. Castle, Rufus E. Hitchcock and Henry S. McGrane, being insolvent, made an assignment in insolvency of all their goods and effects for the joint and equal benefit of their creditors, under the statute of New York of April 13th, 1860, to Leopold Bamberger of said city, who accepted said trust, gave bonds according to law, and entered upon his duties on August 12th, 1875.

Previous to this time said firm had been the selling agents in said city of the United States Button Company, a joint stock corporation, duly incorporated in pursuance of the laws of this state, and established at Waterbury. Said firm had in their store on said August 12th, 1875, the manufactured goods of said company which had been theretofore sent to them for sale upon commission, to a large amount, which goods were the property of said Button Company. The market value of said goods was $7,500. The company had not been in the habit of drawing against their consignments, but prior to this date had obtained from S. A. Castle & Co. their accommodation acceptances to the amount of $22,500, and it was agreed between said parties at the time when said acceptances were given, that said firm should have a lien on the goods which were from time to time unsold as security against their liability upon said acceptances. These acceptances had

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been discounted for the benefit of said Button Company, and were then held and owned by the Waterbury National Bank.

The goods of said company in the possession of S. A. Castle & Co. were specified in their inventory, which was duly made and filed in pursuance of the laws of the state of New York, under the head of "Goods on hand on which allowances have been made, and merchandise in stock, &c.," as "Consigned by the United States Button Co.," and were appraised at $6,054. The assignee thus had notice of the ownership of the goods.

Said Bamberger immediately took possession of said goods as his own, and as equitably belonging to the creditors of S. A. Castle & Co., and proceeded forthwith to sell them as rapidly as he was able for the benefit of said estate. On September 24th, 1875, said Button Company took up and received said acceptances from the Waterbury National Bank by the substitution of the Button Company's notes therefor, and thereupon the president of said company carried said acceptances to New York, tendered them to said Bamberger, and demanded of him the goods belonging to said company, but said Bamberger refused to deliver the same, and continued the sale thereof.

On or about November 1st, 1875, the plaintiff was duly appointed receiver of the estate of said Waterbury Button Company by the Superior Court of New Haven County, under and by virtue of the 23d section of chapter 1, title 17, of the General Statutes of Connecticut, (Revision of 1875, page 281,) and said receiver was authorized by the decree of said court to execute the powers specified in the 1st section of part 14, chapter 17, title 19, of said General Statutes, (Revision of 1875, page 482.) The plaintiff accepted said trust, gave bonds pursuant to law which were accepted by said court, and entered upon his duties.

On November 24th, 1875, the plaintiff, accompanied by the secretary of said company as a witness, again tendered to said Bamberger in the city of New York said acceptances, and again demanded said goods as the property of said Button Company, but said Bamberger refused to deliver them. The

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plaintiff then asked Bamberger if there were any other acceptances outstanding against said goods, or if there were any other claims or charges against the goods for interest, commissions, &c., except the tendered drafts, to which inquiry Bamberger replied in the negative. Upon the payment of said accommodation acceptances S. A. Castle & Co. were indebted to said Button Company in a large amount as appeared by said inventory. The present action was brought in a state court of this state, and was removed to this court by the defendant. At the close of the testimony the plaintiff asked and obtained leave, against the objection of the defendant, to amend the declaration by the addition of the 2d and 3d counts for a conversion prior to the plaintiff's appointment. Opportunity was given to the defendant after the allowance of said amendments to introduce additional testimony if he desired.

Upon the foregoing facts the conclusions of law are as follows:

1. The defendant rightfully took possession of the goods of the Button Company, but tortiously converted them thereafter.

S. A. Castle & Co. were the factors of the Button Company, and as such were personally entrusted with the sale of its goods. This trust was a personal one, and could not be delegated to another beyond the usual course of business, without the consent of the consignors. Neither had Castle & Co. any right to sell or transfer the goods in payment or in pledge for their own indebtedness. Having a lien upon the goods as security for their liability upon the accommodation acceptances which they had given to the consignors, Castle & Co. had a right to transfer said lien to their creditors, and deliver the goods to their assignee for the benefit of their creditors, solely as a security to the extent of said lien. The Button Company could not regain possession until they had tendered to the assignee the amount of the lien of Castle & Co. or otherwise discharged said lien, and upon such tender or discharge had the right to regain possession of their property, if it could be traced, or distinguished from the mass of the other prop-

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erty of the factor in the possession of the assignee. *Warner* v. *Martin*, 11 Howard, 209; *Veil* v. *Mitchell*, 4 Wash. C. C., 105; *Thompson* v. *Perkins*, 3 Mason, 232; *Cook* v. *Kelley*, 9 Bosw., 358; *Chesterfield Manf. Co.* v. *Dehon*, 5 Pick., 7; *Denston* v. *Perkins*, 2 Pick., 86; *Scott* v. *Surman*, Willes R., 400.

But the rightful possession of the assignee gave him no authority to assume to himself the entire property, or right of disposing of the goods, until duly authorized by law, and when, having taken possession, with notice that the goods were the property of the Button Company, he proceeded to sell and convert them into money as rapidly as he could, there was a conversion. The action of trover "always supposes the defendant to have come legally into possession of the goods. It is the breach of the trust or the abuse of such lawful possession which constitutes the conversion." *Murray* v. *Burling*, 10 Johns., 172; *Connah* v. *Hale*, 23 Wend., 462; *Fiske* v. *Ewens*, 46 N. Hamp., 173; *Baldwin* v. *Cole*, 6 Mod., 212; *McCombie* v. *Davies*, 6 East, 540.

2. The plaintiff as receiver had a right to institute a suit in this state against the defendant for a conversion happening prior to the plaintiff's appointment.

It is contended that the decree of the state court had no extra-territorial jurisdiction, and gave the plaintiff no title to property beyond the limits of this state, and that therefore he had no right to institute a suit for the recovery of the value of property which had been since his appointment beyond the jurisdiction of this state. But the statutes of this state in regard to the appointment and duties of receivers of the property of corporations do not undertake to change the title of the property or to vest it in the receiver. Receivers are declared by the statute to have the right to the possession of the property of the corporation, and power in their own names or in its name to commence and prosecute suits for and on behalf of the corporation, to demand and receive all evidences of debt and property belonging to it, and to do and execute in its name or their own names as such receivers, all other acts and things which shall be necessary or proper in the execution of their trust, and to have all the powers for any of said pur-

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poses possessed by such corporation. The receiver is the agent of the law to collect the property of the corporation and to wind up its affairs, and for that purpose to do all acts which may be necessary to the execution of the trust. By authority of law he acts in the place of the directors, but no title to property is changed. Such has been the construction of similar statutes elsewhere. *Willink* v. *Morris Canal & Banking Co.*, 3 Green Ch., 377.

It is unnecessary to determine whether the receiver was empowered to commence a suit in his own name in the state of New York for the recovery of the property of the corporation. As the title to the property which is now in question was confessedly always in the Button Company, a suit could have been instituted in New York against the defendant in the name of the corporation, certainly with the assent of its officers. It is apparent that both before and after the appointment of the plaintiff the officers of the corporation were seeking to obtain this property, and they have not been prevented from aiding the receiver in the collection of the debts of the company in any court here or elsewhere. They are still the officers of the company. In this state the plaintiff can commence a suit either in the name of the corporation or in his own name in its behalf. Whether the receiver or the corporation is plaintiff, the action is for the recovery of the value of property, the title of which is in the company.

Being then the agent of the law to wind up the affairs of the corporation, and to do whatever it could do in this behalf, the receiver is authorized to collect within this state its debts and choses in action of whatever nature the same may be, and to commence any proper suits whether sounding in tort or in contract. "There is no greater reason for allowing the receiver to recover damages in his own name for the breach of a contract made with the bank, than there is for allowing him to recover damages in his own name for the wrongful withholding of the property of the bank in another form." *Gillett* v. *Fairchild*, 4 Denio, 80.

The fact that the United States Button Company had not discharged the lien, and so were not entitled to the possession

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of the goods, at the time of the conversion by the defendant on August 12th, 1875, does not defeat the action of trover, the lien having been discharged before suit was brought. If the plaintiff had a right of action when the suit commenced, it is competent for him to show a prior conversion. *Delano* v. *Curtis*, 7 Allen, 470; *Carpenter* v. *Hale*, 8 Gray, 157.

Judgment should be rendered in favor of the plaintiff for $7,500, and interest at six per cent. from September 24th, 1875, and his costs accruing after May 15th, 1877.

Upon the amendment the plaintiff should pay the defendant his taxable costs until May 15th, 1877, in accordance with the state practice. *Richardson* v. *Hine*, 43 Conn., 201.

THE MERCHANTS AND MANUFACTURERS BANK *vs.* THE STAFFORD NATIONAL BANK.

A firm in the state of Michigan left for collection with the plaintiffs, a bank in that state, a sight draft of their own for $500 on "*J. C.* treasurer of the *M. S. Co.*," a manufacturing corporation in Connecticut. The plaintiffs at once sent the draft to the defendants, a bank in Connecticut, with directions to "return at once without protest if not paid." The defendants presented the draft to the drawee and he replied that he would look up his account with the drawers and inform the cashier with regard to payment. The drawers had also written *J. C.* that such a draft had been forwarded, and he wrote them in reply, "The $500 draft has been received and paid. Don't draw any more." On the receipt of this letter the drawers showed it to the plaintiffs, who believing that the draft had been duly paid, paid the drawers the $500. *J. C.* the drawee, was also president of the defendant bank, and this fact was known to the plaintiffs. The draft had not in fact been paid, though the drawee supposed it had, but the defendants had neglected to return it or send notice of its non-payment. If they had returned it at once it would have prevented the payment of the $500 to the drawers. Several days later the cashier returned the draft unpaid, which was his first information to the plaintiffs with regard to the matter. The plaintiffs thereupon demanded repayment of the drawers, which was refused. They were solvent, but had no visible property and the claim could not have been collected without much difficulty. Held—

1. That the defendants, as agents of the plaintiffs for the collection of the draft, had been guilty of negligence in not obtaining payment of the draft or returning it at once to the plaintiffs.

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2. That, although the plaintiffs paid the money to the drawers upon the statement of the drawee to the drawers that the draft had been paid, yet, as they would have been saved from loss if the defendants had performed their duty, the defendants were liable for the actual damages resulting from their neglect.
3. That these damages were to be regarded as the whole amount paid by the plaintiffs to the drawers, and that they had a right to recover this sum although they had a right of action for the whole amount against the drawers.

ASSUMPSIT, brought to the United States District Court for the District of Connecticut, and heard before *Shipman, J.*, at the May term, 1877. The case is fully stated in the opinion.

E. B. Bennett, for the plaintiffs.

H. C. Robinson, for the defendants.

SHIPMAN, J. This is an action of assumpsit to recover damages for the alleged breach of contract by the defendants in not collecting a draft which was forwarded to them for collection, and for non-compliance with their undertaking as collecting agents. The action was tried by the court, both parties having by written stipulation waived a trial by jury. The facts which were found to have been proved on the trial are as follows.

Both parties to the suit are national banking associations. S. Folsom & Co., of Detroit, Michigan, endorsed and delivered for collection, on August 30th, 1876, to the plaintiffs, a bank in Detroit, said Folsom & Co.'s draft of that date for $500 upon Julius Converse, treasurer of the Mineral Springs Manufacturing Company, payable at sight to the order of the drawers, at the Stafford National Bank. On the same day the plaintiffs forwarded said draft to the defendant corporation, endorsed "Pay R. S. Hicks, cashier, or order, for collection," and attached to the draft the following notice: "If not accepted or paid, return without protest." The draft was enclosed in a letter to the defendants' cashier, of which the following is the material portion: "I enclose for collection and remittance to the Merchants Natl. Bk., N. Y., for our account. Return at once, if not paid. Yours Truly, F. W. Hayes, Cashier. No protest, $500." The letter and draft were received by the defendants on September 1st or 2d, who

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presented it for acceptance to the drawee prior to September 4th. He replied that he would look up his account and inform the cashier in regard to payment. Mr. Converse as treasurer was also advised by the drawers by letter of August 30th, that such a draft had been forwarded, and on September 4th wrote them as follows: "The $500 draft has been received and paid. Don't draw any more. The balance that may be due on what you have bought, if any, we will remit for when we get your full account." Upon the receipt of this letter on the afternoon of September 5th the drawers showed it to the plaintiffs, who, believing from its contents that the draft had been duly paid to the defendants, paid the drawers $500, less $1.25 charges of collection. Mr. Converse was also president of the defendant corporation, which fact was known to the plaintiffs.

After September 4th Mr. Converse wrote S. Folsom & Co. making inquiries in regard to items of their account which were not understood. Not hearing from them, or not receiving satisfactory replies, he began to investigate the account, and ascertained that he had overpaid them $300, not including the $500 draft. When he commenced this investigation he did not know that the draft had not been paid by the defendants. Meanwhile the draft had been mislaid in the defendants' bank, and had escaped the attention of the cashier, who had no further conversation with Mr. Converse on the subject until September 22d. On that day Mr. Converse directed the cashier to return the draft unpaid, who accordingly on September 22d wrote to the plaintiffs for the first time on the subject of the draft and returned it unpaid. The plaintiffs thereupon demanded repayment from S. Folsom & Co., which was refused. Folsom & Co. are solvent, and ordinarily pay their bills, but a judgment against them cannot be collected from any visible property without difficulty. If the defendants had written the plaintiffs on or prior to September 4th that the draft had not then been paid, the defendants would not have paid Folsom & Co. The amount of the draft has never been paid to the defendants, and no part of the sum has ever been repaid to the plaintiffs.

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The principles of law which I deem to be applicable to the case upon the foregoing facts, are as follows.

The relation which the defendants sustained to the plaintiffs was that of an agent who has undertaken with his principal upon sufficient consideration to perform a certain duty. The general duty of an agent who receives for collection a bill of exchange is to use due diligence in presenting the same for acceptance, and in presenting it for payment if it has been accepted, and to give the holder and other parties to the paper, by the next day's post, the notices of dishonor required by law in case acceptance or payment is refused, and to give to his principal any special notice which is required by the terms of the instructions to the agent, or of the contract which the agent has entered into with his principal. The agent is also required to protest, in case of non-acceptance or non-payment, if protest is not forbidden, and to send the protest to the holder. *Walker* v. *Bank of the State of N. York*, 5 Seld., 582; *Hamilton* v. *Cunningham*, 2 Brock., 350. The special instructions which were given in this case to the defendants, which instructions by the acceptance of the agency they undertook to observe in substance, were as follows: the draft was not to be protested, but was to be returned at once to the plaintiffs if not paid; if paid, the amount was to be remitted to a specified bank in the city of New York. It thus became the duty of the defendants to present the draft for acceptance, and if acceptance was refused, or payment was not made, (no days of grace being allowed in this state upon sight drafts,) to return the draft at once, or to notify the plaintiffs of the delay in payment. The draft was received on September 1st or 2d. It was promptly presented for acceptance, but without any formal acceptance so far as the defendants were aware. No further communication was had with the drawer, and the draft was mislaid until September 22d, when for the first time any information was given to the plaintiffs. The defendants do not seem to have appreciated the duties which devolved upon them by reason of the agency. They were manifestly guilty of laches, and it is not denied that a collecting agent may recover from his

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agent the loss which the former has sustained by reason of the laches of the latter. *Commercial Bank* v. *Union Bank*, 11 N. York, 203.

The important question however in the case is as to the amount of damages which were sustained by the plaintiffs in consequence of the defendants' neglect. The agent by neglecting any part of his duty does not necessarily become responsible for the whole debt. The damages are not necessarily commensurate with the amount of the draft which has been remitted for collection. "A person acting on commission, who by his misconduct has brought loss upon his principal, is responsible to the precise extent of the loss produced by that misconduct." *Hamilton* v. *Cunningham*, cited *supra; Van Wart* v. *Woolley*, 3 Barn. & Cress., 439; *S. C.*, M. & M., 520.

In this case the payment was made by the plaintiffs upon the strength of the drawee's letter of September 4th, and I have been in some doubt, the payment to Folsom & Co. having been made in reliance upon the drawee's assertion that the draft had been paid, whether the defendants, although liable for the non-performance of their duty, were liable for the full amount which was paid to Folsom & Co. But the duty of the defendants was to return the draft at once if not paid, or inform the remitter of the delay in payment. If the defendants' cashier had discharged his duty, and had informed the plaintiffs of the non-payment, no injury would have accrued to the plaintiffs, who would have been seasonably advised of the mistake of the drawee.

Furthermore, if the defendants had promptly performed their duty, and obtained an answer to their demand of payment, the draft would either have been paid on September 4th, for the drawee was apparently then ready to pay, or on the same day they would have notified the plaintiffs of non-payment. In either case no loss would have been sustained by the plaintiffs.

Although Folsom & Co. are liable to the plaintiffs for the amount of money which they paid through mistake of fact, which amount was not actually due to Folsom & Co. from the

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drawee, (*Bank of Orleans* v. *Smith*, 3 Hill, 560; *Wingate* v. *Mechanics' Bank*, 10 Penn. S. R., 104; *East Haddam Bank* v. *Scovill*, 12 Conn., 303;) yet the loss having actually occurred to the plaintiffs through the laches of the defendants, and the amount of that loss having been ascertained, the plaintiffs may look also to the defendants for satisfaction.

Judgment should be entered in favor of the plaintiffs for $498.75, and interest from September 5th, 1876.

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THEODORE M. DAVIS, RECEIVER, *vs.* HARVEY H. WEED, ADMINISTRATOR.

By the act of Congress with regard to National Banks, all stockholders of such banks are liable to assessment for the debts of the banks in case of their insolvency, to the extent of the par value of their stock in addition to the amount invested in such stock; but persons holding stock as executors, administrators and trustees are not to be personally subject to any liability as stockholders, but such liability is to attach only to the property in their hands. *W* died in January, 1871, being at the time a stockholder of a national bank. His estate was subsequently settled, with a limitation for the presentation of claims, a settlement of the administration account, and a final distribution. The bank failed in December, 1871, and a receiver was appointed by the Comptroller of the Currency, and in January, 1877, a long time after the distribution of *W's* estate, the Comptroller made an assessment upon those who were stockholders at the time of the failure of the bank for the payment of the debts of the bank. Held, in a suit brought by the receiver against *W's* administrator—

1. That the stock was not to be regarded as having been, at the time of the failure of the bank, the property of the administrator, in such a sense as to constitute him the shareholder within the meaning of the act.
2. That the provision of the act exempting executors, administrators and trustees from personal liability was not intended to affect the liability to assessment of estates in process of settlement, but only to prevent a personal liability from running against persons acting in a trust capacity who had received the stock for the benefit of the trust estates.
3. That the fact that the assets of the estate of *W* had been distributed before a demand was made for the assessment, so that the administrator had nothing in his hands, was no reason why judgment should not be rendered against him *de bonis decedentis*.
4. That the liability of *W* was in the nature of a contract, and as such was a personal liability for which his estate was holden at his death.

In England a judgment against an executor *de bonis testatoris* is equivalent to

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a finding that he has assets in his hands unadministered. In this state it involves a finding merely that the estate is liable to pay the claim sued upon The question of assets is not before the court; and judgment should be rendered for the whole indebtedness.

Under the Connecticut statute the settlement of an administration account and the distribution of an estate does not prevent the estate being subjected, if actually solvent, to the payment of a debt which accrued after the settlement of the estate.

Where such a claim is presented to the administrator and is disallowed by him, it is necessary that its validity be determined by suit against the administrator before a court of common law or equity jurisdiction; and such suit must be commenced within four months after the disallowance, in the same manner as is required by statute in the case of claims presented within the time originally limited by the court of probate.

It is not necessary that a new administrator be appointed; the distribution does not exhaust his power.

A bill in equity will not lie against the heirs, to compel payment from their real estate of a claim accruing subsequently to the distribution.

ACTION at law by the plaintiff, as receiver of a national bank, against the defendant as administrator of a stockholder of the bank, to recover the amount of an assessment for the payment of the debts of the bank; brought to the United States District Court of the district of Connecticut, and heard before *Shipman, J.*, at the November term, 1877. The case is fully stated in the opinion.

T. M. Davis and *W. Howe*, for the plaintiff.

H. C. Robinson and *S. Fessenden*, for the defendant.

SHIPMAN, J. This is an action at law brought by the receiver of the Ocean National Bank of the city of New York, to recover an assessment which is claimed, under the facts hereinafter stated, to be due from the defendant as administrator *de bonis non* of the estate of Nathaniel Weed. The parties agreed by stipulation in writing, waiving a jury, that the case should be tried by the court. The pleadings subsequently terminated in a demurrer to the special plea of the defendant.

The declaration alleges the organization of the Ocean National Bank of the city of New York, as a national banking association; its failure on December 12th, 1871, to pay

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and redeem its circulating notes; the protest of said notes; the appointment of the plaintiff as receiver by the Comptroller of the currency; the plaintiff's acceptance of said office; the ascertainment by the comptroller that the assets of the bank are insufficient to pay its liabilities, and that it is necessary to enforce the individual liability of the stockholders; the order of the comptroller, dated January 19th, 1877, making an assessment of forty per cent. of the par value of the shares held by each shareholder, payable in two installments, to wit: $10 per share on February 26th, 1877, and $10 per share on April 26th, 1877, and the order of the comptroller to institute suits for the enforcement of said liability.

The declaration further alleges, as follows: About the time of the failure of said bank Nathaniel Weed died intestate, leaving a large real and personal estate; at the time of said failure he was the owner of 514 shares of said bank; on or about September 9th, 1872, Harvey A. Weed was duly appointed administrator of said estate; subsequently Harvey A. Weed died, and on or about December 3d, 1872, the defendant, Harvey H. Weed, was duly appointed administrator *de bonis non* upon the estate of Nathaniel Weed, who accepted said trust, and is now said administrator; demand was made on March 22d, 1877, and on June 12th, 1877, for payment of said respective installments, and by reason of the premises the defendant is liable to pay said assessment.

