CONNECTICUT REPORTS:

BEING REPORTS OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ERRORS

OF THE

STATE OF CONNECTICUT.

VOL. LIV.

By JOHN HOOKER.

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PREFATORY NOTE.

In the present volume the cases are printed in the order in which the opinions were filed without reference to the terms of the court. The date at the head of each page is that of the filing of the opinion. To each case is prefixed a memorandum of the county or district, of the term, and of the judges sitting, and at the foot of the head-note the dates of the argument and decision. It is proposed to pursue the same course in the later volumes. The cause of the absence of any judge will not be noted, and where a judge of the Superior Court is called in to sit in a case his name will be given with the others without mentioning the fact that he is a judge of that court, leaving the reader to ascertain for himself by reference to the list of the judges of both courts which will be prefixed to the volume.

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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. DWIGHT WHITEFIELD PARDEE.
HON. DWIGHT LOOMIS.
HON. MILES TOBEY GRANGER.

JUDGES OF THE SUPERIOR COURT.

HON. EDWARD I. SANFORD.
HON. SIDNEY B. BEARDSLEY.
HON. CHARLES B. ANDREWS.
HON. HENRY STODDARD.
HON. DAVID TORRANCE.
HON. JAMES PHELPS.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ERRORS

OF THE

STATE OF CONNECTICUT.

THE STATE *vs.* LOREN BOSWORTH.

Hartford District, Jan. T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS AND GRANGER, JS.

All offenses involving continuous action and which may be continued from day to day, may be charged as committed from one date to another.

In a complaint for cruelty to animals, one count charged the defendant with overworking certain oxen from the first to the fourteenth day of a certain month, and another with neglecting to provide them with proper food and shelter for the same time. Held that each count charged but a single offense, and properly charged it as a continuing one.

The overworking and the neglect to properly feed and shelter cattle, may be charged as one offense.

[Argued January 6th—decided January 22d, 1886.]

COMPLAINT by a prosecuting officer of the Connecticut Humane Society for cruelty to animals, upon which the defendant was bound over by a justice of the peace to the Superior Court in Tolland County. In that court the defendant demurred to the complaint; the demurrer was overruled, and the case tried to the jury before *Andrews, J.* Verdict guilty and appeal by the defendant. The case is fully stated in the opinion.

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J. M. Hall and *W. Bennett*, for the appellant.

B. H. Bill and *C. Phelps*, for the State.

CARPENTER, J. The only question presented by this record which we can notice is that which arises on the demurrer. The only ground of demurrer is that several offenses are alleged in each count.

The first count charges the defendant with cruelly overworking certain oxen from the first to the fourteenth day of January, 1885. The second count charges him with neglecting to provide them during the same period with proper food, drink and protection. The third charges that during the same period he deprived them of proper sustenance.

Properly construed there is but one offense in each count. Perhaps it may be said that there is but one offense charged in all the counts. The court below must have so regarded it, as there was but one fine imposed. The gist of the offense is cruelty to animals. That may consist of overworking, under-feeding, or depriving of proper protection, or all these elements may combine and constitute the offense.

But aside from this, all offenses involving continuous action, and which may be continued from day to day, may be so alleged. This is obviously an offense of that character, and the demurrer was properly overruled.

In this opinion the other judges concurred.

THE STAFFORD SAVINGS BANK *vs.* EMMA K. UNDERWOOD AND OTHERS.

Hartford District, Jan. T., 1886. PARK, C. J., CARPENTER, PARDEE, and GRANGER, Js.

A married woman can make a valid mortgage of her real estate to secure a debt of her husband.

The husband must join in the execution of the mortgage in the same way as in any other conveyance of her real estate.

[Argued January 5th—decided January 22d, 1886.]

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ACTION for the foreclosure of a mortgage; brought to the Superior Court in Tolland County, and heard before *Loomis, J.* Facts found and decree of foreclosure passed. Appeal by the defendants. The case is sufficiently stated in the opinion.

C. Phelps, for the appellants.

M. R. West and *C. E. Gross*, for the appellee.

GRANGER, J. This is an action brought for the foreclosure of a mortgage. A decree of foreclosure was granted in the Superior Court, and the defendants have appealed.

The land described in the mortgage was the estate of Emma K. Underwood, one of the defendants, who is the wife of Frank H. Underwood, the other defendant. The note secured by the mortgage was for $2,000, a portion of which ($532,) was money appropriated by the wife for her sole benefit, and the balance was a debt due solely from the husband. The note and mortgage were both duly executed by the husband and wife.

The only question is—Can a married woman mortgage her real estate to secure a debt of her husband? the plaintiff not seeking to hold the wife upon the note.

This question depends largely upon the power given to a married woman by the statute of this state, which provides that "all conveyances of the real estate of married women, executed by them jointly with their husbands and duly acknowledged and recorded, shall be valid and effectual to transfer such estate, and all conveyances by the husband alone of the real estate of the wife shall be ineffectual to convey her interest therein." Gen. Statutes, p. 353, sec. 10.

It is manifest that under this statute the only limitation upon the wife's power of alienation of her real estate is the consent of her husband. When that is evidenced by his joining her in the execution and acknowledgment of the deed, the power of the wife to transfer her estate is perfect and unrestricted. She may convey her estate absolutely

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and for any purpose she may desire; she may sell it for a valuable consideration, or she may give it in charity, or transfer it by the ordinary method of conveyance between husband and wife to her husband, either with or without a money consideration. The power of the wife to make an absolute conveyance under the statute cannot be doubted, and, as the greater includes the less, it must follow as a logical deduction that she has power to make a conditional conveyance and may mortgage her estate to secure any valid debt, either of herself or her husband.

In an early work on Mortgages by Powell, 1799, it is said that "if the wife joins in a mortgage of her lands and levies a fine thereof, this will be binding on her and her heirs notwithstanding the coverture. For as by such process she may make an absolute alienation of her real estate, so she may make a conditional one thereof." Powell on Mortgages, p. 737. In 2 Swift's Digest, on page 209, the law is thus stated:—"A wife may join in the mortgage deed, which will be valid in the same manner as an absolute alienation, and when the wife joins with the husband in mortgaging her estate for his debt it is his duty to pay it, and her heirs after her death may apply in chancery and compel him to redeem the estate."

The statute under consideration seems to be simply an affirmance of the common law, dispensing with the machinery of fine and recovery and substituting the consent of the husband by his joining in the deed.

It appears that this statute was passed in 1723, and we think it has been the common understanding of the profession that mortgages of the same character as the one in question were good and valid. They never have been questioned or doubted until the present case.

The statutes of 1869 and 1872, relied upon by the defendant, and the cases cited, do not appear to sustain the claim that this mortgage is invalid as against the wife. The object of these enactments was to enlarge the power of married women to make contracts under certain circumstances, but not, as we apprehend, to curtail in any manner their

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power of alienating their real estate in the manner provided by the statute of 1723.

The case of *Smith* v. *Williams*, 43 Conn., 409, and the other cases cited by defendants' counsel, are entirely outside of the principles involved in this case. In *Smith* v. *Williams* the attempt was made to hold the wife's estate liable by virtue of a simple executory contract; the notes sued upon in that case were executed by her and her husband, and it was stated in them that each intended to charge their individual property for the payment of the notes. This court held that the notes not being given for the benefit of herself, her family or her estate, were not binding on her estate under the acts of 1869 and 1872.

But we do not deem it necessary to analyze further the cases cited by the counsel for the defendants. This case rests not upon the statutes last named. No liability is claimed against the wife upon the note or upon any contract outside of the mortgage deed. The rights of the parties depend entirely upon the validity of this conveyance, which we think has been shown to be clearly within the power of the wife to make, and she must be bound by it.

There is no error in the judgment appealed from.

In this opinion the other judges concurred; except LOOMIS, J., who having tried the case in the court below, did not sit.

JAMES BLAKE *vs.* CHAUNCEY E. BALDWIN.

Hartford District, Jan. T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS AND GRANGER, JS.

Sundry parties, some of whom had attached and others were about to attach certain personal property of a debtor, and others of whom were threatening to carry the debtor into insolvency, agreed that the property should be sold by the officer who held it, upon executions obtained by some of the parties, and that the proceeds should be divi-

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ded by him among them *pro rata*. The property was located in different towns of the county, but it was agreed that it should all be sold together in one of the towns. After the property had been sold the parties disagreed as to whether by the agreement a certain creditor was to participate. By the delay the time for carrying the debtor into insolvency had passed. The officer decided that the creditor in question was entitled to participate, and distributed the money on that basis, accompanying the payment with a written statement of the total amount of the fund and of the sums to be paid to each claimant, such payments exhausting the fund. In a suit brought against the officer by a creditor who had objected to the basis of distribution, but had received the money offered him, it was held—1. That the agreement had wholly superseded the rights of the parties as attaching creditors. 2. That the plaintiff by receiving the money in the circumstances had accepted it as his share. 3. That the sale of the property by the officer, though in form an official sale, was yet made by him under the agreement of the parties and as their agent, and that his compensation was to be a reasonable sum, and was not limited to the statutory fees of an officer.

[Argued January 22d—decided February 12th, 1886.]

ACTION to recover money due; brought by appeal from a justice of the peace to the Court of Common Pleas in Litchfield County, and there tried to the court before *Warner, J.* Facts found and judgment rendered for the defendant. Appeal by the plaintiff. The case is sufficiently stated in the opinion.

G. A. Hickox, for the appellant.

L. J. Nickerson, with whom was *J. Huntington*, for the appellee.

PARDEE, J. The plaintiff attached the property of Elias R. Hart, situated in the towns of Cornwall and Litchfield, and obtained a judgment against him for $100 and costs. Subsequently E. D. Goodwin attached the same property and obtained a judgment against Hart for $100 and costs. Then H. Clemens placed in the hands of the officer an execution against Hart for about $37. The plaintiff was also informed that Hart owed S. Pratt $100 and G. Hall a like sum, and that each of them threatened to put the debtor

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into insolvency. The plaintiff, for the purpose of preventing other creditors of Hart from obtaining any part of his property, proposed a meeting of those above named. Hall and Goodwin met the plaintiff, who also acted for Pratt, at the office of A. D. Warner, who was the attorney for Hall and Goodwin, and they agreed that the defendant, a deputy-sheriff, should sell at Litchfield the property attached, on executions, deduct expenses, and pay the surplus *pro rata* to certain creditors, some of whom had liens and some of whom had not. The plaintiff, Hall and Goodwin all understood the arrangement to include debts due to the plaintiff, Hall, Goodwin, Clemens and Pratt. Hall, Goodwin and Warner understood that it also included a debt of $14.50 due to Warner; the plaintiff did not understand that it did. The defendant sold the property, deducted expenses, and paid the plaintiff, Hall, Goodwin, Pratt, Clemens and Warner *pro rata*, the plaintiff objecting to the last payment. He claims that the payment to Warner was not authorized by the agreement, and in his bill of particulars charges the defendant for balance of money collected, $35; also for money paid by the plaintiff for the defendant, $2. The defendant had judgment, and the plaintiff appealed.

When the fact of this misunderstanding came to light the time had passed when the parties could place themselves in their original positions. So far forth as Goodwin was concerned the agreement had been executed; he had parted with his right to compel the plaintiff to share with him and all other creditors equally in the assets of the debtor; the plaintiff had secured and proposed to retain for himself a percentage upon his claim larger than he would have received but for this executed agreement; the property had been sold and the attendant expenses paid, never to be recovered. The defendant was in possession of the balance rightfully, by the joint consent of the plaintiff and all other persons having claims upon it, to be divided by him. All these had united in setting aside the statutory rule of division upon good considerations mutually paid and received; therefore it cannot be restored except by unanimous con-

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sent; this has not been obtained. The plaintiff in this action has undertaken to enforce a substitute rule; but the parties who agreed to and did set aside one rule were not agreed as to the substitute. Proof of a misunderstanding does not entitle him to a judgment.

Again, the plaintiff claims that a certain sum was due to him from the fund. Hall, Goodwin and Warner claimed that his share was a lesser sum. There being neither judicial determination nor controlling voice among the parties, it fell upon the defendant, the holder of the fund, to adopt a rule of division. He determined that the plaintiff was not entitled to the sum demanded by him. Therefore there was an unliquidated claim; a disagreement between the party entitled to receive and the one under obligation to pay. The defendant then paid a sum to the plaintiff, accompanying the payment was a written statement of the total amount of the fund and of the amounts which he intended to pay or had paid to the plaintiff and to each of the other claimants, showing that these sums would exhaust it. This was a very explicit notice to him that the payment was made in full; that no more was due; that no more would or could be paid. Two courses were open to him; he could return the money or he could keep it; but, if he chose the latter, he kept it with the impress stamped upon it by the payor of payment in full. He kept it, and thus barred any further recovery. *Potter* v. *Douglas*, 44 Conn., 541.

The plaintiff also claims that the defendant diminished the fund by receiving sums as fees illegally. But the sale at Litchfield of all the property attached, although under the forms of law, was in reality under the private arrangement, outside of the law, between the execution creditors and the defendant. Therefore there is no place for a controversy as to what fees the statute would allow; it is simply a matter of reasonable compensation for unofficial services. On this point the finding is silent.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

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HENRY FIELDS *vs.* THE HARTFORD & WETHERSFIELD HORSE-RAILROAD COMPANY.

Hartford District, Jan. T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

A horse-railroad company was required by its charter to grade and keep in repair the surface of the street for a space not less than two feet in width on each side of each rail. Held that where an injury was caused by the defective condition of such part of the street the company was entitled, before being liable to a suit, to written notice of the injury under the statute (Session Laws of 1883, p. 283,) which provides that no action for an injury from a defective highway shall be maintained against any town, city, corporation or borough, unless written notice of such injury and of its nature and the place of its occurrence shall be given within sixty days.

[Argued January 22d—decided February 12th, 1886.]

ACTION for an injury from the negligence of the defendant company upon a part of the highway which the company was bound to keep in repair; brought to the Superior Court in Hartford County. The defendant demurred to the complaint; the court (*Beardsley, J.*,) sustained the demurrer, and rendered judgment for the defendant. The plaintiff appealed. The case is sufficiently stated in the opinion.

T. M. Maltbie and *P. S. Bryant*, for the appellant.

H. C. Robinson, for the appellee.

GRANGER, J. This is an action for an injury caused by the negligence of the defendant, a horse-railroad company, upon a part of a highway which the company was by its charter bound to keep in a safe condition. The defendant demurred to the complaint on the ground that it "does not aver that written notice of the injury and of the nature and cause thereof, and of the time and place of its occurrence, was given to the defendant as required by law." The Superior Court sustained the demurrer, and the plaintiff appealed.

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If the injury complained of resulted from a defective highway which it was the duty of the defendant to keep in repair, then the defendant was entitled to have the notice prescribed by the statute. The language of the statute is as follows:—"Any person injured in person or property by means of a defective road or bridge may recover damages from the party bound to keep it in repair, but no action for any such injury shall be maintained against any town, city corporation, or borough, unless written notice of such injury, and of the nature and cause thereof, and of the time and place of its occurrence, shall within sixty days thereafter, or, if such defect consist of snow or ice or both, within fifteen days thereafter, be given to a selectman of such town, or to the clerk of such city, corporation or borough; and when the injury is caused by a structure legally placed on such road by a railroad company, it, and not the party bound to keep the road in repair, shall be liable therefor." Laws of 1883, p. 283.

By the General Statutes, and by the charter of the defendant, (Gen. Statutes, p. 329; Private Laws, vol. 5, p. 3,) it is made the duty of the defendant to grade and keep in repair the surface of the street adjoining the rails of its road for a space not less than two feet in width on each side of each rail, and to construct all crosswalks so that all vehicles can conveniently cross or turn off from such track.

The plaintiff alleges that the defendant so "improperly and negligently maintained and operated its railway in said highways as to render the use of them by the public dangerous, and that the plaintiff, while passing in his sleigh along said highways, and near the intersection thereof, by reason of the negligence and carelessness of the defendant was overturned and thrown from his sleigh and received many and severe bodily injuries."

This is the essential part of the plaintiff's complaint. What the pleader intended to prove under this statement we can only conjecture. We think the only fair import of the language is, that the defendant had so negligently constructed and kept or maintained its railroad track in rela-

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tion to the highway on each side, as to render the crossing unsafe at the place where the plaintiff's sleigh was overturned; that the railroad track was raised above or depressed below the adjoining grade of the street so as to constitute a defect in the highway, for which the statute referred to makes the defendant alone responsible. And a horse-railroad company that is bound to keep a part of a highway in repair is entitled to notice of an injury from a defect in that part of the highway, as much as a town or any other corporation which is bound to keep a road in repair.

The complaint we must therefore treat as a complaint founded upon the statutory liability of the defendant, and before the plaintiff can enforce its provisions against the defendant he must perform his own duty under it; he must give the written notice prescribed; and the giving of such notice is a condition precedent to his right to maintain the action. This has been so often and so recently decided that it needs no further consideration. *Hoyle* v. *Town of Putnam*, 46 Conn., 61; *Shaw* v. *City of Waterbury*, 46 id., 266; *Cloughnessey* v. *City of Waterbury*, 51 id., 405; *Wall* v. *Toomey*, 52 id., 35.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

CLINTON PHELPS, ADMINISTRATOR, *vs.* ALLIE C. BATES AND OTHERS.

Hartford District, Jan. T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS AND GRANGER, Js.

A testator gave certain estate to his son, with a gift over if he should die during minority or without issue. Held, upon a construction of the whole will, that the word "or" should read "and," and that the son's estate became indefeasible on his attaining his majority.

[Argued January 7th—decided February 5th, 1886.]

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SUIT for the construction of a will; brought to the Superior Court in Hartford County, and reserved, upon facts found, for the advice of this court. The case is fully stated in the opinion.

H. C. Robinson and *E. H. Hyde, Jr.*, for the defendants Allie C. Bates and Hannah S. Bates.

H. E. Taintor, for the defendant Ellen A. Cuzner.

J. P. Andrews, with whom was *C. H. Briscoe*, for the other defendants.

CARPENTER, J. This is a suit for the construction of a will. The testator gave the bulk of his property to his son, then thirteen years old. The second section of the will reads as follows:—"I give and bequeath to my only son, Allie Carlos Bates, all my estate, both real and personal, of every name, kind or description, except what I hereafter donate in this will to the other legatees." Section three provides for his wife; sections four and five give legacies to two sisters; section six gives a legacy to a brother; section seven provides for a step-son and makes an additional provision for his wife; sections eight and nine provide for two other persons outside of the family. The will then proceeds as follows:—

"In my extreme embarrassment in making provision for unforeseen events or cases of death I am at a loss what to do, but decide upon the following, viz:—In the event of the death of my son Allie C. during his minority, or without family or issue, the bank stock and real estate or home farm (so called) and stock and household goods, &c., to go to , and that she, Hannah S., shall share equally with my own family heirs in the division of all of the property which may be left or remain from my son Allie C., viz:—with Anson Bates's heirs, Albert Bates, Flora B. Metcalf's heirs, C. Laura Vandorn, Alfred Bates, and Mindwell D. Smith or the heirs of each (if any) that may be

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deceased at that time—seven equal shares in all. I do hereby direct the legacies in this will to be due six months after my decease. To be more explicit:—I wish and design to give to my wife, Hannah S., the use and benefit of my home farm during her life, with the stock, tools, household goods and implements on and belonging to the same, during her life, in the event of the demise of my son, Allie C., during his minority or without issue or heir, before her decease, (Hannah S.,) and she to share equally in fee simple with my six family heirs, in all of the rest of my property given in this will to my son Allie C."

Under this will two questions arise:—1. What estate does the son take? and, 2. What estate does the widow take? In behalf of the son it is claimed that he takes an absolute estate, or, at least, an estate that becomes absolute on his attaining his majority. In behalf of the "family heirs" it is contended that he takes either a life estate, or a defeasible fee; and that the heirs take a remainder, or a gift by way of an executory devise.

In construing this will we must bear in mind that the general leading intent as therein manifested is evidently to give a very large portion of the estate to the son. He is first provided for. The second section gives an estate in fee simple. *White* v. *White*, 52 Conn., 518. That ought not to be cut down to a less estate unless we find a clear intention that it be done in the subsequent parts of the will.

We think it is very clear that the testator did not intend to give his son a mere life estate. There are in this will no less than five distinct life estates. In every instance such an estate is clearly expressed. The testator, or whoever drafted the will, knew what language to use in order to create a life estate. When that was his intention it was not left to inference from words of doubtful construction. A defeasible fee, such as is here contended for, in the minds of most men could not be distinguished from a life estate. It is, in effect only an estate for life, although it may not technically be termed a life estate. The presumption is that

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if the testator had intended a defeasible fee he would have created a life estate, and thus have disposed of the remainder as he did in other instances. Instead of that he used appropriate language to give a fee.

The first nine sections dispose of all his property. His first and leading intention, as well as nearly all his minor and subordinate ones, are found in them. If they stood alone no such question as now arises could have been made. What then did the testator intend by that portion of the will following the ninth section? That seems to have been suggested to him by contemplating the possibility of his son's early death. That that might occur before the will could take effect was evidently in his thoughts, as he assumes that his property in that event would go to his own heirs, and provides that his wife shall be admitted upon the same footing with his brothers and sisters. That assumption is inconsistent with the vesting of the property in the son by force of the will; for in that case the property would go to the heirs of his son instead of his own heirs. Hence there is some reason for construing this part of the will as meaning the death of his son during his own life. But if for any reason that is inadmissible, then we think it must mean the death of his son during his minority *and* without heirs or issue. Evidently he had in mind his death during the life of the mother, for the will makes her as one of the heirs. In the seventh section the death of the son during minority is spoken of by itself, and that event is provided for so far as the home farm is concerned. But in the portion following the ninth section, where only the expressions, "or without family or issue," "or without issue or heir," are found, they are coupled with the words "during his minority."

In behalf of the heirs it is contended that the prominent and controlling intention of the testator was to prevent his property from going out of his own family. But we think that intention was contingent and secondary, while his primary and more important intention was to provide liberally for his son. All his property is disposed of before these

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expressions are reached. They are used in making some change in the disposition of his property in a given possible contingency. Manifestly he regarded the provision for heirs as of minor importance. Until now they are not named, and here they are not named as devisees or legatees but as heirs. There is no direct express gift to them. It is only by an implication from an assumption that the property, in case it becomes intestate, will go to them as his heirs, that it can be said that they are legatees at all. The leading thought in his mind seems to have been to make an additional provision for his wife, rather than make provision for his brothers and sisters; and this he did by making her as one of them. Incidentally and by implication the provision is for their benefit. So far as that was intended it was a particular intent, the general intent being in favor of the wife. The former cannot prevail over the latter; much less over the general and all-important intent to give his property to his son.

Moreover this was the matter which caused him "extreme embarrassment;" concerning which he was "at a loss what to do." With doubt and hesitation he finally decided "upon the following," &c. To call the part of the will thus produced the important part, containing the general intent, and construe it as prevailing over the intent to provide for his only son, a matter concerning which he was not at a loss, did not hesitate, but was clear and decided, would be absurd. We shall not be justified in inferring from a provision of that character an intention to cut down an estate in fee to a life estate, or, which is in effect nearly the same thing, to a defeasible fee. The consequences of such a construction would be serious. The son would be left with nothing that he could call his own and enjoy except the income; for it will be observed that everything given to the son is subject to this provision. That the testator intended such a result will not be presumed; and it ought not to be produced by construction if the will will admit of any other rational interpretation. To avoid it, and at the same time give effect to the major intent apparent throughout the

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whole will to make his son his principal beneficiary, we feel justified in giving to the word "or" the meaning of "and"; so that the will in meaning will read "during his minority and without issue." Such a change gives effect to the intent of the testator, and hence is within the authorities on that subject.

Again; suppose the son had died while under age but leaving issue. Then, if the words are to be taken literally and disjunctively, the issue would not have taken, but the estate would have gone to collateral heirs. Manifestly that would be contrary to the intention of the testator. To effectuate that intention it would be necessary that the words should be taken in a conjunctive sense. And that would require both contingencies to concur in order to give effect to the limitation over. The general rule is, that when an estate depends upon a double contingency, both must concur. Doubtless an estate may be made to depend upon one of two or more alternative contingencies, but the supposition we have made shows that such was not the meaning of the testator in this case.

The case of *Williams* v. *Hubbard*, 2 Root, 191, is identical with this case so far as this question is concerned. An estate was given to a grandson, with this provision:—"In case the grandson dies before he arrives at the age of twenty-one years, or before he has any heirs of his body, then the estate given to him shall go to the said daughters." It was held that the estate vested in the grandson on arriving at the age of twenty-one years, though he died without heirs of his body. The court say:—"The dying without heirs is to be understood to relate to the time before he arrives at the age of twenty-one years."

If the testator intended death during his own life, or death during minority, then the estate becomes indefeasible in the son, at least as soon as he attains his majority.

The gift to the wife in the third section of the will is clear and requires no construction. The provision for her benefit in the seventh section is contingent upon the son's dying during minority, and, as that event can now never

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happen, we have no occasion to consider what interest she takes under that section.

The provision found in the concluding portion of the will is inoperative for the reason given above.

The Superior Court is advised to render judgment in accordance with these views.

In this opinion the other judges concurred.

JOHN M. BLACK *vs.* THOMAS O'HARA.

Hartford District, Jan. T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

A private right of way by prescription was claimed over what had formerly been a public highway, but had been abandoned and fenced up. Held that the right of way could have been acquired only by a user that was adverse, that the user could not have been adverse while the highway was open to public use, and that therefore there must have been fifteen years of adverse user after the highway had been abandoned and closed up.

[Argued January 15th—decided March 12th, 1886.]

ACTION for throwing down a fence on the land of the plaintiff; brought, by appeal from the judgment of a justice of the peace, to the Court of Common Pleas of Litchfield County, and tried to the jury before *Warner, J.* Verdict for the defendant, and appeal by the plaintiff for error in the charge of the court. The case is fully stated in the opinion.

G. A. Hickox, for the appellant.

J. Huntington and *W. H. O'Hara*, for the appellee.

CARPENTER, J. This is an action of trespass; the defense sets up a right of way by prescription; the replication

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alleges that the supposed right of way was along and over a public highway which was discontinued in 1875; the rejoinder denies the replication and further alleges that if ever a highway it was abandoned more than thirty-two years prior to 1875. The replication, if true, disproved the alleged right of way, so that it in substance denied the defense. The rejoinder, if true, disproved the replication. Upon this state of the pleadings the issue was whether the defendant had a right of way by prescription. On the trial the parties agreed that the *locus in quo* was once a highway. If it existed until 1875, when it was formally discontinued, the defendant could have acquired no right of way, because sufficient time for that purpose has not yet elapsed since 1875. If the highway ceased to be such more than thirty-two years prior to 1875, then it was possible for the defendant to have acquired such a right.