The defendant pleaded specially the following facts: "The said Nathaniel Weed died in January, A. D. 1871, intestate; afterwards, on the 9th day of September, A. D. 1872, one Harvey A. Weed was duly appointed and qualified as administrator of his, said Nathaniel's estate; six months from the date of said appointment was by the court of probate for the district of Stamford, which was the domicile of said intestate, limited as the time for creditors to present their claims against said estate; no claim in behalf of this plaintiff was presented by said administrator; all claims theretofore presented against said estate were paid and settled, and said estate was settled and according to law; afterwards, said Harvey A. Weed died, on the 3d day of December, A. D. 1872, the defendant was

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appointed administrator of the estate of said Nathaniel, which had not been already administered; the defendant hath fully administered all and singular the goods, chattels, and estate, which were of the said Nathaniel Weed, deceased, at the time of his death, and which have ever come to the hands of the said defendant, administrator, etc., to be administered, and the said defendant hath not, nor on the day of the plaintiff's writ in this behalf, or at the time of commencing this suit, or at any time since, had any goods, chattels or estate which were of said Nathaniel Weed at the time of his death in the hands of said administrator, etc., to be administered; and the defendant has not now, and did not on the day of the demand set up in plaintiff's writ, nor at the commencement of this suit, nor at any time since either of said dates, have in his hands any estate or funds belonging to the estate of said Nathaniel Weed, or which were said Nathaniel Weed's at the time of his death. Said Nathaniel Weed's estate, after the death of said Harvey A. Weed, was treated as the estate of said Harvey A. Weed, and distributed among his heirs at law."

In this state of pleadings the defense is two-fold.

1st. It being admitted that the estate of Nathaniel Weed had been settled according to law, prior to the demand, and that there were no assets in the hands of the administrator at the time of the demand, and that he has fully administered the estate, and that no assets have come to his hands as administrator since the demand, no judgment can be rendered against him.

2d. That, inasmuch as the insolvency of the bank occurred after the death of the intestate, when the title of the stock became vested in the administrator, no debt or liability existed at any time against the estate; that the liability, if any, was against the administrator, who by section 5,152 of the Revised Statutes is freed from personal liability, and is only liable to the extent of the trust estate and funds in his hands at the time of the demand.

The plaintiff does not claim that a judgment *de bonis propriis* can be rendered against the defendant.

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I. The first question requires an examination of the statutes of Connecticut in regard to the settlement of estates, and in regard to the presentation, allowance and payment of claims against the estates of solvent deceased persons.

The settlement of estates in Connecticut is regulated by statute. A time is limited by the court of probate for the exhibition of claims against the estate of a deceased person which is represented by the executor or administrator to be insolvent, and every creditor who has not exhibited his claim within the time limited is debarred, unless he can show some estate not in the inventory. In the case of an estate which is actually insolvent, the proceedings under the orders of the court of probate, by which all the estate has been actually paid to the claimants who have proved their claims within the limited time, are a bar to claims which subsequently accrue and have not been proved.

But it is provided that where an estate which has been represented insolvent turns out to be solvent, "the rights of all persons having claims against such estate subsequently accruing, and which shall not have been exhibited to the commissioners within the time limited for the exhibition of claims, shall be the same in respect to any estate of such deceased person remaining after the payment of the claims allowed by them, as they would have been in regard to such remaining estate if said estate had always been treated as a solvent estate."

Existing claims against a solvent estate must be presented to the representatives of the estate within the time limited by the court of probate; "but any creditors not inhabitants of this state may exhibit their claims against any estate which has not been represented insolvent, at any time within two years after publication of such notice, and shall be entitled to payment only out of the clear estate remaining after the payment of the claims exhibited in the time limited; and when a right of action shall accrue after the death of the deceased, it shall be exhibited within twelve months after such right of action shall accrue, and shall be paid out of the estate remaining after the payment of the debts exhibited in the

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time limited." Revised Statutes, title 18, chapter 11, part 3, section 5. "When the creditor of an estate, not represented insolvent, shall present his claim to the executor or administrator, within the time limited by the court of probate, or by any of the provisions of the preceding section, and he shall disallow and refuse to pay it, if such creditor shall not, within four months after he has been notified by him that his claim is disallowed, commence a suit against him for the recovery thereof, he shall be debarred of his claim against such estate." *Ib.*, section 6.

Intestate solvent estates, after deducting the debts and the expenses of settlement, may be distributed to the heirs by persons appointed by the court of probate, and "every person to whom any part of an estate shall be distributed, and every person to whom any estate shall be devised or bequeathed, when no sufficient provision is made by will for the payment of the debts out of some particular estate, shall give a bond to the state, with surety, to the acceptance of the court of probate, conditioned that if after the settlement of the estate debts shall appear and be allowed, he will pay to the executor or administrator his proportional part of such debts, and of the charges of the executor or administrator." Page 374 of the Revised Statutes. The provision for the giving of a bond is cumulative, and the bonds are not the only fund for the payment of debts which are properly allowed after the settlement of a solvent estate. *Griswold* v. *Bigelow*, 6 Conn., 258.

No suit except for debts due to the United States or to the state, or for the expenses of the last sickness or funeral charges, can be brought against the executor or administrator of an insolvent estate in course of settlement. Suits against the representatives of a solvent estate are not prohibited.

The two provisions which have been mentioned in regard to the payment from a solvent estate of the debts which accrue after the expiration of the time limited for the presentation of existing claims, viz: the provision for payment of a claim accruing after the death of the deceased, if exhibited within one year after the right of action accrued, and the provision

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requiring heirs to give a counter bond for the payment of debts which appear after the distribution of an estate, clearly indicate that the liability of the solvent estate of the deceased person does not cease with the settlement of the estate as to those claims which accrue after the time limited for the presentation of existing claims. If the settlement of an estate and its distribution is a bar against the liability of the estate, or against the liability of a representative *de bonis testatoris*, no bond from the heirs would have been required.

From the statutes which have been cited, and the Connecticut decisions upon the statutes, the following principles are deduced:

1. In Connecticut, real and personal estate of the person are alike a fund for the payment of his debts, and both are assets in the hands of the administrator.

2. The non-exhibition against a solvent estate, within the time limited for the presentation of existing claims, of a claim which accrued after the expiration of such limitation, is not a bar to its payment, provided it is exhibited within one year after it accrues. *Hawley* v. *Botsford*, 27 Conn., 80; *Bacon* v. *Thorp*, 27 Conn., 251.

3. The order of a court of probate settling the administration account and the distribution of real or personal estate to the heirs, does not prevent such estates being subjected to the payment of a debt of the solvent intestate, which accrued after the settlement of the estate. Distribution is not necessarily the final consummation of the administrator's powers, and is not necessarily a complete settlement of the estate. *Griswold* v. *Bigelow*, 6 Conn., 258; *Seymour* v. *Seymour*, 22 Conn., 72; *Booth* v. *Starr*, 5 Day, 419.

4. When an administrator of a solvent estate denies the validity of a claim against the estate accruing after the time appointed for the exhibition of existing claims, or after distribution, it is necessary that the validity of the claim should be determined by suit thereon against the administrator before a court of common law or equity jurisdiction. A court of probate has no original jurisdiction to allow or reject disputed claims against a solvent estate.

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It will not be denied that this is true in regard to existing claims which are presented before the expiration of the limitation, and I do not see why the necessity of suit against the administrator does not exist in the case of subsequently accruing claims, provided he denies their validity. If he "disallows the claim," the creditor must commence suit within four months after notification of the disallowance, and the suit must be one in which the validity of the claim can be determined. *Spalding* v. *Butts*, 6 Conn., 28. The suit must be in a court of ordinary jurisdiction, for courts of probate have no original power to decide upon the validity of claims which are disallowed by the administrator of a solvent estate. *Isaacs* v. *Stevens*, 13 Conn., 499; *Bacon* v. *Thorp*, 27 Conn., 251. If the administrator, as in *Griswold* v. *Bigelow*, and in *Seymour* v. *Seymour*, admits the validity of the claim and pays it, or, the personal estate having been exhausted, seeks an order of the court of probate to sell real estate for the purpose of payment, the validity of the claim is collaterally passed upon by the court of probate, by its approval or disapproval of the item in the administration account, or by granting or refusing an order to sell real estate. If the administrator disallows an unadjudicated claim, the court of probate cannot compel payment.

The question whether a suit can be sustained against an administrator upon a claim which accrued after distribution, and when all the estate had been distributed before the claims accrued, has not arisen before the Supreme Court of Errors of this state, except in the case of *Booth* v. *Starr*, 5 Day, 275, a case which was decided by a divided court, and the authority of which has been much shaken by subsequent decisions. In *Griswold* v. *Bigelow* the first administrator had died, and a new one was appointed, who allowed the accruing claim upon presentation. In *Seymour* v. *Seymour* the administrator was himself the creditor and allowed his own claim. In *Bacon* v. *Thorp* unadministered estate was in the hands of the executrix of a solvent estate which had been represented insolvent. In *Hawley* v. *Botsford* undistributed real estate was in the hands of the two sons of the intestate, one of

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whom was the administrator. Dower had been set out to the widow. In the latter case it is decided that a bill in equity to compel all the heirs to pay a debt which accrued after the limitation, will not lie, there being adequate remedy at law. What the remedy may be is not stated, but as it is substantially held in *Bacon* v. *Thorp* that the court of probate is not the tribunal in which relief can be originally sought, the inference is, that the first step is to have the validity of the claim ascertained in an action at law against the administrator. While the precise point which is now under discussion has not been judicially settled in Connecticut, two things have been established. (1.) The court of probate has no original jurisdiction in regard to a disputed claim against a solvent estate; and (2,) a bill in equity against heirs will not lie to compel payment from their real estate of a claim accruing subsequently to distribution. The tendency of the decisions since *Sacket* v. *Mead*, 1 Conn., 13, is in support of the mode of procedure which I have pointed out.

It may be urged that the administrator, having settled his administration account, and having distributed the estate, is *functus officio*, and that it is necessary for the creditor to apply to the court of probate for the appointment of a new administrator. Distribution, as has been said, does not necessarily exhaust the administrator's power. If he is living he is still the representative of the estate, and if he is competent and willing to act there is no necessity of a new appointment. He has not ceased to be administrator from the fact that his account has been approved and that the estate which was in his hands at the time of the settlement of the account has been distributed. If new personal assets should be discovered, the title would vest in him, and he would be the person to reduce such estate to possession. If it should be ascertained that a debt theretofore undiscovered was due the estate, he is authorized as administrator to commence suit for its recovery. It is believed that the court of probate cannot appoint a new administrator until there is a vacancy by death or removal or resignation.

5. The system of the settlement of estates in Connecticut

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differs so materially from the method of settlement in England, that the system of pleading by an executor or administrator in Connecticut differs also materially from that which was in use at common law.

By the common law, where the estate was insolvent, the representative was obliged to pay debts in a particular order, and among creditors of equal degree could pay one in preference to another, although this election was in a degree controlled by legal or equitable proceedings. The real estate was not liable in the hands of an executor to pay debts, but the heirs and devisees were liable upon specialties. 1 Swift's Digest, 459. The plea of *plene administravit*, or want of assets at time of suit brought, was adapted to this system. In Connecticut, if the estate is insolvent, there should be a representation of insolvency so soon as that fact appears, and thereafter the payment of debts is conducted under the orders of the court of probate. So long as the estate is solvent, the debts which accrue after the expiration of the time for presentation of existing claims are a valid claim against the estate, if they are presented within one year from the time the debts accrue. *Plene administravit* is a good plea by an executor *de son tort*, (*Olmsted* v. *Clark*, 30 Conn., 108,) and want of assets is pleadable in an action against an executor for a legacy (*Knapp* v. *Hanford*, 7 Conn., 132); but, says Judge Swift, in speaking of the statutory system of Connecticut for the payment of debts, "I can imagine but one instance in which the executor or administrator can avail himself of the plea of *plene administravit*. Debts due to the state, and the expenses of the last sickness and the funeral, are preferable debts; if the whole estate should be absorbed in discharging these debts it would be useless to proceed in the settlement of it as an insolvent estate; and if a suit should be brought by a creditor against the executor or administrator for a debt, he might plead this in bar." 1 Swift's Digest, 459; *Bennett* v. *Ives*, 30 Conn., 329; *Bacon* v. *Thorp*, 27 Conn., 251; *Griswold* v. *Bigelow*, 6 Conn., 258.

So also in England, a judgment against an executor *de bonis testatoris* is equivalent to a finding that he has assets.

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In Connecticut a judgment is a finding that the estate of the deceased is liable to pay the claim which is sued upon. If the claim accrues and is presented after distribution, and payment is refused by the executor, it is incumbent upon the creditor to bring suit within four months after refusal. Suit is brought that the validity of the claim may be adjudicated. The question of assets is not before the court. The judgment shows that there is a valid claim against the estate of the deceased. In what manner payment may be obtained it is not my province now to decide, but the authorities which have been cited show that when the statute declares that the after accruing claims "shall be paid out of the estate remaining after the payment of the debts exhibited in the time limited," it is not meant that the estate remaining at the date of the judgment in the hands of the executor as executor is the only fund from which the claimant can enforce payment, and that if that has been distributed to the heirs he is remediless. When an action is brought against an executor of a solvent estate judgment is properly rendered for the whole demand, "for these if no other reasons, that it was found justly due, that other assets might afterwards be discovered, and that if the estate should be, as it was afterwards represented to be, insolvent, the plaintiff might be enabled to obtain his dividend upon his whole demand." *Tweedy* v. *Bennett*, 31 Conn., 276.

In this case the bank became insolvent in December, 1871. An assessment was made upon the stockholders by the comptroller of the currency on January 19th, 1877; demand was made of the plaintiff on March 22d, 1877, and June 12th, 1877, and suit was commenced July 14th, 1877. Until the order of the comptroller of the currency the claim was contingent. He ascertains and decides how much shall be collected, and until his decision the receiver has no power to enforce a liability against the stockholders arising out of their stock. The action of the comptroller "is indispensable whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of a suit by the receiver." *Kennedy* v. *Gibson*, 8 Wall, 498. The claim accrued at the date of the comptroller's order. The amount

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to be paid was there liquidated, and by the terms of his order became due and payable. Until his order, the amount, if any, to be paid was not due. *Casy* v. *Galli*, 4 Otto, 673.

II. The defendant next insists that, inasmuch as the intestate died previous to the insolvency of the bank, there was at the time of his death no claim, contingent or otherwise, against his estate; that the title of the stock vested by operation of law in the administrator upon his appointment; that the assessment is against stockholders, and that therefore the liability has accrued against the administrator who holds the stock as trustee; that by section 5,152 of the Revised Statutes, he is freed from personal liability, and that the estate and funds only which are in his hands are liable for payment, and that it is admitted by the pleadings that the defendant has no estate or funds in his hands.

The action is based upon the theory that the claim is against the estate of the intestate as an estate in process of settlement, and under the facts in the case the question arises whether a receiver of an insolvent national banking association has a valid claim for an assessment against the estate generally of a deceased stockholder, who died prior to the insolvency of the bank, but whose stock has not been transferred at the date of the comptroller's order. The defendant contends that the receiver never had a claim against the estate of Nathaniel Weed, but that his claim is against existing stockholders, and that the title to the stock vested in the administrator September 9th, 1872, and related back to the date of the intestate's death.

It is true that the title to personal property of an intestate vests in Connecticut in his administrator by force of local law and the grant of administration, but I think that the claim of the defendant, although ingenious, is not tenable, for the following reasons:

1. "An executor or administrator has his estate as such in *autre droit* merely, viz: as the minister or dispenser of the goods of the dead." 1 Williams on Executors, 562.

2. The original liability of the intestate to pay the assessments which may be ordered by the comptroller was a volun-

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tary agreement, evidenced by his subscription or by his becoming a stockholder. It is not imposed by way of forfeiture or penalty. It is imposed by the statute, but it also exists by virtue of the contract which the intestate entered into when he became a stockholder. When the stockholder dies his estate becomes burdened with the same contract or agreement which the dead man had assumed, and so long as it, through the executor or administrator, holds the stock as the property of the estate, and the stock has not been transferred on the books of the bank, and the liability has not been discharged by some act which shows that the new stockholder has taken the place of the old one, the contract liability still adheres to the estate. This liability is not the result of any new contract, for the administrator did not voluntarily become the owner of the stock; it came to him as the dispenser of the goods of the dead, and the liability rested upon the stock, and was a part of the contingent liability of the estate, at least until it was transferred to some other person by a transfer free from fraud. *Corning* v. *McCullough*, 1 Comst., 47; *Bailey* v. *Hollister*, 26 N. York, 112; *Loury* v. *Inman*, 46 N. York, 119; *Hawthorne* v. *Calef*, 2 Wall., 22; *Gray* v. *Coffin*, 9 Cush., 192.

3. When an obligation devolves upon an executor solely by virtue of his successorship to the estate, and not by express contract or agreement of his own, the estate is liable. If an executor is liable to pay an obligation resting upon personal property which came to him from the testator, and of which the executor is the owner only as a representative of the estate, and which obligation is due from him solely because he represents the estate, he is liable as executor, even if suit might have been also brought against him personally. *East Hartford* v. *Pitkin*, 8 Conn., 404, per WILLIAMS, J.

4. I do not think that section 5152 was intended to affect the liability for assessments of estates in process of settlement. The principal object of the section was to prevent a personal liability from running against executors, administrators, trustees or guardians, who had purchased as trustees, or to whom had been transferred in their names as trustees

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national bank stocks for the benefit of the trust estates. Having by such purchase voluntarily entered into a contingent liability for assessments, it might be claimed that a judgment *de bonis propriis* could be rendered against them. The main object of the section was to prevent personal judgments being rendered against such persons in whom the stock stood on the books of the bank as trustees.

I am therefore of opinion that the facts alleged in the plea are not a valid defense to prevent a judgment against the defendant from the estate of the intestate.

As it is not suggested that the defendant has any other ground of defense, the demurrer is sustained, and judgment should be rendered against him as administrator *de bonis non*, solely from the estate of the intestate, for the sum of $10,280, with interest on $5,140 thereof from February 26th, 1877, and on $5,140 thereof from April 26th, 1877, at six per cent.

Theodore M. Davis, Receiver, *vs.* The First Baptist Society of Essex.

To protect a trustee, who is a stockholder in a national bank, from personal liability, under the provision for such exemption in the act of Congress with regard to national banks, it must appear on the books of the bank that he was such trustee.

In ordering an assessment for the payment of the debts of an insolvent national bank, the stock certificates and stock ledger of the bank must be taken by the Comptroller of the Currency, in the absence of fraud or mistake, as showing who the stockholders were at the time of the failure of the bank.

The stockholder, in subscribing for or in accepting the stock, assents to becoming security to the creditors for the payment of the debts of the bank.

A religious society purchased and held in its own name certain shares of a national bank, using for the purpose a fund which had previously been given to such society by a testator, the whole bequest being used in the purchase. The society had other funds, given by other donors, which were otherwise invested. Held that the society was not to be regarded as a trustee, but as an ordinary stockholder, and was liable as such to assessment for the debts of the bank on its failure.

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ACTION AT LAW by the plaintiff as receiver of a national bank against the defendants as a stockholder, to recover the amount of an assessment for the debts of the bank; brought to the United States District Court of the district of Connecticut, and heard before *Shipman, J.*, at the November term, 1877. The case is fully stated in the opinion.

T. M. Davis and *W. Howe*, for the plaintiff.

L. E. Stanton, for the defendants.

SHIPMAN, J. This is an action at law brought by the receiver of the Ocean National Bank of the city of New York, to recover from the defendants an assessment upon their stock in said bank.

The parties agreed by stipulation in writing, waiving a jury, that the case should be tried by the court.

All the allegations of fact which are contained in the plaintiff's declaration were admitted by the defendants to be true and are found to be true. The certificate of stock which was delivered to, and was accepted and is now held by the defendants, is in the name of the First Baptist Church and Society of Essex, individually, and not as trustees. The stock stands, and has always stood, since its purchase by the defendants, upon the stock ledger and the stock books of said bank in the name of the defendants, without indication or notice that they are or were, at the time of the purchase, trustees. The foregoing facts were proved by the plaintiff. It was not claimed that the bank was ever notified that the defendants claimed to be trustees.

The defendants, as matter of defence, offered to prove the following alleged facts, which are set forth in the notice annexed to the plea of the general issue. To the admission of this evidence the plaintiff objected, upon the ground that it was irrelevant and immaterial and constituted no defence against the admitted facts.

The defendants offered to prove that said thirty-six shares of the capital stock in the said Ocean National Bank,

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described in the plaintiff's declaration to have been owned or held by the defendants as shareholders in said bank "were purchased and held by the defendants only as trustees, and were never in any manner owned or held by them in their individual capacity, either as a society corporation or as individuals, but that said shares were in fact purchased wholly with funds which were given by William Williams of Saybrook, Connecticut, deceased, in and by his last will and testament, which was dated December 31st, 1834, as follows, to wit: one-nineteenth of his estate to the Second Baptist Church and Society in Saybrook, and their successors forever, in trust to be put to interest with good and sufficient securities, or invested in stocks, the use of which shall be applied annually to defray the expenses of said society; always provided that the salary shall be not at any time less than four hundred dollars the year, including house rent; and another nineteenth of his estate, less three hundred dollars, given to the same persons and their successors forever in trust to be invested as aforesaid, and the use of which is to be applied from time to time to the cause of missions. The defendants will prove that when said stock was purchased the defendants were and now are the successors of said Second Baptist Church and Society in Saybrook in said trust, and that on or about the 27th day of January, 1867, a committee of the defendants invested in the purchase of said thirty-six shares, the sum of about $1,900, the same being wholly derived from said bequest of William Williams, and being the whole of the funds derived from said Williams, viz: two-nineteenths of his estate, less three hundred dollars, and held by the defendants only under said trust."

The defendants further offered to prove "that by the failure of said Ocean National Bank, the defendants, trustees as aforesaid, have wholly lost all of the trust fund received under said will, and have not now in their hands or possession any property or estate, except such as was given and granted to them by other grantors and donors in trust for charitable and pious uses, and none which is liable to be taken to pay the assessment set forth in the plaintiff's declaration."

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This evidence was excluded. The defendants duly excepted to the ruling of the court excluding said evidence.

The foregoing constituted all the facts which were proved, and which were offered to be proved, upon the trial.

The evidence was excluded upon the ground that the facts which were offered to be proved constituted no defence against the action.

Section 5150 of the Revised Statutes, the personal liability section of the act authorizing the establishment of national banking associations, is a part of the charter of each national bank. It "pledges the liability or guarantee of the stockholders, to the extent of their stock, to the creditors of the company, and to which pledge or guarantee the stockholders, by subscribing for stock and becoming members of it, have assented." *Hawthorne* v. *Calef*, 2 Wall., 22.

A stockholder of record is liable to an assessment although he has sold his stock, if such transfer has not been made upon the books of the bank. Pledgees of stock who hold the legal title and are stockholders of record are liable, although the pledgor may be the actual owner of the stock. So long as stockholders permit themselves to appear upon the record as stockholders, their personal liability continues. The creditors have a right to rely upon the guarantee of those who continue to hold themselves out as stockholders. In ordering an assessment, the stock certificates and the stock ledger are the basis upon which the comptroller of the currency, in the absence of fraud or mistake, must rely. It is impossible for him to ascertain the equities of each stockholder, and if any stockholder could relieve himself from the consequence of his laches by showing that another unknown person was the owner of the stock, creditors might have payment of their debts indefinitely postponed, and an unjust burden might be imposed upon the acknowledged stockholders. Some definite and conclusive means of information as to the ownership of stock for the purposes of assessment ought to be furnished to creditors, to the receiver, and to the comptroller. This information should be found, in the absence of fraud or mistake, in the certificates of stock, and in the stock books of the bank.

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But the defendants insist that inasmuch as section 5151 frees from personal liability persons who hold stock as trustees, extrinsic evidence can be resorted to for the purpose of proving the trust, although the certificates and the stock ledger do not disclose trusteeship.

Creditors have a right to know who have pledged their individual liability. If trusteeship does not appear upon the books of the bank, they have a right to infer that the stockholder is personally liable. If a trustee wishes to disclose his trusteeship, there is no difficulty in giving notice upon the books of the bank. If he does not disclose his trusteeship, he is guilty of laches, for which others should not suffer. The settlement of the affairs of an insolvent bank would be rendered a matter of great labor, expense and delay, if persons who appeared upon the books of the bank as individual stockholders were permitted to relieve themselves by proving that they held the stock as executors, or guardians, or trustees. If *A* is permitted to prove that he holds his stock as trustee for *B*, and *B* is permitted to show that he is trustee for *A*, litigation would be protracted, individual stockholders would suffer, and the strength of the personal liability section might be seriously impaired. Existence of the trust should appear upon the evidence of ownership. *Adderly* v. *Storm*, 6 Hill, 628. If it does not appear, and no fraud or mistake is imputed to the bank, the trustee is in fault, and not the bank, nor the creditors. As between two persons otherwise equally innocent, the one who is guilty of laches whereby the other was misled should suffer. *Adderly* v. *Storm*, 6 Hill, 628; *Stover* v. *Flach*, 30 N. York, 64; *Creese* v. *Babcock*, 10 Met., 525; *Hale* v. *Walker*, 31 Iowa, 344.

Again, the liability of the stockholder arises from his virtual contract, evidenced by his subscription to the stock, or by his becoming a stockholder. He thereby assents to become security to the creditors for the payment of the debts of the bank. It is not in form a contract, but is an agreement resulting from the assent of the parties to the statutory liability. "It does not exist solely as a liability imposed by statute. It is not enforced simply as a statutory obligation,

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but is regarded as voluntarily assumed by the act of becoming a stockholder. By such act he consents to be bound, or that his property shall be charged with debts of the corporation, to the extent and in the manner prescribed by the act of incorporation." *Loury* v. *Inman*, 46 N. York, 125; *Hawthorne* v. *Calef*, 2 Wall., 22; *Corning* v. *McCullough*, 1 Comst., 47. The defendants by becoming stockholders, and by the acceptance of a certificate which shows that they hold the stock in their own right, have entered into this contract of personal liability. The contract is a completed one, and cannot now be changed against the will of one of the parties into a contract of different character.

Let judgment be entered for the plaintiffs for the sum of $720, with interest on $360 thereof from February 26th, 1877, and upon $360 thereof from April 26th, 1877, at six per cent.

In re Matthew M. Merriman's Estate.

A discharge in bankruptcy, under a composition between a bankrupt and his creditors, made and confirmed under the provisions of the bankrupt act, is a discharge by operation of law, and not a voluntary discharge.

And this, as against a creditor voluntarily signing the composition, as well as against a non-assenting creditor.

An indebtedness thus discharged is therefore a valid consideration for a subsequent promise by the debtor to pay the original debt.

Where a debtor was discharged under such a proceeding, and afterwards gave to one of the creditors who had signed the composition a new note for the old debt, and soon after went again into bankruptcy, having incurred large debts for goods purchased, which goods constituted the principal part of his assets—it was held that the old debt so renewed could not be postponed to the newly incurred debts.

The bankrupt act gives to the District Courts power to marshal assets according to priorities established by the act itself, but they have no power to make discriminations, which the act has not made, between different classes of debts of the same legal character.

Appeal from a Register in Bankruptcy to the Judge of the U. S. District Court for the District of Connecticut, sitting

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in bankruptcy; heard in chambers, February 11th, 1878; being an application of the assignee of the estate of Matthew M. Merriman, bankrupt, to have the proof of a claim by the American National Bank expunged. The case is fully stated in the opinion.

J. Hooker and *A. D. Smith*, for the assignee.

H. C. Robinson and *C. E. Gross*, for the bank.

SHIPMAN, J. Matthew M. Merriman had been duly adjudicated a bankrupt by decree of this court, prior to August 17th, 1875, and his estate was then in settlement. On that day, upon his application, an order was passed directing a meeting of his creditors to be held on August 30th, 1875, to ascertain if they would resolve to accept a composition to be proposed by him in satisfaction of their respective debts. At said meeting he presented a proposition to pay, in full satisfaction and discharge of their respective claims, twenty-five per centum thereof, which payment was to be secured by his four equal promissory notes, endorsed by Joseph Merriman, to be dated on the day of the final confirmation of the resolution by the court, and payable in three, six, nine, and twelve months from the date thereof, with interest. The American National Bank had duly proved against the estate of said bankrupt his notes to the amount of $4,400, endorsed by Joseph Merriman. Said resolution was passed at said meeting by the requisite majority in number and value of the creditors assembled at such meeting, and was confirmed by the signatures thereto of the debtor and of the requisite creditors in number and value. The American National Bank, by their duly constituted attorney, expressly accepted said proposition at the first meeting of creditors, and expressed said acceptance by their signature. At the second meeting of creditors, held on September 11th, 1875, the resolution was found by the court to be for the best interest of all concerned, and was ordered to be recorded.

On November 27th, 1875, M. M. Merriman gave said bank

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his three notes, amounting in all to $4,400, endorsed by Joseph Merriman, in renewal of the pre-existing notes which were due to said bank, paid the discount due thereon, and continued to renew said notes, making from time to time partial payments on the renewals, and paying the discounts thereon, until December 8th, 1876, when there was due upon the last renewals $3,185, which sum with interest thereon is still unpaid. Joseph Merriman has continued to be the endorser upon each set of renewals. The bank received in one year after September 11th, 1875, either in reduction of the notes, or by way of interest, more than the amount which was payable by M. M. Merriman by the terms of the composition, but did not receive the same as a payment on the composition. No notes in accordance with the resolution were ever given to or demanded by said bank, but the giving of said notes was waived by the bank. Joseph Merriman's endorsement made the original notes and the renewals secure.

It was not claimed by the assignee that said bank assented to or signed said resolution under any promise or expectation that the debt of $4,400 was to be paid by the bankrupt. Fraud on the part of either party to the composition was not claimed.

M. M. Merriman was again adjudicated a bankrupt by decree of this court on February 16th, 1877, and John Hooker, Esq., was subsequently appointed assignee of his estate. Said bank has proved against said estate the last renewal notes, amounting to $3,185. The assignee objects to the allowance of this claim upon the ground that the notes are without consideration, and that the debt which they represent has been legally discharged.

All the questions of law which arise upon the foregoing facts were discussed by counsel, the principal question being, whether an express promise made by a bankrupt to a creditor to pay the amount of his debt is valid, such creditor having theretofore expressly assented to a composition made and confirmed under the 17th section of the amended bankrupt act of June 22, 1874, and such composition having been

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substantially carried into effect, and exact compliance with its terms having been waived by the creditor.

An express promise by a debtor to pay a debt which had been, previously to such promise, barred by some positive statute, or had been discharged by operation of law, is binding upon the promissor. *Cook* v. *Bradley*, 7 Conn., 57; *Stafford* v. *Bacon*, 1 Hill, 533. In such cases the moral obligation to make payment, although the debt has been legally discharged, is a sufficient consideration for a new and express promise. In order to revive a debt which had been discharged by bankruptcy or insolvency proceedings, the new promise must be clear, distinct and unequivocal. *Allen* v. *Ferguson*, 18 Wall., 1.

A promise to pay a debt which has been voluntarily discharged by the creditor, as by accord and satisfaction, is not legally binding. Performance of an agreement of composition *inter partes*, in accordance with the terms of the agreement, or legal tender of performance of such agreement in accordance with its terms, is a discharge of the debt which has been agreed to be compromised, so that the discharged debt cannot legally be revived. An agreement of composition *inter partes* becomes an executed agreement by full payment on the composition, though not in accordance with the terms of the agreement, provided compliance with the terms is waived by the creditor.

I forbear to consider the question whether the payment within the year to the bank of an amount of money equal to the twenty-five per cent. and interest, which was payable by the resolution, is a satisfaction of the agreement, the money not having been paid to or received by the bank upon the composition, but upon the antecedent debt, and shall assume that, before the last renewal notes were given, the debtor had been legally discharged by his compliance with the terms of the resolution, legal compliance having been waived by the creditor.

The question which was first suggested resolves itself into this—Is a discharge, by performance of the terms of a bankruptcy composition, a discharge by operation of law, or is it

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a voluntary discharge from the debt which was due to a creditor who had expressly assented to the resolution of composition?

The resolution to accept a composition, and the proceedings which result in an assent by the requisite number of creditors, and in the recording of the resolution by order of court, are proceedings in bankruptcy. They are a method of dividing the estate of the bankrupt among his creditors under the control of a court of bankruptcy. Payment under a composition is one mode of distribution; payment of dividends by an assignee is another mode. Theoretically, each mode divides the whole estate.

A discharge by virtue of payment of the amount specified in the resolution of composition is confessedly a compulsory discharge as to the non-assenting creditor. The discharge is in a certain sense a voluntary act of an assenting creditor, because it is in his power to give or withhold his assent. Assent is a matter of his own election, and if the requisite number of creditors do not assent, the resolution has no effect. But the discharge is also by operation of law as to the assenting creditor, because the entire proceeding is a part of bankruptcy proceedings instituted under authority of a court, and this particular method of division of the bankrupt assets has no validity unless the court is satisfied that the proposition is for the interest of the creditors. The assent of the creditors is a means of ascertaining the fairness and propriety of the proposed division.

The proceeding is not a composition *inter partes*, in which proceeding each creditor can make his assent or dissent final as to himself, but is a statutory composition wherein the assent only of a specified number is required, subject to a subsequent decree of court. The composition is as to the assenting creditor both a voluntary act and an act of the law, but its efficiency is derived from the compulsory power of the law. The differences are radical between the nature of a composition *inter partes* and of a bankruptcy composition; the root of their differences is the fact that the entire proceedings for and in a bankruptcy composition are pro-

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ceedings in bankruptcy, and are a part of a system for the compulsory division of assets which is administered by a court, while a composition *inter partes* derives its validity merely from the will of the parties. These differences induced the Supreme Court of Massachusetts to declare recently, that the proceedings for a composition under the statute "differ wholly in nature and effect from a voluntary composition which binds only those executing it." *Guild* v. *Butler*, Oct., 1877, published in The Reporter of Jan. 2d, 1878.

That a discharge by virtue of compliance with the terms of a bankruptcy composition is a discharge by operation of law, is indicated by the effect of such a discharge upon sureties or indorsers of the debtor under the corresponding section of the English act of bankruptcy.

Proceedings under the 126th section of the English bankruptcy act of 1869, are substantially similar in character to proceedings under the section of our bankrupt act in regard to composition. A discharge of the principal debtor by virtue of an executed agreement *inter partes* is a discharge of his surety, unless such result is expressly avoided by the terms of the agreement of composition, but a discharge of the principal debtor by virtue of a composition under the 126th section of the English act, is, after some hesitancy on the part of courts, and after a contrary decision, now clearly held not to be a discharge of the surety, although the creditor had expressly assented to the terms of the resolution. *Ex parte Jacobs*, L. R. 10 Cha. Ap., 211, overruling *Wilson* v. *Lloyd*, L. R. 16 Eq. Cas., 60.

In the case of *Megrath* v. *Gray*, L. R. 9 Com. Pleas., 216, the same result was reached. The Court of Common Pleas placed their decision upon the ground that it is a universal rule in bankruptcy law that the discharge of an insolvent debtor does not discharge his solvent co-debtor, and that this principle has always been recognized in English bankruptcy acts since the declaratory act in 10 Anne, and was again expressly incorporated in section 50 of the act of 1869, and that the discharge mentioned in section 50, applies

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also to a discharge which may be obtained as a result of the proceedings under section 126.

In *Ex parte Jacobs* the court took a somewhat broader view of the subject. It stated the question as follows: "There can be no doubt that, if the holder of a bill, by becoming party to a deed or agreement, independently of the bankrupt act, agrees to accept a composition from the acceptor, he thereby discharges the drawer; but on the other hand, it is equally clear that if the acceptor is discharged from his liability by operation of law by becoming a bankrupt, the liability of the drawer to the holder is not thereby affected. We have now to consider whether the discharge of the acceptor under the 125th and 126th sections of the bankruptcy acts of 1869, where the holder of the bill votes in favor of the liquidation or composition, is to be considered a discharge by the voluntary act of the holder, or a discharge by operation of law." The reasons which influenced the court were, first, that in a composition *inter partes* the discharge is the act of the creditor alone, whereas in a bankruptcy composition the proper majority have power to assent to the terms, whether the particular creditor chooses to attend or not, or chooses to vote or not; and, secondly, the injurious results of the doctrine that an assenting creditor was discharging his surety. "The consequences of holding that the holder could not vote without discharging the drawer would be, that in many cases a great number, and in some cases the majority, could not vote."

I have been pressed towards a conclusion that the discharge should be deemed to be the voluntary act of the assenting creditor, by the fear that the contrary doctrine would open a door to fraud, and that a bankrupt would be enabled to obtain easily the requisite majority of his creditors, and then, disregarding forthwith the terms of the resolution, would give notes to the favored few, and thus revive his debts to the disadvantage of subsequent creditors, while he is also guilty of a breach of faith towards the unfavored majority. But a consideration of the character and nature of bankruptcy compositions leads to the conclusion, that while this improper

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course of conduct is possible and practicable, it is one which is permitted by the present terms of the bankrupt act.

The assignee also claimed that the case showed that M. M. Merriman's estate was deeply insolvent, which was not denied, and that the bulk of the debts were incurred after the first bankruptcy for goods which went into the new business, that the bankrupt obtained credit upon the faith of his discharge by virtue of his composition and in the belief that his old debts were cancelled, and that the goods which were then sold form the bulk of the assets of the estate. From these facts the assignee insists that an equity has arisen that payment of a dividend upon the revived debts should be postponed until the new debts have been fully paid.

If the conclusions which have heretofore been indicated are correct, each class of debts is alike legally due, and no express lien in favor of any one class of creditors has attached to the fund in the hands of the assignee. Section 4972 declares that "the jurisdiction conferred upon the district courts as courts of bankruptcy shall extend * * *Fourth.* To the adjustment of the various priorities and conflicting interests of all parties. *Fifth.* To the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors." I am of opinion that these clauses confer upon the District Court power only to marshal assets according to priorities and rights which have been created or established by the act itself, or have been created by liens which have been placed upon the assets by the act of one of the parties or by operation of law, and that it is not in the power of the court to discriminate between different classes of debts of the same legal character, although as matter of morals or of honor one class of debts should not have been incurred.

The application to expunge the claim of the bank is denied.

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STATE EX REL. CHARLES J. COLE *vs.* CHARLES R. CHAPMAN.

By the charter of the city of Hartford a city attorney is to be appointed by a major vote of the entire court of common council in joint convention assembled. Held—

1. That a quorum, and a quorum only, of each branch of the common council was necessary to make a convention of the entire common council.
2. That the major vote intended was a major vote of those actually assembled and participating in the ballot, and not a major vote of all the members elected.
3. That a blank vote cast was to be counted.

Where, under a vote previously passed by the convention to elect the city attorney by ballot, twenty-two votes were cast for each of two candidates and a blank vote, and the tellers did not count the blank vote, but reported a tie, and the mayor gave a casting vote (which he was authorized to do in case of a tie), for one of the candidates and declared him elected, after which the convention passed a resolution that the mayor's declaration of the election was erroneous, and that they would proceed to vote for city attorney by yeas and nays, and thereupon, against a ruling of the mayor that such action was out of order, passed by a yea and nay vote a resolution that the other candidate was appointed city attorney—it was held—

1. That in the first vote taken there was not a tie, and that therefore it was not a case where the mayor had a right to give a casting vote.
2. That it was therefore a case where the convention had a right to proceed to appoint.
3. That it was not necessary that the convention should formally rescind its vote to elect by ballot, but that the legal effect of the resolution to elect by a yea and nay vote was to rescind that vote, which was all that was necessary.

INFORMATION in the nature of a quo warranto; filed in the Superior Court in Hartford County, and heard on the 29th day of April, 1878, before *Hovey, J.* The case is fully stated in the opinion.

H. C. Robinson, for the relator.

A. P. Hyde, for the defendant.

HOVEY, J. This is an information in the nature of a *quo warranto*, filed by the State's Attorney at the relation of Charles J. Cole against Charles R. Chapman, to test the title of the respondent to the office of city attorney of the city of Hartford.

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The respondent in his plea justifies under and by virtue of an election by the major vote of the entire court of common council of the city of Hartford, in joint convention assembled, on the 15th day of April, 1878, in accordance with the provisions of the city charter; and he alleges with particularity the manner in which the election was made, the number of votes cast, and the number which he and the relator respectively received, and every other fact necessary to entitle him to hold and exercise the office in question.

The relator replies, specially setting forth certain provisions in the charter of the city of Hartford prescribing the mode of electing the city attorney, the number of members of which the court of common council is composed, and the proceedings of that court on the occasion referred to by the respondent in his plea, and claiming that the respondent upon that occasion did not, but that he, the relator, did receive the major vote of the said court of common council then assembled in joint convention, and that he, the relator, was thereby appointed and chosen to the said office of city attorney.

The respondent rejoins by denying the truth of the matters contained in the replication of the relator, and alleging that on the 15th day of April, 1878, he, the respondent, was duly and legally elected by a major vote of the entire court of common council of the city of Hartford, attorney of said city for the year ensuing. Issue was joined to the court upon this rejoinder, and the parties were fully heard thereon.

The question, therefore, is—Was Charles R. Chapman, the respondent, duly and legally elected on the 15th of April last to the office of attorney of the city of Hartford, as alleged by him in his plea and rejoinder? The charter of the city provides that there shall be a court of common council of said city, which shall consist of two separate branches—a board of aldermen and the common council board; that the board of aldermen shall be composed of all the aldermen of said city and the common council of all the common councilmen of said city; and that one-half of each board shall constitute a quorum thereof. The board of

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aldermen consists of sixteen members, and the common council board of thirty-two members, making in all forty-eight members of both boards.

The charter also provides that an attorney of the city, who shall be counsel to the corporation and whose duties and compensations shall be fixed by by-laws or ordinances, shall be appointed by a major vote of the entire court of common council in joint convention assembled; and that the mayor shall be the presiding officer of all joint conventions of that court and be empowered to give a casting vote in all cases where the action of any such convention shall result in a tie. And by an ordinance of the court of common council, passed in accordance with the charter, it is provided that a meeting of the entire court of common council shall be holden yearly upon the second Monday after the annual city election, for the choice of such officers as are to be chosen by said court in joint convention. The court of common council constituted as stated, assembled in joint convention on the 15th day of April, being the second Monday after the annual city election, for the choice of such officers as were to be chosen in joint convention. Forty-five members of said court were present and participating in the action of the convention. The mayor also was present and presided. On motion it was voted that the convention proceed to the election of city attorney by ballot, and thereupon the mayor appointed one alderman and one councilman to act as tellers in collecting and counting the ballots. The convention then proceeded to vote by ballot for city attorney, and forty-five ballots were cast, one of them being a blank ballot. The tellers, however, reported to the mayor that the whole number of ballots cast was only forty-four, and that twenty-two of those were for the relator and twenty-two for the respondent. The blank ballot they did not report. The mayor thereupon declared that the action of the convention had resulted in a tie, and voted *vivâ voce* for the respondent, and declared him to be elected attorney of said city for the year ensuing, and until his successor is appointed and qualified.

The relator introduced a large number of witnesses to prove a mistake on the part of the tellers in counting the

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ballots, and that in fact he received at least twenty-three ballots instead of twenty-two, as reported by the tellers, and that the respondent received twenty-one only instead of twenty-two, as the tellers reported. The respondent introduced evidence to prove that the count of the tellers was correct.

Alderman Dow, one of the tellers, testified that he counted the ballots cast twice, and upon each count he found twenty-two for the relator and the same number for the respondent, and one blank.

Mr. Higgins, the clerk of the joint convention, testified that he also counted the ballots for the respondent, and that there were twenty-two of them.

Councilman Ensworth, the other teller, did not count the ballots cast for the respondent, but counted those only which were cast for the relator and the blank ballot, and he testified that twenty-two was the number cast for the relator.

N. Brigham Hall, the clerk of the board of common council, testified that he was present when the ballot was taken; that the ballots after being counted were left upon the table which had been occupied by the tellers; that he gathered them up, placed a band around them, put them in his pocket, and took them to his house; that he there counted them and found that there were twenty-three for the relator, twenty-one for the respondent, and one blank.

Those ballots were brought into court, and a large portion of those which were for the relator were identified by members of the court of common council as the votes which they had cast. But Mr. Higgins, the clerk of the convention, testified that the ballots were not left upon the table, but were brushed by him on to the floor or into the waste basket which stood upon the floor.

The relator also introduced twenty-four members of the court of common council, each of whom testified that he voted for the relator. But one of those witnesses must have been mistaken, for it is admitted on all hands that only forty-five members voted upon the ballot for city attorney; that the respondent received at least twenty-one votes, and that there was one blank ballot, so that not more than

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twenty-three members could have voted for the relator. The member who voted the blank ballot probably supposed it was a ballot for the relator. This is the only way in which the testimony can be satisfactorily explained.