The case was tried to the jury, the defendant had a verdict, and the plaintiff appealed. The court charged the jury, as the plaintiff requested, that the burden of proof was on the defendant to prove the alleged right of way; but refused to charge, as further requested, that proof of a public highway would not prove a private way by prescription; and this is the first objection to the charge.

If the plaintiff, instead of replying evidential facts to the defense, had contented himself with a simple denial, there would have been more force in this objection. Even then, however, it is questionable whether the objection should not have been taken to the evidence. But the plaintiff introduced the subject of a highway into the pleadings; and the subordinate issue as to evidential facts is whether the highway was discontinued by action of the town in 1875, as claimed by the plaintiff, or by abandonment, some forty years before, as claimed by the defendant. Another subordinate issue, but incidental and contingent, raised, not by the pleadings, but by the defendant on the trial, was whether the highway existed at the time of the alleged trespass. Now evidence as to this whole matter seems to have been given to the jury without objection. It does not appear,

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however, that the defendant claimed it as sustaining his defense, but claimed it rather as disproving the plaintiff's allegations; and further claiming, if those allegations were disproved, and the highway still existed, that it constituted a defense to the action. The counsel on both sides, and the court, seem to have treated it as a distinct, independent defense. As such no objection was made and no question raised. The court submitted that incidental defense, which the trial developed, to the jury. As the defendant did not claim that proof of a highway proved a prescriptive right of way, and as the trial proceeded upon the theory that a highway was a separate defense, we think the court was justified in not charging as requested.

The next objection is to the following charge:—"And the law is, that if you find that the defendant's grantor and he have uninterruptedly and continuously occupied and used said claimed right of way for the period of fifteen years before the beginning of this suit, then your verdict should be for the defendant, provided you also find in this connection that this claimed right of way was not over and on a then existing public highway, as claimed by the plaintiff." The objection to this part of the charge is thus stated:—"The special error here assigned is, that the court charged the jury that mere possession, occupancy and user would establish a legal private way without regard to the character thereof, and whether adverse or not to the rights of the plaintiff."

We recognize the principle underlying this objection as sound. Of course mere user will not establish a right; it must be adverse. If the record disclosed any claim of a license or other circumstance aside from the matter of a highway, showing that the use was not adverse, and the court had failed to notice it or qualify the charge as claimed, it would have been difficult to escape the conclusion that the charge was erroneous and not adapted to the case. But we interpret this record as showing that the only ground on which the plaintiff claimed that the use was not adverse was the alleged existence of a highway during a part of the

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fifteen years. There is no intimation of any other evidence or any other circumstance qualifying the use. We think it may fairly be inferred from the record that the plaintiff admitted the adverse character of the use unless there was a highway existing at the time. That and that alone is the special matter set up in his replication as showing that a prescriptive right did not exist; and that matter was sufficiently noticed and properly submitted to the jury in the concluding sentence of the charge.

The court further charged the jury as follows:—"If you find that the highway was abandoned and fenced up, as claimed by the defendant, forty years ago, and you also find that the defendant has used said right of way as claimed by him uninterruptedly and continuously for fifteen years before the commencement of this suit, then your verdict should be for the defendant." This is objected to for three reasons. 1. It is claimed that a non-user of a highway for forty years or more is not sufficient in law to operate as an abandonment. 2. That the user of the defendant could not avail him in the law except such user as he proved subsequent to the abandonment of the highway. 3. That such user must have been adverse.

The last objection we have already answered. The implication of law in the second objection will be admitted, namely, that the adverse user must have commenced after the right of the public had ceased. But we do not understand that the charge conflicts with that proposition. The import of the charge is, that if the highway was abandoned and fenced up more than forty years ago, and so continued for about twenty-five years, and then the defendant's user commenced, and continued for fifteen years before the suit was commenced, it was a defense. The jury must have understood from that, as well as from other parts of the charge, that an adverse user by the defendant and a right to use as one of the public could not exist during the same time.

In respect to the first objection; we do not understand the charge as referring to a period of time more than forty

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years ago as the time when the process of abandonment commenced. For aught we know that process commenced so long before that time that the abandonment was then complete and the road then fenced up, so that all the public were then excluded therefrom. We think the charge fairly imports that. The language is "abandoned and fenced up more than forty years ago." The language of the defendant's rejoinder to the plaintiff's replication is of the same import. "It had been abandoned and discontinued for more than thirty-two years prior to 1875." So that the question how long a time it takes for the public to abandon a highway does not appear to have been made on the trial. The record discloses no such claim by either party. And neither the record nor the course of the trial warrants us in concluding that the judge assumed anything in respect to that matter.

We think there was no error in this part of the charge.

The record presents other questions; but as they have not been discussed, and as the appellant claims nothing in respect to them in this court, it is unnecessary to consider them.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

EDWARD CAMP, TRUSTEE, *vs.* THE ADMINISTRATOR AND HEIRS OF MARY A. CROCKER.

Hartford District, Jan. T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, JS.

Bequest of a fund to trustees "to appropriate the principal and interest, as they shall deem proper, to the aid of such indigent, needy and meritorious widows and orphans of the town of *W* as may need temporary help to keep them from being chargeable to the town as paupers, leaving it to the trustees to exercise a sound discretion as to who shall be made the subjects of such aid." Held to be a valid gift to a charitable use.

[Argued January 6th—decided February 5th, 1886.]

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SUIT for advice as to the construction and validity of a bequest; brought by the trustee under the will to the Superior Court in Litchfield County. Facts found and case reserved for advice. The case is stated in the opinion.

A. H. Fenn, presented the case in behalf of all parties interested.

PARDEE, J. James Crocker of Winchester died in 1859, leaving a will, the fifth paragraph of which is as follows:—

"In case my wife shall die leaving my said daughter living, then it is my will that my said daughter shall succeed to any and all property and rights which shall remain after the death of my said wife; and in case my said daughter shall survive my said wife, and shall herself die without issue, then it is my will that any and all property, whether real or personal, which may pass to my said wife by virtue of this will, or to my said daughter, or to either of them, and the proceeds and avails thereof, shall be converted into cash, and, until disposed of by the stipulations hereinafter written, shall remain a fund in the hands of the trustees aforesaid, and their successors appointed by said court of probate, to be used and disposed of as follows, to wit:— Said trustees and their successors are to appropriate the principal and interest of said fund, as they shall deem proper, and in such sums as they may deem proper, to the aid of such indigent, needy and meritorious widows and orphan children of the town of Winchester aforesaid as may need temporary help to keep them from the disgrace of being chargeable to said town as paupers, leaving it to said trustees and their successors to exercise a sound discretion as to who shall be made the subjects of such aid, and to what amount, taking into view the amount of the fund.

"If my son Corrill shall come to want during the existence of the trust hereby created, then it is my will that said trustees shall, from time to time, appropriate such part of the proceeds of the property hereby devised as they may deem just and proper to his support, unless all of said pro-

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ceeds shall be needed for the support of my said wife and daughter."

His wife has since died, as have also his son and daughter, neither leaving issue. The plaintiff, trustee under the will, asks us to construe it in the following particulars:—

1. Whether any legal effect can be given to any part of the fifth section of the will, and if so, what; and whether all or any part of said section is or is not void; and whether any portion of the provision therein made for the aid of indigent, needy and meritorious widows and orphan children can be made legally operative.

2. Whether the trust which it was sought to create by said section is or is not void for uncertainty, ambiguity, indefiniteness, or a failure of the object of the testator's bounty.

3. Whether said trust is void by reason of the statute relating to perpetuities, or by the common law regulating the time in which an executory devise must vest, or for any other cause, either wholly or in part.

4. In the event of said trust being adjudged to be inoperative or invalid or to have failed, either wholly or in part, then to whom, and in what proportions, and in what manner, shall said funds in the hands of the plaintiff descend or be distributed, and who is entitled thereto, and to whom shall the plaintiff account for and pay over the same?

The testator has given power to the trustees to select the beneficiaries. These are to be such widows and orphans of the town of Winchester as no individual is bound and able to support; who have practically exhausted their own means, and would, but for this fund, have no resource except public aid. This fund is then to intervene and supply their necessities; to postpone at least, possibly to prevent, the reception of public aid. They are to be residents of the town; persons to whom, if they are found in the condition above specified, it would be the duty of the town in the first instance to give aid; and this regardless of the place of legal settlement, regardless of the question whether they were born before or after the death of the testator. It is a

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valid gift to a charitable use; a definite class; persons appointed to select; and it runs without limitation as to time parallel to, and of course never conflicting with, the statute against perpetuities.

The Superior Court is advised that the fifth clause of the will contains a valid gift to a charitable use.

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

ALVORD E. WINCHELL *vs.* GEORGE E. CONEY AND OTHERS.

Hartford District, March T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

It is not necessary that a note should be described with entire accuracy in the condition of a mortgage given to secure it. It is enough if it appears with reasonable certainty to be the note intended.

Notes for a large amount were payable in five years from date "with interest annually at six per cent." but were described in a mortgage as "bearing interest at six per cent. per annum." In a suit for foreclosure for non-payment of annual interest and for a reformation of the mortgage, it was held—

1. That the notes expressed the real contract between the parties as to the time of payment of interest, and controlled the description of them in the mortgage.
2. That the description of them in the mortgage as "bearing interest at six per cent. per annum," was sufficient to put a purchaser of the property on inquiry as to the time of payment of interest expressed in the notes.
3. That the mortgage and notes taken together made the former a security for the payment of annual interest, and that against a subsequent purchaser as well as the original mortgagor, and that no reformation of the mortgage was necessary.

A case in the Superior Court was, in form, removed to the United States Circuit Court, which court held that it was not removable. Held that the action of the former court in allowing the application for removal, accepting the bond given, and treating the case as no longer in court, did not operate as a dismissal of the case for want of jurisdiction, but that it still remained in the Superior Court.

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The action of the clerk in restoring the case to the docket was all that was necessary, and this action could be taken without an order of the court.

An appeal to the Supreme Court from the order of removal made by the Superior Court, did not take it out of the latter court.

In proving the value of property for the purposes of a foreclosure the rental value may be shown. Also what it would cost to reproduce the buildings.

In showing the rental value it is questionable whether the mere judgment of an expert would be proper evidence. The rents actually received, deducting therefrom the expense, would ordinarily be the proper proof.

[Argued March 9th—decided April 10th, 1886.]

SUIT for the reformation of a mortgage and for a foreclosure; brought to the Superior Court in New Haven County. The defendants were Peter R. Carll, the original mortgagor, and George E. Coney, a purchaser of the mortgaged property, who alone made defense. The facts were found and the case reserved for the advice of this court at its next session in Hartford. The points of law decided by the court will be sufficiently understood without a statement of the facts, which are of much complication and would require much space.

J. W. Alling, for the plaintiff.

S. E. Baldwin and *J. H. Whiting*, for the defendant Coney.

CARPENTER, J. This is a suit to foreclose a mortgage. The mortgage was given to secure three notes amounting to $21,000. The three notes bear the same date, are payable in five years from date, "with interest annually at six per cent." These notes are described in the mortgage as follows:—"One note for five thousand dollars, dated May 10th, 1881, bearing interest at six per cent. per annum, payable five years from date; one note for six thousand dollars, dated May 10th, 1881, payable five years from date, bearing interest at six per cent. per annum; and one note for ten thousand dollars, dated May 10th, 1881, payable five years from date, bearing interest at six per cent. per annum."

The complaint as amended shows the terms of the note

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and the condition of the mortgage deed, alleges a mutual mistake, by which the parties failed to state in the condition of the mortgage that the interest was payable annually, and prays for a reformation of the mortgage, for a foreclosure, and for possession.

One of the defendants is a non-resident. He attempted to remove the case to the Circuit Court of the United States. From that attempt arises a question as to the jurisdiction of the Superior Court.

The defendant Coney denies that the deed can be reformed as against him. There are also some questions made as to the admission of evidence, the propriety of the amendments, &c. But passing by all other questions for the present, we will first consider whether the plaintiff is entitled to a foreclosure of the mortgage as it stands. If he is, many of the questions discussed are of little importance.

As no part of the principal secured by the mortgage is now due, a foreclosure can only be for interest due and unpaid. The condition of the mortgage does not, of itself, show that the interest is payable before the maturity of the notes; but it purports to secure the notes "according to their tenor." The condition is—"Now, therefore, if said notes shall be paid according to their tenor, then this deed shall be void and of no effect; otherwise it shall remain in full force."

The notes are all alike except in the amount. Omitting that, they all read—"Five years after date for value received, I promise to pay Alvord E. Winchell or order, dollars, with interest annually at six per cent." We interpret that as a promise to pay interest annually. That is the obvious meaning of the words and is doubtless what the parties intended. So that the real question is, whether the condition sufficiently describes the notes to secure the payment of annual interest as against Coney, who has acquired an interest in the equity of redemption from the mortgagor.

A large number of cases have been decided by this court respecting the certainty required in the description of debts secured by mortgage. It has been held that the nature of

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the debts must be truly stated—whether by note, bond or open account; that the amount of the debt must be stated, not with exactness, but as nearly as may be, fairly and without fraud; and the character of the indebtedness, whether contingent or absolute. In all these respects this description meets the requirements fully. It goes further, and gives the terms of the notes in part—the date, when payable, and the rate of interest. But it fails to tell us when the interest is payable. Is that failure simply an omission, or does it amount to a false description? We think it is an omission merely. If a note is given on time with interest, and the time for the payment of the interest is not specified, it is payable when the principal is. The same rule of construction however ought not to be applied to the condition of the mortgage. The object of each instrument differs widely from that of the other. The object of the note is to embody the contract between the parties. Of course it must be complete in itself and express the whole contract. The intent of the parties must be gathered from the language used. The object of the other is to identify the note or debt secured by the mortgage and give reasonable notice of the extent of the incumbrance. All the terms of the note are not essential to that object; hence all need not be stated. The particularity required in making a contract is not required in describing it. Hence it may be safely assumed that some particulars may be omitted in the description. Therefore the failure of the condition to tell us when the interest is payable does not necessarily afford ground for the inference that it is payable when the principal is, especially in notes for a large amount and with a long time to run. It is a matter of common observation that a large portion of the indebtedness of the world pays interest annually or oftener—as national, state, municipal, and corporation bonds. So also with long time loans by savings banks and insurance companies. Loans by individuals are hardly exceptions to the rule. We apprehend that it is an unusual occurrence to find a loan for a large amount, to run for more than one year, unless it is stipulated that interest shall

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be paid annually at least. Therefore there can be no presumption that payment of interest was to be postponed for five years.

Moreover, the condition required the mortgagor to pay the notes according to their tenor. Obviously "their tenor" was not wholly expressed. There was one omission, and that omission was the subject of conversation between Coney and the mortgagor before he took his deed. He sought information, but not from the right source. The mortgage pointed him directly to the notes. He could there obtain definite, certain and precise information. Instead of inquiring in that direction he chose to rely upon the uncertain, and, as it proved, the unreliable recollection of the mortgagor. That was his own folly. He was not deceived or misled by the record.

We have no case in this state directly in point. In the cases in which the general question is discussed we find no principle which would make this description fatally defective. On the other hand certainty of description in every particular is dispensed with, provided the record gives reasonable notice of the nature and extent of the incumbrance. *Stoughton* v. *Pasco*, 5 Conn., 442; *Merrills* v. *Swift*, 18 Conn., 257.

But there are cases in other jurisdictions which more closely resemble this. In *Richards* v. *Holmes*, 18 Howard, 143, a case very much like this, Mr. Justice CURTIS says:—"It was argued that the trust deed does not describe the note as bearing annual interest, and consequently that the subsequent incumbrancer has a right to insist that, as against him, there was no power to sell for non-payment of such interest. It is true the deed does not purport to describe the interest which is to become due on the note; but it clearly shows that it bore interest at some rate, and payable at some time or times, and this was sufficient to put a subsequent incumbrancer on inquiry as to what the rate of interest and the time or times of payment were. The deed in effect declares, and its record gives notice to subsequent purchasers, that its purpose is to secure the payment of such

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interest as has been reserved by the note; the amount, and date, and time of payment of which are mentioned. We do not think the mere omission to describe in the deed what that interest was to be, is a defect of which advantage can be taken by the complainants."

In *Pierce* v. *Parker*, 4 Met., 80, a note was described in a deed of release as payable May 21st, 1834, when in fact it was payable April 21st. It was held that parol evidence was admissible to identify the note. The court says:—"And it is a well-settled principle of law that when an instrument, which is offered to prove the subject matter described, differs in one or more particulars from the thing described, evidence is admissible to show their agreement or identity, notwithstanding such misdescription."

In *Worthington* v. *Hylyer*, 4 Mass., 196, PARSONS, C. J., says:—"But if the description be sufficient to ascertain the estate intended to be conveyed, although the estate will not agree to some of the particulars in the description, yet it shall pass by the conveyance, that the intent of the parties may be effected."

In *Bourne* v. *Littlefield*, 29 Maine, 302, the condition of a mortgage deed was, that if the mortgagor or his assigns should pay five hundred dollars at a future specified time, then the deed, as also a note bearing even date with it, given by the mortgagor to the mortgagee to pay that sum at the time stated, should both be void. In a bill to redeem it was held that parol evidence was admissible to show that a note of five hundred dollars, payable on demand with interest, was the one secured by the mortgage. Surely if a misdescription may be corrected by parol evidence, a defective description, which defect the note when produced will supply, cannot be a serious objection, and cannot impair the security. See also *Johns* v. *Church*, 12 Pick., 557; *Hall* v. *Tufts*, 18 id., 445; *Jackson* v. *Bowen*, 7 Cowen, 13.

In *Webb* v. *Stone*, 24 N. Hamp., 282, the marginal note is as follows:—"It is not necessary that all the particulars of the note secured should be set forth in the condition of the mortgage. It is enough if it appears with reasonable cer-

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tainty to be the note intended." In *Cleavenger* v. *Beath*, 53 Ind., 172, the note did not correspond with the description of the note in the mortgage. It was held that the note controlled and cured the defective description in the mortgage. These cases illustrate the distinction we would emphasize—that that part of a contract describing the subject matter to which it relates need not be certain in itself, and does not require that degree of certainty that is required in defining the thing to be done by each of the contracting parties. One object of the condition of a mortgage is to point out the debt intended to be secured thereby. It of itself imposes no obligation upon either of the parties. It is descriptive in its character, and is like the descriptive part of a deed, or other instrument of conveyance, describing the property conveyed. It need only point out the thing conveyed with reasonable certainty. It is not required that the description shall be certain and precise in every particular.

That these notes were sufficiently described for all the purposes of identity can admit of no question. That the description gave Coney all the information he required, or the means of obtaining that information, is equally certain.

We may properly take another view of this question. The description in the mortgage, "bearing interest at six per cent per annum," is at least ambiguous. It clearly expresses the rate of interest, and would have done so if it had simply said "interest at six per cent." That would have been the way in which most people would have expressed it if that had been all that was intended. When therefore the note is described as "bearing interest at six per cent per annum," it is reasonable to suppose that something more was intended. And what else could it be but to indicate the time or times for the payment of interest? Finding that expression there, Coney had no right to assume that it was without meaning, and that no interest was payable until the end of five years. He knew that the notes were on interest and that it was payable at some time. As the description left that matter uncertain he was bound to inquire. Where to look for information could not be a matter of

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doubt. In some states it is held that a mortgage and the note or notes secured by it, for all the purposes of security constitute but one transaction—virtually one instrument. This must be so where the mortgage sufficiently identifies the note. Of course to comprehend the full meaning of the transaction the note as well as the mortgage must be examined. The mortgage points him directly to the note. He cannot be permitted to omit inquiry and thus say that the mortgage misled him. By so doing he would not only be taking advantage of his own negligence, but he would thereby make others responsible for that negligence.

There is no hardship in requiring him to resort to the holder of the notes for information. Suppose the mortgage had stated in terms that the interest was payable annually; even then, if a purchaser would obtain exact information he must make inquiry. From the nature of the case the mortgage could not tell how much interest would remain in arrears at any subsequent time. If important, he may as well inquire to ascertain when interest is payable as to ascertain how much is unpaid.

Again, in considering what notice the mortgage gave to Coney, we must bear in mind not only the circumstances of this particular case, but also the practice or the usual course of capitalists in loaning money. Money, especially in large amounts, is income producing, as much so as houses or lands. We should about as soon expect to find a real estate owner renting a house for five years, the whole rent payable at the expiration of the lease, as to find a man loaning twenty thousand dollars for five years with interest payable only at the maturity of the note. There is therefore no presumption that the payment of interest in such a case is to be deferred. The presumption is rather the other way.

Our conclusion is, that the mortgage as it stands secures the payment of interest annually, and that too as against subsequent purchasers. That being so, the plaintiff is entitled to a decree without a reformation of the mortgage.

We next come to the question of jurisdiction. The views above expressed make that comparatively an easy matter.

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It is the ordinary case of a suit to foreclose a mortgage. One of the defendants, being a non-resident, attempted to remove the cause to the Circuit Court of the United States. That court decided that the cause was not removable, and that decision has been affirmed by the Supreme Court of the United States. The result is that the cause now is, and always has been, within the jurisdiction of the Superior Court.

The action of the Superior Court in allowing the application, approving the bond, and declining further proceedings, has not the force of an order abating the suit, or erasing it from the docket, for want of jurisdiction. The Superior Court cannot remove or prevent the removal of a cause. If the application is refused, the cause nevertheless, if removable, is removed on filing the application and bond by force of the federal statute. If not removable, the allowance of the application is without force. When a cause is removed it disappears from the docket because the case has gone out of court, not by the act of the court, but by the operation of an act of Congress. If the case is not removed it is because that act does not apply, and the case remains in the Superior Court. It logically follows that, in contemplation of law, the case all the time has remained on the docket of the Superior Court and has been within its jurisdiction. No action of the court was required to reinstate it in the docket, or to revoke the order, if it may be called an order, removing it. The action of the clerk in re-entering it on the docket, when officially notified that the case was not removed, was proper. The appeal to this court from the order of removal did not oust the Superior Court of its jurisdiction. That order being a nullity, the appeal fell with it.

So far as we can see the second application for a removal stands upon the same grounds as the first. The prayer for a reformation of the mortgage is not based upon a separate cause of action against Coney, but the reformation asked for is incidental to the foreclosure. As such it would affect both defendants, the same as the foreclosure, and both are

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interested. Therefore the refusal to allow the removal was proper. But aside from that, the reformation being unnecessary, that of itself justifies the refusal.

Concerning the amendments little need be said. The objection that they were made while the court was without jurisdiction, for reasons already given, is without foundation.

The facts essential to a reformation of the deed do not, in this case, constitute a separate and distinct cause of action. That matter is incidental to the main object of the suit—a foreclosure. Therefore the objection to the amendment on that ground cannot prevail. Besides, it is a sufficient answer to these objections that the allegations respecting the reformation of the mortgage, being unnecessary, are immaterial and may be rejected as surplusage.

The amendments to the complaint for the purpose of showing that interest is due are unobjectionable.

The material questions arising on the several demurrers need not be separately noticed. The views already expressed dispose of them.

It only remains to consider some of the questions of evidence. Many of these questions arose in the effort to prove that Coney was not a *bonâ fide* purchaser, but that Carll, notwithstanding the conveyance, was the real owner of the equity of redemption. As we have assumed that Coney was a *bonâ fide* purchaser to the extent at least of $1,100, and as we are of the opinion that the plaintiff nevertheless is entitled to a decree against him, those questions are unimportant and need not be noticed.

Another question related to the alleged mistake. That, too, may be laid out of the case.

The conversations between the plaintiff and Carll are of no importance. They seem to have been offered solely for the purpose of affecting the question relating to the time when interest was payable as showing the practical construction adopted by the parties. As the written instruments taken together are free from ambiguity, we cannot see that any such evidence was necessary, or, strictly speaking, admissible for that purpose. But we cannot see that either

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defendant was harmed by it, and therefore the finding is not vitiated by its admission.

The other evidence objected to was offered for the purpose of proving the value of the property, and that for the purpose of fixing the time to be limited for redemption. This too is of little consequence; for if the evidence was clearly inadmissible, we should advise the Superior Court to ascertain the value by competent testimony and pass a decree. The testimony of Mr. Treat, that the buildings could be re-produced for $30,000, tended to show the value of the buildings now standing, and was clearly admissible. The testimony of Mr. Wall, an expert, for the purpose of showing the rental value of the property, is less clear. He stated what in his judgment the rental value was. Ordinarily the rents actually received, deducting therefrom the expense, would be more satisfactory. But that being a matter peculiarly and perhaps solely within the knowledge of Carll, we cannot say that the court erred in not compelling the plaintiff to make Carll his witness. That the rental value, when shown, is competent evidence of value cannot be doubted.

For these reasons the Superior Court is advised to render judgment for the plaintiff.

In this opinion the other judges concurred.

THE TOWN OF HADDAM *vs.* THE TOWN OF EAST LYME.

Hartford District, Jan. T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

Upon the creation of a new town out of the territory of an existing one, where the legislature does not otherwise provide, any settled inhabitants of the original town who become paupers, are to be considered as belonging to the new town if they had their residence as such inhabitants upon the territory embraced within it.

The town of *E* was incorporated from territory taken from the towns of *W*

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and *L*. The resolution provided that "all the inhabitants now or at any time residing within said limits, excepting the paupers of *W* now in its poor-house, shall be a separate corporation." Held that the provision with regard to a portion of the paupers, and the omission to provide for any others, and the comprehensive language used, did not take the case out of the application of the general rule.

One of three selectmen of a town submitted the question of the settlement of a pauper to arbitration. Of the other selectmen one had agreed that this one "should attend to the case," and the other had not been consulted. Held that the town was not bound by the award.

[Argued January 5th—decided March 1st, 1886.]

ACTION to recover for supplies furnished to a pauper claimed to belong to the defendant town; brought to the Superior Court in Middlesex County. Facts found by a committee and case reserved for advice. The case is sufficiently stated in the opinion.

S. A. Robinson, for the plaintiffs.

S. Lucas and *C. W. Butler*, for the defendants.

PARDEE, J. In 1839 the town of East Lyme was incorporated, including territory taken from Waterford and Lyme. The father of the pauper was born within the limits of the present town of Waterford and there lived until the year 1837, when he removed to that part of the same town which was made part of the town of East Lyme; there the pauper was born in 1838; and there he lived with his father until after the incorporation of East Lyme. Neither of them gained a legal settlement in the part of Waterford which was made a part of East Lyme, nor subsequently in any other town. The pauper came to want in and was aided by East Haddam in 1882. This suit is for money thus expended. The plaintiff had judgment, and the defendant appealed.

In *Bethany* v. *Oxford*, 15 Conn., 550, it is said as follows: —"But, by the construction which has been given to our laws relating to the settlement of paupers, when a town has been divided each part becomes liable to support such pau-

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pers as have gained a settlement in that part, provided the legislature on the division has not prescribed a different rule."