There is so much doubt about the time when and the manner in which the ballot for the relator discovered by Mr. Mather got into the hat used for a ballot-box that I cannot find as a fact that it was one of the ballots cast by members of the court of common council for city attorney. Besides it would, if allowed and counted, make the whole number of votes forty-six, while no one pretends that more than forty-five votes were cast. I therefore pass that by without further consideration. Upon the whole the evidence is calculated to create some doubt as to the real state of the vote for city attorney, but it is not sufficient to warrant a finding that the count made by the tellers was erroneous.

Assuming then, for the purposes of the case, that there were twenty-two votes for the relator, twenty-two for the respondent, and one blank, was the respondent legally elected by the casting vote of the mayor? Had there been but forty-four members of the court of common council present and participating in the ballot, and the votes cast had been equally divided between the relator and respondent, as the tellers reported, I should entertain no doubt that the casting vote of the mayor would have legally elected the respondent. The charter does not require a majority of all the members elected to the court of common council to appoint a city attorney. It requires only a major vote of the entire court in joint convention assembled. To constitute the entire court of common council, a quorum only of each branch is in my opinion necessary. In the case of *Warnock* v. *LaFayette*, 4 La. An., 419, the power of amotion being conferred upon a city council, to be exercised by a vote of two-thirds of that body, it was considered to give the power of removal to two-thirds of a legal quorum. Two-thirds of the whole number of members composing the council were held not to be required. If, therefore, there had been eight aldermen and sixteen councilmen present and participating in the action of the joint convention on the 15th of April, they would have

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constituted the entire court of common council within the meaning of the city charter, and thirteen votes would have been sufficient to elect a city attorney. If the votes of the twenty-four members had been equally divided between the two candidates, the mayor might, in my opinion, have decided the election by his casting vote.

When there is an odd number of members present and participating in the action of the convention, as there was in this case, it is obvious that there can be no election unless one of the persons voted for receives a majority of the votes of all the members present and participating. Nor can an election be effected in such a case by the casting vote of the mayor, for there cannot be an equal division of the members, and consequently there can be no tie in their votes. But when the number present and participating is an even number, an election may be effected by the votes of one-half of the members with the casting vote of the mayor. Applying these rules to the case before me, the entire court of common council in joint convention assembled at the time the ballot for city attorney was taken, was composed of forty-five members. That number of members was present and participated in the action of the convention. Twenty-three votes were therefore necessary to constitute a major vote of the entire court. The respondent received but twenty-two and consequently was not elected. Had there been twenty-three blank ballots instead of one the twenty-two votes received by the respondent would not have elected him.

The next question raised by the pleadings is whether the relator is entitled to the office of city attorney? It appears from the record of proceedings of the joint convention that an appeal was taken from the decision of the mayor that there was a tie and that the respondent was elected, and the appeal was sustained by the convention. The convention thereupon passed a resolution in the following words:

"*Resolved*, That the declaration by the mayor of a tie vote for city attorney was erroneous, and that this convention now proceed to vote for city attorney by yeas and nays."

And then the following resolution was offered, to wit:

"*Resolved*, That Charles J. Cole be and hereby is appointed

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city attorney in and for the city of Hartford for the ensuing year, and until his successor is duly appointed and qualified."

The mayor ruled that this resolution was out of order, but an appeal was taken and sustained by the convention. It was then moved to amend by substituting the name of the respondent for that of the relator, but the amendment was lost. The resolution was then passed by yeas and nays—twenty-five members voting in the affirmative and twenty-two in the negative.

The respondent claims that the court of common council had no power, after his election was declared by the mayor, to take the action which they did, or any other or further action in the matter. It is undoubtedly true that if the respondent had been duly and legally elected the power of the court of common council would have been exhausted. But it appearing from the statement and record of the vote itself that the respondent did not receive the number of ballots required by the charter of the city to elect him, and that the mayor had no right to give the casting vote, and that consequently there had been no legal election of city attorney, it was competent for the court of common council to take the action they did in reference to the declaration of the mayor as to the result of the ballot, and to proceed to vote again by ballot, or otherwise, for the office in question. It would have been more regular for the convention to have rescinded their order that the election should be by ballot before acting upon the resolution appointing the relator, than it was to vote upon the resolution without formally rescinding the order. But that irregularity does not deprive the resolution of any of its force, or impair in any degree or to any extent its validity. The legal effect of the resolution was to rescind the previous order that the election should be by ballot, and that was all that was required. I am, therefore, of opinion that the relator was legally elected to the office of city attorney.

Whereupon it is considered that the respondent, with the said office of attorney of the city of Hartford may in no way intermeddle, but may hereafter be altogether excluded from the same.

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APPENDIX.

OBITUARY NOTICE OF ORRIS S. FERRY.*

ORRIS SANFORD FERRY, a member of the Fairfield County bar, was born at Bethel, August 15th, 1823, and died at Norwalk, where he resided, on the 21st of November, 1875. His father, Starr Ferry, was a manufacturer, and for a time sheriff of Fairfield County. Young Ferry was fond of athletic games and sports, and when grown to manhood greatly enjoyed a day's recreation with his gun or fishing rod. He worked for a short time, when a boy, in his father's hat factory, but his growing love of books soon determined him to seek a liberal education. At the age of seventeen he entered Yale College, graduating in 1844. He excelled when in college in general literature, oratory and debate, being awarded by the faculty the highest literary prizes, and taking such rank among his fellow-students that they regarded his future eminence as assured.

Immediately after graduation he began the study of law under the late Judge Osborne, at Fairfield, and afterwards pursued it at Norwalk, in the office of Hon. Thomas B. Butler, since Chief Justice. He was admitted to the bar in 1846, and was for a short time in partnership with Judge Butler. Mr. Ferry about this time married Miss Charlotte C. Bissell, a daughter of Governor Bissell, who, with a daughter, survives him.

Mr. Ferry soon became a conspicuous character in the community in which he lived. A native of the county, of popular manners, a generous disposition, a tall and commanding figure, a highly intellectual face, of fine abilities and culture, and already a practiced and eloquent public speaker, ambitious of professional distinction, with too much pride of character to be a self-seeker and yet a natural leader, he could not fail soon to attract the public attention. He soon found himself in the enjoyment of a good practice, which steadily increased, and though he was at times drawn aside from his profession, he never returned to it without finding an immediate and abundant call for his services. While he was yet a young man he ranked among the leaders of the bar in the amount of his business and the ability and success with which it was conducted.

If Mr. Ferry had devoted his life to his profession he would have been a great lawyer. He had a fine legal mind. It was not acute and subtle,

* Prepared by Asa B. Woodward, Esq., of the Fairfield County Bar.

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but it was broad, comprehensive, logical, quick of apprehension, and rapid in its operations. He had an excellent memory, both of facts and principles. He was not a man of especial tact, nor of artful expedients, neither was he cool, calculating and passionless; on the contrary, he was always frank, open-hearted, ardent in temperament, and naturally so impulsive that he would often have made grievous mistakes but for the restraining power of his strong common sense and clear intellect. He had an excellent knowledge of the common law as a scientific system, and loved to read the abstruse treatises of the old writers. His conservative mind was somewhat impatient of modern innovations, yet had the flexibility to recognize and adapt itself to the actual condition of things. He was not deceived by sophistries, either in his own argument or that of his opponent, but was a clear, logical reasoner, and was especially powerful as an advocate, both before juries and courts. Great responsibility never depressed him or paralyzed his efforts, but always nerved him with increased energy and power. His legal arguments and opinions were rapidly but carefully and deliberately prepared; and he was a safe and judicious legal adviser. His mode of examining a legal question was characteristic of his mind. He never counted the authorities on one side and the other, but quickly turned to the leading cases, scrutinized the reasonings of the judges, rapidly seized upon the exact point decided, and then by a comparison of the cases formed his own judgment of what was the true principle, with its just limitations. In the trial of his cases in court, where of course he was most conspicuous to the public eye, he was not especially conciliatory in manner, but was always courteous to his opponent, fair and candid in his statement of law and evidence, and always bold and aggressive, winning often where a timid man would have failed. He was always ready to try his cases when reached, never appeared at a disadvantage for want of preparation, and never had to rely on the good nature of his opponent to overlook his own remissness. He was prompt, faithful and conscientious in the discharge of all his professional duties, and manly and dignified in his intercourse with clients, members of the bar and courts.

Mr. Ferry was for a short time Judge of Probate for the district of Norwalk. In 1855 and 1856 he was a member of the State Senate, and from 1856 to 1859 was State's Attorney for Fairfield County.

When he entered the legislature he was a young man, and was then for the first time in public life. He there found himself associated with gentlemen of unusual experience and ability, but his own talents soon gave him a recognized rank among the ablest of them. He now became known to the state at large, and from this time was a positive power in the affairs of the commonwealth. He acted, when in the legislature, with the so-called American party, which was then dominant, but followed his own judgment when it differed from that of the majority, and manifested the same independence of party dictation which was charac-

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teristic of him through life. The Republican party, brought into being by the repeal of the Missouri Compromise, was then just beginning its existence. Mr. Ferry was among the first to see that the principle it represented was to be the inevitable issue in politics, and he fully sympathized with it. He labored zealously to bring those with whom he was then acting into a union with the new party. This result was soon substantially accomplished, and Mr. Ferry was ever afterwards a Republican, though in his later years he often differed with the majority of his party, on questions of both principle and policy.

His services as an advocate of the principles of his party were much sought and freely rendered. He entered with great zeal into the Presidential canvass of 1856, making many public speeches in this and the neighboring states. In 1857 he was nominated for Congress and was defeated. In 1859 he was again nominated. It was not then common in New England for candidates to address the people in their own behalf. Mr. Ferry yielded reluctantly to the request of the convention which nominated him, and spoke in every town in the district. The contest was considered a doubtful one, but Mr. Ferry was elected by a handsome majority, and the result was attributed in great measure to his own speeches.

Mr. Ferry was in many respects remarkable as a public speaker. He possessed a fine taste, and when the occasion required it, could prepare addresses of much literary merit. His delineations of the characters of Roger Sherman and of Governor Buckingham, on presenting to Congress a statue of the former, and on the death of the latter, (Mr. Ferry's last effort,) are models of chaste eloquence, seldom surpassed in their kind. In the discussion, however, of issues before the people or in public bodies, as well as in his arguments at the bar, he never spoke to amuse or be admired, but always to convince or persuade. With perhaps a few exceptions in the earlier part of his congressional career, he always spoke extemporaneously, his preparation being a clear comprehension and firm mental grasp of his subject, and a definite plan in his mind of his mode of treating it. He began with a clear statement of the issue in hand, and proceeded in an unbroken argument to the end, always carrying his audience with him in unflagging attention and interest; and yet he never attempted to amuse his audience or relieve the tedium of his argument by anecdote, wit or sarcasm, nor to embellish it by literary quotation. So much in earnest was he that he could not have done so even if he had possessed the faculty for it. He never raised a laugh. Unless in the discussion of purely legal questions before a court, where he spoke with calmness and deliberation, he was earnest and impassioned in manner, enchaining attention, and often, as it were, compelling assent. When great interests were at stake he seemed wholly enwrapped in his subject, his large eyes flashing with enthusiasm, and his whole person giving emphasis to his utterances. His statements of propositions of law or

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fact were admirable for clearness and force, and his reasonings lucid and compact. The learned and the unlearned alike appreciated his eloquence, and gave him their undivided attention. His language was well chosen, but not fastidious. There was nothing sententious, brilliant or especially original in his style of expression or mode of thought, but his words, tersely and forcibly expressing his meaning, issued forth, when in his impassioned arguments, like the rush of a torrent. He never halted or hesitated in the choice of language, nor had occasion to recall a word misused, to re-construct a tangled or obscure sentence, or to re-state a proposition to make it more clear. And in this respect his manner in private conversation was the same.

In the autumn of 1859, before taking his seat in Congress, Mr. Ferry made a public profession of religion by uniting with the First Congregational Church of Norwalk; and the profession of his faith was not with him a matter of mere form. From that time to his death he was a consistent and active Christian worker. When he was at home, as long as his health allowed, he taught a Bible class in the Sunday-school, and was a regular attendant and participant in the meetings of the church. When no pastor was present he often conducted evening meetings, and delivered lectures. His successive pastors have borne public testimony to the depth and earnestness of his religious convictions and the great value of his influence. He was a man emphatically of growth in religious character as well as intellectual power and breadth, to the day of his death.

While he was a member of the National House of Representatives he delivered two elaborate speeches on the slavery question, and the threatened secession of the Southern States, in which he ably set forth and defended the principles of the Republican party, and was a member of the celebrated committee of thirty-three on the state of the Union. In 1861 he was again nominated for Congress, and was defeated.

Being in Washington at the breaking out of the civil war, he enlisted in a volunteer battalion for the temporary defense of the seat of government, and served until troops were obtained from the North. He was soon after tendered and accepted the command of the Fifth Regiment Connecticut Volunteers. He was afterwards promoted to be brigadier-general, and served through the war, with an honorable though not brilliant record.

Returning in 1865 to his profession, he was a year later chosen United States Senator for the term commencing in 1867, and was re-elected in 1872. The limits of this notice will not admit an outline of his senatorial career. Many questions of grave importance, growing out of the late war, demanded the attention of Congress. Corruption was rife in many departments of the public service. The conventional usages of the Senate restrained Mr. Ferry at first from taking a prominent part in the debates, and in the spring of 1869 an insidious disease, ultimately fatal,

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attacked his spine, and gradually impaired his physical powers, so that in the latter part of his career he could not mingle in the discussions to the extent that he would have desired. He was, however, always at his post of duty, and a laborious worker on committees, where he had a prominent place; and he spoke frequently, at first in more elaborate efforts, but afterwards generally in off-hand powerful arguments, inspired by his earnest and positive convictions, and remarkable for compactness, brevity and effective force. He came to be regarded as one of the ablest members of the Senate, and his acknowledged uprightness, independence and intellectual power combined to give him an influence in that body hardly surpassed by any in his time. He died with no blot on his good name, and no man ever suspected his integrity, or questioned his purity or his personal honor.

At his death his associates in Congress and his brethren at the Fairfield County bar paid fitting tributes to his memory. Hon. Carl Schurz, who was one of the most eminent members of the Senate during six years of Mr. Ferry's service, in opening a public lecture at Norwalk shortly after the decease of the latter, spoke as follows:

"I see around me the life-long friends and neighbors of Senator Ferry, now no more; a man whom I cherished as a dear companion and associate, and to whom I looked up as one of the foremost men of the republic, in talent, integrity and patriotic spirit. More than almost any one I knew did he possess those qualities of mind and character which just at this period of our history are so greatly needed for the guidance of public affairs. There was in him a clearness and grasp of judgment which no sophistry could baffle, a sense of right and wrong which no party spirit could stagger; a depth and strength of conviction which no self-interest could obscure; a force of will which no opposition could bend; an independence and pride of genuine manhood which no frown of power could frighten, and no blandishment could seduce. Had his body been as strong as his mind and heart, he would beyond doubt have compelled universal recognition as one of the very first of statesmen in American history."

OBITUARY NOTICE OF ELEAZER K. FOSTER.*

Few men have ever lived in New Haven whose death called forth an expression of sorrow so universal and so sincere as that of Judge

* This notice was originally prepared for the New Haven *Palladium*, by Arthur D. Osborne, Esq., of the New Haven Bar, and has been revised by him at the request of the Reporter for insertion here.

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Foster. For more than thirty years he had been a conspicuous figure in that community, and so hale and fresh and full of life he always seemed, that when it was announced that his illness would probably prove fatal, an expression of surprise and grief fell from the lips of every one.

ELEAZER KINGSBURY FOSTER was born in New Haven, May 20th, 1813. His father, Eleazer Foster, son of Edward Foster and Rachel Newell, was born in Union, Conn., graduated at Yale College in 1802, and was a prominent lawyer in New Haven at the time of his death, in 1819. His mother, Mary Pierpont, was a lineal descendant of Rev. James Pierpont, who settled in the ministry in New Haven, in 1684, and was one of the founders of Yale College; and of Mary Hooker, daughter of Rev. Samuel Hooker, of Farmington. Their descendants have ever since resided in New Haven, and the sisters of Judge Foster still retain and occupy a portion of the original homestead of Rev. James Pierpont.

Mr. Foster graduated at Yale College in 1834, studied law partly in New Haven and partly in the office of W. T. Worden, Esq., at Auburn, N. Y., was admitted to the bar in New Haven in March, 1837, and resided there in the practice of his profession until his death, June 13th, 1877.

He married Miss Mary Codrington, then of New Haven, a lady of English birth, and formerly of Kingston, Jamaica, January 2d, 1838. Three sons survive him, all graduates of Yale College—William E., now an editor of the Buffalo *Commercial Advertiser;* Eleazer K., a practicing lawyer at Sanford, Florida; and John P. C., a practicing physician in New Haven. A beloved daughter, Mary, died December 12th, 1864, at the age of twenty-one. His wife died September 25th, 1872.

Soon after his admission to the bar he was elected prosecuting grand-juror of the town. He was appointed judge of probate for the New Haven District in the years 1845, 1846, 1848, 1849, and chosen a delegate to the Republican National Convention at Chicago in 1860. In 1854 he was appointed State Attorney for New Haven County, and nominated Register in Bankruptcy, by Chief Justice Chase, when that office was created, and continued in both these positions until his decease. He was a member of the Common Council of the city of New Haven during six years. He represented the town of New Haven in the General Assembly in the years 1844 and 1845, and also in 1865, when he was elected speaker of the House. In 1858 he was a candidate for the Republican nomination for the office of governor of this state, but was defeated by Governor Buckingham. Later his friends again proposed to him to be a candidate, when he would probably have been nominated and elected, but he withdrew from the canvass for private reasons.

This brief record of offices and honors conveys no idea of the man. At the bar, in public life, and in society, Judge Foster was a man of mark. The eminence that he attained at the bar was not due to laborious application or systematic study. A noble presence, a grand voice,

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the graces of oratory rising often to eloquence, wit and humor, a thorough knowledge of human nature, and a quick sympathy with all ranks of men—these were the gifts that always secured to him a place in the front rank of the profession. For many years his official position had confined him chiefly to the practice of criminal law. But in this department he was repeatedly required to deal with the most important causes, and to encounter the ablest, the most gifted, and the most laborious of his brethren. To these demands he was always equal, and was ever regarded as a most formidable antagonist before the jury. With this tribunal he was especially successful. His tact, his ready wit, his quick perception of all their prejudices and preferences, always kept him in harmony with the jury, and often he seemed able to carry them along with him to whatever conclusion he desired. As a cross-examiner he was remarkably skillful, and many an unhappy culprit has seen the secrets of his breast laid bare by him, even while believing that every avenue of approach to them had been securely closed. In the administration of his office of State Attorney he sought to do justice, rather than to exact the extreme penalty of the law. He never demanded the pound of flesh, but whenever the case would allow, he mitigated the severity of the prosecution, and tempered justice with mercy. His management of causes was honorable and manly; he treated antagonists, both parties and witnesses, kindly and generously, so that it was not uncommon for persons, with whom the necessities of the case required him to deal severely, to thank him for his forbearance.

Judge Foster was the last survivor, (save Hon. Alfred Blackman,) and also the youngest, of that brilliant circle of lawyers whose fame in the past is already becoming a tradition to the lawyers of this generation.

In many respects Judge Foster was peculiarly fitted to adorn the highest positions in public life, and no doubt, at times, conscious of his own abilities, he aspired to those higher walks which he failed to reach. In politics he was a whig until the dissolution of that party, after that always an earnest republican. As a public and political speaker he was necessarily a great favorite.

The political and public meetings and ceremonial occasions which were graced with his presence, and enlivened with his wit and eloquence, seem, as we recall them, almost countless. Though the people loved him, and honored him whenever they had an opportunity, he was not the master of those arts by which nominations are secured, and less able and more contriving men often grasped the prizes which might have been worthily bestowed upon him.

But in social life he was pre-eminent. All men counted his society a privilege. He was a man of infinite humor, fresh, constant and inexhaustible, and ever a fountain of cheerfulness and entertainment to all with whom he came in contact. He had dramatic power that would have distinguished him as an actor. The cultivated, the refined, the

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learned, found pleasure in his society. The humblest and poorest were cheered and brightened by his conversation. Although fond of the pleasures of the table, at which on festive occasions he was the central figure, his personal habits were simple and unostentatious. He was a very early riser, and those morning hours which most professional men devote to sleep, he spent in walking about the town, meeting and chatting with people of every sort, and brightening himself and them with his cheerful talk.

Beneath these gay and lighter aspects of his character rested a thoughtful and serious mind. He had on all important subjects deep and earnest convictions. He loved justice, and truth, and honor, and his passionate outbreaks of indignation at any thing false, or mean, or cruel, often startled those who had only seen him in his pleasant moods. He was some times irascible and impatient, but the deep-seated kindness of his nature soon absorbed these temporary feelings, and nothing that he said left any sting behind. He had great physical strength and courage, and as is often the case, these were combined with most gentle and tender feelings. He loved little children, and they always attracted his notice, and he was an immense favorite with them. He loved to surprise some poor man or woman with a kindly and generous gift, to reward a little street *gamin* beyond his expectation, or to draw a hearty laugh from a knot of the common folk.

Without special culture in any branch of the fine arts, he instinctively appreciated and delighted in whatever was excellent in these. He was very familiar with the Bible and with Shakespeare, and his quotations from these books, as well as from many others, were frequent and felicitous. He was very thoughtful of the feelings of others, and had the happy faculty, in whatever society he was thrown, of saying something to please and to be remembered. A marked trait in his character was the real and sincere pleasure he felt and expressed in the prosperity and happiness of others, and in their enjoyment. These characteristics made him an universal favorite, and in every circle of society, in his native town, he was missed and mourned.

Judge Foster was a man of deep religious convictions. He believed firmly in the fundamental doctrines of the Episcopal Church, of which he was a member. His Christian faith and hope and his entire resignation to the divine will were often and fully expressed by him during his last illness.

The Greeks had a proverb that no man should be pronounced happy while he lived; yet we surely may now call him happy who, having closed a long and honorable career, has advanced with courage and hope from this life temporal into the life eternal, leaving the rich legacy of an honored name and the tender affection of the people among whom he had always lived, to children worthy to receive and to cherish it.

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OBITUARY NOTICE OF ISAAC M. STURGES.*

ISAAC MOREHOUSE STURGES was born at Wilton, on the 6th day of July, 1807; he died at his sister's residence in that town, on the 30th day of October, 1877.