In *Waterbury* v. *Bethany*, 18 Conn., 424, it is said as follows:—"It is a well established principle of the common law of this state, as expressed by WAITE, J., in the opinion of the court in *Bethany* v. *Oxford*, 15 Conn. R., 550, that when a town has been divided, each part becomes liable to support such paupers as may have gained a settlement in that part, provided the legislature on the division has not prescribed a different rule; and that the question as to the settlement of paupers must be determined as if the two towns had always been as they now are, except so far as the legislature may have otherwise provided. * * * In the next place, by the principle of our common law which has been mentioned in regard to the settlement of paupers, on the division of the town of Woodbridge the paupers of that town would be deemed to have a settlement in that part where they would have had one if the two new towns had always been distinct, and the new town constituted of that part would be liable for their support."

Upon these authorities, assuming that the towns of Waterford and East Lyme were incorporated at the same time, with their present respective boundaries, the pauper through his father had a legal settlement in Waterford, which he retains to this present, having never gained another in East Lyme or elsewhere.

Presumptively the parties knew the common law rule and were unwilling to permit it to operate in its integrity. Presumptively too they asked and obtained legislative restriction upon it in some particulars. The legislature divided present paupers. It also provided that all persons who should thereafter come to want in any town except Waterford and Lyme, who had not elsewhere gained a legal settlement, should be chargeable to East Lyme, provided they had formerly resided on the territory assigned to it, and had removed therefrom prior to its incorporation. The pauper in question was not a pauper at the passage of the resolu-

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tion; he then and for a time thereafter resided upon the territory included in East Lyme. We must assume that the legislature in omitting to touch his case intentionally left him under the control of the common law.

The resolution incorporating East Lyme specifies the territory, and says that it "shall be, and the same is hereby made and constituted, a separate and distinct town by the name of East Lyme, and all the inhabitants now or at any time residing within said limits, excepting the Waterford town paupers now in the pauper house of said town of Waterford, shall be and remain a separate and distinct corporation." It is the claim of the plaintiff that "this clause shows clearly that the then inhabitants of the new territory (having a settlement in the ancient town of course) except such residents as were then in the pauper house of Waterford, were intended by the operation of the whole act to be settled inhabitants of the new town." But in *Bethany* v. *Oxford*, (*supra*), the resolve incorporating Bethany, after disposing of present paupers, said:—"And in all other respects the said territory and the inhabitants thereof shall constitute a part of said Bethany, with all its privileges and liabilities." Of this the court said:—"The language of the resolve must be understood according to the manifest intent of the legislature. That was to transfer to Bethany a part of the old town of Oxford, with all the inhabitants residing thereon; not to change or affect the settlement of those inhabitants, except so far as it might be affected by the division of the towns as has already been stated; that is, those who had their settlement on the part annexed to Bethany would thereafter have their settlement in Bethany instead of Oxford." We think the same meaning is to be imputed to the resolve incorporating East Lyme.

The plaintiff began to assist the paupers in 1882, and notified the defendant and the town of Waterford that it should claim repayment from each. Smith was a selectman of the plaintiff town, Comstock of the defendant town, and Beckwith of Waterford. Upon invitation of the latter the others met him for the purpose of adjusting the claim. Af-

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ter conversation Beckwith said in Comstock's presence to Smith, "You go home Comstock and I will settle to which of our towns the pauper belongs." Beckwith and Comstock agreed to, and did, submit that question to an arbitrator, who decided that he belonged to East Lyme. Comstock was one of three selectmen of East Lyme; one other had agreed that Comstock should "attend to this pauper case;" the third was not consulted. East Lyme refused to be bound by the decision. It is the claim of the plaintiff that the defendant is bound by the award and that its liability is *res adjudicata*. We cannot assent to this. The town in its corporate capacity had given no power to Comstock to submit the claim; the board of selectmen, three in number, gave him no such power; one of them neither said nor knew anything about the matter; the third consented to nothing more than that Comstock should "attend to this pauper case." To these words no greater force or broader meaning is to be given than to interpret them as imposing upon Comstock the duty of gathering information and making other preparation necessary to the protection of the town against such claim as the plaintiff should attempt to enforce by legal proceedings. If he became persuaded that the interests of his town could be more safely entrusted to arbitration than to the judgment of a court, it was his duty to get the necessary authority to submit it, from the board of selectmen at least.

The Superior Court is advised to render judgment for the defendant.

In this opinion the other judges concurred.

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THE TOWN OF NEW HARTFORD *vs.* THE TOWN OF CANAAN.

Hartford District, March T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

The statute (Gen. Statutes, p. 196, § 4,) provides that an "inhabitant" of any town in this state may gain a legal settlement in any other town by supporting himself and paying all assessed taxes for six years. *L* was born in 1836 in Massachusetts, his father being an alien residing there. When he was five years old his father removed with his family to this state, residing in different towns, but acquiring no settlement in them, and finally settling in *N*, where he resided till after *L* became of age. After reaching his majority *L* resided more than six years in *N*, self-supporting and paying all assessed taxes. Held—

1. That *L* acquired by birth citizenship in the United States.
2. That when he became of age he began to acquire a settlement by commorancy in *N*.
3. That in coming from another town in this state to *N* he came as an "inhabitant" of the former town, although not then of age, and having no legal settlement there.
4. That he became a settled inhabitant of *N* at the end of the six years.

[Argued March 3d—decided May 3d, 1886.]

ACTION to recover for supplies furnished to a pauper claimed to belong to the defendant town; brought to the Court of Common Pleas of Litchfield County, and tried to the court before *Bradstreet, J.* Facts found and judgment rendered for the plaintiffs and appeal by the defendants. The case is fully stated in the opinion.

L. B. Dean and *W. B. Smith*, for the appellants.

A. H. Fenn, for the appellees.

PARDEE, J. LaFayette Parrott was born in 1836 in Massachusetts, his father being an alien resident there. Some five years thereafter the father removed with his family, including LaFayette, into this state; residing first for about two years in Colebrook; then for about the same

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length of time in Winchester; going thence to Norfolk, where he resided until 1868. In 1855 in Norfolk he was naturalized, La Fayette being then a minor. After attaining majority the latter resided more than six years in Norfolk, presumptively self-supporting and paying all assessed taxes. In 1879 he came to want in the town of New Hartford, but had not then acquired a settlement there under the pauper laws. The latter town expended money for his support, and, claiming that the town of Canaan is his place of settlement, brought this suit for re-payment.

In *Lynch* v. *Clarke*, 1 Sandford's Ch. R., 584, it is said as follows:—"Upon principle, therefore, I can entertain no doubt but that, by the law of the United States, every person born within the dominion and allegiance of the United States, whatever was the situation of his parents, is a natural born citizen. It is surprising that there has been no judicial decision upon this question. None was found by the counsel who argued this cause, and, so far as I have been able to ascertain, it never has been expressly decided in any of the courts of the respective states or of the United States. This circumstance itself, in regard to a point which must have occurred so often in the administration of justice, furnishes a strong inference that there has never been any doubt but that the common law rule was the law of the land. This inference is confirmed and the position made morally certain by such legislative, judicial and legal expositions as bear upon the question. Before referring to these I am bound to say that the general understanding of the legal profession, and the universal impression of the public mind, so far as I have had the opportunity of knowing it, is that birth in this country does of itself constitute citizenship. Thus, when at an election the inquiry is made whether a person offering to vote is a citizen or an alien, if he answers that he is a native of this country, it is received as conclusive that he is a citizen. No one inquires further. No one asks whether his parents were citizens or were foreigners. It is enough that he was born here, whatever was the status of his parents. I know that common

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consent is sometimes only a common error, and that public opinion is not any authority on a point of law. But this is a question which is more important and more deeply felt in reference to political rights than to rights of property. The universality of the public sentiment in this instance is a part of the historical evidence of the state and progress of the law on the subject, indicates the strength and depth of the common law principle, and confirms the position that the adoption of the federal constitution wrought no change in that principle." In *McKay* v. *Campbell*, 2 Sawyer, 118, it is said:—"By the common law a child born within the allegiance of the United States is born a subject thereof, without reference to the political status or condition of its parents." In 2 Kent's Commentaries, (9th ed.,) 1, it is said that "natives are all persons born within the jurisdiction and allegiance of the United States." To the text is subjoined the following note:—"This is the rule of the common law, without any regard or reference to the political condition or allegiance of their parents, with the exception of the children of ambassadors, who are in theory born within the allegiance of the foreign power they represent. *Calvin's case*, 7 Coke, 1; *Lynch* v. *Clarke*, 1 Sandford's Ch. R., 584, 639. In this last case the doctrine relative to the distinction between aliens and citizens in the jurisprudence of the United States was extensively and learnedly discussed, and it was adjudged that the subject of alienage, under our national compact, was a national subject, and that the law on this subject which prevailed in all the United States became the common law of the United States when the union of the states was consummated; and the general rule above stated is, consequently, the governing principle or common law of the United States, and not of the individual states separately considered. The right of citizenship, as distinguished from alienage, is a national right, character, or condition, and does not pertain to the individual states separately considered. The question is of national and not individual sovereignty, and is governed by the principles of the common law, which pre-

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vails in the United States, and became, under the constitution, to a limited extent, a system of national jurisprudence. It was accordingly held in that case that the complainant, who was born in New York of alien parents, during their temporary sojourn there, and returned while an infant, being the first year of her birth, with her parents to their native country, and always resided there afterwards, was a citizen of the United States by birth. This was the principle of the English common law in respect to all persons born within the king's allegiance, and was the law of the colonies, and became the law of each and all of the states when the Declaration of Independence was made, and continued so until the establishment of the constitution of the United States, when the whole exclusive jurisdiction of this subject of citizenship passed to the United States, and the same principle has there remained."

In Field's International Code, 132, it is said:—"A legitimate child, wherever born, is a member of the nation of which its father at the time of its birth was a member." Upon this Morse, in his work on Citizenship, p. 17, thus comments:—"This is the law in most European states; (Westlake, p. 16; Foelix, p. 54;) but not in England or in the United States. However in *Ludlam* v. *Ludlam*, 26 N. York Rep., 371, the court says:—'Citizenship of the father is that of the child so far as the laws of the country of the father are concerned.' And it has been held in the United States that the national character of the parent is of no importance, even in the case of a child born within the territory to a parent who has not been, and has not taken any steps towards becoming, naturalized here, and who removes the child while an infant. *Lynch* v. *Clarke*, 1 Sandford's Ch., 585. But this decision seems not to be entirely approved (*Munro* v. *Merchant*, 26 Barbour, 400,) and probably would at the most be considered as authority only in regard to the right of succession to real property within that state."

But in *Munro* v. *Merchant*, (supra,) the marginal note is as follows:—"A child born in this state of alien parents

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during its mother's temporary sojourn here, is a native born citizen." And the court says:—"It is further contended on the part of the defendant, that the plaintiff himself is an alien. He was born in Ballston Spa, in this state, while his father was a resident of Canada, and returned to his father's domicile with his mother within a year after his birth. His mother was temporarily there without any actual change of residence, either on her part or that of his father. It is argued that, at common law, a natural born subject was one whose birth was within the allegiance of the king. The cases of children of ambassadors born abroad, and of children born in English seas, were considered exceptions. Chancellor KENT, in his Commentaries, defines a native born citizen to be a person born within, and an alien one born out of, the jurisdiction of the United States. 2 Kent's Com., 37–50. In *Lynch* v. *Clarke*, 1 Sandf., Ch. R., 583, the question was precisely as here, whether a child born in the city of New York of alien parents, during their temporary sojourn there, was a native born citizen or an alien; and the conclusion was that, being born within the dominion and allegiance of the United States, he was a native born citizen, whatever was the situation of the parents at the time of the birth. That case, if law, would seem to be decisive of the present question. But, admitting the plaintiff to be an alien, the cases already cited show that the term 'heirs or assigns,' in the ninth article of the treaty, is not to be confined to the immediate descendants, but is to be extended indefinitely till the title comes to a citizen." The court did not find it necessary to deny the doctrine of *Lynch* v. *Clarke*, but rested its decision upon other grounds.

In *Ludlam* v. *Ludlam* (supra), among other facts found is the following: R. L. Ludlam, the father of Maximo M. Ludlam, in 1822 voluntarily expatriated himself from the United States, where he was a natural born citizen, for the purpose of becoming a permanent resident of Lima, in Peru, South America, and of establishing his permanent domicile there, and a few months thereafter did become such permanent resident and establish his permanent domicile

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there, and M. M. Ludlam was there born of a native of Chili. The court says:—"If we assume that the laws of Peru are similar to ours on the subject of citizenship, there is no doubt that Maximo Ludlam would be in that country regarded as a citizen of Peru. 1 Sandford's Ch., 583. This would involve him, according to the rules which I find established, in a double allegiance to this country and Peru; and it cannot be denied that inconveniences might result from such a condition. The case however is not new, and I am not aware that any practical inconvenience has ever resulted to persons occupying such positions; their immunity in this respect resulting mainly, it may be presumed, from the liberality of civilized governments towards persons thus situated. * * * Practically the person so situated secures all the rights of citizenship, or at least the right of inheritance, in two countries, and discharges the duties of allegiance in only one."

In Morse on Citizenship, p. 241, sec. 203, is the following citation from an opinion of the secretary of state to the president:—"The child born of alien parents in the United States is held to be a citizen thereof, and to be subject to duties with regard to this country which do not attach to the father. * * * Such children are born to a double character; the citizenship of the father is that of the child so far as the laws of the country of which the father is a citizen are concerned, and within the jurisdiction of that country; but the child, from the circumstances of its birth, may acquire rights and owe another fealty besides that which attaches to the father."

In Rawle's View of the Constitution of the United States, p. 86, it is said:—"Every person born within the United States, its territories or districts, whether the parents are citizens or aliens, is a natural born citizen within the sense of the constitution, and entitled to all the rights and privileges appertaining to that capacity."

Again, neither in *Ludlam* v. *Ludlam*, nor in *Munro* v. *Merchant*, (supra), did the court undertake to decide the political question as to the extent to which the United

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States would be compelled to go in defense of persons born here of aliens; in each case it was defining private pecuniary rights under state laws. Such is the nature of the question in the case at bar. Practically it is, under our statutes, from what town is LaFayette Parrott entitled to receive aid if in want?

Moreover, if, as is suggested, he was born to the advantages of a double allegiance, upon attaining his majority he exercised the right which was his of electing the government to which he would give allegiance, and that election related back to the time of birth. Upon these authorities LaFayette had by birth what his father did not then have, citizenship of the United States and of the state of Massachusetts. This privilege neither needed nor received any strengthening by reflection from the subsequent naturalization of his father; he held it to the fullest extent in his own, and that the highest right. In *Town of Bridgeport* v. *Town of Trumbull*, 37 Conn., 484, the court, speaking of a minor born in New York of aliens, brought by her parents into this state, and here residing during six years, said of her that she was not an inhabitant of this state within the meaning of a cited statute. The obvious meaning of the court is that she was not a settled inhabitant. When this case was previously before this court, (52 Conn., 158,) the finding was that he came directly from Massachusetts to Norfolk. The court said—"LaFayette was born in Massachusetts in June, 1836, and resided there with his father until 1847, when both removed to Norfolk in this state, where they resided until 1868. These facts we think make LaFayette a citizen of the United States and of the state of Massachusetts by birth. 2 Kent's Com., p. 1, note *a*. When he went to Norfolk he had the same right as any other inhabitant of another state. Under the decisions in *Town of Bridgeport* v. *Town of Trumbull*, 37 Conn., 484, and *Town of Morris* v. *Town of Plymouth*, 34 id., 270, this right was suspended while he was a member of his father's family during his minority. But the record shows that he became of age in June, 1857, and resided thereafter in Norfolk until 1868; but the

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further facts that are essential to bring him under the provisions referred to in the second class are not found;"—meaning thereby that possibly upon another trial it might be proven that, during his residence in Norfolk after attaining majority, he became a settled inhabitant, either by admission or by the ownership of real estate as prescribed by statute, in his capacity as a resident citizen coming from Massachusetts directly to Norfolk. But upon the new trial the fact came into the case that he came from Massachusetts as a citizen there and became a resident citizen or inhabitant of this state, first in Colebrook, then in Winchester, going thence to Norfolk. Of course if the acquisition of a settlement in Norfolk may be made to rest upon his residence while a minor in Massachusetts, it may be made to rest upon his residence while a minor in Connecticut.

In 1857 he attained majority in Norfolk and then and there began and completed a longer period than six years, self-supporting and tax-paying. In determining the question whether he thereby acquired a pauper settlement in Norfolk, we are to ask from whence did he come to that town? He came from another town in this state. Of course during minority he was obliged to serve and obey his father, and under pauper laws the residence of the father was imparted to him. It is true he did not remove from one residence to another in the right and power of an adult to determine for himself where he would live, but because of the power of the father to command him. But the subjection of the son to the father did not destroy, or even affect, the citizenship of the former; all the privileges and all the duties pertaining to that right were his; he might be called from under the father's authority to serve and defend the United States or the state of his residence. And wherever he resided, although there by the command of his father, he was an "inhabitant" in the fullest sense and by all definitions. The statute does not require him to come into Norfolk an adult inhabitant; nor does it require that the six years of self-supporting and tax-paying residence shall begin simultaneously with his coming from another town. And

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although while a minor in his father's family he could not acquire a settled inhabitancy because, in the matter of receiving aid from the public, the father is the representative of and recipient for the minor, yet after he had attained majority and had subsequently completed six years of self-supporting and tax-paying residence, it was his right to take advantage of any fact as to his status at birth, and as to subsequent inhabitancy, in establishing his legal settlement in Norfolk. His minority is not a blank.

The cases of *Huntington* v. *Oxford*, 4 Day, 196, *Salisbury* v. *Fairfield*, 1 Root, 132, and *Sterling* v. *Plainfield*, 4 Conn., 115, decide nothing more than that a minor cannot gain a settlement for pauper purposes by commorancy; they do not decide that he may not be an *inhabitant*.

In *Scott* v. *Sanford*, 19 Howard, 422, it is said:—"Undoubtedly a person may be a citizen, that is, a member of the community who form the sovereignty, although he exercises no share of the political power, and is incapacitated from holding particular offices. Women and minors, who form a part of the political family, cannot vote; and when a property qualification is required to vote or hold a particular office, those who have not the necessary qualifications cannot vote or hold the office, yet they are citizens."

Therefore LaFayette Parrott, as an inhabitant of Winchester removing to Norfolk, became and continues to be a settled inhabitant of the last named town. This conclusion renders it unnecessary to discuss other questions presented.

There is error in the judgment of the court below.

In this opinion the other judges concurred.

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THE SINGER MANUFACTURING COMPANY *vs.* WILLIAM RHODES AND WIFE.

New London County, May T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

The Statute (Gen. Statutes, p. 484, sec. 2,) requires a bond to be given by the plaintiff in all replevin suits, to prosecute the suit to effect and pay any judgment that the defendant may recover in the suit. Another statute (Gen. Statutes, p. 397, sec. 3,) requires bonds for costs in all suits brought by non-resident plaintiffs. Held that the special bond required in replevin suits necessarily covered the costs that might be recovered by the defendant as a part of the judgment that might be rendered in his favor, and that it was not necessary for a non-resident plaintiff in such a suit to give the ordinary bond for costs.

[Argued May 25th—decided June 18th, 1886.]

REPLEVIN of goods wrongfully detained; brought, by appeal from the judgment of a justice of the peace, to the Court of Common Pleas for New London County and tried, upon a plea in abatement, before *Mather, J.* Facts found and judgment rendered for the defendants. Appeal by the plaintiff. The case is fully stated in the opinion.

A. A. Browning and *S. A. Crandall*, for the appellant.

C. W. Comstock, for the appellee.

CARPENTER, J. Action of replevin; plea in abatement, alleging that the plaintiff, a non-resident corporation, did not give bonds for costs; replication denying the plea and setting out the bond given when the writ issued. The case came by appeal to the Court of Common Pleas. That court rendered judgment for the defendants, abating the suit. The plaintiff appealed to this court.

The condition of the bond is "that said Singer Manufacturing Company, who has prayed out the foregoing writ of replevin against said William Rhodes and Mrs. A. C. Rhodes,

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shall prosecute its suit to effect, and shall pay to said William Rhodes and Mrs. A. C. Rhodes any judgment that said defendants may recover in said suit, and return to said defendants the goods and chattels that may be replevied under said writ, and pay to them all damages that they may sustain by the replevying thereof, if said Singer Manufacturing Company fails to establish its right to the possession of the same."

This bond is such as is required by the statute relating to actions of replevin. Gen. Statutes, p. 484, sec. 2. Another statute requires bonds for costs in all actions brought by non-resident plaintiffs. Gen. Statutes, p. 397, sec. 3. No bond was given in this case except the replevin bond; and the only question in the case is—whether that bond secures costs to the defendants in case the plaintiff should fail to maintain its suit.

Any costs to which the defendants may be entitled, and which the statute was intended to secure to them, must necessarily be included in some judgment rendered in their favor against the plaintiff. One condition of the bond is that the plaintiff shall pay "any judgment that said defendants may recover in said suit." If the judgment is paid costs are paid, and the defendants have all they are entitled to. If the costs are not paid the bond is forfeited, and they may be recovered in a suit on the bond. It is idle to contend that the bond does not secure costs.

The court below followed *Fleet* v. *Lockwood*, 17 Conn., 233. The error arose in not noticing the distinction between that case and this, and the statutes then and now existing. In that case goods attached were replevied; in this there is no attachment, but the action is for goods detained under a recent statute.

In *Fleet* v. *Lockwood* the condition of the bond was, "that said Daniel Fleet shall prosecute the writ of replevin now taken out against said Davis Lockwood, at the County Court to be holden, &c; and in case he fail to make his plea good, to return and re-deliver the goods hereby directed to be replevied, to said Davis Lockwood, who attached the same,

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so that the same may be forthcoming to be taken on the execution that may be recovered in said suit; and on failure thereof to pay the debt, damages and costs that may be recovered therein."

It was no part of the condition there, as it is here, that the judgment which the defendant may recover in the replevin suit shall be paid. The obligors in that case could have discharged their obligations by returning the property, or by paying the judgment which might be recovered in the suit on which the property was attached. That judgment of course could not include the defendant's costs in the replevin suit; consequently the bond was no security for such costs. That bond conformed to the statute then in force, and a separate recognizance was required to secure costs. The statute now in force contemplates but one bond, and the form prescribed shows that it was designed to secure to the defendant not only the property, if it belongs to him, but also the costs.

The judgment complained of is reversed, and a new trial ordered.

In this opinion the other judges concurred.

THE SIXTEENTH SCHOOL DISTRICT OF STONINGTON *vs.* THE EIGHTEENTH SCHOOL DISTRICT OF STONINGTON.

New London County, May T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

The statute (Gen. Statutes, p. 134, secs. 1, 6 and 7,) provides that towns may form, unite, alter and dissolve school districts within their limits; that an appeal may be taken from such action to the Superior Court; that the court upon such appeal shall have the same power to act in the matter that the town had; and that no alteration of the lines fixed by the decree shall be made except by the court. A town divided an existing district and created a new district of one of the parts, and the district thus divided appealed to the Superior Court, which by its

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decree set aside the action of the town but passed no further decree in the matter. Held not to be such a fixing of the lines of the district by the decree of the court as precluded the town from making any alteration of the same at the same place.

[Argued May 25th—decided June 18th, 1886.]

APPLICATION to the Superior Court to set aside the action of the town of Stonington in annexing a part of the plaintiff school district to the defendant school district. Demurrer to application; demurrer sustained and judgment rendered for the defendant, (*Beardsley, J.*,) and appeal by the plaintiff. The case is sufficiently stated in the opinion.

S. Lucas, for the appellant.

J. Halsey and *C. Perrin*, for the appellee.

GRANGER, J. The plaintiff alleges that on the seventeenth day of July, 1882, the town of Stonington, at a legal town meeting held on that day, voted that a new school district, to be called the Seventeenth School District, be formed from the Sixteenth School District in that town, giving its boundaries, and that an appeal was taken from this action of the town by the latter district to the Superior Court for New London County, and that that court adjudged and decreed that the action of the town in the matter should be "reversed, annulled and set aside." It is also alleged that the town of Stonington on the 30th day of April, 1883, after the decree just mentioned, at a legal town meeting then held, voted that the same tract of land with the inhabitants residing thereon, which had before been taken from the Sixteenth to form the Seventeenth district, be added to and included in the Eighteenth school district of the town.

The plaintiff, the Sixteenth School District, appealed from this action of the town to the Superior Court, on the ground that such action was illegal and beyond the power of the town to take. The court sustained the action of the town; the school district appeals to this court from that judgment; and the sole question in the case is, whether the town had power to take the action in question.

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The plaintiff rests its claim upon the provisions of the seventh section of the General Statutes, title 11, chap. 5.

The first section of that statute provides that each town shall have power to form, unite, alter and dissolve school districts within its limits. The sixth section provides that when application shall be made to any town to form, alter or dissolve a school district, any district aggrieved by its action may appeal to the Superior Court. The seventh section is as follows:—"Said court shall have the same power to act upon said application that said town had, and may appoint a committee to report the facts and its opinion thereon; and the final decree of the court shall be recorded in the records of said town. * * * And unless the town shall thereafter abolish all the school districts within its limits, no alteration of the lines fixed by said decree shall be made, except by the Superior Court."

The plaintiff contends that the decree of the court fixed the lines of the Sixteenth district within the meaning of the above statute, and that as the present action of the town assumes to make an alteration of those lines it is in conflict with the statute.

But the court on that decree did not undertake to fix the lines of the Sixteenth district. The appeal of that district from that action of the town alleged "that the division of said Sixteenth School District was illegal and unjust, and against the best interest of said district and of the public;" and its sole prayer was that that action might be set aside. The parties were at issue only upon that question of fact, and the court in sustaining the appeal simply adjudged that the action of the town should be "reversed, annulled and set aside." The decree establishes nothing; it simply annuls the action of the town, and leaves both districts *in statu quo*. The subject of fixing the lines of either district is nowhere alluded to in the allegations of the appeal or in the pleadings, finding or decree, and so far as those lines are established they are so in no manner by force of the decree, but purely by force of their original establishment, which remained undisturbed.

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The statute should receive a liberal construction, but should not be extended to apply to cases where the court does not by its decree fix the lines of a district specifically and definitely.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

THE BRISTOL MANUFACTURING COMPANY *vs.* WALLACE BARNES.

Hartford District, Jan. T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

A warranty deed described certain property conveyed, being part of a larger tract belonging to the grantors, as "the horse shed on the west side of the highway, with the land covered by the same; the grantee to have the right to go on land of the grantors around the shed for the purpose of repairing the same." Held that the highway referred to as the eastern boundary was the apparent highway, and not the line of the highway as found by actual survey, and that the land conveyed was that actually covered by the shed, without reference to its situation in relation to the true line of the highway.

The question was regarded as one wholly of the construction of the language of the deed, and the provision in the deed that the grantee was to have the right to go around the shed on the land of the grantors for the purpose of making repairs, was regarded as showing clearly that the parties did not intend to convey or acquire any other land than that actually covered by the shed.

The statute (Gen. Statutes, p. 445, sec. 8,) provides that in all actions of tort brought to the Superior Court or Court of Common Pleas, if the damages found do not exceed fifty dollars, the plaintiff shall recover no more costs than damages, unless the title to land, or a right of way, or to the use of water, is in question, the value of which property is found to exceed fifty dollars. Held—

1. That the title must be so put in issue as to be settled, but that it makes no difference whether it is put in issue by the nature of the complaint or by the pleadings on the part of the defendant.
2. That as, under the Practice Act, the complaint for disseizin contains substantially the same allegations of fact as were required in the old action of disseizin, the title is put in issue by it.

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3. That it is for the court and not for the jury to find the value of the property, the title of which is determined in the case.

A plaintiff in a complaint for disseizin may recover less land than he demanded.

And it is enough to bring the case within the exception of the statute if the part of the demanded premises as to which the title is put in issue is of the value required, and is so described in the pleadings or in the verdict as to be identified and to admit of valuation.

[Argued January 6th—decided January 22d, 1886.]

ACTION to recover possession of land and for damages; brought to the Court of Common Pleas of Hartford County, and tried to the jury upon a general denial before *Calhoun, J.* Verdict for the plaintiffs and appeal by the defendant for error in the rulings and charge of the court. The case is fully stated in the opinion.

T. E. Steele and *E. Peck*, for the appellant.

C. E. Gross and *J. J. Jennings*, for the appellees.

LOOMIS, J. It appears from the finding in this case that prior to January 27th, 1857, the plaintiff owned a large tract of land in the town of Bristol, situated on both sides of Main street, which runs north and south, and on that day conveyed by warranty deed to one Welch a portion of the land, namely, one lot on the east side of the street with a building used for a store standing thereon, also a horse shed with the land covered by it situated on the other side of the highway. The horse shed was removed by the grantee in the year 1870, and in 1875 the title of Welch in the land was conveyed to the defendant. The plaintiff is still the owner of all the tract first mentioned, except the portion conveyed to Welch. The deed to Welch under which the defendant claims, after describing by metes and bounds the land on the east of the highway upon which the store was situated, contains this additional description which covers the land in controversy:—"Also the horse shed on the west side of the north and south highway, westerly of said store, together with the land covered by the same;

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reserving however the right and privilege of using said premises, so far as the same may be necessary, for the purpose of repairing the race-way of the grantors westerly of said shed; the grantee to have the right and privilege to go on land of grantors around said shed for the purpose of repairing the same."

There was no dispute between the parties as to the quantity of land conveyed by this deed. It was conceded that the foundation lines of the old shed, which was thirty-six feet by eighteen, indicated the precise extent of the land purchased.

The plaintiff contended that the land conveyed to Welch and now belonging to the defendant must be confined to the actual site of the old shed, while the defendant insisted that he might take other lands of the plaintiff to make his thirty-six feet by eighteen, provided it should appear from the evidence that the legal western line of the highway should be found upon actual survey to cross the land conveyed farther to the west than the front or east line of the old shed.

It appeared that the defendant, pursuant to his claim, had constructed a new building of the same size as the old shed, and had located it so that it covered a piece of land seven feet and one and a half inches wide on the north end, and five feet one and a half inches wide on the south end, and thirty-six feet long, of the adjoining land of the plaintiff not covered by the old shed, and extending over the plaintiff's race-way.

The defendant asked the court to charge the jury that the recitals and covenants in the deed were conclusive evidence against the plaintiff that the horse shed stood wholly westerly of the legal western line of the highway as it was on January 27th, 1857, and that they could render no verdict inconsistent with this conclusion, and he had previously upon the same ground objected to the plaintiff's evidence showing where the horse shed stood. The court charged the jury that the question was wholly one of fact; that they were to decide from the evidence where the old horse shed really stood, and render their verdict accordingly.

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The defendant invokes the doctrine of estoppel in support of his position, but we think the question depends solely upon the construction of the deed to Welch. The controlling inquiries are—what does the description mean, and where is the land described situated? If the land is to be found wholly west of the extreme western limit of the highway, and that line is where the defendant claimed, he must prevail, not by reason of any estoppel, but simply because the deed conveyed the land in question to his grantor; but if the description locates the land wholly under the old shed, the plaintiff is right, and cannot be estopped from showing it. Both parties must accept and are equally bound by the true interpretation of the deed.

The defendant makes a mistake when, contrary to a fundamental rule of construction, he selects a single feature of the description and ignores all the rest; and the mistake is all the greater when it appears that the part selected by him is uncertain in meaning, while the part ignored is absolutely certain.

If we read the entire description it is impossible to entertain a doubt that the only land except the store property conveyed by the deed to Welch was that actually covered by the horse shed as it then stood. It would seem impossible to make the intent more certain. The deed first conveys the horse shed itself, and then adds, "together with the land *covered by the same*." This clearly restricts the conveyance to the land lying within the exterior lines formed by the sides of the building; not an inch outside was conveyed. Then follows the special provision authorizing the grantee to go around the shed for the purpose of repairing it *on land* of the grantors; also the provision reserving to the grantors the right to enter on the premises conveyed, to repair the race-way of the grantors leading to their factory, on the east bank of which one corner of the shed stood.

If now we recur to that part of the description upon which the defendant places his whole case we shall see that there is not the slightest difficulty in giving it such a construction as to accord with all the rest of the description,

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It is manifest that the main object of the deed was to convey the land on the other side of the street with the store standing thereon. This the deed first describes by metes and bounds, and then, as incidental thereto and convenient for use in connection with the store, the horse shed is referred to on the opposite side of the street, and it was most natural to refer to it as "on the west side of the north and south highway, westerly of said store." It would have been most unnatural for the parties at the time to have had in view anything more than the apparent highway, for the court finds that "at the time the deed was executed there were no fences or other thing to indicate the western boundary of any legal highway other than where the highway practically existed."

We think therefore that this language should be construed as referring to the apparent highway.

In *Falls Village Water Power Co.* v. *Tibbets*, 31 Conn., 167, it was held by this court, BUTLER, J., delivering the opinion, that "a road or highway, mentioned in a deed as a boundary, must be understood to mean what is meant by other existing objects or monuments described and intended as boundaries, namely, an object existing in fact, not of record merely—something apparent, unmistakable and permanent." And this positive rule was applied to a case where the special reasons for such an application were not nearly as strong as in the case at bar.

The remaining questions relate to the taxation of full costs by the court, which the defendant claims was not in accordance with section 8, page 445, of the General Statutes. But in addition to a verdict for one dollar damages the plaintiff recovered the seizin and possession of land which the court finds to have exceeded fifty dollars in value, and so the case would seem to come clearly within the exception of the statute.

But it is contended that the answer of the defendant, in admitting paragraph first and denying paragraphs second and third, did not put the title in issue, and therefore it does not fall within the exception. In order to do so the author-

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ities establish the principle that the title must be so put in issue as to be settled. It makes no difference whether it is put in issue by the nature of the complaint or action or by the pleadings on the part of the defendant. In all the cases referred to by the defendant where it was held erroneous to tax full costs, the nature of the action did not involve proof of title, but the title only came incidentally in issue for the purpose of defeating the plaintiff's right to recover. But in the case under consideration the complaint was for disseisin, wherein it was alleged that the plaintiff owned and possessed certain real estate. This was a fundamental fact, and it was incumbent on the plaintiff to establish it as a necessary part of his case, and the defendant could not escape full costs either by denying it or by admitting it. The title to the land as alleged was necessarily settled by the verdict, and it estops the defendant from contesting it again in another action, although he should then deny the title.

At the time the statute as to costs was passed and up to the time the new procedure act went into effect, in every action of ejectment or disseisin the title was put in issue simply by pleading the general issue, and the defendant under the rules of pleading was not even allowed to plead title in himself because it amounted to the general issue. 1 Swift's Digest, side page 650. Under the new practice the complaint for disseizin contains the same allegations of fact as were required in the old action, and the title we think is put in issue by the nature of the complaint and the purposes which it serves.

But the further claim is made in the case at bar that, owing to the general description in the complaint, no issue of title was made as to any definite piece of land so accurately described as that the court could identify it for the purpose of finding its value.

This point is predicated on the fact that the plaintiff's complaint describes a large tract of land by bounding it in a general way on the highway and abutting owners, among which the defendant is named as adjoining owner. The description was true, but the land really in controversy was

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a very small part of the tract described. No objection was made as to this in the court below, either on the trial to the jury or before the court on the question of costs; but on the trial the court finds that it was admitted by both parties "that the land in dispute was a piece of land seven feet one and a half inches wide on the north end and five feet one and a half inches on the south end, and thirty-six feet long, and bounded easterly on the land of the defendant, and on all other sides on lands of the plaintiff." The title to this part of the larger tract was actually put in issue, and the jury by special verdict described this part of the demanded premises, using different language, but containing such definite measurements as would make the piece of land susceptible of easy identification. It was a fundamental principle, even under the old practice, that the plaintiff might recover less land than he demanded. 1 Swift's Digest, side page 650. And surely under the less technical new procedure such a verdict is good.

It is enough to bring the case within the exception of the statute if the part of the demanded premises as to which the title is put in issue, is of the value required, and is so described, in the pleadings or in the verdict, as to be identified and to admit of valuation.

But the defendant further contends that it was for the jury and not the court to find the value. We cannot accept such a proposition. It is contrary to the universal and long continued practice in this state, and contrary to principle, inasmuch as the taxation of costs is peculiarly within the province of the court. It cannot be done until after verdict has been rendered and the jury have finished their work.

There was no error in the judgment complained of.

In this opinion the other judges concurred.

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HARVEY HOYT *vs.* THEODORE V. KETCHAM.

Fairfield County, March T., 1886. PARK, C. J., CARPENTER, LOOMIS, GRANGER and BEARDSLEY, Js.

A deed of a tract of land contained the following provision: "If any building shall be erected on said tract, the cost of which shall be less than four thousand dollars, or used for other purposes than as a dwelling house, then the whole of said land shall be forfeited and revert to the grantor, his heirs and assigns." Held—

1. That this provision was not a mere restriction or limitation of the right conveyed, nor a mere personal covenant of the grantee that terminated with his death, but was a condition of the title.
2. That this condition was released by a conveyance to a party who held the title, of all the grantor's interest in the property, by the administrator of the grantor with the will annexed; the will giving the executor the power to convey, and the administrator with the will annexed having by statute (Session Laws of 1877, ch. 40) the same power to convey that the executor had.

A quitclaim deed, in this state, is an ordinary and primary instrument of conveyance, and carries to the releasee whatever interest the releasor had in the premises.

The grantee in the deed above mentioned took back a mortgage for a part of the purchase price, and afterwards, on payment of the mortgage, gave the mortgagor a quitclaim of all his interest, not limiting it to his interest as mortgagee, nor referring to the payment of the mortgage, though stating the fact of its existence. Held that the quitclaim conveyed the entire interest of the grantor and released the condition of the original deed.

A right to enter for condition broken is not assignable at common law, but is so under our statute (Gen. Statutes, p. 471, sec. 1 of part 5).

[Argued March 18th—decided June 28th, 1886.]

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

S. Fessenden, for the plaintiff.

N. R. Hart and *J. E. Keeler*, for the defendant.

CARPENTER, J. This is an amicable suit reserved for

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the advice of this court. The material facts are these: In 1858 William Skiddy conveyed certain land to Mary M. Robertson, wife of William H. H. Robertson. The deed contained the following provision:—"But nevertheless this grant and conveyance is made with this limitation and qualification, and on these express conditions, that if, at any time hereafter, any building shall be erected on said tract or any part thereof whose first cost shall be less than $4,000, and which shall be used for any other purpose than a dwelling house, or if said tract shall be used for any other purpose than a meadow or park, then the whole of said tract shall be at once forfeited and revert to the grantor, his heirs and assigns forever. But this limitation is not to apply to any building which shall be erected in the place and on the site of one there previously erected and burnt or pulled down, nor to any building erected on said tract as a grapery or servant's house or out-house of any kind in connection with the present residence of said grantee."

Soon after the deed was given Mrs. Robertson and her husband mortgaged the same property to Skiddy. In 1860 Skiddy quit-claimed his interest therein to W. H. H. Robertson. The plaintiff is now the owner of the premises.

In 1870 William Skiddy died, leaving a will, by which, after making provision for his wife, his property was given in trust for his children during life, remainder in fee to his grandchildren. He left surviving him three children, all of whom have children. The children, by deed dated February 26th, 1886, quit-claimed all their interest in the property to the plaintiff; and on the same day the administrator of the estate of said Skiddy with the will annexed, with the consent and advice of the court of probate, conveyed to the plaintiff all interest which the deceased had in the premises at the time of his death.

The defendant has contracted to purchase the property, and is willing to accept a deed and pay for it, provided the provision in the deed from Skiddy to Mrs. Robertson is not an incumbrance, or defect in the title; and the question is—whether that provision is such an incumbrance or defect.

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The plaintiff contends that it is not, for several reasons:

1. That the language quoted is a restriction and not a condition; that it is in the nature of a personal covenant, and that, after the death of the grantee, neither the grantor nor his heirs can enter for condition broken; and that the grantee being dead the restriction is now removed.

In *Warner* v. *Bennett*, 31 Conn., 468, this court held that similar language in a deed was a condition subsequent and not a limitation. As the language here used is apt and appropriate to raise a condition subsequent, we must, upon the authority of that case, hold it to be a condition and not a restriction merely or personal covenant.

2. In the next place, the plaintiff contends that the quitclaim deed from William Skiddy to W. H. H. Robertson releases to Robertson the right of entry, and so destroys the condition and makes the title absolute in the plaintiff, he having all the title and interest which Mrs. Robertson and her husband had, including the right of reversion. It is conceded that in this state a quitclaim deed is an ordinary and primary instrument of conveyance and conveys to the grantee whatever interest the grantor has in the property. Counsel for the defendant, without controverting this proposition, insist that this deed did not have that effect, for two reasons: First, that the right to enter for condition broken is not assignable. That is doubtless so at common law, and this court so decided in *Warner* v. *Bennett*, (*supra*); but such an interest is now assignable by statute. Gen. Statutes, p. 47, sec. 1, of part 5. Secondly, it is said that that deed was made solely to release the mortgage, and that the parties did not intend that any other interest should be discharged.

Ordinarily the meaning of a written instrument is to be gathered from the language used; and when that language is explicit and free from ambiguity, the court is not at liberty to give it a different meaning or limit its effect, for the reason that it is probable that the parties did not intend all that its language imports. The secret, unexpressed intention of the parties cannot be permitted to vary or change

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the meaning of the plain unambiguous language used. In this case there is no room for doubt. The deed says:—"All right, title, interest, claim and demand *whatsoever*, which I the said releasor have or ought to have in or to a certain tract of land, &c." And the effect of this is not destroyed by the statement in the quitclaim that the premises had been theretofore mortgaged to him. It is not stated that the mortgage had been paid, and the same language might have been used for the purpose of more completely identifying the land conveyed.

In *Ely* v. *Stannard*, 44 Conn., 528, the present Chief Justice speaking for this court says:—"A quitclaim 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 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.*"

Besides, as is well said by the learned counsel for the plaintiff, "it is the universal rule that a deed must be construed strictly against the grantor, and must be taken to convey the entire property and interest of the grantor in the premises, unless something appears to limit it to a partial interest."

If Skiddy had intended to limit the effect of his deed to discharging the mortgage it would have been an easy matter to say so; or he might have excepted this reversionary right from its operation. As he has not done so the law conclusively presumes that he intended to convey all his interest to Robertson. This result is reached by whatever rules of construction the matter is tested. It may be that it was an inadvertence, and that the releasor did not intend to discharge this interest. Nevertheless he has in fact done so and the law will afford him no relief.

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3. If we are right in this, then the condition was irrevocably gone, and the plaintiff's title is complete. In that event Skiddy at the time of his death had no interest in the property, and there was nothing on which the deed from his administrator could operate. If however by any possibility he had a remaining interest, that interest was conveyed to the plaintiff by the administrator's deed, and the plaintiff must succeed on his third claim. Such a conveyance the will authorized the executors to make; the statute of 1877, chap. 40, page 167, confers the same power upon the administrator with the will annexed; and the parties to that instrument intended to convey that interest and that interest only. That conveyance is not affected by the fact that Skiddy devised that interest with other property to the grandchildren; for they took this, as they did all other property, subject to the power of sale.

The Superior Court is advised that the plaintiff has good title to the property.

In this opinion the other judges concurred; except PARK, C. J., and BEARDSLEY, J., who concurred in the result, but preferred to rest the case solely on the deed given by the administrator.

JOSEPH SCHIETENGER *vs.* THE BRIDGEPORT KNIFE COMPANY.

Fairfield County, March T., 1886. PARK, C. J., CARPENTER, LOOMIS, GRANGER AND BEARDSLEY, Js.

The defendants, a manufacturing company, had a standing rule known to their workmen, that "all employees not engaged for a definite time must give two weeks notice before leaving; that any workman giving such notice and working the two weeks would then be paid in full; and that any workman leaving without giving such notice should forfeit all unpaid wages." The plaintiff was working for the defendants for no definite time, but at an agreed price per piece for his work, and

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the defendants gave him notice that they should begin the next day to pay him a reduced price for all his work done on and after that day. The plaintiff refused to accept the reduced payment and left their service. In a suit brought to recover an amount due for his work to that date, it was held that the rule had no proper application to the case.

The defendants rather than the plaintiff ended the relation of employer and employee. They refused to keep him except at a reduced rate of payment, and he had never agreed, and was under no obligation, to continue to work at the reduced price.

Even if the plaintiff could be regarded as having the right under his contract to work two weeks longer at the old price, yet he had a full right to join with the defendants in rescinding the contract.

[Argued March 16th—decided April 24th, 1886.]

ACTION to recover for work done; brought to the Court of Common Pleas in Fairfield County and tried before *Hall, J.* Facts found and judgment rendered for the plaintiff and appeal by the defendants. The case is sufficiently stated in the opinion.

D. B. Lockwood, for the appellants.

R. E. DeForest, for the appellee.

BEARDSLEY, J. On the 22d day of January, 1885, the plaintiff was, and for several years had been, in the employment of the defendants, under a contract indefinite as to time, by which he was to receive an agreed sum per piece for the work to be done by him. On that day the defendants notified the plaintiff that a price considerably less than that fixed by the contract would be paid to him for work done by him on and after January 23d, 1885. The plaintiff thereupon notified the defendants that he should not work for such reduced price, and at the close of the same day left their employment.

There was then due to him the sum of $176.83 for work which had been done by him during that month, which upon demand the defendants refused to pay, and for the recovery of which this suit is brought. The defendants set up in their answer, and it is found, that when the plaintiff was

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hired by them there was and ever since has been a rule of their company known to the plaintiff as follows:—"All employees not engaged for a definite time must give two weeks notice before leaving the employ of the company, to the foreman in charge, as well as to the timekeeper. In case any such workman shall leave the employ of the company without having given and worked out such two weeks notice in full, all wages which might have otherwise been considered as earned at the time of leaving will be forfeited to the company and will not be paid. Any employee giving his two weeks notice and working it out in full will be paid in full at the expiration of such notice."

The defendants claim that by the operation of this rule the plaintiff, having left without having given two weeks notice, forfeited the claim which he now makes for his unpaid wages.

It seems clear that the rule has no application to the facts of this case. Up to the 23d of January the plaintiff was working under a contract fixing his compensation. If he had then left of his own motion, without giving the notice required by the contract and working till its expiration, he might have lost the right to recover his unpaid wages.

The defendants and not the plaintiff put an end to the contract of service. They refused to pay the plaintiff for future services the only price for which he had agreed or was willing to perform them. Thereupon the relation between them as employer and employee ceased. In effect the plaintiff was discharged. It is true that the defendants told him that they were willing to pay him a reduced price for his labor in future, but the plaintiff in the exercise of his undoubted right declined to work upon the terms they proposed.

The rule in question is a reasonable and proper one for the protection of the defendants against the loss which might result from the sudden and unexpected leaving of their workmen without cause, but is not to be so construed as to subject an employee to forfeiture of his unpaid wages

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who declines at their dictation to work for a smaller compensation than he has ever agreed to receive.

The somewhat remarkable claim is made in behalf of the defendants, that because the plaintiff violated the contract between the parties under that clause in the rule which provides that "an employee giving two weeks notice and working it out in full will be paid in full at the expiration of the notice," he might, in defiance of the defendants' refusal to be longer governed by the contract, have recovered the contract price if he had given notice and worked two weeks longer. Assuming, what is by no means clear, that the plaintiff might have done this, it does not aid the defence. If he might have insisted that the contract was in force when the defendants declared it was not, he might also take them at their word and join with them in rescinding it.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

LYMAN WETHERELL *vs.* THE TOWN OF NEWINGTON.

Hartford District, Jan. T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS AND GRANGER, Js.

The defendant town instructed its selectmen to open and grade as a part of the highway a strip of land in front of the plaintiff's dwelling house, which he claimed as his private property and on which trees and shrubs were growing. The selectmen were proceeding to do this, acting solely under the instructions. No lay-out of this part of the highway was shown, but it was claimed to have been established by dedication. An old fence had stood between the strip in controversy and the plaintiff's house for over forty years. The plaintiff brought a suit for an injunction against the town. The court below found that the strip was the property of the plaintiff free from the public easement, and granted the injunction. Held—

1. That the court did not err in not holding, as matter of law, that the old fence was to be taken as the line of the highway, as dedicated, the question being wholly one of fact.

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2. That the injunction was properly issued against the town, since the selectmen, though agents of the law in removing nuisances from highways, were yet the agents of the town and acting solely under its vote in attempting to commit the trespass threatened.
3. That the court below having found that the acts threatened would, if committed, work irreparable injury, it was a proper case for an injunction.

[Argued January 7th—decided February 5th, 1886.]

SUIT for an injunction against the removal of trees and fences and the appropriation of land for a highway; brought to the Court of Common Pleas of Hartford County, and heard before *Calhoun, J.*

The judgment rendered embraced the following finding:—The court, having heard the parties, finds the issues for the plaintiff, except as to the western boundary of the land described in said complaint, and also finds that the plaintiff is the owner in fee simple, free from any public easement, of the following described piece of land, with buildings thereon, situated in said town of Newington, namely: bounded north by an old highway and land of Elisha Whaples, east on land of Edward Wetherell, south on the highway; that part of the west boundary running northerly from the wood shop standing on the land of the plaintiff, being as follows, [describing it,] said line being west of a row of maple trees standing on the plaintiff's land; the above described piece of land being the same land described in said complaint, except as to the portion of the west boundary thereof which is above described.

The court made the following separate finding:—The plaintiff became the owner of the premises described in the complaint on May 4th, 1859, by deed from Charles S. Francis. Prior to 1807 a highway, by the dedication of the former adjoining proprietor, existed in front of and west of the premises, which, running from the south, past the plaintiff's present premises, at the northern end thereof turned and ran westerly. A highway also existed by dedication, on the north side of the premises, which led to the house of Elisha Whaples and to Cedar Mountain. This highway was sold by the town in 1817, and that part of the same which ad-

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joined the plaintiff's land was sold to said Whaples, and thereafter the highway was closed up by the town and abandoned.

The eastern limits of the highway in front and west of the premises was and is west of a row of maple and other trees standing on the land of the plaintiff, and is the same line described in the judgment file as being the west boundary of the plaintiff's land free from any public easement.

In 1807 the County Court passed a decree establishing a highway west of this highway and running through the land of Jemima Welles.

At the time of the purchase of the premises by the plaintiff the remains of an old fence existed thereon, which was situated about one rod back of the row of maple and other trees, and extended nearly across the premises in a substantially straight line. This fence, or one in the same line, had stood for more than forty years, but the evidence did not disclose when it was first erected; which old fence was about six and one half feet east of the line of the highway fences of the adjoining proprietors on the south. This fence was removed by the plaintiff in the year 1868.

Between this line of fence and the eastern limits of the highway, as defined by this court, the ground has always been occupied by the plaintiff and his predecessors as far back as the testimony extended, by setting out fruit and ornamental trees and by other trees and shrubbery, and the surface of the ground and the character of the occupation have been such as to make it impracticable for the public to use it as a highway, and it has never been dedicated to or used by the public for highway purposes, and it is not needed for the convenient use of the highway.

The town of Newington at a legal town meeting held on the 7th of September, 1885, passed the following votes:—

"*Voted*, That the selectmen be instructed to fence in the green in front of the premises of Lyman Wetherell, leaving a roadway on the north and east sides, and to grade the ground and set out ornamental trees, as they may deem best, for the purpose of making a public park.

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"*Voted*, That the road north of the park be forty feet wide, and east of the park two rods wide from the street line in front of Wm. Hubbard's.

"*Voted*, That the selectmen be instructed to proceed at once to carry out the foregoing votes."

The selectmen of the town, claiming to act solely under the authority of these votes, threatened and were about to enter upon the plaintiff's land described in the judgment file, and upon which stands the row of maple and other trees, for the purpose of grading the same, and of doing anything thereon that might be necessary to be done to make a park and roadway, according to the votes of the town, including the removal of so many of the trees as might be found necessary for the purpose and the digging up of the ground, and for the purpose of appropriating the same for the uses of a park and roadway, and so informed the plaintiff; but their present intention is to remove only one apple tree; which threatened acts, if permitted to be done, would cause irreparable injury to the plaintiff.

Upon the trial of the cause the defendant claimed as matter of law upon the above facts—1. That relief by way of an injunction was not the proper remedy. 2. That no injunction should be adjudged against the town of Newington because the selectmen of the town did not act in the premises as agents of the town, but as agents of the law solely. 3. That the old fence conclusively determined the limit of dedication for highway purposes, and defined and marked the eastern bound of the highway in front of and west of the premises of the plaintiff. The court overruled these claims and rendered judgment for the plaintiff. The defendant appealed.

R. Welles, for the appellant.

1. An injunction is not the proper remedy. The main question was, whether the strip of land in question was subject to the public easement as a part of the highway. The title itself is not in question. The whole trouble has arisen from the illegal act of the plaintiff in setting his fence out

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upon the highway and claiming a part of it by adverse possession. The question is purely a legal one. 1 Story Eq. Jur., § 616; *Wolcott* v. *Robbins*, 26 Conn., 236. The court will not interfere by injunction where the plaintiff's right is a doubtful one. *Roath* v. *Driscoll*, 20 Conn., 533; *Falls Village Water Power Co.* v. *Tibbits*, 31 id., 168. Besides, the court is really discontinuing a highway, which the Court of Common Pleas has no power to do. And the defendant is entitled to a trial of the questions involved by a jury. ELLSWORTH, J., in *Roath* v. *Driscoll*, 20 Conn., 539. Besides, the proposed acts of the selectmen were official, in the exercise of their control over highways, and ought not to be interfered with where pecuniary compensation can be awarded by a court of law if these acts should be held to be illegal. *Fellows* v. *City of New Haven*, 44 Conn., 250; *Benjamin* v. *Wheeler*, 8 Gray, 413; *Cross* v. *Mayor &c.*, 3 C. E. Green, 305; *Taintor* v. *Mayor &c.*, 4 id., 46; High on Injunctions, § 404. Injunctions will be granted only in cases of irreparable injury. *Rowland* v. *First School District*, 42 Conn., 31; *Hawley* v. *Beardsley*, 47 id., 571. And in the contemplation of the statute no damage from the taking of land for a highway is irreparable. Gen. Statutes, p. 235, sec. 28.