Admitted to the bar of Fairfield County in January, 1837, he at once commenced practice in Newtown, removing from that place to Bridgeport in 1848, where he soon obtained a large clientage, and continued in the full discharge of his professional duties till the very last. He had been engaged in the trial of a cause the day before his death, and left it unfinished at the close of the day, intending to continue the trial on the morrow, but died very suddenly from an attack of heart disease before the morrow came.

His father, Erastus Sturges, a farmer living at Wilton, was a justice of the peace of the old school, fourteen times elected to the General Assembly, and a member of the Constitutional Convention of 1818; before him were tried many cases, and Betts, Bissell, and Sherwood in their management of justice trials, furnished the student with examples of legal ability and models for emulation—the only school of instruction open to him, for until his admission to the bar Mr. Sturges had never been present at a higher court.

Entering the profession somewhat late in life; with limited educational advantages—being mainly those, aside from attendance at district schools in the winter months, derived from three years instruction (1826–1829) at the Wilton Academy, then under the charge of Mr. Hawley Olmstead; with his opportunity for literary culture circumscribed; he neglected nothing, but treasured every thing of which he could avail himself, and brought to the chosen calling of his life a mind so matured and trained that he became not only an acknowledged leader of a bar where leadership carried with it deserved recognition of ability, but, outside of professional studies, he was one of the best read of our number, and kept himself abreast of all that was new in literature and science. He thought earnestly, talked well, and applied with discrimination the thoughts and opinions of others.

His chief characteristic was thoroughness. In the technics of the profession he had hardly a superior; he elaborated every detail, sometimes beyond apparent necessity, but he always had a precedent for every proposition suggested, and with abiding faith in his own premises, he considered it his duty to force a recognition from the court, by citing numerous authorities, of the conclusion which he deemed established. He took nothing for granted, in the court or in any thing else, but developed his argument with syllogistic precision,

"*Ab ovo usque ad mala.*"

* Prepared by Hon. Calvin G. Child, of the Fairfield County bar.

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This minuteness of research characterized his professional life throughout; it was unsafe to disregard his law, for the motion in error was sure to follow, urged with dangerous persistency; it was unwise to be heedless of his facts, for each was claimed for a fixed and special purpose in the line of his argument; and as a result of such completeness few were employed in as many cases, none was more able as a practitioner, and so vigorous was he as an adversary that it was unsafe to meet him, with hope of success, having a single weak spot in armor, for his thrust was unerring with whatever weapon he went to battle, and he never asked nor gave quarter.

One eminent in our profession has called Judge Hosmer "a travelling index of the law." There was no safer digest for Fairfield County than Mr. Sturges, for his tenacious memory and diligent research enabled him to furnish information of some decision on almost every conceivable point—information which he was always ready to impart.

Somewhat of a recluse in his habits, being unmarried, and living quite by himself in bachelor quarters, till the last few years, when he made his home with a sister at Wilton, going to and from his office at Bridgeport daily, he acquired a taste for a solitary life, which at times made him appear unsocial; but his character when sought out and known was thoroughly cordial and kindly. He seemed to dread the first approach to companionship or intimacy, but after the friendship was formed he was loyal to it in word and deed. Possessed of a sensitiveness which at times almost mastered him, he seemed to desire to appear to the world as indifferent to criticism, censure or praise; he aimed to be strictly just, but the equipoise of the scales, which he prided himself in holding well balanced, was not rarely disturbed by a genial kindliness, which he never admitted he possessed. Without being lavish in expenditure or in the least degree ostentatious, he showed in many ways, quietly and without publicity, a generosity which sprang from a large hearted sympathy and thorough unselfishness.

His ambition centred in his profession. He was however elected a representative from Wilton in 1837, from Newtown in 1844, and again from Wilton in 1876. He was judge of probate for the district of Newtown in 1844, and judge of the City Court of Bridgeport in 1860 and 1861.

"The annals of lawyers, like the annals of the poor, are brief and simple. No memorial can keep their memories from oblivion, even in the next generation, except the brief record of their forensic contests to be found in the Connecticut Reports." So wrote Mr. Sturges shortly before his death. Surely in that record, which shows to a certain extent what the lawyer is, few have a more prominent place.

And thus another passes from the brotherhood of the profession—that brotherhood which amidst the contentions and emulation of forensic struggles, admits a generous chivalry in its antagonisms and ends contest.

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with the adjournment of court; which respects rivalry, buries animosity, and recognizes in the leadership earned by professional prominence, the tribute due to patient effort in an honorable calling.

OBITUARY NOTICE OF EZRA HALL.

EZRA HALL, a member of the Hartford Bar, died at Hartford on the third day of November, 1877, at the age of forty-two. He was born at Marlboro in this state, and after working upon his father's farm till he was twenty years of age, he determined to acquire a liberal education, and after a course of preparatory study at the seminary at East Greenwich, R. I., he entered Wesleyan University, at Middletown, in 1858, graduating in 1862. He read law in the office of the late Thomas C. Perkins, and immediately after his admission to the bar commenced practice in the city of Hartford, pursuing his profession there until his death. He was elected to the State Senate in 1863 from the district in which his native town was situated, and was the youngest member of the body. He was again elected to the Senate in 1871, and in 1874 represented Marlboro, in which he still kept his legal residence, in the House of Representatives. In 1874 he was admitted to the bar of the Supreme Court of the United States and argued some important cases before that tribunal. He was taken suddenly ill, and died after a few days of intense suffering. He left a widow and two children.

The death of Mr. Hall was a painful surprise to the community and a cause of deep sorrow to his professional associates and his many friends. He had been so full of energy, so enthusiastic in the pursuit of his profession, so intent on success, making himself felt as a force wherever he went, and was still so young and full of promise, that it seemed almost impossible that such a career could be so suddenly ended.

Mr. Hall had attained an honorable position at the bar and a high place in the public esteem. He was ambitious in his profession, and indefatigable in the discharge of its duties. No client ever had reason to complain of any neglect of his interests. He was always honorable in his practice and had in this respect the entire confidence of his associates at the bar. His business had become quite large and he found himself in his later years often compelled to give up to labor many hours that were required for sleep. His constant overwork undoubtedly injured his health and perhaps hastened his death.

He had a tenacious will, showing itself in his persistency in pursuing his ends and not at all in obstinacy, a vigorous and especially active

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and perceptive intellect, and a rare faculty for the despatch of business. He was however made for a man of affairs rather than for a great thinker, and found his most fitting place in dealing practically with business and with men. With a shrewdness and sagacity of the traditional New England type, he was unusually skillful in negotiation. In all his business relations he commanded the confidence of all who dealt with him, as a man of perfect integrity, while his agreeable manners very generally won over those whom he met in an adverse relation.

Mr. Hall was full of cheerful good nature, always hopeful and always ready to cheer others, and where he was able, to help them. His countenance was lighted up by good will and his manners were frank, courteous and kindly. His nature was sympathetic and generous. His pastor, the Rev. W. L. Gage, said of him at his funeral: "I do not know as, during the ten years I have lived in Hartford, I have seen any one who so habitually had such a radiant and pleasant countenance, or who so often had a word of good cheer for those who needed it."

During the later years of his life Mr. Hall was a specially growing man. An earnest study, not merely of the law, but of every thing that would help him to a higher development of his faculties, was showing its fruit. Professional success was still the great object of his ambition, but it seemed to gather about itself in his conceptions higher and higher moral conditions—a wider knowledge, a more thorough self-culture, a high standard of personal honor. He was thus growing in moral purpose and in all the elements of true manhood.

He had been for many years a communicant in one of the Congregational Churches of the city of Hartford and for a long time was one of the most active laborers in its Sabbath-school.

At a meeting of the Hartford County Bar, held on the occasion of Mr. Hall's death, and which was very fully attended, the following resolution was unanimously adopted:

Resolved, That we regard with profound sorrow the death of Ezra Hall, Esq., a member of this bar. Mr. Hall has been taken away in the fulness of his manhood from the active and successful pursuit of his profession, and from a general usefulness of life that made him a most valuable member of the community. With rare industry, with enthusiasm in his profession, with untiring devotion to the interests committed to his care, and with an unusual knowledge of men and tact in the management of causes, he united a high sense of professional honor and a firm allegiance to moral duty. Without a high degree of oratorical skill, but with a vigorous intellect, clear perceptions, and a thorough understanding and preparation of his cases, he was able to make effective arguments, either to the court or to the jury. His mind was practical and sagacious. His integrity was unquestioned. With a countenance indicating natural refinement, with great kindness of heart and an affable manner, he had yet a firm will, a decided judgment, and great energy of character. He

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was warm in his friendships, and found great happiness in serving those whom he loved. He was a man of professed and consistent Christian life. He met death with entire composure, expressing a desire to live but a readiness to die. He leaves behind him a most pleasant memory and the influence of a good life.

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INDEX TO THE FORTY-FOURTH VOLUME.

ACCEPTANCE OF ORDER.

The defendant had accepted sundry orders drawn on her by a contractor who was building a house for her. In a suit brought upon an accepted order the question was whether she had accepted it conditionally or absolutely. It appeared that in accepting it she had said to the payee that she must accept it conditionally as she had the orders of the other creditors. Held that this was a conditional acceptance, without reference to the question whether she had in fact, or had not, accepted the other orders conditionally. *Foster* v. *Balmforth*. 435

AGENT.

See CONTRACT, 3.

ARBITRATION.

W and *F*, having a controversy as to a claim of indebtedness, submitted the matter to an arbitrator, by a written submission which provided that the award should be "final and conclusive, *and made to be executed within ten days after the award.*" The award as made merely directed that *F* should pay *W* sixty-five dollars. Held to be void as not following the submission. *Waller* v. *Shannon*. 480

ASSUMPSIT.

1. The defendant for a valuable consideration agreed to convey to the plaintiff a city lot, which was at the time liable to an assessment for a street improvement, the amount of which was not then determined, and agreed to pay the amount when determined to the city and save the property from the assessment lien. He soon after conveyed the property to the plaintiff, who entered into possession. The assessment was afterwards made by the city and notice given to the defendant, who refused to pay the same, and the plaintiff afterwards, to save the property from foreclosure upon the lien, paid the amount to the city. Held that the plaintiff could recover the amount of the defendant in assumpsit for money paid, and that it was not necessary for him to sue upon the contract. *Post* v. *Gilbert*. 9
2. It was not essential to the plaintiff's recovery in this form of action that the defendant should have been legally liable to the city for the amount of the assessment and thus should have been relieved by the plaintiff's payment of an obligation legally resting upon him. *ib.*
3. It is enough in any such case that the plaintiff has paid the money at the request of the defendant, express or implied. *ib.*
4. And the necessity of making the payment on the part of the plaintiff, and the defendant's leaving him to pay when he had agreed to make the payment himself, constituted such an implied request. *ib.*
5. And held that the defendant's agreement to pay the assessment might be proved by parol. *ib.*
6. The plaintiff sold groceries from time to time to *M*. The defendant, a relative of *M*, was during this time allowed by him to receive his earnings and apply them to the support of *M's* family and the payment of his debts, and promised the plaintiff to pay his account with others as he collected such earnings, and did from time to time make payments to the plaintiff on his account. When the plaintiff stopt delivering goods to *M* the balance due him was over $300, and there was in the defendant's hands, of *M's* earnings, $164. Held that the plaintiff could not recover this sum of the defendant as money received to his use. *Douglass* v. *Skinner*. 338
7. The fund being held by the defendant for the support of *M's* family and the payment of his debts generally, the plaintiff was not entitled to the whole of it, and if to a portion, it could not be determined in an action at law to what portion. *ib.*

ASSUMPTION OF MORTGAGE DEBT.

See MORTGAGE, 4.

ATTACHMENT.

1. An officer having attached personal property, undertook to complete his service of the writ by leaving a copy, with his doings endorsed upon it, at the usual place of abode of the defendant, as required by statute, but by mistake left it at the wrong place, and the

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writ on this ground was afterwards abated. After the attachment and before the session of the court the property was sold by the officer under the statute authorizing the sale of attached property that is perishable or expensive to keep. In trespass for taking and converting the property, brought against the plaintiff in the attachment suit, it was held—1. That the return of the officer that he had left the copy at the defendant's place of abode, was open to contradiction. 2. That the attempted service was of no effect. 3. That the writ and proceedings under it were no justification in the present suit. *Buckingham* v. *Osborne.* 133

2. The defendant attached as the property of *B* a musical instrument belonging to *B's* wife, the officer locking up the room containing it and taking the key. Soon after the building took fire and the instrument was damaged by water in extinguishing it. *B* requested the defendant, during the fire, to allow him to remove the instrument, which could have been done, but he refused, and afterwards refused to allow its removal to a dry place, and it became greatly damaged. Soon after the officer notified *B* that he relinquished the attachment upon it, but did not otherwise return or offer to return it. In trespass by *B*, as trustee for his wife, it was held—1. That the notice of the relinquishment of the attachment did not amount to a return of the property nor to an unequivocal offer to return it. 2. That the defendant was liable for the damage done to the instrument after the relinquishment of the attachment. *Becker* v. *Bailies.* 167

ATTACHMENT (EXEMPTION FROM.)

The horses and carts of a person engaged in the business of carting coal, are not protected from attachment as tools of a debtor's trade. *Enscoe* v. *Dunn.* 93

AWARD.

See ARBITRATION.

BAIL BOND.

The surety on a bail bond is not liable unless there has been an avoidance by the debtor. And there is no such avoidance where there has not been due diligence on the part of the officer. *Beach* v. *Elliott.* 237

BANK (NATIONAL.)

See NATIONAL BANK.

BANKRUPTCY.

1. Where there is a leasehold estate among the assets of a bankrupt, the assignee is not bound to take the property unless it is for the interest of creditors that he should do so. *White* v. *Griffing.* 437

2. And he is to be allowed a reasonable time, before making his election, in which to ascertain whether the lease has any value. *ib.*

3. If he accepts the lease he is bound by its covenants. *ib.*

4. And his acceptance takes effect from the time when the bankrupt proceedings were instituted. *ib.*

5. A sale of the assignee's interest in the lease and the receipt by him of a considerable sum of money for it, would seem to involve an acceptance of the lease by the assignee. *ib.*

6. Where a party had given a guaranty for the payment of the rent by the lessee, and the assignee had sold the leasehold property to the lessor, it was held, (assuming the assignee to have accepted the lease and the sale to have carried the assignee's interest in it,) that the sale extinguished the lease and discharged the guarantor from all liability accruing after the institution of the bankrupt proceedings. *ib.*

7. A discharge in bankruptcy, under a composition between a bankrupt and his creditors, made and confirmed under the provisions of the bankrupt act, is a discharge by operation of law, and not a voluntary discharge. *In re Merriman's Estate.* 587

8. And this, as against a creditor voluntarily signing the composition, as well as against a non-assenting creditor. *ib.*

9. An indebtedness thus discharged is therefore a valid consideration for a subsequent promise by the debtor to pay the original debt. *ib.*

10. Where a debtor was discharged under such a proceeding, and afterwards gave to one of the creditors who had signed the composition a new note for the old debt, and soon after went again into bankruptcy, having incurred large debts for goods purchased, which goods constituted the principal part of his assets—it was held that the old debt so renewed could not be postponed to the newly incurred debts. *ib.*

11. The bankrupt act gives to the District Courts power to marshal assets according to priorities established by the act itself, but they have no power to make discriminations, which the act has not made, between different classes of debts of the same legal character. *ib.*

BILLS.

See NOTES AND BILLS.

BONA FIDE PURCHASER.

A purchaser of real estate gave no consideration beyond a mortgage back for the price, with a stipulation in the mortgage deed that the mortgage debt was not to be paid any further than it could be obtained from the mortgage. Held not to be a bonâ fide purchaser, as against a party who had taken a prior voluntary conveyance. *Alden* v. *Trubee.* 455

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BRIDGE.

By an act of the legislature the city of *N. H.* and town of *E. H.* were required at their joint expense to build and maintain a bridge over a river that was the boundary between them, the location and manner of construction to be determined by a board of commissioners, each to pay all damages for land taken on its own side for the bridge or for highways connected with it, and each to provide all necessary and convenient highways within its own limits to connect the bridge with existing highways; the bridge to be suitable and convenient for public travel and to be a public highway. A high embankment was necessary to make the bridge accessible, but a much louger one on the side of the city than on that of the town. Held that the bridge, as intended by the act, did not include the embankments necessary for access to it, but that each corporation was to make the embankment on its own side. *Phillips* v. *East Haven.* 25

BROKER (REAL ESTATE.)

1. The defendant agreed to pay the plaintiff, a real estate broker, $70 if he would find a person with whom he could exchange certain land owned by him for other land on satisfactory terms. The plaintiff found *A*, who offered to give the defendant for his land certain real estate of his own, which he stated to be encumbered to the amount of $3,000 and no more, and a certain sum in money. The defendant accepted the offer and the parties agreed to meet at the plaintiff's office at a later hour the same day and execute the deeds, which the defendant requested the plaintiff to prepare. The plaintiff prepared the deeds and *A* attended at the time agreed, but the defendant did not come, and never consummated the exchange. It appeared that, after the parties separated at the first meeting, the defendant discovered that there was a lien of $300 for unpaid taxes on *A's* land, but he did not inform *A* or give any reason for abandoning the exchange. *A* had failed to mention the tax lien by inadvertence, and was able and prepared to pay the taxes and remove it. In a suit brought by the plaintiff to recover the $70 for procuring a party to make the exchange, it was held that he could not recover. *Rockwell* v. *Newton.* 333
2. The defendant, finding that *A* had misstated the amount of the incumbrance on his property, had a right to drop the negotiation at once, without further communication with him. *ib.*

CHANGE OF POSSESSION.

See Possession (Change of.)

CHARGE TO JURY.

See Practice, 2.

CHARGES ON BOOK.

A person who has charged *A* on his books for goods sold, may yet show that they were in fact sold on the credit of a corporation of which *A* was agent, and that the corporation received the goods and gave the seller credit for them. *Northford Rivet Co.* v. *Blackman Manf. Co.* 183

CHARITABLE USE.

1. A will, having created a trust, and given sundry legacies under the trust, made the following provision with regard to the residue: "It is my will that said trustee shall dispose of such remainder for any and all benevolent purposes that he may see fit." Held to be void for uncertainty. *Adye* v. *Smith.* 60
2. It does not help the will in such a case for the trustee to designate certain charitable purposes to which he proposes to apply the property. The question is not whether the trustee may apply the estate to such purposes, but whether he is bound to do so. *ib.*

CITY.

1. The legislature incorporated the New Haven Water Company, with power to open the grounds in any streets of the city of New Haven, for the purpose of laying and repairing water pipes, and to establish the water rents to be paid. At a later session, and after the company had expended a large amount, the legislature granted a revised charter to the city, in which the common council were authorized "to regulate or prohibit the excavating or opening of the city streets, for public or private purposes, and to regulate the laying of gas pipes, water pipes and drains." Under this grant the common council passed an ordinance requiring the water company to pay $1 for a license to open an unpaved street, $10 for every nine hundred feet of pipe laid, and $50 for opening any paved street. Held—1. That the right conferred upon the common council, so far as the operations of the water company were concerned, was one of regulation merely. 2. That under this power the common council had the right to establish a reasonable fee for granting a license to the company to open a street; but that there could not be an assessment of taxes for revenue under the form of a license fee. 3. That the amount of the fee should be fixed with reference to the reasonable cost of issuing the license. 4. That the fees established by the common council were, both in their amount and in the graduated principle upon which they were fixed, unreasonable and illegal. *City of New Haven* v. *New Haven Water Co.* 105

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2. A city held liable for an injury from the slippery condition of a sidewalk by reason of ice upon it, where the city had been guilty of negligence in the care of the walk. *Dooley* v. *City of Meriden.* 117
3. The duty on the part of a city of opening a public street, carries with it the right to determine the grade of the street and the manner of constructing it. *Fellowes* v. *City of New Haven.* 240
4. With the exercise by the city authorities of their discretion in the matter no other tribunal has any right to interfere, so long as they keep within the limits of their powers. *ib.*
5. If, in such a case, private property is incidentally damaged, the party injured may or may not be entitled to compensation, according to the circumstances; but such damage, unless possibly in extreme cases, affords no reason for the interference of a court of equity. *ib.*
6. Where a city, in the discharge of a duty imposed by law, has by adverse proceedings taken land for a public street and paid the damages legally assessed, it is not liable for an injury incidentally and necessarily caused to the adjoining land by the grading and working of the street in a proper manner. *ib.*
7. It is presumed in such a case that the city, in taking and paying for the land for a street, took, as an incident, a right to establish the grade according to its own judgment, and to bring the street to that grade, without further compensation. *ib.*

CITY OF HARTFORD.

See COMMON COUNCIL, 1, 2.

CLOUD UPON TITLE.

1. Where a deed is void upon its face it is a well settled rule that a court of equity will not set it aside as a cloud upon a title. *Alden* v. *Trubee.* 455
2. But the rule is otherwise where the invalidity of the deed is not apparent on its face, but depends upon extrinsic evidence. *ib.*

COLLECTING AGENT.

A firm in the state of Michigan left for collection with the plaintiffs, a bank in that state, a sight draft of their own for $500 on "*J. C.* treasurer of the *M. S. Co.*," a manufacturing corporation in Connecticut. The plaintiffs at once sent the draft to the defendants, a bank in Connecticut, with directions to "return at once without protest if not paid" The defendants presented the draft to the drawee and he replied that he would look up his account with the drawers and inform the cashier with regard to payment. The drawers had also written *J. C.* that such a draft had been forwarded, and he wrote them in reply, "The $500 draft has been received and paid. Don't draw any more." On the receipt of this letter the drawers showed it to the plaintiffs, who believing that the draft had been duly paid, paid the drawers the $500. *J. C.* the drawee, was also president of the defendant bank, and this fact was known to the plaintiffs The draft had not in fact been paid, though the drawee supposed it had, but the defendants had neglected to return it or send notice of its non-payment. If they had returned it at once it would have prevented the payment of the $500 to the drawers. Several days later the cashier returned the draft unpaid, which was his first information to the plaintiffs with regard to the matter. The plaintiffs thereupon demanded repayment of the drawers, which was refused. They were solvent, but had no visible property and the claim could not have been collected without much difficulty. Held—1. That the defendants, as agents of the plaintiffs for the collection of the draft, had been guilty of negligence in not obtaining payment of the draft or returning it at once to the plaintiffs. 2. That, although the plaintiffs paid the money to the drawers upon the statement of the drawee to the drawers that the draft had been paid, yet, as they would have been saved from loss if the defendants had performed their duty, the defendants were liable for the actual damages resulting from their neglect. 3. That these damages were to be regarded as the whole amount paid by the plaintiffs to the drawers, and that they had a right to recover this sum although they had a right of action for the whole amount against the drawers. *Merchants & Manufacturers Bank* v. *Stafford Bank.* 564

COMMON CARRIER.