2. An injunction could not properly be adjudged against the town, because the selectmen were acting as agents of the law and not of the town. Gen. Statutes, p. 236, secs. 30, 33; id., p. 253, sec. 2; *Tomlinson* v. *Leavenworth*, 2 Conn., 272; *Willard* v. *Killingworth*, 8 id., 254; *Torrington* v. *Nash*, 17 id., 197; *Abendroth* v. *Greenwich*, 29 id., 362; *Simmons* v. *Stratford*, 30 id., 288; *Booth* v. *Woodbury*, 32 id., 124. The vote of the town could not affect the case. 2 Dillon's Mun. Corp., §§ 767, 772; *Whitlock* v. *West*, 26 Conn., 406; *Gregory* v. *Bridgeport*, 41 id., 86; *Anthony* v. *Adams*, 1 Met., 286; *White* v. *Phillipston*, 10 id., 110; *Barney* v. *Lowell*, 98 Mass., 570; *Eastman* v. *Meredith*, 36 N. Hamp., 284; *Smith* v. *Rochester*, 76 N. York, 509.

3. The court erred in not holding that the old fence conclusively determined the limit of dedication for highway

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purposes and marked the eastern boundary of the highway. The dedication was long prior to the decree establishing the highway, as it is spoken of in that decree as an "old highway." The plaintiff occupied the premises for nine years, until 1868, with this old fence undisturbed. He then removed it. So that in 1868 this old fence had been the practical boundary in front of the plaintiff's premises for forty-nine years, and how much longer did not appear. The marks of the old stone wall are still plainly visible, making its present age at least sixty-seven years. This old landmark, after this long period of years, should have been held by the court to conclusively mark the boundary between the old homestead and the old highway.

A. F. Eggleston, for the appellee.

PARK, C. J. The parties were at issue in this case as to whether a certain strip of land, upon which the selectmen of the defendant town were about to enter and grade it as a part of a public highway, was in fact a part of such way, or belonged to the plaintiff as his private property.

In deciding the question the court used the following language:—"The court having heard the parties, finds the issues for the plaintiff, except as to the western boundary of the land described in the complaint, and also finds that the plaintiff is the owner in fee simple, free from any public easement, of the following described piece of land, with the buildings thereon, situated in the town of Newington." Then follows a description of the tract of land, which includes. it is conceded, the strip of land in controversy.

In the finding of facts the following statement appears with regard to this strip of land:—"The ground has always been occupied by the plaintiff and his predecessors as far back as the testimony extended, by setting out fruit and ornamental trees and by other trees and shrubbery, and the surface of the ground and the character of the occupation have been such as to make it impracticable for the public to use it as a highway, and it has never been dedicated to or

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used by the public for highway purposes, and it is not needed for the convenient use of the highway."

These findings would seem to dispose of the defendant's claim, that the strip of land was a part of the public highway.

But it appears in the case that the highway adjoining the plaintiff's premises on the west runs nearly north and south, and that the strip of land in controversy lies along the easterly side of the highway as it passes the plaintiff's premises. On the easterly side of the strip of land there were the remains of an old fence running north and south by the premises of the plaintiff and parallel to the highway, that had stood there, or one like it at the same place, for a period of forty years. On the trial of the cause in the court below the defendant asked the court to rule, as a matter of law, that the old fence was on the eastern boundary of the highway along the plaintiff's premises; constituting, as the highway was dedicated, the eastern line of the dedication, leaving all outside of the old fence to fall into the highway. The court did not so rule, and the omission is made the ground of error in this court.

Manifestly it cannot be said, as matter of law, that the old fence afforded conclusive evidence that it was coincident with the line of the highway as dedicated, although it may be from its location strong evidence of the fact. The question was one of fact for the court to determine, and not one of law.

The defendant further requested the court to rule "that no injunction should be adjudged against the town of Newington, because the selectmen of the town did not act in the premises as agents of the town, but as agents of the law only."

The court finds that the selectmen claimed to act solely under the authority of votes passed by the town. But, however it may be in certain cases that the selectmen of towns act for the public in removing nuisances from highways, still they never act for the public in committing tres-

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passes upon private property, which, according to the finding, would have been the legal effect of the acts threatened.

Again, the defendant claimed, and requested the court to rule, "that relief by way of injunction was not the proper remedy."

But the court has found that the threatened acts of the defendant "if permitted to be done, would cause irreparable injury to the plaintiff." We think there is no foundation for this claim. It is every day's practice to grant injunctions to restrain the commission of injuries to real estate, in cases where the injuries would be irreparable if committed.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

THE STATE EX REL. HALFWAY RIVER SCHOOL DISTRICT *vs.* WALTER S. BRADLEY AND ANOTHER.

Fairfield County, March T., 1886. PARK, C. J., CARPENTER, LOOMIS, GRANGER and BEARDSLEY, Js.

In the absence of record evidence of the establishment of a school district, its legal character as such may be proved by reputation.

A school district originally legally organized in the town of *N*, claimed that a portion of the adjoining town of *M* had been annexed to and become a legal part of it. There was no record evidence of the fact. Held that the legal annexation of the part in question might be shown by such conduct of the district and of others with regard to it for a period of forty years as raised a presumption of such annexation.

And held that the district claiming the territory in question must show a definite line bounding it.

Sundry facts considered which were held sufficient to raise a presumption of such annexation.

And sundry facts considered which were held sufficient to determine the existence and location of such a boundary line.

[Argued March 18th—decided April 24th, 1886.]

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APPLICATION for a mandamus to compel the defendants, assessors of the town of Monroe, to make a separate valuation of the real estate lying within a part of the town claimed to belong to the plaintiff school district, which district lay principally in the adjoining town of Newtown, but claimed to include a portion of the town of Monroe. The application was made to the Superior Court in Fairfield County and, upon an answer filed by the defendants, was heard before *Sanford, J.* The plaintiff's evidence being in, the defendants moved for a non-suit, which was granted by the court; and on the denial of a motion to set it aside, the plaintiff appealed to this court. The case is sufficiently stated in the opinion.

D. Davenport and *W. H. O'Hara*, for the appellant.

W. H. Williams, for the appellees.

PARK, C. J. It appears in this case that the plaintiff school district, being indebted, levied a tax upon the property of the district to pay the indebtedness. The district is mainly in the town of Newtown, but claims as a part of its territory certain land in the adjoining town of Monroe. This land is assessed with other property of that town which lies without the limits of the district, and there has been no separate valuation of the property which is claimed to lie within the plaintiff district in that town.

This proceeding is brought to compel the assessors of the town of Monroe to make a separate valuation of the real estate of the town which is claimed to be within the district, in order that it may be taxed. The defendants claim that no part of the territory of the town lies within the limits of the plaintiff district, and they therefore refuse to make the valuation.

Hence the sole question in the case is,—does the plaintiff district include a definite portion of the town of Monroe?

The district was incorporated in the year 1803, and its original territory was wholly within the town of Newtown.

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On the trial of the cause in the court below no record evidence was offered by the plaintiff showing that a portion of the territory of the town of Monroe had been annexed to the district, but the plaintiff relied upon prescription to prove the fact—upon a long continued exercise of authority by the district over a definite portion of the territory of the town as a part of the district; which acts had been acquiesced in by the school societies of Monroe and Newtown, which had jurisdiction over the formation and alteration of districts down to the year 1856, and by the towns since that time; and likewise upon confirming acts of the legislature, and acts recognizing the district as embracing a definite part of the territory of the town of Monroe.

Some of the acts of authority, exercised by the district over the territory in dispute, and tending to show that the territory had at some time been annexed to and incorporated in the district, are the following:—More than forty years ago the district built, and ever since has kept up, a district school house, and has maintained a district school therein, at which school the children of that part of the town of Monroe claimed to belong to the district have attended according to law, and to the satisfaction of the school committees and of the school societies of the towns of Newtown and Monroe. During all that time the district has held district meetings, in which the inhabitants of Monroe living on the disputed territory have taken part; they voted and some of them at times presided therein. The district has levied and collected taxes upon property in both towns for district purposes, without objection from the property owners who lived within the disputed territory. The district has drawn money from both towns for district purposes without objection. The district applied to the selectmen of both towns to define the southeastern boundary line of the district, and the line was defined by a selectman of each town, the two acting together, and each acting for the other selectmen of his town. The inhabitants of both towns living within the district have at various times held the offices of district committee, treasurer, and collector, and have performed the

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duties thereof under oath. Children belonging to the town of Monroe, living within the disputed territory, have been enumerated by the district committees from time to time as belonging to the district; and returns of such enumeration have been made to the Newtown school visitors under oath, as by law required in case of a joint district. The town officers of the town of Monroe have, from time to time, paid school fund money to the district as a joint district. The selectmen of the town of Newtown have demanded money of the town of Monroe, and received it on account of this district as a joint district. The selectmen of Monroe in the year 1863 established the northern boundary of the Eastern School District as the southern boundary of the plaintiff district.

These acts, and many others of a like character, running over a period of nearly forty years, were introduced in evidence, tending to show that the plaintiff district is a joint district, embracing a part of the territory of the town of Monroe; and we think they establish a strong *primâ facie* case to that effect, if the evidence was properly received for the purpose.

The defendants insist that record evidence is the only proper evidence for such purpose; but we think the authorities establish a different rule.

In the case of *Bow* v. *Allenstown*, 34 N. Hamp., 351, the court say:—"It has been settled by the decisions of the Superior Court that in a case where no charter or act of incorporation of a town can be found, it may be proved to be a town by reputation, or it may be shown to have claimed and exercised the powers of a town, with the knowledge and assent of the legislature and without objection or interruption, for so long a period as to furnish evidence of a prescriptive right." The principle of this case applies equally well to a school district.

In the case of *Dillingham* v. *Snow*, 5 Mass., 547, the court held that where no act of incorporation of a parish could be found, the court below very properly admitted proof of its incorporation by reputation.

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In the case of *Bassett* v. *Porter*, 4 Cush., 487, the court say:—"It was by no means necessary to produce a record of the lay-out of the district or any direct and positive evidence of such lay-out; the fact that such a district had existed, had been known and recognized, and had acted as such in all respects, would be ample evidence from which a jury might well infer or presume that it had a legal origin, though no direct or positive evidence of its origin could be produced. In truth, the simple fact of the existence, in such a town as Taunton, of a school district, known and acting as such for many years, would lead the mind almost unavoidably and irresistibly to the conclusion that it must have had a legal origin. The longer its existence could be shown the stronger would be the presumption that it was originally duly established, and that the direct evidence of its establishment had been lost by time or accident. That it would be perfectly competent and proper for the jury to make such presumption there can be no doubt. Such presumption would be warranted by one of the most familiar and well-settled principles of the law of evidence. It is a matter of every day's practice that a long continued possession furnishes ground of presumption that such possession was rightfully commenced, and thus a legal title is established to land, or to an easement upon land, though no grant or deed is shown, and no positive evidence of such grant or deed is introduced."

In the case of *Barnes* v. *Barnes*, 6 Verm., 388, the court, in considering a similar question to the one raised in this case, use the following language:—"No records of the town were produced to show either the existence or organization of the district; and if no other proof is admissible for that purpose the defendant has failed in making out his title. The court however consider that the existence of a school or highway district may be proved by reputation. If the records of the town have been examined, and the organization of such districts does not appear of record, their existence in point of fact may be proved. All that is necessary in such a case is to show that there is a district long known

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and recognized as such. If there are persons claiming to act as inhabitants of a school district within certain boundaries, and who have for a long time acted as a school district, whether those boundaries are designated by any particular lines or by the farms of the individuals belonging thereto, they may be regarded as belonging to a district regularly organized. Without this kind of proof there would be a failure of evidence as to the existence or organization of most of the highway and school districts in this state."

In the case of *Sherwin* v. *Bugbee*, 16 Verm., 439, the court say:—"It is now well settled in this state, notwithstanding the decisions reported to the contrary, that the mere fact of a school district maintaining its existence and operation for a great number of years, say fifteen, is sufficient evidence of its regular organization."

We deem these authorities sufficient to show that the evidence in question was proper to be received, as tending to prove that the plaintiff district was duly organized as a joint district, having a part of its territory in the town of Monroe.

The only remaining question is, does the territory embraced by the district in the town of Monroe have definite limits?

We fully agree with the counsel for the defendants, that the territory must have such limits, or else the plaintiff will fail, for this proceeding is adapted only to the enforcement of legal rights that are well defined.

The controversy regarding this question is confined to the southern boundary of the plaintiff district. It appears that the Eastern School District No. 2, of the town of Monroe, lies southerly of the plaintiff district, the northerly line of which, it is conceded, is well defined. We think the southerly line of the plaintiff district coincides with this line, for the following reasons: In the first place, it appears from the evidence in the case that, unless this be true, there is territory north of this line and between it and the southerly line of the plaintiff district which is included in no district of the town of Monroe; an improbable state of

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things, in these days when all property is intended to be burdened with the expense of maintaining district schools. In the second place, the territory which lies north of this line and between it and the town of Newtown, which lies still further north, contains seven families, residing in seven different farm houses, four of whom are embraced by the plaintiff district, and unless the other three are thus included, it follows that they belong to no district of the town of Monroe; which again is a conclusion too unreasonable to be accepted. In the third place, all the evidence in the case tends to show that the northerly line of the Eastern School District coincides with the southerly line of the plaintiff district. There is no suggestion of any other line, which could hardly be the case if there was another line. And lastly, upon application being duly made, the first selectman of the town of Newtown, and the first selectman of the town of Monroe, acting together, and each for the other selectmen of his respective town, being thereto authorized, established the northerly line of the Eastern School District as the southerly line of the plaintiff district.

We think, therefore, that the evidence offered by the plaintiff district clearly established a *primâ facie* case in its favor, and that the court below erred in deciding differently.

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

In this opinion the other judges concurred.

THERON M. COOLEY *vs.* BARTHOLOMEW GILLAN AND ANOTHER.

New Haven Co., June T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

It is well settled that a contract for the sale of personal property, to be at once delivered to the vendee, but the title to remain in the vendor until the price is paid, is valid.

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Under the act of 1882 (Session Laws 1882, p. 146, sec. 8) which provides that errors are not to be considered on an appeal unless it appears on the record that the questions made were distinctly raised at the trial and decided adversely by the court, this court will hold itself at liberty to lay such errors out of consideration even though no objection is made by the opposing counsel in the argument.

In replevin for sundry articles of personal property the court rendered judgment for the plaintiff as to all the articles but one, as to which it rendered judgment that it be returned to the defendants. The court allowed full costs to the plaintiff and only the cost of certain witnesses to the defendants. Held to be no error.

[Argued June 3d—decided July 9th, 1886.]

REPLEVIN for a pair of horses, a double harness, a hack, a pair of blankets and a whip; brought to the Court of Common Pleas of New Haven County. The defendants pleaded a general denial, and that the property was that of one Phillips, and had been attached by them as his. The case was tried before *Deming, J.*, who found the facts and rendered judgment for the plaintiff as to one of the horses, known as the gray horse, and as to the hack, harness, blankets and whip, and for a return to the defendants of the other horse. The court taxed full costs in favor of the plaintiff to the amount of $44.90, and costs for two witnesses ($1.70) in favor of the defendants—leaving a balance of costs in favor of the plaintiff of $43.20. The defendants appealed from the judgment on the ground of errors in the ruling of the court as to points of law and as to costs. The facts found and the points made are sufficiently stated in the opinion.

W. E. Munson, for the appellants.

W. B. Stoddard, with whom was *G. R. Cooley*, for the appellee.

GRANGER, J. This is an action of replevin for two horses, a hack, a pair of harnesses, two blankets and a whip, which were attached by the defendants as the property of one Phillips. The plaintiff claims to have been the owner

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of them at the time of the attachment. The Court of Common Pleas decided that one of the horses and the hack, harnesses, blankets and whip, were the property of the plaintiff, and as to them rendered judgment in his favor. The other horse the court found to have been the property of Phillips at the time of the attachment and as to that rendered judgment for the defendants. The defendants appealed from the judgment against them.

Some reasons of appeal that were assigned we shall not consider, as it does not appear that the questions were made and decided in the court below. Under the statute of 1882 (Session Laws of 1882, p. 146, sec. 8,) no errors are to be considered on an appeal "unless it appears on the record that the questions made were distinctly raised at the trial and were decided adversely by the court." This court will always hold itself at liberty to lay such questions out of consideration, even though no objection to their consideration is interposed by the opposing counsel upon the argument here.

The court below finds that for some time prior to February, 1885, Wales O. Hotchkiss was the owner of the hack, harnesses, blankets and whip, and of one of the horses, known as the gray horse; and that for about eighteen months before that time this property had been in the possession of Phillips, who was a hack driver, and who had received it from Hotchkiss under a written agreement, in the form of a lease, by which they were to remain the property of Hotchkiss until a certain agreed price was paid for them. This price was never paid. While this agreement was pending Hotchkiss, at the request of Phillips, sold the property to Cooley, the plaintiff. It was then in the barn of Cooley, where it had been kept by Phillips during the eighteen months preceding. Hotchkiss gave Cooley a bill of sale of it, acknowledging the receipt of the price, which was $200. Cooley at the same time agreed to sell it to Phillips for $200, the title to remain in Cooley till the $200 was paid—but Phillips to pay $5 a week, to be taken as rent for its use, until it was paid for. Under this arrangement

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Phillips gave his note to Cooley for the $200. The property after this was kept in Cooley's barn as before. The note had not been paid when the defendants attached the property. The court found the property to have been at the time of the attachment the property of Cooley.

This finding leaves really no question of law for us to consider. But it is contended, first, that under such a contract the title could not remain in Cooley, and, in the next place, that there was not a sufficient delivery of possession to Cooley to make the sale good against the creditors of Phillips.

But it has been settled by repeated decisions of this court from *Forbes* v. *Marsh*, 15 Conn., 384, down to *Appleton* v. *Norwalk Library Corporation*, 53 Conn., 4, that such a conditional sale is a valid one and that the title remains in the vendor.

And as to the question of the change of possession—if the title was in Hotchkiss and not in Phillips at the time of the sale by Hotchkiss to Cooley, then no change of possession was necessary as against the creditors of Phillips; and if a change would otherwise have been necessary, yet here the property was already in Cooley's barn, and therefore visibly in his possession when he bought it.

As to the question of costs. The judgment of the court as it appears upon the record is as follows:—"The court having heard the parties finds the issue in part for the plaintiff. Whereupon it is adjudged that the plaintiff retain possession of the gray horse, hack, double harness, two blankets and whip; the defendants to have return of the bay horse. The plaintiff to have costs taxed at $44.90 and defendants to have costs for two witnesses at $1.70, leaving a balance of costs to be recovered by the plaintiff amounting to $43.20." We find no error in this ruling as to costs. There was really one issue, the plaintiff simply failing to make good his title to all that he claimed. An allowance to the defendants of the cost of their witnesses upon that part of the case that was decided in their favor is clearly

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all that they were entitled to, if they were entitled to any costs.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

GARDNER MORSE AND OTHERS *vs.* HERRICK P. FROST AND OTHERS.

New Haven Co., June T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

When property has been sold on time for a price payable in installments on different dates, and notes have been given for the installments, which have become due and are unpaid, the creditor, in an action for the amount due, may allege in a single count that the debtor owes him to an amount equal to the entire price and that his obligation to pay is evidenced by several promissory notes, and may prove this debt by the introduction of the notes in evidence.

[Argued June 2d—decided July 8th, 1886.]

ACTION to recover the price of certain land sold, for which sundry promissory notes had been given; brought to the Superior Court in New Haven County. The complaint in one count set forth nine promissory notes of $400 each, dated June 1st, 1872, and payable in four years from date; a second count set forth three promissory notes of the same date for $500 each, payable six years from date; and a third count, added by amendment, set forth an indebtedness of $5,100 evidenced by the twelve promissory notes before mentioned. At the time the suit was brought all the notes were overdue and unpaid. Of the three defendants, one set up a discharge in bankruptcy and had judgment in his favor, one suffered a default, and the other demurred to the complaint as amended on the ground that there were several distinct causes of action set up in each count, and moved

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that the suit be dismissed so far as the nine notes of $400 each were concerned, on the ground that they were within the sole jurisdiction of the Court of Common Pleas. The court (*Stoddard, J.*,) overruled the demurrer and motion and rendered judgment against the two defendants. The last mentioned defendant appealed to this court. The case is sufficiently stated in the opinion.

W. L. Bennett, for the appellants, cited—Practice Act, § 13; *Dennison* v. *Dennison*, 16 Conn., 34; *Nichols* v. *Hastings*, 35 id., 546; *Camp* v. *Stevens*, 45 id., 92.

J. B. Morse, for the appellees.

PARDEE, J. In 1872 the defendants purchased a piece of land upon time and evidenced their obligation to pay the price, namely, $5,100, by their twelve joint promissory notes —nine for $400 each, payable four years from date, and three for $500 each, payable six years from date. All are due, unpaid and the property of the plaintiffs. The first paragraph of the original complaint counts upon the first nine, and the second paragraph upon the last three. The first paragraph of the amendment counts upon an indebtedness of the defendants in the sum of $5,100, with the allegation that it is evidenced by notes as above set forth, concluding with an ad damnum of $5,500. To the complaint as amended the defendants demurred, for the reason that it sets forth twelve distinct causes of action in one count. Upon the trial one of the defendants moved the dismissal of the action so far as it is based upon the nine notes for $400 each, for the reason that the subject matter of the action on the notes is not within the jurisdiction of the Superior Court, but is within the jurisdiction of the Court of Common Pleas. The demurrer and motion were overruled; judgment was rendered for the plaintiffs, and the defendants have appealed.

In saying that there is no error in the judgment we are required neither to determine, nor discuss even, the ques-

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tion whether the plaintiffs could or could not institute twelve suits; nor the question as to the effect of a suit and judgment upon a single note upon the right to a subsequent judgment upon the others. Only this, that when property has been sold on time and the price is made to become due in installments payable on different dates, and all become due and are unpaid, the creditor may allege in one count that the debtor owes him to an amount equal to the entire price and that his obligation to pay is evidenced by several promissory notes, and prove this debt by the introduction of the notes in evidence. It is simply the indebitatus count in general assumpsit with such additional narrative of facts as the Practice Act requires. Under the facts of this case it would be a reproach to the law, if, contrary to the will of the plaintiffs, it permitted the defendants to draw upon themselves the consequences of their prayer, namely, the payment of several bills of costs where only one is necessary.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

THE TOWN OF CANTON *vs.* THE TOWN OF SIMSBURY.

Hartford District, May T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS AND GRANGER, Js.

A minor, born in Massachusetts, was supported by that state for several years during his minority at the Deaf and Dumb Asylum at Hartford in this state. From there he went, about three years before his majority, to the town of *C*, where he staid nearly two years. He then went to the town of *S*, where he became of age and remained for nearly twenty years, supporting himself, but with no taxes assessed against him. Held that he acquired a settlement in *S*.

While residing in *C* he was an *inhabitant* of that town, though having no settlement there, and although a minor, and when he removed from there to *S* he began to acquire a settlement in the latter town as an inhabitant of one town removing to another, under Gen. Statutes, p. 196, sec. 4.

[Argued May 18th—decided June 18th, 1886.]

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ACTION to recover money expended in the support of a pauper claimed to belong to the defendant town; brought to the Court of Common Pleas in Hartford County, and heard before *Calhoun, J.* Facts found and judgment rendered for the plaintiff and appeal by the defendant. The case is fully stated in the opinion.

T. M. Maltbie and *P. S. Bryant*, for the appellant.

C. H. Briscoe and *J. P. Andrews*, with whom was *F. M. Mills*, for the appellee.

PARDEE, J. Moses G. Wise was born in New Hampshire and came thence into the town of Canton in this state in his minority and has there since continued to reside, a voter but not a settled inhabitant either by admission or the ownership of real estate. During a temporary stay in Massachusetts in 1846 his son Henry A. A. Wise, the pauper, was born. From 1853 to 1865 the last named state supported this son as a pauper—for eight or nine years at the Deaf and Dumb Asylum in Hartford in this state. He left the Asylum some three years or more before attaining majority and went thence to his father's house in Canton and remained a few months, and then to the house of his employer in the same town for about eighteen months, and from thence to Simsbury in 1866, where he has had his domicil to this present; voting there from 1867 to 1884, two years perhaps excepted. He was self-supporting, and no taxes were assessed against him, from the time of leaving the Asylum to July, 1885. In that month he was temporarily in Canton, was injured and required immediate public aid from that town. It was given and this suit is for repayment. The plaintiff had judgment in the court below, and the defendant appeals.

It is the contention of the defendant that the pauper could not become a settled inhabitant of Simsbury without admission or ownership of real estate.

The fact that the state of Massachusetts supported him

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during several years does not determine the law of this case. The condition of being a pauper is not unalterable; the brand is not ineffaceable. Two or three years before his majority that state ceased to aid him; he then went to and became and during two years continued to be a self-supporting inhabitant of Canton—none the less so if we should concede that he had a legal settlement in Massachusetts; he could elect to have his domicil elsewhere. A minor is an inhabitant in the eye of the pauper law. An inhabitant of Canton, he removed thence into Simsbury in 1866; attaining majority there in 1867, there he has resided hitherto, self-supporting, with no taxes assessed. Thereby under the statute he acquired a legal settlement in his own right in the last named town. *Town of New Hartford* v. *Town of Canaan*, 54 Conn., 39.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

THE STATE *vs.* GEORGE A. BASSERMAN.

New Haven Co., June T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS AND GRANGER, JS.

The act of 1882 (Session Laws 1882, ch. 107, part 2, sec. 2,) provides that where any town shall have voted against the granting of licenses for the sale of intoxicating liquors, a delivery of such liquors within such town shall be deemed a sale in such town, although the contract for the sale shall have been made in another town. Held not necessary that the prosecuting officer, to avail himself of this statute, should found his complaint upon it, but that an ordinary charge of a sale of the liquors in the town would be sufficient.

It is never necessary to aver more than the legal effect of the acts constituting an offense.

Under that statute a delivery by an agent is in all respects the same as a delivery by the vendor himself.

Aside from the statute, a delivery in one town of liquors ordered in another

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town, is a sale in the former town if the liquors were not separated from others until the delivery.

Proof of a sale of liquors will sustain a charge of offering to sell.

Where a general verdict has been rendered on several counts, a defendant who has not requested the court to order separate verdicts, can not complain of it.

[Argued June 1st—decided July 8th, 1886.]

COMPLAINT for the sale, and the offering and keeping for sale, of intoxicating liquors; brought, by the appeal of the defendant from the judgment of a justice of the peace, to the Superior Court in New Haven County, and tried to the jury in that court before *Andrews, J.* There were four counts in the complaint. The jury rendered a general verdict of guilty; and the defendant appealed to this court for error in the rulings and charge of the court. The case is fully stated in the opinion.

L. N. Blydenburgh, with whom was *D. Strouse*, for the appellant.

T. E. Doolittle, State's Attorney, for the State.

GRANGER, J. This is a prosecution for a violation of the statute of 1882, (Acts of 1882, ch. 107, part 6, sec. 1,) which provides that "any person who, without license therefor, shall sell or offer or expose for sale, or shall own or keep with intent to sell, any spirituous and intoxicating liquors * * * shall be fined for the first offense not more than fifty dollars." The information contains four counts. The first charges that on the 22d day of May, 1885, the defendant, at the town of Hamden in this state, sold and delivered certain spirituous and intoxicating liquors without having a license therefor; the second and third counts that on the 8th day of July, 1885, he offered and exposed for sale spirituous and intoxicating liquors at Hamden, without a license therefor; and the fourth that on the 8th of July, 1885, at Hamden, without a license therefor, he owned and kept spirituous and intoxicating liquors with intent to

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sell them. The case came to the Superior Court by the defendant's appeal from the judgment of a justice of the peace, and was tried to the jury on a single plea of not guilty. The jury brought in a general verdict of guilty and the defendant appeals to this court.

It appears by the finding of facts by the judge on the appeal that the defendant was a brewer, living and carrying on his business in the town of New Haven, to which Hamden adjoins, where he had a license for the sale of spirituous and intoxicating liquors, ale and lager beer, at wholesale and retail, and that he was in the habit of sending a wagon on regular trips, once or twice in each week, through the town of Hamden for the delivery of ale and lager beer to various persons residing there; and the State's Attorney offered evidence to prove, and claimed to have proved, that one Adolph Kleiber was the driver of the wagon and the agent of the defendant in making such deliveries. It was also proved and admitted that the town of Hamden, at its annual town meeting in October, 1884, had voted against the granting of licenses for the sale of spirituous and intoxicating liquors in the town.

Among other witnesses the State called Bela Mann, who testified as follows:—"I know Adolph Kleiber. He drives Basserman's beer wagon. I have seen him frequently with that wagon. I saw him the 8th day of July last with the wagon in Hamden. He delivered a case, or two cases, of beer on that day at the house of Mr. Rosenthal in Hamden. I had one of the bottles. It was lager beer. A case is a box with partitions in it for the bottles to stand in. A case sometimes contains a dozen bottles and sometimes two dozen. It was Basserman's wagon. The name 'George A. Basserman, Rock Brewery,' was painted on the side of it. I have seen the same wagon stop at Mr. Cresswell's and at Radcliff's." The defendant objected to the evidence for the reason that the State could not, under the averments in the complaint, prove a delivery of spirituous liquors in Hamden, the contract for which was made in New Haven. But the court overruled the objection and admitted the evidence.

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The State introduced sundry other witnesses who testified to various acts of Kleiber, as that he drove said wagon, that he had done so for a year or more, that he made stated trips and stopped at houses in Hamden and left cases of bottles, etc. The defendant objected to the evidence. The Attorney for the State thereupon stated that the evidence was offered, not for the purpose of showing a sale, but for the purpose of showing, in connection with other evidence in the case, that Kleiber was the agent of the defendant. For the last mentioned purpose solely the evidence was permitted to go to the jury.

The State called John Cresswell as a witness, who testified:—"I live in Hamden. I know the man who drives Basserman's beer wagon. I do not know his name. He delivered lager beer to me at my house in Hamden. He has done so at several times. He did so once shortly before the first of July last. I ordered this beer from Basserman by a written order. The order was for a case of lager beer to be delivered to me at my house. I wrote the order in Hamden and sent it to Basserman by the driver. The beer was delivered to me a day or two afterwards—on the next trip the wagon made."

The State offered considerable other testimony. The defendant rested his case without calling any witnesses.

The defendant's counsel asked the court to charge the jury, "that under the statute (Acts 1882, p. 178, sec. 2,) which makes the delivery in a non-license town a sale by the vendor or his agent, the delivery is the crime, not the sale, and the vendor is not liable unless he also delivers himself; the intent of the law is to punish the party delivering in the town." The court did not so instruct the jury, but said to them that if they found Kleiber to have been the agent of Basserman, and as such agent delivered intoxicating liquors in the town of Hamden, such delivery would be the act of Basserman, for which he might be convicted as much as if he had made the delivery in person.

The Attorney for the State in his argument claimed from the testimony of Cresswell that the defendant was guilty of

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selling intoxicating liquors in Hamden, without any reference to the statute last referred to. Upon this claim the court charged the jury as follows:—"If you find that an order was sent from Hamden to the defendant requesting him to deliver lager beer in Hamden, and that such order did not specify any particular case of beer, but only called for beer generally, and if you find that in pursuance of such order the defendant did deliver lager beer in Hamden, and that no act had been done towards setting apart any particular case of beer to fill the order, until it was actually delivered to and accepted by the purchaser in Hamden, then according to the rule of law no title passed from Basserman to the purchaser till that delivery, and as that, as well as the order, was in Hamden, the sale would be in that town. If you find these several steps to be proved beyond a reasonable doubt, the claim of the State's Attorney is correct."

The defendant contends that the court erred in ruling that proof of a delivery in Hamden of lager beer contracted for in New Haven, would sustain a general charge of selling lager beer in Hamden under part 6, section 1, of the statute, which forbids such sale. The claim, as we understand it is, that the prosecuting officer, to avail himself of the provision of the 2d section of part 2d of the same statute, that such a delivery in a non-license town of liquors purchased in a license town shall be deemed a sale in the former town, must found his complaint specifically upon that statute, and allege the liquors to have been delivered as liquors so purchased in another town. But by the statute such a delivery is in law a sale in the town where delivered, and it is never necessary to aver more than the legal effect of the acts constituting an offense. The law making the delivery in Hamden a sale, the delivery can be charged as a sale, as in other cases of actual sale.

The defendant further contends that after the State's Attorney had offered evidence of a sale to Rosenthal, thereby electing that as the sale relied on, he could not offer evidence of a sale to Cresswell.

There are two answers to this objection. First, that there

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were three counts charging sales or offering for sale, and the evidence as to a sale to Cresswell would have been admissible under either of the other two after the sale to Rosenthal had been proved under one of the counts. Proof of an actual sale would have sustained a count for offering to sell, and the penalty for the latter was the same.

But if there had been but a single count the objection could not now be made. It appears that the evidence as to the sale to Cresswell was not objected to at the trial. Under the statute no question not made and decided in the court below can be made by counsel here. But aside from this statutory rule, it is clear that there could be no error in admitting evidence not objected to.

It is then contended that the verdict is not a legal one inasmuch as it is a general one, and does not specify what particular charges it finds proved, so that it can never be known of what precise offense the defendant was found guilty. But here again the plaintiff has waived all objection to the verdict by not asking that a separate verdict should be rendered on each count. Whether or not it be a case where the court would have ordered such separate verdicts, yet it is clear that the defendant, not having asked for such an order, can not now object to the general verdict.

There is clearly nothing in the further point made by the defendant, that to make a delivery in a non-license town of liquors sold in another town a sale in the town where delivered, such delivery must have been by the vendor himself and not by his agent, and that the crime is that of the person delivering and not of the vendor if he is not the one delivering. A delivery by an authorized agent is exactly the same thing as a delivery by the principal himself. There is no difference between the civil and the criminal law in this respect, when once the agency has been proved. And the statute itself makes such a delivery a sale whether made by the vendor or his agent.

There is not only no error in the charge of the court as to what would constitute a sale in Hamden of beer ordered of the defendant in New Haven, but the charge is more

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favorable to the defendant than he had a right to claim. The mere delivery in Hamden was under the statute a sale in Hamden, even though the beer ordered had been set apart for such delivery.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

JAMES A. BUTTERFIELD *vs.* CORNELIUS MCNAMARA.

New London Co., May T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

The defendant agreed in writing to sell the plaintiff a lot with a dwelling house thereon "and the use of the sewer through the grantor's adjoining land to the Church street sewer." Soon after a deed was executed by the defendant and delivered to the plaintiff, which contained only the following provision as to the sewer :—"Reserving to myself and my heirs and assigns the right to connect sewer pipes with the sewer now leading from said described premises through my adjoining land to Church street." The plaintiff, supposing that the deed secured to him the right to the use of the sewer, accepted it and paid the defendant the price agreed for the lot conveyed. In an action afterwards brought by him for a breach of the contract in not conveying to him the sewer right, it was held—1. That the deed did not convey such right. 2. That the plaintiff's acceptance of the deed, being made under a mistake as to its effect, did not conclude him.

The mistake, though as to the legal effect of the deed, was yet essentially a mistake of fact.

The defendant owned the adjoining lot, through which the sewer ran, in common with another person, who knew of the existence of the sewer and of the contract with and deed to the plaintiff, and made no objection thereto. The two tenants in common afterwards conveyed the property to *O*, who soon after conveyed it to *C*, who built a house on the lot and destroyed the sewer. Held that if the other tenant in common would have been himself estopped from denying the plaintiff's right to the use of the sewer, yet his grantee would not be estopped.

The deed to *O* and that of *O* to *C*, contained the following provision as to the sewer:—"Together with the right to connect sewer pipes with the sewer now leading from said *B's* [the plaintiff's] land to the Church street sewer." Also:—"And said premises are conveyed subject to

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such rights, if any, as said *B* has to maintain a sewer across said premises." Held that nothing was conveyed to the plaintiff by these provisions.

[Argued May 25th—decided June 18th, 1886.]

ACTION for breach of a contract to convey to the plaintiff a right to the use of a sewer; brought to the Superior Court in New London County, and heard before *Torrance, J.* Facts found and judgment rendered for the plaintiff, and appeal by the defendant. The case is fully stated in the opinion.

S. Lucas, for the appellant.

1. The plaintiff accepted the defendant's deed with a full knowledge of all the facts. This is set up in our defense and is found by the court. The finding is that "at the time said agreement was executed the plaintiff knew that the land mentioned as the defendant's land was owned by the defendant and his brother as joint tenants."

2. The reservation in the deed was of sufficient scope to give the plaintiff a right to use the sewer in common with the defendant, and the knowledge and assent of his co-tenant gave him the right to use it in common with him also. This right, if not thus established, was confirmed and established by the deed of the defendant and his co-tenant to Osgood. By that deed they conveyed to him "the right to connect sewer pipes with the sewer now leading from Butterfield's land to the Church street sewer." Here the existence of the sewer was fully recognized and it was treated as an established and permanent one. But the deed does not stop here, but goes on to make the premises conveyed "subject to such rights as said Butterfield has to maintain a sewer across said premises." And the deed of Osgood to Cassidy contains the same provisions. The effect of the whole was to give the plaintiff the right to use the sewer in common with the owner of the servient estate whoever he might be. *Pettee* v. *Hawes*, 13 Pick., 327; *Dyer* v. *Sanford*, 9 Met., 405; *Bryan* v. *Bradley*, 16 Conn., 474, 484; 2 Washb. R. P., 27; Washb. on Easements, 43, 44.

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3. The deed operated to convey the right to the sewer upon the well-recognized principle that if a tenant in common conveys a part of the common estate by metes and bounds, it passes a good title to the tract conveyed if the other tenants in common assent. Here the co-tenant of the defendant clearly assented. *Hartford & Salisbury Ore Co.* v. *Miller*, 41 Conn., 112; *Stevens* v. *Town of Norfolk*, 46 id., 229; *Goodwin* v. *Keney*, 49 id., 563; *Varnum* v. *Abbot*, 12 Mass., 474; *Blossom* v. *Brightman*, 21 Pick., 283; *Dall* v. *Brown*, 5 Cush., 289; *De Witt* v. *Harvey*, 4 Gray, 491; *Clark* v. *Packer*, 106 Mass., 554. But the defendant did not agree to sell the exclusive use to the sewer, but only a use in common with the owners of the land then held in common. It is found that a year or two before the agreement was executed, "the defendant had built said sewer at *his own expense* from the premises conveyed to the plaintiff through said adjoining land owned in common to the public sewer in Church street with the knowledge and *assent* of his co-tenant." That is, one joint owner of an estate owned in common, with the knowledge and assent of his co-tenant, expends his money to construct a drain through the same for the benefit of his own individual estate and for use in connection therewith and the estate held in common. It appears therefore that from the first the co-tenant knew and assented that the joint estate should be burdened with that sewer by reason of the supposed benefit it derived therefrom. From the time of its construction he knew of and assented to its use as an appurtenant to the premises conveyed to the plaintiff. This was not anything done on land by one who had no interest therein under a license from the owner, but on premises of which the defendant was the owner of an undivided half. He had a perfect right to construct it with the assent of his co-tenant, and by doing it he acquired certain rights to the portion of land through which the drain was constructed. On a partition equity would have given him the benefit of it. 1 Washb. R. P., 446. And equity would have restrained the co-tenant from destroying

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it. Washb. on Easements, 63. A parol assent was sufficient. *Haynes* v. *Seachrest*, 13 Iowa, 455.

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

CARPENTER, J. On the 31st of January, 1883, the defendant agreed in writing to sell to the plaintiff a tract of land with a dwelling house thereon, "and the use of the sewer from said house through his other land adjoining to the Church street sewer." On the 6th day of February following he executed and delivered to the plaintiff a deed of the lot and dwelling house, but the deed made no mention of the sewer except in the following clause:—"Reserving to myself and my heirs and assigns the right to connect sewer pipes with the sewer now leading from said described premises through my adjoining land to the Church street sewer from time to time." The adjoining land so referred to was not owned by the defendant except as tenant in common with his brother. The plaintiff, supposing that the deed was a performance of the contract by the defendant, paid the stipulated price in full performance of the contract on his part.

The adjoining land was subsequently sold by the brothers to Charles H. Osgood, and Osgood sold the property to Mrs. Cassidy, who with her husband erected a building thereon and thereby destroyed the sewer. The house and lot without the connecting sewer is worth $800 less than it was with it.

This suit is brought on the contract by which the defendant agreed to sell the use of the sewer. The plaintiff had a judgment for $800, and the defendant appealed.

The defendant in his first defense denies a portion of the plaintiff's complaint. His second defense is as follows:—"The defendant executed and delivered the deed mentioned in the second paragraph of the plaintiff's complaint in the full performance on his part of said agreement, and the plaintiff, with knowledge of all the circumstances, accepted said conveyance in full performance of the agreement on

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the part of the defendant to be performed, and before the performance of the agreement on the part of the plaintiff." This the plaintiff denies. The court finds as follows:—"The defendant executed and delivered to the plaintiff the deed, which deed was then supposed by both of the parties to be in performance of said agreement; and the plaintiff, upon the delivery of said deed, paid to the defendant, in full performance of said agreement on his part, the sum of forty-five hundred dollars."

The defendant insists that upon this finding, on this issue, judgment should have been rendered for the defendant. A sufficient answer to this claim is the fact that it is not found true that the plaintiff accepted the deed with full knowledge of all the circumstances. The material and all-important fact that the deed did not convey to the plaintiff a right in fee to the sewer was then unknown to him. It is found that he supposed that it was in full performance of the contract, but in fact it was not. It would be inequitable to hold him concluded by a mistake of this character—a mistake by which, without fault on his part, he failed to receive what he bought and paid for. The mistake, it is true, was as to the legal effect and operation of the deed under the circumstances, but it has in it nevertheless so large an element of fact that the case is brought directly within the principle of *Blakeman* v. *Blakeman*, 39 Conn., 320. The question in that case related to a right of way over adjoining lands which the parties supposed existed, but which in fact had been extinguished by operation of law. In an application to reform the deed it was held that the mistake was so much a matter of fact that a decree was entered correcting it. So in this case the right which the plaintiff purchased, and which the defendant intended he should receive, was not in fact conveyed to him.

The fourth, fifth and sixth reasons of appeal may be considered together; for they all depend upon the validity of the claim that the deed conveyed to the plaintiff a right, not merely to use the sewer so long as it should exist, but to have it remain permanently, thus constituting an easement in the adjoining land.

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It is attempted to sustain this claim by an implication from the deed given by the defendant and his brother to Osgood, together with the reservation contained in the deed to the plaintiff. It is practically admitted that the latter deed alone conveys no such right, but it is insisted that the defendant having reserved a right to connect with this sewer on the adjoining land, and the right thus reserved having been expressly conveyed to Osgood, there arises an implication that the adjoining land is subject to an easement in the plaintiff. We fail to appreciate the force of this reasoning. We do not see how it is that, in a deed from the defendant and his brother to Osgood, anything can be conveyed even by implication to the plaintiff, a stranger to that deed. The most that can be said is that that deed recognizes the existence of the sewer. The reference to it was not for the purpose of benefiting the plaintiff, but for the purpose of defining an interest granted to Osgood. The language is—"together with the right to connect sewer pipes with the sewer now leading from said Butterfield's land to the Church street sewer." The deed contains this further clause—"and said premises are conveyed subject to such rights, if any, as said Butterfield has to maintain a sewer across said premises." Surely this is not appropriate language to convey anything to Butterfield. Its object evidently was to save the grantors contingently from any liability on their covenants. It contains a significant intimation that the grantors do not admit that the plaintiff has any right to maintain the sewer. Aside from the fact that the plaintiff is a stranger to that deed, it is impossible for us to construe its language as conveying any right to him.

Osgood's deed to Mrs. Cassidy contains the same provisions; and what we have said in regard to the deed to Osgood applies equally well to the deed from him.

It is further insisted that the plaintiff's deed, in connection with the facts of the case, operates to convey an easement. On the one hand it is conceded that, if the defendant had owned the adjoining land in severalty, the deed would have conveyed a permanent easement. On the other hand

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it is conceded that, inasmuch as he owned only an interest as tenant in common, the deed of itself will not have that effect. But it is contended that, the other tenant in common having assented to the construction and use of the sewer by the defendant, and knowing of the contract with and conveyance to the plaintiff, and making no objection thereto, he thereby subjected his own interest in the joint property to the servitude, upon the same principle and for the same reason that when one co-tenant gives a deed of a portion of the joint property in severalty, and the other tenant confirms or ratifies the deed, the conveyance will be valid. *Hartford & Salisbury Ore Co.* v. *Miller*, 41 Conn., 112; *Stevens* v. *Town of Norfolk*, 46 id., 229.

To make that principle applicable it must appear that the defendant's brother confirmed the deed in such a manner as to bind his assigns. A distinction is to be observed between a man's binding himself and binding his estate. The former may be by conduct which will estop him; the latter can only be by deed, express or implied; that is, it must in some way be impressed upon the title so that the record will fairly give notice of its true condition. In this case John R. McNamara tacitly or verbally consented to the construction and use of the sewer; he knew of the contract with the plaintiff, and of the deed to him; and he made no objection. Now these acts might well enough be held to estop him from objecting to the right of the defendant and his grantee permanently to maintain and use the sewer. But the question here is, not what right has John R. McNamara to interfere, but what right has Mrs. Cassidy to do so? Obviously she stands in a much more favorable condition. She has done nothing by which the defendant has been misled or deceived. She derived her title legitimately, and as the title was clear on the record she took it free from any cloud or incumbrance and unaffected by the conduct of John R. McNamara.

In this connection the defendant cites *Goodwin* v. *Keney*, 49 Conn., 563. That case does not support him, being wholly unlike this. A mortgage was given by one tenant in common of a part of the common property by metes and

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bounds. All parties acquiesced in it for more than thirty years. At one time one person owned both the mortgage and the equity of redemption. She subsequently sold the mortgage to the plaintiff and transferred it by deed. One of the respondents afterwards acquired her interest in the equity of redemption. It was held that the respondent, being in privity with the mortgagor, could not deny the validity of the mortgage.

We conclude then that the plaintiff's deed conveyed to him no right to maintain the sewer across the adjoining land, and that he could not have restrained Cassidy from destroying it.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

EDWARD M. GUSHEE AND WIFE *vs.* THE UNION KNIFE COMPANY AND OTHERS.

New Haven Co., June T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

Where a creditor holds a mortgage on real estate and obtains a judgment lien on other real estate of the mortgage debtor for the same debt, there is no rule of equity which will prevent his taking a general decree of foreclosure on the mortgage and judgment lien at the same time.

The statute of 1878 (Session Laws of 1878, ch. 129, sec. 2,) which provides for the appraisal of mortgaged property where on a foreclosure the mortgage becomes absolute, and for the recovery in a later suit of only the balance of the debt above the value of the property taken by the foreclosure, does not apply to the case.

[Argued June 2d—decided July 8th, 1886.]

SUIT for the foreclosure of a mortgage and judgment lien; brought to the Superior Court in New Haven County.

The complaint alleged that on the 30th of September,

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1875, the Naugatuck Wheel Company, a joint stock corporation, was indebted to Ebenezer H. Ives in the sum of $8,000, and on that day mortgaged to Ives two pieces of land in the town of Naugatuck in this state, with factories, dwelling houses and other buildings thereon; that the mortgaged property was, on the 11th of November, 1881, conveyed, subject to the mortgage, by the Naugatuck Wheel Company to the Union Knife Company, the principal defendant, a joint stock corporation, located in Naugatuck, and that the grantee assumed and agreed to pay the mortgage debt; that the Union Knife Company, on the 23d of November, 1881, conveyed the property to the Hartford Crystal Cutlery Company, a joint stock corporation located in Naugatuck, which was now the owner of the same; that the said Ebenezer H. Ives had died, leaving a will by which he had bequeathed the note and mortgage to Fanny S. Gushee, one of the plaintiffs and wife of Edward M. Gushee, who was the other plaintiff; that there had been paid only $3,043.60 on the principal of the note; that a judgment had been obtained by the plaintiffs in the Superior Court in New Haven County at its September term, 1885, against the Union Knife Company, on its assumption of and promise to pay the note, of $5,662.43; that in the suit five pieces of land in Naugatuck belonging to the company and described in the complaint had been attached, and after the judgment had been rendered a certificate of a judgment lien on the lands attached had been filed according to law; and that sundry parties named had acquired a later interest in the lands on which the lien was held, such parties being made defendants with the Union Knife Company. The complaint then prayed for a decree of foreclosure of the mortgage and of the judgment lien.

The Union Knife Company alone made defense, and filed an answer which, after admitting all the allegations of the complaint to be true, proceeded as follows:—

"1. This defendant by way of equitable relief, for which he prays the court, says that the mortgaged premises described are more than sufficient to pay all of the plaintiffs'

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claim, and the plaintiffs ought not in equity to have a foreclosure of said judgment lien, as said defendant has no interest in said note and mortgage.

"2. This defendant by way of alternative relief prays the court to allow no foreclosure decree on said judgment lien until it shall be determined what the value of said mortgaged premises may be by appraisers duly appointed by this court for that purpose, and if on such appraisal said mortgaged premises shall be appraised for less than said sum so due, then that this defendant shall stand charged under said judgment lien with only the balance so found due over the value of said mortgaged premises."

The plaintiffs filed the following demurrer to this answer:—

"The plaintiffs demur to the answer of the Union Knife Company because—1st. Said company, being the party against whom said judgment was rendered, ought to pay it. 2d. The answer does not allege any tender of said judgment debt. 3d. The plaintiffs are entitled to obtain an actual payment in money from all the property subjected therefor. 4th. If said company believe the mortgaged real estate to be of greater value than the debt, they can pay the debt and be subrogated to the plaintiffs' rights as against the holder of said mortgaged property. 5th. On the facts stated the defendant is not entitled to the relief claimed in said answer."

The court (*Stoddard, J.*,) sustained the demurrer and passed a general decree of foreclosure, embracing all the property covered by the mortgage and the judgment lien. The defendant appealed to this court.

H. C. Baldwin, for the appellant.

The defendant corporation owned a large amount of real estate in 1881; the plaintiffs held a mortgage of long standing on other real estate for $8,000; the equity of redemption of the last real estate was conveyed to the defendant with the formal agreement to "assume and pay said mortgage," and by the defendant to another party, the defendant

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having now no interest in the equity. The party last mentioned paid part of the mortgage. The plaintiffs brought suit on the defendant's promise to pay the note, and attached all of its real estate. On this suit they obtained a judgment and filed a judgment lien against all the real estate attached. Then they bring a general suit for foreclosure, tack the mortgage and lien together, and say: You must redeem not only the original mortgaged premises, in which you have no interest, but your own estate as well. This defendant, by way of equitable relief, says: You are only entitled to satisfy, out of my estate, what may be found due on the note over and above the value of the original security. This presents the single issue in this case.

An answer to this involves an inquiry into the rights of mortgagees and judgment creditors in the light of purely equity practice. If, on such full inquiry, this court shall find that the views taken by the court below work inequitably toward the debtor, then of course some way of relief must be found, whether it be precisely the one suggested by the debtor or not.

The legislature, by the act of 1878, (p. 341, sec. 2,) recognized the principle of an appraisal of mortgage security for the purpose of extinguishing the debt. Had this defendant been the owner of the equity of redemption in these mortgaged premises, and a foreclosure had been brought, it will not be denied that it would have had the right under this statute to have an appraisal, and if, on such an appraisal, the property should be found of the value of the mortgage note, no judgment could then be had against it for any amount, and if it should be found less, then a judgment for the balance only could be given, and such judgment would be a lien on its property for only that amount, and by paying that it could redeem.

This is not in accordance with the theory of the court below. The court holds that, by virtue of the act of 1881, (authorizing the holder of a mortgage to maintain a suit in his own name on the assumption of the mortgage debt by a grantee,) if the equity of redemption has passed through

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the hands of forty different owners, each agreeing to "pay said mortgage," the holder of the mortgage note can maintain suits and obtain judgments against each, attaching all the property of each, and then file judgment liens in each case and bring a general foreclosure, piling up all the bills of costs, which must be added to the original debt and paid in order for any to redeem. It hardly seems as if such a doctrine was in accordance with the spirit of equity. The plaintiff did not loan this money to the defendant, and did not trust in his promise or property to pay, and it would seem as if the claim against the defendant's property should be limited to the sum only which the mortgage property fails to pay, and to ask that we be compelled to pay more than that amount out of our property seems unjust.