See RAILROAD, 2.

COMMON COUNCIL.

1. By the charter of the city of Hartford a city attorney is to be appointed by a major vote of the entire court of common council in joint convention assembled. Held—1. That a quorum, and a quorum only, of each branch of the common council was necessary to make a convention of the entire common council. 2. That the major vote intended was a major vote of those actually assembled and participating in the ballot, and not a major vote of all the members elected. 3. That a blank vote cast was to be counted. *State ex rel. Cole* v. *Chapman.* 595
2. Where, under a vote previously passed by the convention to elect the city attorney by ballot, twenty-two votes were cast for each of two candidates and a blank vote, and the tellers did not count the blank vote, but reported a tie, and the mayor gave a casting vote (which he was authorized to do in case of a tie), for one of the candidates and de-

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clared him elected, after which the convention passed a resolution that the mayor's declaration of the election was erroneous, and that they would proceed to vote for city attorney by yeas and nays, and thereupon, against a ruling of the mayor that such action was out of order, passed by a yea and nay vote a resolution that the other candidate was appointed city attorney—it was held—1. That in the first vote taken there was not a tie, and that therefore it was not a case where the mayor had a right to give a casting vote. 2. That it was therefore a case where the convention had a right to proceed to appoint. 3. That it was not necessary that the convention should formally rescind its vote to elect by ballot, but that the legal effect of the resolution to elect by a yea and nay vote was to rescind that vote, which was all that was necessary. *ib.*

CONFLICT OF LAWS.

1. The plaintiff, a citizen of Rhode Island, attached in this state a debt due from a resident of this state to a corporation located in the state of Pennsylvania. Previous to the attachment the corporation had gone into insolvency under the insolvent laws of that state, and had under those laws made an assignment of all its effects to a trustee for the benefit of its creditors, and notice of the assignment had been given to the Connecticut debtor. Held that the trustee in insolvency did not acquire a title to the debt that was good against the attachment. *Paine* v. *Lester.* 196
2. The giving effect in this state to the laws of a sister state or foreign country, in the case of the transfer of or succession to personal property within the limits of the state, is wholly an act of comity, and not a recognition of a right. *ib.*
3. This comity our courts will extend where there is no interest of our own citizens, or of the citizens of other states who are seeking to avail themselves of the benefit of our laws, to be injuriously affected by it. *ib.*
4. Where such interests exist, the courts owe a legal duty to the parties so interested which is more imperative than the demands of mere comity. *ib.*
5. The citizens of other states coming into this state to avail themselves of our laws for the protection of their rights are, by the constitution of the United States, entitled to the same aid from our courts that one of our own citizens would be entitled to. *ib.*

CONSERVATOR.

A conservator can not maintain a suit in his own name for money lent by the ward. *Riggs* v. *Zaleski.* 120

CONSIGNEE.

A manufacturing corporation located in the state of Connecticut consigned to the firm of *C & Co.* in the city of New York a quantity of goods to be sold on commission, it being agreed that the firm should have a lien on them for outstanding acceptances of the firm for the accommodation of the corporation. *C & Co.*, becoming insolvent, made an assignment of all their property, for the benefit of their creditors, under the insolvent laws of the state of New York, to the defendant, who as such assignee took possession of these goods and proceeded to dispose of them without regard to the rights of the corporation. The latter soon after took up all the acceptances and made demand on the defendant for the goods, which demand was refused. The plaintiff was afterwards appointed receiver of the corporation under the statute (Gen. Statutes, tit. 17, ch. 1, sec. 23,) and after making demand, brought an action of trover in his own name against the defendant in this state, service having been made upon him here. Held—1. That *C & Co.* having been entrusted with the sale of the goods, that trust was a personal one, which could not be delegated to another, beyond the usual course of business, without the consent of the consignors. 2. That all that *C & Co.* could transfer to their assignee for the benefit of their creditors was their lien on the goods. 3. That while therefore the assignee had lawfully come into possession of the goods, his sale of them had been a tortious conversion. 4. That though the title to the goods did not become vested in the receiver on his appointment, he yet could sue for them in his own name under the statute. 5. That it did not alter the case that the lien had not been discharged when the conversion took place. It was enough that it was discharged before demand was made and suit brought. *Terry* v. *Bamberger.* 558

CONSTITUTIONAL LAW.

Certain real estate was devised to *A* for life, and after her death upon certain contingencies to *B* and others. The General Assembly, upon the petition of *A*, and against the remonstrance of *B* and others, passed a resolution authorizing the sale of the real estate by certain trustees named, and the holding and investing by them of the proceeds for the benefit of all parties interested, according to their respective interests. Held to be constitutional and valid. *Linsley* v. *Hubbard.* 109

CONTEMPT.

1. An adjudication of contempt by a court of competent jurisdiction, where the proceeding is according to the common law practice, is final, and can not be reviewed by a court of error. *Tyler* v. *Hamersley.* 393
2. But when the question of contempt is tried upon an issue of law tendered by the party moving in the proceeding, and decided upon

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such issue, the decision must be regarded as a judgment upon which a writ of error may be brought. *ib.*

CONTRACT.

1. The plaintiff, a sculptor, made a plaster bust of the deceased husband of the defendant, under an agreement that she was not to be bound to take it unless she was satisfied with it. When it was finished she was not satisfied with it and refused to accept it. In a suit for the price agreed it was found that the bust was a fine piece of work, a correct copy of a photograph furnished by the defendant, and that it accurately portrayed the features of its subject; and that the only fault found with it was that it did not have the expression of the deceased when living, which was caused by no imperfection in the work but by the nature of the material. Held that the plaintiff was not entitled to recover. *Zaleski* v. *Clark.* 218
2. As the bust was to be satisfactory to the defendant, it was for her alone to determine whether it was so, and it was not enough that her dissatisfaction was unreasonable. *ib.*
3. The order for the bust was procured by a third person who had a general authority to solicit orders for the plaintiff, but none to make such a condition. Held—1. That such a general authority would seem to be sufficient to authorize the agent to agree upon the terms of the contract. 2. But that, if the authority was not sufficient, the result would be that there was no special contract, and as the defendant had not accepted the bust there was no sale and no liability on the part of the defendant. *ib.*

CONTRACT (CONSTRUCTION OF).

The plaintiff for a small consideration conveyed to the defendants the right to flow his land by the erection of a dam across a river, and the defendants executed to him a bond in the penal sum of $1,000, with the following condition: "The condition of this obligation is such, that whereas the said *T.* has conveyed to the *O. W. Co.* the right of flowage of his land lying &c., and whereas on the southerly side there is a bank wall on which stands the carriage house of said *T.;* and whereas the flowage of said land may injure said wall and carriage house; *and whereas the O. W. Co. has undertaken, and does hereby undertake and agrees, forever to protect and maintain said wall* against all damage resulting from the water and ice in said river while said dam shall remain standing: Now if the said *O. W. Co.* shall well and truly maintain said wall and repair all injury that may so result, then this bond shall be void; otherwise in force." Held that by this instrument the defendants had, in addition to the obligation of the bond as such, covenanted to protect and maintain the wall in question, so long as the dam remained standing. *Tomlinson* v *Ousatonic Water Company.* 95

CORPORATION.

When the legislature has granted special privileges at different sessions to two independent corporations, the court will not so construe any general expressions in the last grant as to effect a repeal or destruction of the first. *City of New Haven* v. *New Haven Water Company.* 106

CORPORATION (JOINT STOCK).

The statute with regard to joint stock corporations (Gen. Statutes, tit. 17, ch. 2, part 8 art. 4, sec. 3,) provides that the officers of such a corporation who shall intentionally neglect to perform any of the duties required by the act, shall be jointly and severally liable for all its debts contracted during the time of such neglect. The defendants were directors of such a corporation and had made themselves liable to its creditors under this act. The plaintiffs had a claim against a creditor of the corporation, on which they brought suit and factorized the corporation, and afterwards obtained judgment against the corporation upon a scire facias. The judgment not being paid, they brought an action under the statute against the defendants, upon their personal liability for the debt attached. Held—1. That the indebtedness of the corporation upon the judgment in scire facias was not a "debt contracted" by the corporation within the meaning of the statute. 2. That the rights of the plaintiffs' original debtor against the defendants did not constitute a claim which the plaintiffs could enforce by an action at law. 3. That if those rights constituted a "security" for the debt attached, to the benefit of which the plaintiffs became entitled under the provisions of the act of 1850, (Gen. Statutes, tit. 19, ch. 2, sec. 37,) yet that the benefit of this security could be obtained only by a proceeding in which all the equities between the original debtor and the defendants could be adjusted. *Armstrong* v. *Cowles.* 44

CORPORATION (MUNICIPAL).

See CITY.

COVENANT.

See CONTRACT (CONSTRUCTION OF), 1.

COVENANTS IN A DEED.

1. Where land is sold with a covenant against incumbrances, and an incumbrance exists of a permanent character, which impairs the value of the premises, and can not be removed as a matter of right by the purchaser, the damages will be measured by the diminished value of the premises. *Mitchell* v. *Stanley.* 312

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2. The defendants conveyed to the plaintiffs, with a covenant against incumbrances, a tract of land on which there was the following incumbrance: a company owning a canal on which the land abutted, had, by a deed of a former owner, the right to pass and repass upon the land along the canal within two rods of the canal bank, for the purpose of cleaning and repairing the canal, upon paying the owner reasonable damage. In an action for a breach of the covenant, it was found that the actual damage from the exercise of the right to the time of suit was $10, but that the land was worth $750 less by reason of the incumbrance. Held that the plaintiffs were entitled to recover $750. *ib.*

DAMAGES.

1. Certain personal property was attached and by the negligence of the officer was burned. At the time of the attachment it was mortgaged for a certain sum. Held that this sum was not to be deducted from the value in fixing the damages in a suit brought by the owner against the officer. *Becker* v. *Bailies.* 167

2. Upon a hearing in damages after a default, in an action on the case charging an injury by the negligence of the defendants, the defendants may show, for the purpose of reducing the damages to a nominal sum, that they were not guilty of negligence. *Batchelder* v. *Bartholomew.* 494

3. And it makes no difference whether the injury charged is one to the person of the plaintiff or to his property. *ib.*

4. Nor that the damages are entire and indivisible. *ib.*

See COLLECTING AGENT, 1; COVENANTS IN A DEED, 2.

DEED OF LAND.

1. The purpose for which an ordinary deed is made is not to state the contract between the parties in regard to the terms of the purchase, but simply to convey the title, and the real contract in pursuance of which the deed was given may be shown by parol. *Post* v. *Gilbert.* 10

2. The defendant conveyed to the plaintiff by warranty deed a tract of land described as bounded "North on F Street 189 feet, East on land of *P* 147 feet, South on lands of *W* and *P*, in all 189 feet, and West on land of *W* 147 feet." The distance between the land of *P* on the east and that of *W* on the west was only 184 feet. In an action for breach of the defendant's covenant that he was seized of the land described, it was held—1. That parol evidence was not admissible on the part of the plaintiff, that the defendant, at the time the deed was executed, proposed to describe the north and south lines as "190 feet more or less," and that the plaintiff refused to accept a deed so drawn and told the defendant to fix on such a number of feet as he was willing to warrant, and that the defendant then drew the deed as above. 2. That the description of the land as bounding on *P* on the east and on *W* on the west was to be regarded as one of greater certainty than the description of the north and south lines by their length, and that therefore the former description controlled the latter. 3. That the deed therefore did not show a clear intent to convey exactly 189 feet of land, and that consequently the covenant of seizin was not to be taken as applying to that quantity. *Elliott* v. *Weed.* 19

3. A release deed is one of the regular modes of conveying property, and it makes no difference whether or not the releasee has an existing estate in possession. *Ely* v. *Stannard.* 529

See MORTGAGE, 2.

DEED (CORRECTION OF).

A mortgage drawn for the purpose of securing to *A* a debt due him, was formally witnessed and acknowledged, but by accident was not signed by the mortgagor. In this form it was delivered to *A* and recorded. On the same day the mortgagor conveyed the premises to *B*, the deed containing the following clause: "Subject to a mortgage to *A* for $500, which the grantee assumes and agrees to pay as part consideration of this deed." On a bill in equity brought by *A* against *B* for a correction of the deed and for a foreclosure, it was held—1. That equity could not furnish relief on the ground that the deed was defectively executed. Such relief could be furnished only by compelling a specific performance of the contract lying behind the deed, and a title thus conveyed or decreed would take effect only from the time of the decree, and would be only such title as the respondent might then have. 2. That specific performance could not now be compelled because the respondent was not the party who contracted to convey, and the party who contracted to convey had no longer any title. 3. That there was no estoppel in pais, as the respondent had done nothing by which the petitioner had been misled. 4. That there was no estoppel by deed, as a grantee is not estopped, by accepting a deed which describes the premises as subject to an incumbrance, from showing that the incumbrance has no existence in fact. 5. That the petitioner was not entitled to a decree of foreclosure, as he had no title legal or equitable, the deed being wholly void. *Goodman* v. *Randall.* 321

DEED (COVENANTS IN).

See COVENANTS IN DEED.

DEFAULT.

See DAMAGES, 2.

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DELIVERY.

See Possession (Change of).

DEPOSITION.

1. The statute with regard to the taking of depositions (Gen. Statutes, p. 436, sec. 4,) requires that they be "sealed up" by the magistrate taking them. Held that the sticking together by means of gum, of the envelope containing the deposition, was sufficient. *Morgan* v. *Jones*. 225
2. The statute does not prescribe the time within which a deposition shall be sealed up and returned to court, and what is a reasonable time must depend upon the circumstances. *ib.*
3. A deposition to be used in this state by the plaintiff in the case, was taken before a magistrate in the state of New York in May, 1875, but was retained by him until the 6th day of March, 1876, when it was sealed up and the next day delivered to the clerk of the court, on which day the trial commenced. It appeared that the sole purpose for which it was retained and kept open by the magistrate was that certain documents attached to the deposition might be examined and referred to in another deposition in the same cause which the magistrate expected to take. It also appeared that the defendant was present with his counsel when the deposition was taken, that it had not been altered since taken, and that the defendant was not injured by the delay. Held that the delay was not a sufficient reason for rejecting the deposition. *ib.*

DEVISE.

See Lapsed Devise.

EQUITY.

1. *M* brought an action against *B* before a justice of the peace, the only service upon *B* being by leaving a copy at his place of residence. He was at that time confined in an insane asylum in another part of the state, and neither he nor any one in his behalf had any notice of the suit, and *M* got judgment by default for $100 damages and $15 costs. *B* afterwards brought a petition to the Superior Court for an injunction against the collection of the judgment, which court decreed a perpetual injunction. Upon a motion in error by the respondent, it was held—1. That the decree was not erroneous on the ground that there was adequate remedy at law by a writ of error, as the writ might not be so served as to operate as a supersedeas. 2. That parol evidence was admissible to prove that the petitioner had no notice of the pendency of the action against him, the proceeding not being a collateral impeachment of the judgment, but a direct proceeding to set it aside. 3. That the general rules governing petitions for new trials and limiting the granting of them, were not applicable, and that the petitioner therefore was not bound to show that he had a good defence against the action. 4. That by a perpetual injunction against the collection of the judgment the respondent was not deprived of his cause of action by reason of its merger in the judgment, since the judgment being void by reason of want of jurisdiction over the person of the petitioner, the original cause of action was not merged in it. 5. But held that the Superior Court had no jurisdiction by reason of the amount involved being less than five hundred dollars, the Court of Common Pleas having exclusive jurisdiction of all causes in equity wherein the "matter in demand" does not exceed that sum. *Blakeslee* v. *Murphy*. 188
2. The "matter in demand," as used with reference to suits in equity, does not necessarily mean a money demand, but the pecuniary value of the matter in controversy. *ib.*
3. Here the matter in controversy was the judgment against the petitioner for $115, and that sum was to be regarded as its value. *ib.*
4. A church association brought a bill in equity against certain parties who claimed to have acquired title to the church property, to restrain them from interfering with the petitioners' use of it and to set aside the deed under which they claimed. The petitioners alleged that they were a corporation and owned the real estate in question. It was found that they were not a corporation, but a mere voluntary association, and that the title to the property had never been in them but in certain trustees for the church. Held that the petitioners could not maintain their bill. *East Haddam Baptist Church* v. *East Haddam Baptist Society*. 259
5. Individual members of the church could be protected in their equitable rights upon a proper bill, making the trustees, and all other persons having a legal or equitable interest, parties. *ib.*
6. Where equitable relief is sought in a cross-bill, and all the facts are brought out on the hearing of the petitioner's bill, it is not a valid objection to a decree in favor of the respondent on his cross-bill, that he would have adequate remedy at law, for, the court having rightfully taken jurisdiction of the case upon the petition, can retain it for the purpose of doing justice upon the whole case. *Alden* v. *Trubee* 455

See Cloud upon Title, 1, 2; Deed (Correction of), 1; Estate in Settlement, 5; Injunction, 1–4; Mortgage, 6–11.

ERROR.

See Writ of Error.

ESTATE IN SETTLEMENT.

1. The statute (Gen. Statutes, tit. 18, ch. 11

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sec. 28,) provides that executors and administrators shall, during the settlement of the estate, have possession and control of the real estate, where the same is not specifically devised, and that all the products and income therefrom shall vest in them in the same manner as personal property Held that such possession and control were for the benefit of the persons entitled to the real estate, and that the rents and profits received from it were to be regarded as an incident of the real estate, and if not needed for the payment of debts were to go with it, and did not go to the residuary legatees. *Remington* v. *American Bible Society.* 512

2. Under the Connecticut statute the settlement of an administration account and the distribution of an estate does not prevent the estate being subjected, if actually solvent, to the payment of a debt which accrued after the settlement of the estate. *Davis* v. *Weed.* 570

3. Where such a claim is presented to the administrator and is disallowed by him, it is necessary that its validity be determined by suit against the administrator before a court of common law or equity jurisdiction; and such suit must be commenced within four months after the disallowance, in the same manner as is required by statute in the case of claims presented within the time originally limited by the court of probate. *ib.*

4. It is not necessary that a new administrator be appointed; the distribution does not exhaust his power. *ib.*

5. A bill in equity will not lie against the heirs, to compel payment from their real estate of a claim accruing subsequently to the distribution. *ib.*

See EXECUTORS AND ADMINISTRATORS, 1; LEGATES FOR LIFE, 1; PRESENTATION OF CLAIM, 1, 2.

ESTOPPEL BY DEED.

See DEED (CORRECTION OF), 1.

ESTOPPEL IN PAIS.

1. *M* gave *B* a power of attorney to lease his real estate, collect rents, and institute all legal proceedings that he should think necessary. Under this power *B* had the care of certain premises leased by *M* to *T*, the lease limiting the use to the keeping of a lager beer saloon, and the lessee covenanting to use the premises for no other purpose. During the term *T* at considerable expense built a small kitchen in the rear, and fitted up a restaurant on the premises. *B* knew of his expending money in the alteration and made no objection until two months afterwards. *M* afterwards brought a petition for an injunction to stop the use of the premises by *T* for a restaurant. Held—1. That if *M* personally had known of the outlay being made by *T* and had made no objection, he would be held to have assented to the new use of the premises. 2. That *B* under the power of attorney so far represented *M* that his knowledge and acquiescence were the knowledge and acquiescence of *M*. *Malley* v. *Thalheimer.* 41

2. Where a declaration is made to one person for the purpose of influencing his conduct, and though not confidential is not intended for others, a bystander who overhears it and acts upon it can not set up an estoppel against the party making the declaration. *Kinney* v. *Whiton.* 262

See DEED (CORRECTION OF), 1.

EVIDENCE.

1. A vote of a school district directing the committee of the district not to re-employ a certain teacher, which was of no legal effect from want of notice of the matter in the warning, held to be inadmissible as proof of the state of feeling on the part of the district with regard to the matter. *Wilson* v. *Waltersville School District.* 157

2. And if the fact that a large number had thus shown their opposition to the teacher were admissible in evidence upon proper proof, yet a copy of the vote certified by the clerk of the district would not be proper proof of that fact. *ib.*

3. The certificate of the clerk imported verity only as to those matters upon which the district might lawfully act. *ib.*

4. A joint bond was executed by *R* and *K*, conditioned that *R* should pay over all funds coming into his hands as agent of an insurance company. In a suit on the bond against both obligors, to which *K* alone made defence, *R* appearing by attorney and consenting to judgment, it was held that the books of *R*, showing the receipt of moneys for the company, kept by him in the regular course of his agency, were admissible against *K*. *Agricultural Ins. Co* v. *Keeler.* 161

5. And held that it did not alter the case that by the books *R* stood charged with certain sums not actually received and for which he might not ultimately be liable, as this fact went to the weight of the evidence not to its admissibility. *ib.*

6. *W* gave *B* a writing by which he agreed to deliver to *B* or bearer a phaeton of a certain description and value on a certain day a few months later. *B* soon after assigned the contract to *K* for a valuable consideration, and the phaeton not being delivered on the day agreed, *K* brought suit upon it. Held that *W* could show by parol evidence that the consideration for the contract was a certain note endorsed to him by *B*, which was to fall due before the day of the delivery of the phaeton, and that it was agreed that he was not to deliver the phaeton unless the note was first paid. *Kinney* v. *Whiton.* 262

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7. Such parol proof does not contradict or vary the written contract, the writing not purporting to state the consideration. *ib.*
8. And the plaintiff especially could not object to parol evidence of the consideration, as it was necessary to his recovery that he should prove a consideration, and as the written contract did not state what it was it could be proved only by parol. *ib.*
9. The heirs at law of a testatrix contested her will on the ground that she was of unsound mind and unduly influenced. The party claiming under the will offered in evidence, for the purpose of showing on the part of the testatrix an actual dislike of the heirs at law and a determination to give them nothing, certain declarations made by her to that effect, among which were several as to the lewd character of the wife of one of them. Held that, for the purpose of showing that she was under a mental delusion, evidence was admissible that the character of the woman in question was perfectly good. *Mills's Appeal from Probate.* 484
10. And held that the fact that counsel for the heirs at law, at the close of the trial before the jury, abandoned the claim that the testatrix was of unsound mind, was not a sufficient reason for refusing to grant a new trial for the error of the court in excluding evidence previously offered by them to prove such unsoundness. *ib.*
11. The heirs at law were allowed to prove certain declarations of the testatrix to the effect that the father of the party claiming under the will had induced her to come to his house to reside and had prevented her from returning by threats. Held that evidence was admissible on the part of the party claiming under the will, that these statements were not true. *ib.*
See ASSUMPSIT, 1; DEED OF LAND, 1, 2; RAPE, 1.

EXECUTORS AND ADMINISTRATORS.

1. A bond given by an executor "well and truly to administer" an estate, covers the duty of the executor to pay over to a legatee for life of personal property, the interest and dividends received by him from the property. *Sanford* v. *Gilman.* 461
2. In England a judgment against an executor *de bonis testatoris* is equivalent to a finding that he has assets in his hands unadministered. In this state it involves a finding merely that the estate is liable to pay the claim sued upon. The question of assets is not before the court; and judgment should be rendered for the whole indebtedness. *Davis* v. *Weed.* 569
See ESTATE IN SETTLEMENT, 1, 3, 4.

FRAUD.

See LAW AND FACT (QUESTIONS OF), 1; MORTGAGE, 12.

FRAUDS (STATUTE OF).

See STATUTE OF FRAUDS.

FOREIGN ATTACHMENT.

See CORPORATION (JOINT STOCK), 1.

HIGHWAY.

1. The selectmen of a town have no right, as against an owner of land on the highway, to divert the water from a spring on such owner's side of the highway, to a public watering trough on the other side. *Town of Suffield* v. *Hathaway.* 521
2. As a general rule courts will not interfere with selectmen in the exercise of their judgment as to the mode of making a highway safe for public travel, but will do so where their object is merely to promote the comfort of travelers, and in so doing they invade private rights. *ib.*
See CITY, 3–7.

HUSBAND AND WIFE.

1. *A* and *B* were married in 1861. By a parol agreement made just before the marriage the wife was to retain the control of her property and be entitled to its use and proceeds. She had about $5,000, with which in 1864 she purchased a farm, taking the deed to herself, and procured stock for it. The husband carried on business elsewhere and had nothing to do with the management of the farm until 1867, when, having failed in business, he came to the farm to live. The wife after this carried on the farm as before, except that he worked upon it when able, being in feeble health, and took special oversight of the out-door work. A horse that was foaled by a mare originally bought by the wife, was in 1874 attached by a creditor of the husband as his property. In trespass against the attaching creditor, brought by the husband as trustee for his wife, it was held—1. That evidence of the parol antenuptial agreement, even though inoperative in itself under the statute of frauds, was admissible, as tending to prove that the husband, by his subsequent conduct in allowing his wife to have the sole control of the property, intended to relinquish all claim that he might otherwise have had upon it. 2. That the stock on the farm belonging to the wife, its increase was her property. 3. That it did not affect the case that the debt for which the horse was attached was for provender fed out upon the farm and flour consumed in the family, since the husband, to whom the credit was given, had no interest in the property. 4. That the court could not presume that there was anything in the arrangement that was fraudulent against the husband's creditors, by reason of his earnings going into the products of the farm, as it did not appear

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that, in the circumstances, his services were worth more than his support. *Sanford* v. *Atwood.* 141

2. Whether the legal title to the property vested in the husband in trust for the wife: *Quære.* *ib.*

3. An action of assumpsit was brought against a husband and wife, and judgment rendered against the husband and in favor of the wife. Held that, under a proper construction of the acts of 1848, 1873 and 1875, (Gen. Statutes, pp. 417, 444, and Session Laws of 1875, p. 31,) the wife was not entitled to costs. *Warren* v. *Clemence.* 308

4. It is settled in this state that in the absence of fraud and where creditors are not prejudiced a man may make a valid transfer of personal property to his wife. *Darcy* v. *Ryan.* 518

5. Such transfers operate to vest an equitable title in the wife, whereby she becomes the real owner, leaving the legal title in the husband as trustee. *ib.*

6. A woman was married in 1871, and lent to her husband $350, which he used in his business from that time till 1876, when, on leaving for Ireland, he executed to her a bill of sale of most of his personal property, of which she took possession. A part of the property was soon after attached by a creditor of the husband. No fraud was shown in the transaction, nor that existing creditors were injured, nor that there was any intent to defraud subsequent creditors, nor that the debt on which the property was attached was due at the time of the transfer. Held that the money lent by the wife to the husband, together with his obligation to provide for her support, constituted a meritorious consideration, and that the bill of sale vested an equitable title to the property in the wife, which was good against the attaching creditor. *ib.*

7. Under the statute (Gen. Statutes, tit. 19, ch. 5, sec. 11,) which provides that "when any married woman shall carry on any business, and any right of action shall accrue to her therefrom, she *may* sue upon the same as if she were unmarried," a suit can be brought only in her name. *Rockwell* v. *Clark.* 534

INJUNCTION

1. Injunctions to restrain proceedings at law do not operate as prohibitions to the courts in the exercise of their jurisdiction, but only prevent the parties enjoined from availing themselves of some undue advantage which they may have obtained by fraud or accident. *Tyler* v. *Hamersley.* 419

2. Where therefore a petition for an injunction against the execution of an order of the court for the commitment of the petitioners for a contempt in disobeying a peremptory writ of mandamus, prayed merely that the State's Attorney be enjoined from praying out and the clerk of the court from issuing any process for their commitment, it was held that the petition, even if otherwise good, could not be entertained. *ib.*

3. But a court of equity has no jurisdiction to grant an injunction to stay the execution of such an order. *ib.*

4. If such an injunction should be granted it would be the duty of the court which ordered the commitment to disregard it, and to protect its officers in proceeding without regard to it. *ib.*

See EQUITY, 1.

INSOLVENT PROCEEDINGS.

1. An assignment in insolvency made by two partners described the property assigned as "all our real and personal estate, and claims and choses in action, of every kind whatsoever, and wheresoever situated, except property by law exempt from execution." Held to carry their individual as well as partnership property. *Von Wettburg* v. *Carson.* 287

2. The statute (Gen. Statutes, p. 384, sec. 27,) provides that property of a debtor attached within sixty days before proceedings in insolvency are instituted, shall go to the trustee in insolvency, who shall have the same right to recover such property as the officer might have had. Held that where a receipt was given for attached property where none had in fact been attached, so that there was in fact no property in the hands of the receiptor to go to the trustee, there could be no recovery against him by the officer in a suit upon the receipt. *ib.*

See CONFLICT OF LAWS, 1.

INSURANCE (LIFE).

1. *L* was insured in a life insurance company by a policy which provided that the annual premium, payable in part in cash and in part by a premium note, should be paid on or before the 9th of May in each year. The company sent him a notice of the premium falling due on the 9th of May, 1874, which he returned for correction, an error being discovered in it, and a new notice was sent him, which reached him on the 9th of May. On that day he delivered a check for the cash part of the premium to *B*, who had conducted the business with the company for him, but was not its agent, and *B* on the 13th of May delivered the check to an agent of the company, who gave him a renewal receipt for *L*. *L* had died suddenly on the 13th, before the agent received the check, but he had no knowledge of the fact when he received it. The premium note that was to have been given at the same time was never given. Held that, upon these facts, as not affected by any question of estoppel, the policy was forfeited. *Lewis* v. *Phœnix Mutual Life Ins. Co.* 72

2. The failure to make the premium note

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would have been enough of itself to work a forfeiture of the policy. *ib.*

3. In addition to the provision of the policy that the premium must be paid on or before the day it fell due, there was a notice on every renewal certificate issued, that no agent had authority to receive any premium after the day it became due without special permission from the officers of the company. Held that the local and limited agents of the company were not to be regarded as having the power, by a mere course of dealing on their part with the policy-holders, to establish a custom which would nullify these provisions and bind the company without its consent or knowledge. *ib.*

4. In the consideration of certain evidence with regard to a custom in this respect, reported in the case, the court was of opinion that all that could be claimed from the custom was, that the company or its agents were in the habit of waiving strict payment at the day in some cases, when there had been no change in the health or condition of the insured. *ib.*

5. This being so, there would be nothing that would bind the company to waive strict payment in any case, but they would be at liberty in all cases to insist upon strict performance. *ib.*

6. The custom manifestly did not extend to a case in which the insured died after the premium fell due and before payment. *ib.*

7. The error in the notice sent to the insured was only as to the amount to be paid, and he knew it to be an error and sent it back for correction. There was no intention on the part of the company to mislead him; the day of payment was correctly stated, and the corrected notice reached him the day the premium fell due. The court below charged the jury that if they should find that it was the custom of the company to give notice thirty days before of payments falling due and that the insured knew of the custom and that by the error in the notice he was prevented from making the payment when otherwise he would have made it, then the company would be estopped from claiming that the payment was not made in due time. Held to be error. *ib.*

8. The court also charged the jury that, if the agent sent the money to the company, and the company with full knowledge of all the facts kept it, claiming it as their own, then they had waived the forfeiture of the policy. Held that the jury might have been misled by this instruction, and that they should have been instructed to ascertain whether at the time they received the money they knew of the death of the insured, and if not, when they first received the knowledge of it, and whether they afterwards retained the money intending to give validity to the policy or to await the result of the claim made upon the policy. *ib.*

INTEREST.

1. A promissory note was made in 1872, with interest payable semi-annually at the rate of eight per cent. per annum, which was then legal. The note was given for a loan made by a corporation, and was intended to run for several years. In 1875 an act was passed limiting the rate of interest for money loaned to seven per cent. Held that eight per cent. continued to be the legal rate of interest upon the note, after that act was passed, and until the note was paid. *Seymour* v. *Continental Life Ins. Co.* 300

2. The note was given by a husband and wife and secured by a mortgage of her land. The husband at the same time signed a paper agreeing to an increase of interest so long as any interest remained unpaid and to a foreclosure if it remained unpaid sixty days after due. Held that this paper was admissible for the purpose of showing that a permanent loan was intended. *ib.*

3. A note on which the interest is payable quarterly at the legal rate, is not usurious. *Mowry* v. *Shumway.* 493

INTOXICATING LIQUORS.

See PLEADING, 1, 2, 3.

JOINT STOCK CORPORATION.

See CORPORATION (JOINT STOCK).

JOINT TENANTS.

A store was hired by *B* and *N* jointly at an agreed rent for two years, the father of each guaranteeing his son's contract for the rent. The lessees went into occupancy, and, in accordance with their purpose in hiring the store together, divided the floor between them, each railing off and occupying separately his portion. Each leased desk room within his enclosure and received the rent, but *B* received a larger amount than *N*. Held that the rents thus received from subtenants were received to their separate use, and that *B* was not liable to account to *N* for the excess of rents received by him. *Noyes* v. *Benham.* 205

JUDGMENT.

1. The plaintiff had paid the amount of a judgment to save his property from being sold on execution, and brought suit to recover back the money, claiming to have paid the judgment before the levy, and the whole question in the case was whether he had so paid. The defendant offered in evidence the record of a judgment in his favor in an action of replevin brought by the plaintiff to recover the property levied on, with parol evidence that upon the trial of that action the plaintiff introduced evidence to prove that he had paid

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the amount of the judgment before the levy, but it did not appear by the record whether the court decided the case against him on that point or on some other of several points involved. Held that the plaintiff was not estopped by the judgment. *Supples* v. *Cannon*. 424

2. To render a former judgment a bar, it must either appear by the record of the prior suit, or be shown by extrinsic evidence consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter sought to be concluded. *ib.*

3. A notice under the general issue puts nothing in issue, and adds nothing to the effect of a judgment. *ib.*

JURISDICTION.

1. By the act of 1875, in a suit upon a contract in a court whose jurisdiction is limited in amount, judgment may be rendered for interest accruing after the commencement of the suit, although the judgment shall be made thereby to exceed the limit of the jurisdiction and the demand in the writ. A cause had been pending for three years in a court whose jurisdiction was limited to $500, and judgment was rendered for $527.75. Held that the excess being manifestly less than the interest would have been, this court would regard it as made up of accrued interest. *Bell* v. *Ayres*. 35

2. A contract was signed by all the heirs of an intestate, by which they agreed that the estate should be settled in the probate court according to a draft of a will prepared by the intestate but never signed. One of the heirs who was weak minded and ignorant of his rights, was unduly influenced by the others, in whom he reposed special confidence, to sign the agreement, and thereby relinquished a much larger interest than he received. Upon a bill in equity brought by him to the Superior Court to set aside the agreement and for an injunction against the proceedings in the court of probate under it, in which it was claimed by the respondents that the probate court alone had jurisdiction of the matter, it was held that the Superior Court had jurisdiction. *Hart* v. *Hart*. 327

JUSTICE COURT.

1. By long established practice one hour of grace is allowed to parties in appearing in actions brought before justices of the peace. *Nugent* v. *Wrinn*. 273

2. But the rule that limits one hour for this purpose is not inflexible in its application. Circumstances may occur which will make it proper for a magistrate in the exercise of a reasonable discretion to vary from it. And where the matter comes to one of minutes, allowance should be made for the want of accuracy of ordinary time-pieces. *ib.*

3. A case before a justice in a country town stood adjourned to a certain day at nine o'clock in the forenoon. The plaintiff, his attorney and the justice waited until, by the attorney's watch, it was ten minutes after ten, when the justice defaulted the defendant, and they went to the attorney's office close by, where the attorney was drawing up a form of judgment for the justice to sign, when the defendant came in. It was then by the attorney's watch twenty minutes after ten. The defendant claimed that by her clock it wanted six minutes of ten when she left her house, which was only two minutes' walk from the justice's office, and asked to be allowed to file a demurrer, which her counsel had prepared for her the day before, and to appeal the case. The justice refused to open the case, and entered up judgment for the plaintiff. Judgment reversed on a writ of error. *ib.*

See RECORD (JUDICIAL), 4.

JUSTICE OF THE PEACE.

See RECORD (JUDICIAL), 1–5.

LANDLORD AND TENANT.

See LESSOR AND LESSEE.

LAPSED DEVISE.

In case of a lapsed devise, the real estate devised goes to the heir at law and not to the residuary devisee. *Remington* v. *American Bible Society*. 512

LAW AND FACT (QUESTIONS OF).

1. Where facts found are strong evidence of fraud, hut do not necessarily prove it, this court can not, as a matter of law, infer fraud. The question is one of fact to be decided as such by the court below. *Thomas* v. *Mullain*. 144

2. Where one person orders goods for another, promising to pay for them, the question to which of the parties they were sold, is wholly one of fact. *Spurr* v. *Coffing*. 147

See POSSESSION (CHANGE OF), 4, 5.

LEASE.

See BANKRUPTCY, 1–6; POSSESSION (CHANGE OF), 1.

LEGATEE FOR LIFE.

The statute (Gen. Statutes, tit. 18, ch. 11, sec. 18,) provides that when a life estate in any personal property is given by will to one and the remainder to another, and no trust is created, the court of probate may, upon the request of the legatee for life, order the executor to deliver the property to him on his giving bond for its safe-keeping and delivery at the termination of the life estate, to the legatee in remainder. Held that this statute

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was intended to apply to all cases in which a life estate was so given, and that no legatee for life, where there were no directions to the contrary in the will, was entitled to the possession of the property, except upon such application to the court of probate and such giving of bond. *Sanford* v. *Gilman*. 461

LEGISLATION.

See CORPORATION, 1; STATUTES (CONSTRUCTION OF), 5.

LESSOR AND LESSEE.

See ESTOPPEL IN PAIS, 1.

LIEN (BUILDERS').

1. *K* purchased of one party a piece of land with a store upon it, and took of another party a lease for fifty years of a vacant lot next adjoining, both lots having a river frontage on one side and abutting on the same street on the other. *K* removed the division fence, constructed a wharf along the entire river front, erected coal sheds on the vacant lots, repaired the store and used a part of it for an office, and converted the whole into a yard for receiving and selling coal. Held that a lien for materials furnished and work done in building the sheds and repairing the store, under a single contract, covered both pieces of land as a single lien. *Marston* v. *Kenyon*. 349
2. Where a lien for work and materials was filed and recorded as amounting to $4,270, when the amount actually due was only $1,544, but the error was made by including certain notes by mistake and omitting certain credits, and there was no intention to mislead, it was held that the lien was good for what was actually due, against a mortgagee who had taken his mortgage while the work and materials were being furnished, and before the certificate of lien had been filed. *ib.*

MANDAMUS.

1. A writ of mandamus is not an appropriate remedy for the enforcement of contract rights of a private nature. *Parrott* v. *City of Bridgeport*. 180
2. It is granted only to prevent a failure of justice in cases where ordinary legal processes furnish no relief. *ib.*
3. The writ refused, where applied for to compel a city to construct a public street, (which had been laid out but not opened,) in a certain special manner, not required by law, but which it was averred had been agreed to by the city and taken into consideration in the assessment of the petitioner's damages and benefits. *ib.*
4. An office is not vacant when there is a de facto incumbent. *Harrison* v. *Simons*. 318
5. Such incumbent must be ousted upon an information in the nature of a quo warranto, before the court will grant a mandamus to compel proceedings for filling the office. *ib.*
6. And the court will not grant a mandamus where it appears that the object sought could have been secured without serious difficulty without the aid of the court. *ib.*
7. Under the rules of the English common law the granting of a peremptory mandamus was a mere award of the court and not a formal judgment; and no writ of error lay from such an award. *New Haven & Northampton Company* v. *State of Connecticut*. 376
8. Under those rules the prosecutor could not demur to the return, and thus raise a question of law as to its sufficiency. *ib.*
9. But under our statute (Gen. Statutes, tit. 19, ch. 17, sec. 2,) the relator is allowed to demur to a return, and the awarding of the mandamus becomes a formal judgment from which a writ of error will lie. *ib.*

MANSLAUGHTER.

See MURDER, 1.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MATTER IN DEMAND.

See EQUITY, 2, 3.

MECHANICS' LIEN.

See LIEN (BUILDERS').

MINISTERIAL ACT.

See RECORD (JUDICIAL), 7, 8.

MONEY HAD AND RECEIVED.

See ASSUMPSIT, 6.

MORTGAGE.

1. A mortgage of real estate described the land conveyed as "four certain farms, situated in the town of *C*, and bounded and described as follows." The farms were then separately described, the descriptive part of the deed closing as follows: "Also all such other lands as we the grantors, or either of us, own or have any interest in, situated in said town of *C*; reference being had to the land and probate records for a more particular description of the same." There were several mortgagors and some of the pieces belonged to some and others to others. Held that another piece of land belonging to one of the grantors, not adjacent to or in any way connected with either of the farms described, was not conveyed by the mortgage. *Herman* v. *Deming*. 124
2. Whether the land in question would have been conveyed under the same description by an absolute deed: *Quære*. *ib.*

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3. The policy of the law with regard to mortgages requires that they give definite information not only as to the debt secured but as to the property mortgaged. *ib.*

4. A piece of land was sold to *T*, subject to two mortgages, which the grantee by the deed assumed and agreed to pay. The second mortgage was made by *W*, a former owner, who afterwards was compelled to pay it. The first mortgagee afterwards foreclosed both *W* and *T*, and on his title becoming absolute conveyed the property to *W* on his paying the amount of the first mortgage. Held that, if *W* had a right of action against *T* upon his assumption of the second mortgage, yet he could recover only so much of that mortgage debt as remained unsatisfied after applying to it the value of the mortgaged property above the first mortgage. *New Haven Pipe Company* v. *Work.* 230

5. And held that, until such value was determined, the claim was of such an unliquidated character that it could not be set off in an action of assumpsit brought by *T* against *W*. *ib.*

6. *H* mortgaged several parcels of land to *A* to secure a note. *W* purchased a part of the lots of *H*, and by the deed agreed to assume and pay the mortgage debt, and mortgaged the lots so purchased by him to *A* to secure such payment. Held that a petition for a foreclosure brought by *A* against both *H* and *W*, praying for a foreclosure of both the mortgages, was not multifarious. *Waters* v. *Hubbard.* 340

7. *A* accepted the mortgage of *W* only as additional security, and with no intention to discharge *H*. Held that, while by the assumption of the mortgage debt by *W*, *H* might become as between themselves a mere surety in respect to the debt, yet his relation to the mortgagee was not changed. *ib.*

8. A part of the land mortgaged by *H* had been previously mortgaged by him to *M*, and had since been foreclosed by a decree against both *H* and *A*. After the expiration of the time for redemption *A* had purchased the land of *M*, under an agreement previously made that if no one redeemed he could have it on paying the mortgage debt and all expenses of the foreclosure. Held that *H* acquired by *A's* purchase of this land no right to redeem it with the other land mortgaged. *ib.*

9. The decree required *W* to pay the entire mortgage debt within the time limited or be foreclosed as to the property mortgaged by him, and on his failure to make such payment required *H* to pay the debt or be foreclosed as to all the property. Held to be correct. *ib.*

10. If the mode of applying the mortgaged property to the payment of the mortgage debt were, as in some of the states, by a sale and application of the proceeds, the decree should have required the land mortgaged by *W* to be first sold and its proceeds applied; but under our law the mortgagee is entitled to all the mortgaged property unless the debt is paid. *ib.*

11. It seems that a decree of foreclosure requiring one respondent to pay a certain debt or be foreclosed, and another respondent, on his failure, to pay a part of the debt or be foreclosed, is valid. *ib.*

12. The plaintiff having bought land of the defendant gave him in part payment his negotiable note. Subsequently, desiring to exchange the land so purchased, with a mortgage upon it, for other land belonging to one *H*, he executed a mortgage to the defendant to secure the note, and delivered it to the town clerk for the defendant's use. The defendant never in fact took it into his possession. The plaintiff then exchanged lands with *H*, the amount of the mortgage note being taken into account and being part of the consideration of his deed. The defendant afterwards transferred the note before maturity to a bonâ-fide holder. The plaintiff having paid the note requested the defendant to transfer the mortgage to him, which he refused to do. The defendant afterwards, for two hundred dollars paid him by *H*, released the mortgage to *H's* grantee, who took both *H's* deed and the release in good faith, supposing that the note was paid. In an action on the case for fraud in releasing the mortgage, it was held—that the defendant's release to *H's* grantee operated as an acceptance of the plaintiff's mortgage, that the plaintiff by paying the mortgage note became equitably entitled to the mortgage, and that the defendant by releasing it had committed a fraud on the plaintiff. *Ely* v. *Stannard.* 528

See DEED (CORRECTION OF), 1.

MURDER.