Prior to the passage of the act of 1878, creating judgment liens, had such a judgment been obtained the attachment would have created the right for four months after judgment for "an execution set-off" and nothing more. Was this law intended to be used in cases where there was security already, or for the purpose of adding to security already held? It certainly nowhere indicates that it was intended to apply in cases where there was other security for the debt. Mortgage creditors, as such, do not need for their protection any such forced construction as this. The fourth section of the act would seem to indicate that no such use of the act was contemplated.

Where is there authority to couple such judgment lien with prior mortgage security and foreclose generally? Section fifth says:—"Any such lien may be foreclosed or redeemed in the same manner as mortgages upon the same estate."

There is no question but that, under the several acts named, with only one bill of costs, the plaintiffs could have brought a suit for foreclosure on the original mortgage, and made this defendant a party, and, on a proper claim, have had the security appraised and afterwards have obtained judgment against the defendant for whatever balance was left unpaid after the appraisal, and then have filed their

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judgment lien for such balance only, and then we would have had to pay that portion only to relieve our property from this lien; and this would really fulfil the spirit of the law and not do violence to the opinion of this court as laid down in *Meech* v. *Ensign*, 49 Conn., 191.

H. G. Newton, for the appellees.

GRANGER, J. This is a suit to foreclose a mortgage upon certain property and a judgment lien upon certain other property. It appears that in 1875 the Naugatuck Wheel Company, a joint stock corporation, mortgaged to Ebenezer H. Ives two pieces of land in the town of Naugatuck to secure a note of $8,000; that only about $3,000 of the note has been paid; that the mortgagee has died and by his will given the note and mortgage to Fanny S. Gushee, one of the plaintiffs and wife of the other plaintiff; and that the mortgaged property has been conveyed to the Union Knife Company, the present defendant, which assumed and agreed to pay the mortgage debt. It further appears that the plaintiffs have brought an action against the Union Knife Company upon its promise to pay the mortgage debt, to recover the balance due on the note, and have attached five pieces of land belonging to the company, all in the town of Naugatuck, and obtained judgment against the company in the suit for $5,662, and that a certificate of a judgment lien upon the lands attached has been filed by them. And they now, by the present suit, seek a foreclosure of the mortgage and of the judgment lien.

The defendant in its answer admits all the allegations of the complaint, but asks for equitable relief on the ground that the original mortgage is more than sufficient to pay the remainder of the mortgage debt, and that it would be inequitable that the property covered by the judgment lien should be taken for the debt when it is fully paid by the mortgaged property; and the defendant prays that the latter property may be appraised, and if on appraisal it shall be found of less value than the amount of the mortgage

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debt, the lands held by the judgment lien shall stand charged only with the balance of the debt so found to be due.

The plaintiffs demurred to this answer, and the court sustained the demurrer, and no other plea being filed, passed a general decree of foreclosure, covering all the property. From this decree the defendant has appealed.

The statute under which the judgment lien was obtained by the plaintiffs (Acts of 1878, ch. 58,) is a recent one, and few questions have yet arisen as to its operation and effect. The question here raised has never before been presented to this court, but we know of no principle or practice in analogous cases which will sustain the claim of the defendant. The plaintiffs have obtained a legal right to the full security which they hold, and they are entitled to hold it till their debt is paid. The only remedy of the defendant is to pay the debt and thus redeem the property.

The statute (Acts of 1878, ch. 129, sec. 2,) which has been cited by the defendant's counsel as a ground for the granting of the equitable relief asked, has no proper application to the case, and can not, we think, by construction be so extended as to apply to it. That statute applies only to the case of a foreclosure which becomes absolute by a failure to redeem, in which case, if the property is insufficient to pay the debt, the court may appoint appraisers to ascertain its value, and in a suit afterwards brought on the note the excess of the debt above that value may be recovered, and only such excess. It was not intended to apply to the case of a judgment lien already obtained on the mortgage debt. The question here is wholly one of marshaling securities. The judgment lien stands on as legal ground as that of the mortgage, and there is no equitable rule by which we can give one an advantage over the other. If there is reason for limiting the rights of the creditor under the judgment lien, it should be done by legislation. As the statute now stands it provides that the judgment lien "may be foreclosed or redeemed in the same manner as mortgages upon the same estate." Acts of 1878, ch. 58, sec. 5.

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There is no error in the judgment complained of.

In this opinion the other judges concurred.

JOHN E. SAUNDERS'S APPEAL FROM PROBATE.

New London Co., May T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS AND GRANGER, Js.

On an appeal from a decree of probate approving a will, on the ground that the will had been obtained by undue influence, the appellant offered in evidence the declaration of *C*, one of the legatees, that he and *F*, (another legatee) "had got the will fixed as they wanted it." *C* and *F* afterwards testified, for the appellees, that they had used no undue influence. Held that *C's* declaration was admissible for two purposes :—as an admission of a fact in issue, by a party to the controversy, to affect him ; and to affect his credibility as a witness.

And it did not affect the case that it was admitted before he had testified, as the order of testimony was a matter for the discretion of the court, and the same use could be made of the declaration after he had testified as if it had then been first introduced.

F, the other legatee, also testified that there had been no undue influence used. Held that *C's* declaration could not in any way affect her or her testimony.

The existence of undue influence may be inferred from the facts and circumstances of the case, even if there be no direct and positive evidence of it. But the facts and circumstances ought to be such as to lead justly and reasonably to such a conclusion.

[Argued May 25th—decided June 18th, 1886.]

APPEAL from a probate decree approving the will of Roxanna Saunders, deceased; taken to the Superior Court in New London County, and tried to the jury before *Torrance, J.*

The reason of appeal assigned was that the testatrix, at the time of the execution of the will, was very infirm, and with her mind diseased and weakened, and that while in this condition she was prevailed on to make the will, to the great injury of the appellant, by the importunities and false

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representations of Clark R. Cook and Fanny Cook, two of the legatees under the will. Fanny Cook was the sister and Clark R. Cook the nephew of the testatrix. John E. Saunders, the appellant, was her only child. He received by the will only some pictures and a desk. The other legacies were $500 each to two churches; $500 each to Clark R. Cook, Levi Saunders and Emily C. Palmer; the household effects of all kinds except wearing apparel, certain pictures and a desk, to Fanny Cook; her wearing apparel to three women named; and the residue in trust to Emma J. Saunders, daughter of the appellant, for her life.

Upon the trial, in support of the claim of undue influence, and in connection with other proof, the appellant introduced, without objection, various witnesses, who testified to the declarations made by Clark R. Cook soon after the date of the instrument, stating "that he and Aunt Fanny had got the will fixed as they wanted it; that John had got enough already; that they had got it fixed now with a man put in as executor who was not afraid of John Saunders." Fanny Cook and Clark R. Cook were subsequently called by the appellees as witnesses, to testify that they never exercised any influence over the testatrix relative to the matters in controversy.

On the argument of the cause the counsel for the appellees claimed, and requested the court to instruct the jury, that the evidence of the declarations made by Clark R. Cook was not admissible for any purpose. The court did not charge as requested, but on this part of the case charged as follows:—

[The charge on this point is given in full in the opinion of the court, and is therefore omitted here.]

The appellant, admitting that upon the question of undue influence the burden of proof was upon him, claimed that, inasmuch as fraud and undue influence are not ordinarily susceptible of direct and positive proof, it was not incumbent upon him to prove the exercise of such influence by direct and positive evidence, but that the jury might infer it from facts and circumstances, proved or admitted,

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attending the transaction; and that if the jury were satisfied from such proof that undue influence was in fact exercised, it was sufficient.

Upon this part of the case the court charged the jury as follows:—"The existence and exercise of such an undue influence is not often susceptible of direct and positive proof. It is shown by all the facts and circumstances surrounding the testatrix, the family relations, the will, her condition of mind and of body as affecting her mind, her condition of health, her dependence upon and subjection to the control of the person influencing, and the opportunity of such person to wield such an influence. Such an undue influence may be inferred as a fact from all the facts and circumstances aforesaid, and others of like nature that are in evidence in the case, even if there be no direct and positive evidence of the existence and exercise of such an influence. But the facts and circumstances ought to be such as to lead justly and reasonably to such an inference, and such inference is not to be drawn unfairly or unreasonably."

The jury returned a verdict setting aside the will, and the appellees appealed to this court, on the ground of error in the rulings and charge of the court.

D. G. Perkins, with whom was *L. Brown*, for the appellants (originally appellees).

1. The court erred in not making it clear to the jury that the declarations of Clark Cook could not have any effect upon the testimony or the rights of Fanny Cook. As admissions he had no right to make them except to affect himself. Treated as a contradiction of his own testimony they could not be taken as a contradiction of her testimony. But the court told the jury that they were admissible "to contradict the *witnesses* who were charged with having used undue influence." These witnesses were Clark and Fanny Cook. But the evidence was not introduced for the purpose of contradicting them. They had not then testified. It was offered as substantive evidence, as a part of the appellants' proof of a matter, the affirmative of which rested

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on him. If after Clark Cook had testified it had been offered as an impeachment of his testimony, we admit that it would have been admissible for that purpose. *Hedge* v. *Clapp*, 22 Conn., 266. The jury would then have understood it. As it is, and especially under the charge of the court, they must have been misled.

2. The declarations of Clark Cook were not an admission that could affect any other party to the case. The admissions of one of several parties to the record are not admissible to affect the interests of others who happen to be joined with him, unless there is some joint interest or privity in design between them. 1 Greenl. Ev., § 174. A mere community of interest is not sufficient. "Devisees and legatees have not that joint interest in the will which will render the admissions of one, though he be a party appellee from the decree of the probate court allowing the will, admissible against the other legatees." *Phelps* v. *Hartwell*, 1 Mass., 72; *Shailer* v. *Bumstead*, 99 id., 127. If the issue had been made that the legacy to Clark Cook was alone the result of undue influence, and not the entire will, then the admissions might have been evidence against him alone, but the court should have so explained them to the jury and limited their effect. Then that legacy might have been declared void and the will itself sustained in the interest of innocent legatees. *Harrison's Appeal from Probate*, 48 Conn., 203.

3. The court erred in instructing the jury that they might infer undue influence from the facts and circumstances of the case. The burden of proof was on the appellant to show (1) undue influence, and (2) that it was effectual. The jury must have understood that the court regarded the facts and circumstances of the case as establishing these two points. The court mentioned the will itself as one of the circumstances from which the inference of undue influence might be drawn. The court undoubtedly referred to the fact that nothing is left to the son, as leading to the presumption that such a result must have been accomplished by undue influence. But the court, in thus charging the jury, gives no benefit to the appellee of

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the admitted fact that but a year before the son had inherited four fifths of a large estate from his father. But even though the provisions of a will show a capricious partiality and there appears to have been an opportunity for the person benefited to wield undue influence, still such facts will not warrant the inference not only that an influence was exercised but that it was effectual to overcome free agency. *McKeone* v. *Barnes*, 108 Mass., 346. But if it be contended that the charge meant simply that the fact of undue influence might be proved by circumstantial evidence, then we say that the language does not clearly convey that meaning, but was confusing and misled the jury. Where the jury are asked to presume one fact as a conclusion from many other facts, the court should caution the jury and explain to them that the facts proved must lead clearly and conclusively to the fact to be inferred. And the facts and circumstances from which such inference is to be drawn must not only be consistent with the hypothesis that the will was obtained through undue influence, but they must be inconsistent with and exclude the hypothesis that it was not so obtained. 1 Wms. Exrs., 72; *Boyse* v. *Hillsborough*, 6 H. L., 52.

A. Brandegee and *S. Lucas*, for the appellee (originally appellant).

LOOMIS, J. The object of this appeal was to set aside the decree of the probate court approving the will of Roxanna Saunders, deceased, upon the ground of undue influence on the part of Clark Cook and Fanny Cook, two of the legatees named in the will.

Upon the trial the appellant in his testimony in chief, without specifying his object, and without any objection, offered in evidence the declarations of said Clark Cook, made soon after the date of the will, to the effect "that he and Aunt Fanny had got the will fixed as they wanted it; that John had got enough already; that they had got it fixed now with a man put in as executor who was not afraid of John

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Saunders." The appellant was the person referred to as "John" and as "John Saunders."

Afterwards the appellees introduced said Clark Cook and Fanny Cook as witnesses, who testified that they never exercised any influence over the testatrix, relative to the matters in controversy.

Upon the final argument of the cause the counsel for the appellees claimed, and requested the court to instruct the jury, that the evidence of the declarations made by Clark Cook was not admissible for any purpose. The court charged the jury as follows:—"Now a word as to the admissions of Mr. Cook, that were put in evidence, and about which comment has been made. This evidence was admitted without objection. It was, as I understood and supposed at the time, offered for the purpose of contradicting the party who had been a witness, testifying that there was not any undue influence. It was offered for the purpose of affecting his testimony, and for that purpose I charge you it was admissible. The point made, as I understand it, is this: If offered for the purpose of showing or proving as evidence that undue influence was in fact used, it is claimed to be inadmissible as against other parties, legatees and beneficiaries under the will, as an admission made by a party who had no right to make an admission for them—whose admission is not evidence against them. And I understand that the admission of a third party, a stranger, cannot affect the rights of another party, and for the purpose of affecting the rights of the other beneficiaries under the will this testimony is not admissible. But I do not understand, as I said before, that it was offered for that purpose, and I charge you that it is evidence for the purpose for which it was offered, and, so far as I know, the only purpose for which it was offered, namely, to contradict the witnesses who were charged with having used undue influence, and who said that no undue influence was used, by showing that they admitted, so far as that was an admission, that undue influence had been used, and for that purpose you may consider it as evidence in the case."

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The question raised by the objection is, whether the evidence was admissible for any purpose; if so there was no error, unless the admission was accompanied with instructions which allowed the jury to make an illegitimate use of the evidence. The evidence was admissible for two purposes:—as an admission of a fact in issue by Clark Cook, a party to the controversy, to affect him; and also to affect his credibility as a witness, being a statement out of court inconsistent with his testimony in court. The court ruled that the evidence was admissible for the last named purpose only, and in so ruling erred in favor of the party now claiming to be aggrieved.

But it is now claimed that the evidence was not admissible for the purpose allowed by the court, because it was actually received (though without objection) before Clark Cook had testified. We think, however, that after the evidence was all in it was too late to object merely on account of the order of its admission. The order of proof had then become wholly immaterial. The foundation for the evidence had then been completely laid, and the only possible reason for its rejection no longer existed.

Suppose a case to depend on the question whether the act of one person is binding upon another who is represented to be the principal, and evidence as to the act of the agent is first received, either without objection or as a matter of discretion with the court, will not the subsequent proof of authority for the act on the part of the principal have precisely the same effect as it would have had if the order had been reversed? Or suppose the declarations in question had been first distinctly offered and received simply as an admission by a party of a relevant fact, could not the same evidence, after the party had testified and denied the fact, be used to discredit him as a witness? Or is the law so unreasonable as to require the useless repetition of the same testimony after the party shall have testified as a witness? The mere statement of such a proposition involves its own refutation, and we forbear further answer.

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But the appellees further claim that the instructions as given might lead the jury to think that the declarations of Clark Cook could be used also to impair the credit of Fanny Cook, another witness. If we take the whole charge together, and consider it in reference to the claims of the parties as understood by the court at the time, we do not think it fairly admits of any such construction.

The language of the charge as first used can by no possibility be misunderstood. Referring in terms to the admissions of *Mr.* Cook, and no one else, the judge says:—"It was, as I understood and supposed at the time, offered for the purpose of contradicting *the party* who had been a witness, testifying that there was not any undue influence. It was offered for the purpose of affecting *his* testimony, and for *that purpose* I charge you it was admissible." The question is then referred to in a more general and abstract form as to the effect of an admission by one party on the rights of other parties, legatees and beneficiaries under the will, and again the rule is clearly stated that such an admission cannot affect the rights of another party—"and for the purpose of affecting the rights of the other beneficiaries under the will this testimony is not admissible." So far the meaning is very clear, that Fanny Cook cannot in any way be affected by the declarations of Clark Cook or any other party.

The only color given for the appellees' claim is in what follows, where the judge, having just stated the rule as to plural parties, unconsciously uses the plural when he attempts to repeat, as he says he does, his first proposition—that the evidence was offered "to contradict the witnesses who were charged with using undue influence," &c. If this language is broad enough to include Fanny Cook, the sentence which immediately follows, in connection with the conceded facts, shows that she cannot be so included, for such witnesses were to be contradicted "by showing that they admitted, so far as that was an admission, that undue influence had been used." Now there was no evidence, and no claim or pretense, that Fanny Cook admitted that she had used undue

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influence, and therefore she ought not to be included even in the last statement, and as she had been twice clearly excluded we do not think the jury could have been misled by the merely obscure language of the closing part of the charge.

The other part of the charge complained of, stating in substance that the existence and exercise of the undue influence relied upon might be found as a fact from all the facts and circumstances, even if there was no direct and positive evidence, provided the facts and circumstances were such as to lead justly and reasonably to such an inference, was unexceptionable.

There was no error in the rulings complained of.

In this opinion the other judges concurred.

CHARLES COMSTOCK'S APPEAL FROM PROBATE.

Fairfield Co., March T., 1886. PARK, C. J., CARPENTER, LOOMIS, GRANGER and BEARDSLEY, Js.

The statute of 1882 (Acts of 1882, chap. 50, sec. 4,) provides that on an appeal to this court the judge, at the request of either party giving notice of an appeal, shall make such a finding of the facts as may be necessary for the proper presentation of the questions of law, and that the appeal need not be filed with the clerk of the court until ten days after such finding has been filed. A finding was made by a judge and filed with the clerk which stated that "on the 2d day of July, 1884, the administrators of *A* filed with the clerk of the court (the court not being in actual session) their application to be made parties to the action." Several months later, at the request of the appellant, the judge amended the finding by striking out the words "the court not being in actual session." Held that the amendment was not to be regarded as a filing at that time of the finding with the clerk, and did not operate to give the appellant ten days from that time within which to file his appeal.

[Argued March 18th—decided April 24th, 1886.]

APPEAL from a probate decree; taken to the Superior

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Court in Fairfield County. The decree was reversed in that court, and certain of the appellees appealed to this court. In this court the First National Bank of New Canaan, which had upon its motion been made a party appellant in the Superior Court, pleaded in abatement of the appeal, and the case was heard upon that plea. The case is fully stated in the opinion.

J. H. Perry, in support of the plea in abatement.

L. Warner, contra.

LOOMIS, J. The only questions for our consideration in this case arise under a plea in abatement to the appeal which Joseph M. Johnson, administrator, attempted to take to this court from the judgment of the Superior Court in the above mentioned appeal from probate.

In support of the plea two independent grounds were urged:—1st, that the appeal was not taken by any party to the proceedings in the court below; and 2nd, that the reasons of appeal were not filed within the time required by the statute.

We will consider only the last named ground, as in our view it is sufficient for the abatement and dismissal of the appeal.

The statute, (Acts of 1882, ch. 50, p. 144, sec. 4,) provides that "if it becomes necessary for the proper presentation of questions of law arising in the cause that there should be a finding of all the facts therein, or of sufficient facts to properly present objections to testimony, or errors claimed to exist in the charge or rulings of the judge, such judge shall, upon request of the party so giving notice of appeal, make such necessary finding, and in such cases said appeal need not be filed until ten days after such finding has been filed with the clerk by said judge and the party giving notice of appeal has been notified thereof by the clerk."

The question is—whether the reasons of appeal were

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filed within the prescribed ten days. This, at first blush, would seem to be a mere question of fact. But the dates here are all conceded. The controversy has reference not to the mere lapse of time but to the starting point for its computation, or, in other words, the question is—what is to be regarded as the finding filed by the judge? Is it the main detailed finding of facts which the trial judge signed and filed with the clerk of the court months before the reasons of appeal, or the slight amendment which he caused to be made on the last day of January, 1886? If it is the latter, then, as the reasons of appeal were filed on the 10th of February following, they came in time, and the appeal must stand so far as this objection is concerned; but if the former is the finding referred to, then it is conceded that the appeal must abate.

In this case the first formal finding was never withdrawn from the files, or intended to be by the judge, but upon request of the appellant the judge made the following amendment. At first the finding was as follows:—"On the 2d day of July, 1884, the administrators on the estate of Darius S. Ayres filed with the clerk of this court (the court not being in actual session) their application to be made parties to this action," and the only change was that the clerk, by written order from the judge, struck out the clause in brackets—"the court not being in actual session."

We shall not attempt to formulate any general rule to determine what sort of amendment would constitute such a finding as would furnish a new starting point for the ten days allowed for the filing of the reasons. It would be difficult to make a rule of easy application, and besides, it is a matter of little practical importance, for, if a party desires to avoid doubts as to the time allowed, he can apply for an extension of time, or the judge can withdraw the first finding and after amendment refile it with the clerk, or the party can go on and file his reasons upon the assumption that the amendment he desires will be made. But it cannot be tolerated, as is virtually claimed in this case, that every change in a finding will of itself work an

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extension of time. It is very common to have amendments made, more or less important, up to the very session of the Supreme Court, and even after the session has commenced.

It will suffice to decide the present case upon the facts referred to. The amendment as made was in no sense a filing of the finding at that time.

It is difficult to conceive how any question attempted to be raised by the appeal could be affected or controlled by the change as made. At first, by the finding, it was made clear that the court was not then in session, but, after the change, it was left in uncertainty whether the court was in session or not; but, in both cases, it was distinctly stated that the application to be made parties was filed with the clerk of the court on the second day of July, 1884. The change was immaterial, and if so, it is perfectly clear that it cannot operate to extend the time, for, if immaterial, no finding on the subject was necessary, and by the third section of the act cited, the ten days allowed for filing the appeal and bond must date from the rendition of the judgment, which in this case was eighty-six days before the appeal was filed.

For these reasons the appeal must abate and be dismissed.

In this opinion the other judges concurred.

Rufus T. Rockwell's Appeal from Probate.

Fairfield Co., March T., 1886. Park, C. J., Carpenter, Loomis, Granger and Beardsley, Js.

Where a will has been duly executed and the testator had sufficient capacity to make a will, the presumption is that it was executed freely, and without fraud or mistake, and the burden of proof to show the contrary rests on the party opposing the probate of the will.

Where undue influence was relied on to invalidate a single bequest in a will, and the court, in sustaining the claim and setting aside that part of the will, found "that there was no sufficient proof to show that the

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bequest was made a part of the will by the direction or with the knowledge of the testatrix," it was held that the court erred in setting aside the bequest on that ground, since the proponents of the will were not bound to offer any evidence whatever on the subject.

[Argued March 16th—decided July 27th, 1886.]

APPEAL from a probate decree approving the will of Chloe Rockwell, deceased; taken to the Superior Court in Fairfield County, and tried to the court before *Andrews, J.* The facts were found, and a residuary bequest to Georgie M. Benedict, and a clause appointing her executrix, were set aside, and the probate of the will otherwise affirmed. She appealed to this court. The case is sufficiently stated in the opinion.

R. E. DeForest and *J. E. Walsh*, for the appellant (original appellee.)

L. D. Brewster and *S. Tweedy*, for the appellee (original appellant.)

CARPENTER, J. This is an appeal from a decree of a court of probate approving a document as the last will and testament of Chloe Rockwell, deceased. No reasons of appeal were filed in the Superior Court, so that the case stood and was tried upon the statutory issue—Was it a valid will? That issue involved three questions: 1. Was the paper executed with the requisite legal formalities? 2. Did the testatrix have testamentary capacity? and 3. Did she execute it freely, without undue influence, fraud or mistake? *St. Leger's Appeal from Probate*, 34 Conn., 434.

The record answers the first two questions in the affirmative. The contention in this case relates solely to the third.

Starting with the concession that the paper was duly executed, and that the persons signing it had sufficient capacity to make a will, the presumption is that it was executed freely and without fraud or mistake until the contrary appears. Neither fraud nor mistake is claimed; but

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undue influence is relied on to invalidate not the whole will, but the residuary clause in favor of Mrs. Benedict, and the clause making her the executrix. The court sustained the claim of the appellant, and set aside those clauses. Mrs. Benedict appealed.

It is not disputed that the two clauses were properly set aside, provided it sufficiently appears that they were the result of undue influence. Does that sufficiently appear? It certainly is not expressly found. Is the finding equivalent to that? We think not.

The court, after reciting the rejected clauses, finds as follows: "The court finds that there is no sufficient proof to show that the same were made a part of said will by the direction or with the knowledge of the testatrix; and so the court finds that the words above recited are not a part of the will of Chloe Rockwell." This is not finding undue influence, nor is it the legal equivalent of such a finding. Every man is presumed to know the contents of a writing which he signs until the contrary is shown. This presumption applies with peculiar force to wills. They are solemn instruments and are usually prepared and executed with great care. Therefore it was not incumbent on the proponents of the will to prove affirmatively that the deceased directed those clauses to be made a part of her will, or that they were inserted with her knowledge; for both will be presumed from the fact that she executed the instrument as her will with those clauses in it.

The record clearly indicates that the court below regarded it as the duty of the proponents to produce positive proof of her direction and knowledge, whereas the burden is on the opponents to show that she did not direct or have knowledge. The burden being on them, the finding manifestly is not equivalent to a finding that she did not direct or have knowledge. It is a finding that the proponents failed to produce *sufficient* evidence as to a matter concerning which they were not bound to produce *any* evidence. Surely such a finding falls far short of showing that the opponents proved what was essential to their case. In no sense there-

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fore can it be said that the finding shows undue influence. The last clause, "and so the court finds that the words above recited are not a part of the will of Chloe Rockwell," is manifestly a legal conclusion from what precedes it. But the clause preceding it, which is a statement of fact, does not justify the conclusion. The conclusion is in substance what the appellant was bound to prove; it cannot be legitimately inferred from the failure of the appellee to disprove it.

If it be suggested that this conclusion is an inference, not merely from the preceding sentence with which it is immediately connected, but also from the evidential facts before recited, the obvious answer is that still the ultimate all-important fact—undue influence—is not found directly and without ambiguity, as it should have been, but is left to be inferred from the evidential facts, not as a legal inference, but as an inference of fact. It is only found argumentatively—if the words in question were not a part of the will they must have been the result of undue influence. Such a finding is objectionable in form and, in this case, in substance, and ought not to be countenanced by this court.

The judgment is reversed and a new trial ordered.

In this opinion PARDEE and LOOMIS, Js., concurred. PARK, C. J., and BEARDSLEY, J., dissented.

CALVERT B. COTTRELL AND ANOTHER *vs.* THE BABCOCK PRINTING PRESS MANUFACTURING COMPANY.

New London Co., May T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

A sale by one partner in a manufacturing firm to the other of all his interest in the property of the firm of every kind and in the good will of the business, gives the vendee the right to carry on the same business at the same place as the successor of the old firm.

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But it does not preclude the selling partner from setting up a similar business in any place he chooses, and by advertisement, letters and personal application soliciting the custom of the old customers of the firm, so long as he does not represent himself as the successor of the old firm or represent the purchasing partner as not carrying on the business.

To warrant a court of equity in decreeing a restraint of trade, there must be a clear contract for such restraint.