If one person intentionally inflicts upon another a wound calculated to destroy life, and death ensues therefrom within a year and a day, the offence is murder or manslaughter, as the case may be; and he is none the less responsible for the result although it may appear that the deceased might have recovered if he had taken proper care of himself, or that unskillful or improper treatment aggravated the wound and contributed to his death. *State* v. *Bantley.* 537

NATIONAL BANKS.

1. By the act of Congress with regard to National Banks, all stockholders of such banks are liable to assessment for the debts of the banks in case of their insolvency, to the extent of the par value of their stock in addition to the amount invested in such stock; but persons holding stock as executors, administrators and trustees are not to be personally subject to any liability as stockholders, but such liability is to attach only to the

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property in their hands. *W* died in January, 1871, being at the time a stockholder of a national bank. His estate was subsequently settled, with a limitation for the presentation of claims, a settlement of the administration account, and a final distribution. The bank failed in December, 1871, and a receiver was appointed by the Comptroller of the Currency, and in January, 1877, a long time after the distribution of *W's* estate, the Comptroller made an assessment upon those who were stockholders at the time of the failure of the bank for the payment of the debts of the bank. Held, in a suit brought by the receiver against *W's* administrator—1. That the stock was not to be regarded as having been, at the time of the failure of the bank, the property of the administrator, in such a sense as to constitute him the shareholder within the meaning of the act. 2. That the provision of the act exempting executors, administrators and trustees from personal liability was not intended to affect the liability to assessment of estates in process of settlement, but only to prevent a personal liability from running against persons acting in a trust capacity who had received the stock for the benefit of the trust estates. 3. That the fact that the assets of the estate of *W* had been distributed before a demand was made for the assessment, so that the administrator had nothing in his hands, was no reason why judgment should not be rendered against him *de bonis decedentis*. 4. That the liability of *W* was in the nature of a contract, and as such was a personal liability for which his estate was holden at his death. *Davis* v. *Weed*. 569

2. To protect a trustee, who is a stockholder in a national bank, from personal liability, under the provision for such exemption in the act of Congress with regard to national banks, it must appear on the books of the bank that he was such trustee. *Davis* v. *Essex Baptist Society*. 582

3. In ordering an assessment for the payment of the debts of an insolvent national bank, the stock certificates and stock ledger of the bank must be taken by the Comptroller of the Currency, in the absence of fraud or mistake, as showing who the stockholders were at the time of the failure of the bank. *ib.*

4. The stockholder, in subscribing for or in accepting the stock, assents to becoming security to the creditors for the payment of the debts of the bank. *ib.*

5. A religious society purchased and held in its own name certain shares of a national bank, using for the purpose a fund which had previously been given to such society by a testator, the whole bequest being used in the purchase. The society had other funds, given by other donors, which were otherwise invested. Held that the society was not to be regarded as a trustee, but as an ordinary stockholder, and was liable as such to assessment for the debts of the bank on its failure. *ib.*

NEGLIGENCE.

See COLLECTING AGENT, 1.

NEW TRIAL.

Upon a motion for a new trial for error in the charge of the court, the charge is to be considered, not in the abstract, but with reference to the actual facts of the case.

See EVIDENCE, 10.

NOTES AND BILLS.

The statute, (Gen. Statutes, p. 343, sec. 2,) which provides that any promissory note payable on demand, which remains unpaid four mouths from its date, shall be considered overdue and dishonored, does not affect the rights of the original parties to the note, but only those of third parties, as endorsers, guarantors or purchasers. *Seymour* v. *Continental Life Ins Co.* 300

OFFICER'S RECEIPT.

1. It is no objection to the validity of a receipt given to an officer for attached property, that the property was not in fact attached by the officer. *Enscoe* v. *Dunn*. 93

2. And the receiptor is estopped from denying the value stated in the receipt. *ib.*

3. Where three such receipts were given at the same time by the same receiptors for the same property, attached on three different writs against the same defendant, with different values fixed with reference to the demands in the different writs, it was held that they were not to be regarded as one contract, but that each receipt stood upon its own ground, as if it were the sole receipt given. *ib.*

See INSOLVENT PROCEEDINGS, 2.

PAUPER.

By statute, Rev. of 1866, p. 621, sec. 22, (slightly changed in Rev. of 1875,) the selectmen of any town are to furnish necessary support to inhabitants of other towns residing within such town, who are poor and unable to support themselves, the amount to be recovered of the towns where they belong; and where any such pauper becomes chargeable to the town the selectmen are to send notice of his condition to the town to which he belongs, the notice to state the name of the pauper and that he is chargeable. The selectmen of the town of *B* sent the following notice to the town of *S*. "We hereby give you notice that N. W. and his wife E. W., paupers of your town, are now here, poor and unable to support themselves, and we look to you for all lawful expenses that may be incurred for their support from this time." Held to be

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insufficient as not showing that the paupers were in fact chargeable to the town sending the notice. *Town of Beacon Falls* v. *Town of Seymour.* 210

PERPETUITY.

A testatrix, expressing her desire that two pieces of land owned by her should be used, the one for a congregational church of the order and faith of the churches connected with the General Association of Connecticut, and the other, which had a dwelling-house upon it, for a parsonage in connection with such church, devised the land to trustees, directing them, if any congregational church and society of such order and faith should desire to erect a church upon the piece of land first mentioned and should in the judgment of the trustees be able to erect and maintain such a church without getting in debt, to allow them to erect the same, and on its being completed to convey such piece of land to such church and society for such purpose, and also to convey to them the second piece as a parsonage. Held that, as there was no limitation as to the time within which the application was to be made and the property conveyed, and no certainty that such an event would occur, and the property was inalienable until then, the devise was void as tending to create a perpetuity. *Jocelyn* v. *Nott.* 55

PLEADING.

1. A complaint charging that the defendant, not being licensed, owned and kept intoxicating liquors with intent to sell them, exposed and offered them for sale, and sold them, is not bad for duplicity, although each of the several acts charged was itself specifically forbidden by the statute. *State* v. *Burns.* 149
2. The rule is that where two or more acts are so connected that each represents a stage in the same offense, though each act taken alone would constitute an offense, they may be coupled in one count. *ib.*
3. A verdict of guilty having been rendered upon the above complaint, it was held that the averment that the defendant kept liquors with intent to sell would support the verdict, even if the other acts were not sufficiently charged. *ib.*

See HUSBAND AND WIFE, 7; JUDGMENT, 3; MORTGAGE, 6.

POSSESSION (CHANGE OF).

1. Hay in a barn was sold by a bill of sale that provided that it should remain in the barn of the vendor until the vendee should see fit to remove it. The vendee endeavored to hire a barn to which to remove it, but did not obtain one till twelve days after. In the meantime the hay was attached by a creditor of the vendor. Held—1. That the provision in the bill of sale as to the hay remaining in the barn, did not constitute a lease of the barn to the vendee. 2. That the vendee did not take possession within a reasonable time, and that therefore the property was held by the attachment. *Seymour* v. *O'Keefe.* 128
2. *A*, owning a clock factory and machinery, entered into an arrangement with *B & C* by which they were to occupy at an agreed rent so much of the factory as was necessary for manufacturing clocks and to have the use of the machinery, and were to make for him at their own expense all the clocks that he should order, making none for other parties, which clocks were to be boxed and set aside for him, and paid for as thus set aside, and which were to remain in the factory until forwarded by his order to purchasers. A quantity of clocks, made for *A*, were thus boxed, and placed in a room of the factory, where they remained over two years. Held that they were to be regarded as during this time, in the possession of *A*. *Partridge* v. *Wooding.* 277
3. The firm of *B & C* was dissolved while the clocks were thus stored in the factory, and the factory was unoccupied for two months, at the end of which time *C* went into partnership with *D* and the new firm took the factory of *A* on the same terms. This firm was soon after dissolved and *C* went on alone under the same arrangement. While *C* was thus occupying, the clocks in question were attached by one of his creditors. Held that, upon the dissolution of the firm of *B & C* and the closing of the factory, any possession that they might be regarded as having had terminated, and that the new arrangement made with *C & D* did not operate to take the possession from *A*. *ib.*
4. Whether there has been such a change of possession accompanying the sale of personal property as to render the sale valid against the creditors of the vendor, is a mixed question of law and fact. *Mead* v. *Noyes.* 487
5. In replevin by a vendee of personal property against an attaching creditor, the judge found the facts in detail with regard to the sale and delivery, and concluded the finding as follows: "Upon these facts I find that the sale was made in good faith, that possession followed it, and that at the time the property was attached the plaintiff was the owner and entitled to the immediate possession of it." Held that the conclusion of the court could be reviewed, as to whether the possession described was such as to render the sale valid against attaching creditors. *ib.*

PRACTICE.

1. The statute (Gen. Statutes, tit 19, ch. 4, sec. 13,) provides that any judge holding the Superior Court or a Court of Common Pleas, may, if in his opinion justice requires it, order any civil cause which has been put to the jury, to be transferred to the same court in

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any other county. Held—1. That such a cause could be transferred after a trial by jury and a disagreement. 2. That it is not necessary that issue should be joined to the jury of the county to which the case is transferred, but it is sufficient if the issue has once been joined to the jury generally. 3. That the record need not show the reasons why the case is transferred. *Bell* v. *Ayres*. 35

2. It is the duty of the court to submit to the jury all controverted questions of fact when there is any evidence to support the respective claims of the parties; but if a claim is made which is wholly unsupported by proof, it is error to submit it to the jury as if the evidence justified the claim, as the jury would be in great danger of being misled. *Lewis* v. *Phœnix Mutual Life Ins. Co.* 73

See JUSTICE COURT, 1, 2; LAW AND FACT (QUESTIONS OF), 1; WILL, 1; WRIT OF ERROR, 1.

PRESENTATION OF CLAIM.

1. A claim against the estate of a deceased person, not represented insolvent, ought properly to be presented to the administrator in writing. While such a presentation is not positively required by the statute, yet this is the only safe mode, as furnishing proof both of the fact of presentation and of the exact claim presented. *Pike* v. *Thorp*. 450

2. A person holding a claim against the estate of a deceased person casually met the administrator, who was a brother of the deceased, and said to him, "I have an account against your brother of about $100;" to which the administrator replied, "I am going to pay up all the bills, but cannot do it just now;" to which the creditor rejoined, "I am in no hurry about it, do it when you get ready." Four months afterwards the creditor again casually met the administrator and spoke of the account, and showed him a bill of items partly made out embracing about a third of the account. The administrator then told him to finish up the bill. Nothing more was done by the creditor until after the time for presenting claims had expired. Held not to be a legal presentation of the claim. *ib.*

PRINCIPAL AND AGENT.

See CONTRACT, 3.

PROBATE COURT.

See JURISDICTION, 2.

QUESTIONS OF LAW AND FACT.

See LAW AND FACT (QUESTIONS OF).

QUO WARRANTO.

See MANDAMUS, 4, 5.

RAILROAD COMPANY.

1. A railroad company, doing a large business in transporting coal from a seaport to the interior, and owning docks and hoisting apparatus, the coal being shoveled into tubs which were swung over the freight cars by a derrick, adopted a rule that masters of vessels should employ as shovelers on board their vessels only such men as the railroad company should provide, the masters paying their wages at a fixed rate, which was intended to be and generally was the market price for such work. This rule was adopted for the purpose of securing steady and reliable shovelers and a greater despatch of the business, and was one of general convenience, except that masters of vessels were able at times to hire men for less than the prescribed wages; but the rule was not made necessary by the state of the coal traffic at that port. Held that the railroad company had no right to make and enforce the rule. *Johnson* v. *318 Tons of Coal*. 548

2. The duty of the master of the vessel was to deliver the coal to the railroad company with no unnecessary delay, but so long as he did this he had a right to employ such men as he pleased to do the work. *ib.*

3. Whether, if a traffic through connecting lines should become so large as to require, for its reasonable despatch, such a rule as this, the rule might not become a proper one: *Quære*. *ib.*

4. And held that the rule in this case was not to be regarded upon the facts as a rule made by the railroad company as a wharf-owner. *ib.*

RAPE.

Upon an indictment for rape the testimony of the woman upon whom the offence was committed may be confirmed by evidence that she had told the same story out of court; and this evidence is not limited to the mere fact of her having made such a statement, but may extend to the particulars of it. *State* v. *Kinney*. 153

RECEIVER.

See CONSIGNEE, 1.

RECORD (JUDICIAL).

1. The same exactness that is required in making up a record of a judgment in the higher courts can not reasonably be required in the case of judgments rendered by justices of the peace. *O'Connell* v. *Hotchkiss*. 51

2. A record of a judgment of a justice of the peace, endorsed on the writ, stated the names of the parties, their appearance, the time of holding the court, an adjournment to a certain day and hour, that the court then sat and the plaintiff appeared, that the defendant being publicly called made default of appear-

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ance, and that the court then rendered judgment for the plaintiff for a certain sum, and adjourned. It was then signed by the justice in his official capacity. Held to be sufficient, though it did not state the place where the court was holden, nor that the magistrate signing it was the justice holding the court, except so far as that fact was to be inferred from the signature. *ib.*

3. As a justice of the peace has no clerk, his official attesting signature at the end of such a record is equivalent to a declaration at the opening that it is the court of a justice of the peace, and that the signer is the magistrate who holds it. *ib.*

4. It will be presumed in favor of such a court that it sat in a legal place, where there is nothing to indicate the contrary. *ib.*

5. A justice's attestation to a copy of his record is legally equivalent to an attestation by a clerk of a higher court to a copy of a record of such court, with the seal affixed, and the certificate of the judge of the genuineness of the seal and signature. *ib.*

6. In a suit upon a recognizance, a certificate of which was annexed to a writ of replevin and signed by the magistrate signing the writ, the defendants claimed that the magistrate inserted their names without authority, and that he signed the certificate without intending to make a record of a recognizance. Held—1. That the certificate was to be received as a record. 2. That it was competent for the defendants to contradict it, and show that they never entered into the recognizance. *Gregory* v. *Sherman.* 466

7. The magistrate in taking the recognizance on issuing the writ was acting in a ministerial capacity. *ib.*

8. A certificate of such a ministerial act, though it becomes part of the record, is only primâ facie evidence of the facts which it states. *ib.*

REPLEVIN.

1. Under the statute with regard to replevin, previous to the Revision of 1875, that action would not lie to recover property held by an officer upon an execution. *Smith* v. *Lyon.* 175

2. And, under the same principle, it would not lie to recover property taken by a tax collector upon a tax warrant. *ib.*

3. While an action of replevin so brought was pending, the act (Rev. of 1875, tit. 19, part 15, sec. 1,) was passed, which provides that "replevin may be maintained to recover any goods or chattels wrongfully detained, &c." Held not to be retroactive, and therefore not applicable to an action of replevin then pending. *ib.*

4. And held that the word "maintained" did not necessarily imply that the statute was to operate on suits already brought. *ib.*

5. A magistrate issued a writ of replevin returnable before a justice of the peace and took a bond for the payment of costs to the defendant and the return of the property if the plaintiff should fail to prosecute his suit to effect. The writ was void on its face by reason of the demand in it being beyond the jurisdiction of a justice, but the goods were taken upon it and were not returned. Held that, the writ being void, the bond was also void. *Rosen* v. *Fischel.* 371

RES ADJUDICATA.

See JUDGMENT, 1, 2.

RES GESTÆ.

Upon the question whether a certain alley-way, which had long been used in connection with a dwelling-house on which it abutted, had been acquired by adverse possession—held that a claim of right made while using the alley by a former owner of the house from whom the present claimant derived title, though inadmissible as a claim of right, was yet admissible as giving character to the use of the alley and showing it to have been adverse. *Turner* v. *Baldwin.* 121

SALE OF PERSONAL PROPERTY.

1. A party has no power to rescind a contract of purchase unless there is a provision in it giving him the right to do so. If the property purchased does not answer the terms of the contract, there being no fraud in the case, his only remedy is by a suit for the breach of the contract. *Buckingham* v. *Osborne.* 133

2. Where a contract of sale of personal property is inoperative under the statute of frauds for want of delivery, a tender made afterwards, and an unconditional acceptance, have the same effect between the parties as if the delivery had been made at the time of the sale. *ib.*

SET OFF.

See MORTGAGE, 4, 5.

STATUTES (CONSTRUCTION OF).

1. A statute should never be held to be retroactive unless such a construction is required by an express provision or by unavoidable implication. *Smith* v. *Lyon.* 175

2. The statute (Gen. Statutes, p. 234, sec. 21,) provides that the driver of any vehicle, meeting another on the public highway, who shall neglect to turn to the right, and thereby drive against the vehicle so met and injure its owner, or any person in it, or the property of any person, shall pay to the party injured treble damages; and that "the owner of the vehicle so driven shall, if the driver is unable to do so, pay such damages, to be recovered by writ of scire facias." Held that, by the word "owner" in the last clause, the person in control of the vehicle, either mediately or

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immediately, was intended, and not necessarily the actual owner. *Camp* v. *Rogers*. 291

3. Any other construction would make the owner of a vehicle liable for the acts of a person in possession of it, over whom he had no control and to whom he did not stand in the relation of master or principal. *ib.*

4. An act that thus arbitrarily and without reason makes one person liable for the acts of another is void, either as against natural justice or as violating that article of the constitution which forbids the taking away of any person's property without due process of law. *ib.*

5. It is to be presumed that the legislature in enacting a law intended to make one that should be reasonable and just, and where a law admits of a construction that will make it so, it is the duty of a court to uphold it by giving it such a construction, where under a literal construction it would have to be held void. *ib.*

See REPLEVIN, 3; TRESPASS, 1.

STATUTE (EFFECT OF REPEAL OF).

See TAXATION, 8.

STATUTE OF FRAUDS.

See SALE OF PERSONAL PROPERTY, 2.

STREET.

See HIGHWAY.

TAXATION.

1. The Board of Water Commissioners of the city of *H.*, under authority of the legislature and at the city expense purchased a large tract of land in the adjoining town of *W. H.* for reservoirs for collecting and storing water for the use of the inhabitants of the city, the water being brought to the city and distributed by pipes. Held that the land so purchased and used was not subject to taxation by the town of *W. H.* *Town of West Hartford* v. *Board of Water Commissioners*. 360

2. And held that it did not affect the case that the water commissioners sold the water to consumers, and paid the interest on the investment and the incidental expenses by the water rents received. *ib.*

3. As a matter of advantage in procuring the land required, the commissioners purchased a larger tract than was needed, so that a portion of the land so purchased was not used for the reservoirs. Held that this land was not exempt. *ib.*

4. Most public property is in terms made exempt from taxation, but without any such statutory protection it would be exempt upon general principles. *ib.*

5. Such public property is generally procured by taxation, and it is against principle that the product of one taxation should be made the subject of another. *ib.*

6. The board of relief of the town of *E* added to the plaintiff's tax list "$1,264" in a column headed "Additions," but with nothing to indicate the property intended. The plaintiff had however money at interest and a draft due for more than that amount, which he had not put into his list, and had been notified by the board of relief to appear and show reason why their amount should not be added to his list, but had failed to appear. Held that the addition was legally made and sufficient in form. *Lewis* v. *Town of Eastford*. 477

7. A statute was passed healing certain defects in assessment lists, and making all taxes *theretofore* as well as thereafter collected under them legal. At the same session a later act was passed healing the same and several other defects in assessment lists and making legal all taxes *thereafter* collected on them. Held that the later act did not by implication repeal the prior one as covering the same subject matter. *ib.*

8. The prior act by its terms took effect on its passage. Held that the assessment list in question became thereby at once validated, and could not be invalidated by a later repeal of the act. *ib.*

TENDER.

1. Where a debt is unliquidated the acceptance by the creditor of money tendered by the debtor as "in full of all account," precludes the creditor from recovering more. *Potter* v. *Douglass*. 541

2. And this although the creditor declares at the time that he receives it only to apply on the debt, so long as the debtor does not assent to his so receiving it. *ib.*

TOOLS OF TRADE.

See ATTACHMENT (EXEMPTION FROM), 1.

TRESPASS.

The statute (Gen. Statutes, tit. 19, ch. 17, sec. 5,) provides that every person who "shall wittingly and unlawfully throw down or leave open any bars, gate or fence" belonging to any enclosure, shall pay to the party injured double damages and a sum not exceeding five dollars, to be recovered in an action of trespass. The defendant, in a controversy with the plaintiffs as to a right of way over their land, threw down their fence, claiming and believing that he had a right to do so, but the court found that he had no right of way. Held that his case fell within the intent of the statute. *Osborne* v. *Warren*. 357

TROVER.

See CONSIGNEE, 1.

USURY.

See INTEREST.

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WAIVER.

See INSURANCE (LIFE), 8.

WILL.

Upon an appeal from a probate decree disallowing a will, the question being whether the testatrix was of sound mind, the party upholding the will was allowed by the court, against objection taken, to read to the jury from books cases decided in other states and in England, for the purpose of showing that the facts set forth in such cases were not inconsistent with the soundness of mind necessary to the making of a valid will. Held to be error, and a ground for granting a new trial. *Baldwin's Appeal from Probate.* 37

See CHARITABLE USE, 1, 2; EVIDENCE, 9; PERPETUITY, 1.

WRIT OF ERROR.

1. The court has the right, and will exercise it in its discretion, of reversing a judgment for an error manifest on the record, though not assigned or the question made in the court below. *Riggs* v. *Zaleski.* 120

2. The statute requires that if judgment be rendered for the defendant in replevin, it shall be for a return of the property and for costs. A judgment was rendered for a defendant for costs only. Held that the plaintiff was not aggrieved by the error and could not take advantage of it. *Smith* v. *Lyon.* 175

3. Where a case has been reserved by a lower court for the advice of this court, and the advice has been given and judgment rendered in accordance with it, the court will not afterwards consider, upon proceedings in error, questions on which the plaintiff in error has been heard, or might have been heard, when the case was before the court upon the reservation. *New Haven & Northampton Co.* v. *State of Connecticut.* 376

4. But where a statute upon which the right of action depends is drawn in question as being repugnant to the constitution of the United States, this court will entertain a writ of error, notwithstanding a previous reservation, for the purpose of affirming the judgment, that the case may be carried to the Supreme Court of the United States. *ib.*

5. A writ of error, though operating in ordinary cases as a supersedeas of execution from the date of its service, does not have that effect in the case of a peremptory mandamus. *Tyler* v. *Hamersley.* 393

6. Especially does it not have that effect where the errors assigned have already been before the court upon a reservation of the case for advice and have been passed upon by the court. *ib.*

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