The question whether an advertising card, issued in such a case by the selling partner, is of such a character as to deceive purchasers, is one of fact.

[Argued May 26th—decided June 18th, 1886.]

SUIT for an injunction against the making and selling, or advertising or offering for sale, a certain kind of printing press, and from using a certain trade-name or trade-mark, and for an account; brought to the Superior Court in New London County, and heard before *Beardsley, J.* The following facts were found by the court:—

Calvert B. Cottrell and Nathan Babcock, both residents of Stonington in this state, formed a co-partnership in 1855 under the name of Cottrell & Babcock, and carried on the business of manufacturing and selling machinery at the town of Stonington. In 1867 they commenced to manufacture and sell printing presses and printing machinery, and so continued up to July, 1880.

The firm manufactured lithographic stop cylinder, two revolution, and drum cylinder printing presses. The presses so manufactured and sold embodied many novel mechanical features and devices which were of great utility and value, by reason of which the presses became widely known among publishers and printers. The firm expended large sums of money in perfecting the mechanical arrangements and devices embodied in their printing presses and also in advertising the presses. The printing presses, while manufactured by the firm, had cast upon their frames the words "Cottrell & Babcock," and were stamped, marked, advertised and sold in large quantities, and were known in the market and to printers, publishers and purchasers as the "Cottrell & Babcock" printing presses.

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In July, 1880, the co-partnership was dissolved by mutual consent. On the twenty-seventh day of that month the following agreement was entered into between Cottrell and Babcock:—

"Whereas the co-partnership heretofore existing under the name of Cottrell & Babcock has been by mutual consent dissolved; and whereas the said Nathan Babcock has preferred his petition to Hon. John D. Park, Judge of the Superior Court, for the appointment of a receiver of the partnership assets; and whereas in order to settle and determine all differences existing between said partners relative to their settlement of their partnership accounts and respective interests in said firm, they mutually agree as follows:—

"*First.* That the said Nathan Babcock agrees to sell, assign, transfer and convey to said Calvert B. Cottrell all his right, title and interest in and to the partnership assets of every name and nature, including all patent rights, good will and trade-marks, whether in his own name or in the co-partnership name, for the sum of $29,000 in cash and the transfer to him of eighty-four shares of the capital stock of the New Williamsburg & Flatbush Railroad Company, now held by William B. Waite as security for the sum of about $1,600, upon the release by said Waite of said stock upon the payment of said sum as security for which it is now held, and the agreement of the said Calvert B. Cottrell to assume and pay all the debts and liabilities of said firm of every description.

"*Second.* The said Calvert B. Cottrell agrees to pay the said $29,000 as follows:—$3,000 within ten days; $13,000 with interest within sixty days; and the balance of $13,000 with interest within ninety days. And within ten days from date the said Calvert B. Cottrell agrees to transfer to the said Babcock as aforesaid the said eighty-four shares of stock of said railroad company, and further agrees that he will assume and pay all the indebtedness and liabilities of said firm of every description as they fall due, and save the

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said Babcock harmless therefrom, and from all costs, loss or damage on account of the same.

"*Third.* That said Calvert B. Cottrell further agrees that he will, on or before the first day of January, 1882, remove the savings bank mortgage, which was given to secure a debt of said co-partnership by said Nathan Babcock upon his residence, and that as soon as practicable, and within the time limited by the trust deed, he will procure the said property to be released from the incumbrance of the conveyance in trust to Thomas Greenman, to secure said partnership creditors.

"*Fourth.* The said Nathan Babcock agrees that, upon the full payment of said $29,000 as stipulated, and the transfer of said eighty-four shares of stock as aforesaid, the said Babcock will execute and deliver to said Calvert B. Cottrell any and all instruments of transfer necessary and proper to convey to said Cottrell all of said Babcock's interest in and to the assets and property before mentioned, but without recourse to him, including all rights pertaining to the same of whatsoever description.

"*Fifth.* It is expressly understood that no obligation shall be contracted and no business carried on in the name of Cottrell & Babcock, except as hereinafter provided.

"*Sixth.* The said Calvert B. Cottrell agrees that upon the conveyance by said Babcock to him as hereinbefore stated, the railroad stock and the Pawtucket stock, if not already properly transferred to said Greenman, as trustee, shall be properly transferred to him for the purposes mentioned in the trust deed of Cottrell & Babcock to Thomas S. Green man, dated the twenty-sixth day of August, 1879; and further, that the machinery now in their factory shall be conveyed to said Greenman in trust, by specific description, in compliance with the laws of this state, to make the same a valid security for the uses and purposes mentioned in said trust deed, and subject to said trust. That said property shall be conveyed to said Greenman for the further trust of securing said Nathan Babcock against any liability,

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loss, costs or damage arising on any claim by R. Hoe & Company.

"And said Babcock further agrees to take such necessary steps to execute all conveyances that may be necessary for the transfer and conveyance of all his right, title and interest in the stock of said Pawtucket Manufacturing Company and the said New Williamsburg Railroad Company to said Greenman in trust.

"And it is further agreed that said Cottrell shall have authority to use the company name of Cottrell & Babcock in liquidation and settlement of all matters growing out of said partnership and its dissolution, and not to be used for the purpose of creating any new liability.

"In witness whereof we, the said Calvert B. Cottrell and Nathan Babcock, have hereunto set our hands and seals the 27th day of July, A. D. 1880.

"C. B. COTTRELL. [L. S.]
"NATHAN BABCOCK. [L. S.]"

Cottrell kept and performed all of the agreements by him made in the above contract, and performed all of the obligations by him therein assumed.

On the 16th day of September, 1880, Babcock executed and delivered to Cottrell two instruments in writing for the purpose of carrying out the contract.

The first of these instruments, omitting the introductory part, which refers to the contract of July 27th, 1880, was as follows:—

"Now therefore, for and in consideration of the sum of one dollar, to me in hand paid, and other good and valuable consideration the receipt of which is hereby acknowledged, I, the said Nathan Babcock, have sold, assigned, transferred and set over, and by these presents do sell, assign, transfer and set over, unto the said Calvert B. Cottrell all my right, title and interest in and to each and every of the letters patent set forth in the schedule hereto annexed, which is hereby made a part of this instrument, together with the invention or inventions therein and thereby secured, and

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also all my right, title and interest in and to any other letters patent or inventions owned or used by said firm, the said letters patent to be held and enjoyed by the said Calvert B. Cottrell for his own use and behoof, and for the use and behoof of his legal representatives, to the full end of the term for which each and every of said letters patent are or may be granted (including any reissue or reissues, extension or extensions thereof), as fully and entirely as the same could have been held and enjoyed by me had this assignment and sale not been made.

"And for a like consideration, the receipt of which I hereby acknowledge, I, the said Nathan Babcock, have sold, assigned, transferred and set over, and by these presents do sell, assign, transfer and set over unto the said Calvert B. Cottrell, all my right, title and interest in and to all trade marks owned or used by the said firm of Cottrell & Babcock in the manufacture and sale of printing presses and printing machines.

"And it is further covenanted and agreed by the said Nathan Babcock that he will sign, execute and deliver, (but without expense to him,) any and all petitions, applications or papers, which may be necessary to enable the said Cottrell, his legal representatives or assigns, to obtain and secure any reissue or reissues, extension or extensions, of all or any of said letters patent set forth in the schedule hereto annexed or which are assigned as aforesaid.

"It being understood that this sale and assignment is without recourse against said Babcock.

"In witness whereof I have hereunto set my hand and seal this sixteenth day of September, A. D. 1880.

"NATHAN BABCOCK. [L. S.]"

The schedule attached was a list of patents, twenty-six in number, all of which were for improvements in printing presses.

The other instrument above referred to was a quit claim deed from Nathan Babcock to Calvert B. Cottrell of all his interest in the real estate upon which the business of Cot-

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trell & Babcock had been carried on, and in the personal property of the late firm of every kind, including its stocks, bonds, accounts and contracts.

Immediately after the dissolution of the firm of Cottrell & Babcock, Cottrell associated with him in the business of manufacturing and selling printing presses and printing machinery his son, Edgar H. Cottrell, under the name of C. B. Cottrell & Co., and succeeded and carried on as successors the business formerly conducted by Cottrell & Babcock.

The rights and interests acquired by Calvert B. Cottrell under the contract of purchase, and the conveyances in pursuance thereof, were valuable in carrying on the business.

On July 12th, 1882, the Babcock Printing Press Manufacturing Company was organized under the joint stock laws of this state, and located at New London, in this state, the stockholders of which company consisted of the said Nathan Babcock, one Charles B. Maxson, and one George P. Fenner. Nathan Babcock was secretary and treasurer of the company, and Maxon president, and Fenner superintendent of the same. Maxon and Fenner were formerly employed for several years by Cottrell & Babcock, and were subsequently in the employ of C. B. Cottrell & Co.

After the organization of the Babcock Printing Press Manufacturing Company, the corporation commenced the business of manufacturing and selling printing presses at New London, and caused to be printed, published, and widely circulated among printers, publishers, and others, an advertising card, of which the following is a copy:—

THE

BABCOCK PRINTING PRESS MAN'F'G CO.

Manufacturers of

DRUM CYLINDER, STOP CYLINDER

and LITHOGRAPHIC PRESSES,

New London, Conn.

NATHAN BABCOCK,

of the late firm of

CHAS. B. MAXON, PRESIDENT. COTTRELL & BABCOCK, GEO. P. FENNER, SUPT.

SECTY. & TREAS.

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Between three and four thousand of these cards were sent by mail, and distributed among printers and publishers, including many of the old customers of the firm of Cottrell & Babcock. Prominence was given to the name of "Cottrell & Babcock" in the printing of the card, and also to the name of Nathan Babcock, by printing these names in more conspicuous letters than any other words upon the card, and also the words "of the late firm of" were printed in much smaller type than any other words on the card. The different sizes of type were used by the printers in printing the card without any instruction from the defendant, and the card was not designed or adapted to mislead any person who read it.

After the sale and conveyances above mentioned Babcock wrote and sent by mail the following letter to one of the old customers of Cottrell & Babcock, namely, Van Antwerp, Bragg & Co., of Cincinnati, Ohio, soliciting their patronage, which letter was duly received by them.

"*New London, Conn., Oct.* 19*th*, 1883.

"Messrs. VAN ANTWERP, BRAGG & CO., Cincinnati, O.

"*Gentlemen:*—Your valued favor of the 15th is at hand and contents noticed. We regret that we are not able to send catalogue of stop cylinder presses, as we have not yet published one of that class. We will mail you a photograph of our new lithograph press which is now completed, and we intend that our stops shall be similar in style and appearance. We should *very* much like to furnish you some stops, and can guarantee them equal in every respect to anything you have seen. We have a new lock motion, for which patents are now pending, which works remarkably smooth and holds the cylinder very firm. We do not know how many presses you want, but we could furnish you three or four in four to six months. If you could make above time answer we shall be happy to call on you and if possible arrange to furnish them. We have the patterns to make, which necessitates so much time. We have no need to assure you that we can furnish a first-class press when we say that our Mr.

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Fenner has made *all* the working drawings ever used by the late firm of Cottrell & Babcock on that class of presses, and that, with the dictation of the writer, he made *all* the plans, measures, movements and proportions of said presses; hence we flatter ourselves that no builders better understand the requirements of a stop cylinder than we do, and certainly none would exert themselves more to furnish a *first-class* press. Please let us hear from you, and oblige,

Yours respectfully,

THE BABCOCK PR'T'G PRESS MFG. CO."

This letter was in reply to the following from that firm:—

"*Cincinnati*, 15*th Oct.*, 1883.

"BABCOCK PRINTING CO., New London, Conn.

"*Gentlemen:*—We will be wanting a few presses soon. Please send us one of your catalogues. Our wants are stop cylinders to print matter 30 x 41. Do your presses resemble Cottrell & Babcock's, of which we have a number? What would you make us a press for, as per above, delivered here, set up? Send catalogue.

Very respectfully,

VAN ANTWERP, BRAGG & CO."

Babcock also, by visit in response to a letter from them, personally solicited one Yewdale, of Yewdale & Co., of Milwaukee, Wisconsin, to patronize the Babcock Printing Press Manufacturing Company. Yewdale was a member of the firm of Yewdale & Co., who were old customers of the old firm of Cottrell & Babcock.

The Babcock Printing Press Manufacturing Company, by their agents and servants, and by their private circulars, cards and newspaper advertisements, solicited the general public to purchase printing presses manufactured by them, and also in the same manner and by the same means solicited the old customers of the firm of Cottrell & Babcock and of their successors, C. B. Cottrell & Co.

After the dissolution of the co-partnership and the pur-

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chase by Cottrell of Babcock's interest in the partnership assets, Cottrell and C. B. Cottrell & Co., as the successors of the firm of Cottrell & Babcock, continued for a time to manufacture and sell printing presses, stamped with the trade name of "Cottrell & Babcock, New York," thereon.

Customers of the old firm of Cottrell & Babcock, and thereafter of C. B. Cottrell & Co., as their successors, have occasionally written and telegraphed to Cottrell & Co., and addressed them as C. B. Babcock & Co., Babcock & Son, and Babcock & Cottrell.

Upon these facts the plaintiffs claimed, and asked the court to rule:—

First. That the firm of Cottrell & Babcock had acquired a valuable trade mark in the name of "Cottrell & Babcock," as so used on their machines; and also a valuable trade name and good-will in the business so advertised and conducted, which it was the duty of a court of equity to protect.

Second. That this trade mark, trade name and good-will became vested in and the property of the plaintiffs by the assignments of Babcock, and the association of C. B. Cottrell and his son, Edgar H. Cottrell, under the name of C. B. Cottrell & Co., conducting the same business at the old stand.

Third. That thereby C. B. Cottrell & Co. became and were the sole successors to the late firm of Cottrell & Babcock, and as such were entitled to all the advantages and benefits of the trade names, trade marks and good-will of the old firm.

Fourth. That the advertising card issued by the defendant was calculated, if not intended, to infringe the trade mark, and also to injure the trade name and good-will so acquired, and the defendant should be enjoined from its use.

Fifth. That the plaintiffs were the lawful and sole successors of the late firm of Cottrell & Babcock, and that the defendant had no right so to advertise or conduct its business as to induce the public to believe that it, or any of its officers, represented or were successors to that firm; and

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that the advertising card of the defendant was so calculated to deceive and had deceived the public, and had induced the belief that the firm of Cottrell & Babcock had been dissolved, and that Babcock and the defendant were its representatives and successors.

Sixth. That the solicitation by the defendant by letter and personal appeal to the old and well known customers of Cottrell & Babcock and the attempt to divert their custom from the plaintiffs as successors of that firm to themselves, was an unlawful interference with the plaintiffs' rights.

The court did not so rule, but found the issues for the defendants. The plaintiffs appealed to this court. The reasons of appeal as filed are given in full in the opinion of the court.

A. Brandegee and *C. Perrin*, for the appellants.

1. The firm of Cottrell & Babcock owned at the date of its dissolution the good-will of its trade, which good-will was part of the assets and property of the firm. The good-will of a business consists in the advantage or benefit which arises from an established connection with customers, in the reputation for skill, or any other advantage acquired by the old firm, and in the chance of keeping and improving former connections; and is an important and valuable interest which the law recognises and will protect. Bouvier's Law Dict. *in verbum;* Story on Partn., § 99; Lindley on Part., (4th ed.,) 859; Pomeroy's Eq. Jur., § 1355; Browne on Trade Marks, §§ 90, 91, 521; High on Injunctions, (2d ed.,) § 1345; *Churton* v. *Douglas*, Johnson, (Eng.,) 174; *Cruttwell* v. *Lye*, 17 Ves., 335; *Potter* v. *Commissioners*, 10 Exch., 147; *Levy* v. *Walker*, L. R., 10 Ch. Div., 436; *Holden's Admrs.* v. *M'Makin*, 1 Pars. Eq. Cas., 270; *Williams* v. *Wilson*, 4 Sandf. Ch., 379; *Dougherty* v. *Van Nostrand*, 1 Hoff. Ch., 68; *Dwight* v. *Hamilton*, 113 Mass., 175. Upon the sale of the business and good-will of a partnership the trade name is included. Story on Part., (7th ed.,) § 100, and note; *Banks* v. *Gibson*, 34

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Beav., 566; *Witt* v. *Corcoran*, L. R., 2 Cha. Div., 69; *Sohier* v. *Johnson*, 111 Mass., 238; *Adams* v. *Adams*, 7 Abb. N. C., 292; *Kellogg* v. *Totten*, 16 Abb. Pr. R., 35. The good-will of the business of a firm is part of the assets of the firm. High on Injunctions, (2d ed.,) § 1345; *Hall* v. *Barrows*, 10 Jur., N. S., 55; *Wedderburn* v. *Wedderburn*, 22 Beavan, 84; *Bradbury* v. *Dickens*, 27 id., 53; *Smith* v. *Everett*, id., 446; *Mellersh* v. *Keen*, 28 id., 453; *Williams* v. *Wilson*, 4 Sandf. Cha., 379; *Dougherty* v. *Van Nostrand*, 1 Hoffm. Ch., 68; *Holden's Admrs.* v. *M'Makin*, 1 Pars. Eq. Cas., 270; *Bininger* v. *Clark*, 10 Abb. Pr. R., N. S., 264; *Sheppard* v. *Boggs*, 9 Neb., 258. The old firm of Cottrell & Babcock were widely known as manufacturers of printing presses and machinery, which embodied many novel features of great value and utility. They had expended large sums of money in advertising, and had a large number of customers among printers and publishers, to whom their manufactures were favorably known. This appears fully in the finding.

2. The good-will of the firm of Cottrell & Babcock was sold and transferred to and became the property of Cottrell, and has since become and now is the property of the plaintiffs. The court below has found as matter of fact that an agreement in writing and under seal was entered into between Cottrell and Babcock, under date of July 27th, 1880, wherein Babcock agreed, in consideration of certain payments of money, &c., "to sell, assign, transfer, and convey to Cottrell all his right, title, and interest in and to the partnership assets of every name and nature, including all patent rights, good-will, and trade marks;" and that Cottrell has kept and performed all his agreements made and all obligations assumed by him in that instrument. Babcock having agreed to convey to Cottrell all his interest in the property, good-will, &c., of the firm, and having received from Cottrell the full amount of the consideration agreed, the interest of Babcock in the same must be found to be vested in Cottrell, even in the entire absence of any subsequent transfer or conveyance. But the good-will being a part of the partnership assets, the interest of Babcock in

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the good-will of the firm was duly conveyed to Cottrell by a sufficient instrument under seal dated September 16th, 1880. That instrument conveys in express terms *all* the right, title and interest of Babcock in and to *all* the personal property of the firm of Cottrell & Babcock of every name, nature and description. *Shipwright* v. *Clements*, 19 W. R., 579. The plaintiffs became the owners and possessors of the valuable rights and interests acquired by Cottrell, and succeeded to and carried on as successors the business formerly conducted by Cottrell & Babcock.

3. The defendants have infringed the rights of the plaintiffs by the commission of acts which are likely to result in the appropriation to their own use of the benefits and advantages belonging to and arising from the good-will to which the plaintiffs are entitled. The value of the good will of a business depends to a very great extent on the absence of competition on the part of those by whom the business has been previously carried on, and a person disposing of his interest in a good-will has no right to interfere with or solicit business from customers of the old firm by letters, cards, circulars or otherwise. Such customers form the good-will. Lindley on Part., (4th ed.,) 859; *Ginesi* v. *Cooper*, L. R., 14 Ch. Div., 596; *Leggott* v. *Barrett*, 15 id., 306; *Burrows* v. *Foster*, 32 Beav., 18, note; *Labouchere* v. *Dawson*, L. R., 13 Eq. Cas., 322; *Hall's Appeal*, 60 Penn. St., 458; *Angier* v. *Webber*, 14 Allen, 211. Nor will he be allowed to use an advertisement or announcement which will lead the public to believe that he is entitled to the good-will of the old firm. The question is not alone whether it will mislead those who read it as a whole, but whether it is likely to mislead those who may see or be impressed by its more conspicuous parts. *Edelsten* v. *Edelsten*, 1 DeG., J. & S., 185; *Hirst* v. *Denham*, L. R., 14 Eq. Cas., 542; *Wotherspoon* v. *Currie*, L. R., 5 H. L. Cas., 508. A trader may refer to the name of his rival in advertisements, but he must do it in such a way as to obviate any reasonable probability of misunderstanding or deception. *Singer Mfg. Co.* v. *Loog*,

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L. R., 8 App. Cas., 15. A man must not use his own name so as to deceive the public. *Clark* v. *Clark*, 25 Barb., 76; *Regina* v. *Dundas*, 6 Cox Cr. Cas., 380. A corporation may be restrained from dealings prohibited to a stockholder, when the connection of such stockholder with the corporation is made conspicuous. *Beal* v. *Chase*, 31 Mich., 490; *McGowan Bros.' Pump & Machine Co.* v. *McGowan*, 2 Cinc. S. C., 313; *Bradley* v. *Norton*, 33 Conn., 164; *Holmes, Booth & Haydens* v. *Holmes, Booth & Atwood Manf. Co.*, 37 id., 278. The defendants have solicited the business of the old customers of Cottrell & Babcock, through the personal acts of Babcock, and by letters and circulars sent to and distributed among them. They have also solicited the business of the old customers by means of a card, in which prominence has been given to the name of Cottrell & Babcock, by printing the same in conspicuous letters, while the words "of the late firm of," immediately preceding the names of Cottrell & Babcock, were printed in very small type. They have also, by the use of the card, solicited from the public at large such custom as would naturally be given and properly belongs to the plaintiffs, who are owners of the good will of the late firm. The matter stated as a finding of fact in the following words: "Said card was not designed and adapted to mislead any person who read it," is not a sufficient answer to the charge that the defendants have infringed the rights of the plaintiffs. It is not a finding of fact, but is a statement of a conclusion from facts already found, and as such may be revised as error. It states only the opinion of the judge as to the probable effect of the card upon the minds to whom it was sent. As to that part of the statement which is to the effect that the card was not *designed* to mislead, the sufficient answer is that it has no bearing on the issue. What the defendants *intended* to do is immaterial. If they have made use of any devices likely to deceive or mislead customers or the public at large, they must be enjoined from such use. *Glenny* v. *Smith*, 2 Dr. & Sm., 476; *Leather Cloth Co.* v. *Am. Leather Cloth Co.*, 1 Hem. & Mil., 271; *Perry* v. *Trueffit*, 6 Beav.,

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66; *Croft* v. *Day*, 7 id., 84; *Harper* v. *Pearson*, 3 L. T., (N. S.,) 547; *Witt* v. *Corcoran*, L. R., 2 Ch. Div., 69; *Hookham* v. *Pottage*, L. R., 8 Cha. App., 91; *Levy* v. *Walker*, L. R., 10 Ch. Div., 436; *Churton* v. *Douglas*, Johnson, (Eng.,) 174; *Scott* v. *Scott*, 16 L. T., (N. S.,) 143; *Stevens* v. *Paine*, 18 id., 600; *Mogford* v. *Courtenay*, 45 id., 303; *Millington* v. *Fox*, 3 Myl. & Cr., 338; *Clark* v. *Clark*, 25 Barb., 76; *Dale* v. *Smithson*, 12 Abb. Pr. R., 237; *Smith* v. *Cooper*, 5 Abb. N. C., 274; *Colton* v. *Thomas*, 2 Brewst., (Pa.,) 308; *Avery* v. *Mickle*, 18 W. Jur., 292; *Glen & Hall Manf. Co.* v. *Hall*, 61 N. York, 234. The inspection of the card itself in connection with the finding of facts, divested of any conclusions, will show that it was likely to mislead, and might be interpreted by different people in different ways, all to the disadvantage and injury of the plaintiffs. It might be understood to mean that the old firm of Cottrell & Babcock had been dissolved and was without successors; or that the defendant was the only successor of the old firm; or that the only person now engaged in that business, and who was a partner in the old firm, is Nathan Babcock. There should be a decree enjoining the defendants from using the name of Cottrell & Babcock, and from soliciting trade from the customers of the late firm of that name, and for an account as prayed in the complaint.

J. Halsey and *S. Lucas*, for the appellees, contended that the court below had found as a fact that the card issued by the defendants "was not intended nor adapted to deceive"; that this was a question of fact the finding upon which could not be reviewed in this court, (*Dudley* v. *Deming*, 34 Conn., 174; *Goodsell* v. *Sullivan*, 40 id., 83; *Spurr* v. *Coffing*, 44 id., 147; *Rogers & Bro.* v. *Rogers*, 53 id., 147;) that the defendants did the plaintiffs no legal wrong in soliciting the custom of the old customers of the firm, if they practiced no deceit by falsely assuming the name and credit of the old firm, (*Thompson* v. *Winchester*, 19 Pick., 214;) that the sale of the good-will of the business to Cottrell could not prevent Babcock from engaging at

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once in a similar business unless it was specially so provided in the contract of sale, which was not the case, (Browne on Trade Marks, §§ 523, 524, 526; Cox's Trade Mark Cases, Nos. 13, 17, 25, 406; *Schackle* v. *Baker*, 14 Ves., 468; *Bassett* v. *Percival*, 5 Allen, 347;) that courts will be specially cautious not to impose unnecessary restraints upon competition in trade, (Browne on Trade Marks, § 401;) and that the only restraint Babcock was under after selling the business to Cottrell was, that he would not be permitted to hold himself out to the world as carrying on the business of the old firm or that his presses were the presses manufactured by the plaintiffs, (*Churton* v. *Douglas*, Johnson, (Eng.), 174; *Holmes, Booth & Haydens* v. *Holmes, Booth & Atwood Manf. Co.*, 37 Conn., 294: *Morgan* v. *Schuyler*, 79 N. York, 490; *Hegeman* v. *Hegeman*, 8 Daly, 1; *Carmichel* v. *Latimer*, 11 R. Isl., 395; *Bergamini* v. *Bastian*, 35 Louis. Ann., 60; Notes in 35 Am. Reps., 546, 550, and 48 id., 232.)

PARDEE, J. (after stating the facts). The plaintiffs' appeal presents the following reasons of appeal:—

1. That the court erred in ruling that the plaintiffs upon these facts had not "acquired a valuable trade name and good-will in the business so advertised and conducted, which it was the duty of a court of equity to protect."

2. That the court erred in refusing to rule that the plaintiffs were the lawful and sole successors of the late firm of Cottrell & Babcock, and that the defendant had no right so to advertise or conduct its business as to induce the public to believe that it, or any of its officers, represented or were the successors of said firm.

3. That the court having found as a fact that "the card gives prominence to the name of Cottrell & Babcock," that "the words '*of the late firm of*' were printed in much smaller type than any other words printed on said card," and "that said card was distributed among many of the old customers of the old firm of Cottrell & Babcock," erred in ruling that said card "was not adapted to mislead any person who had it."

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4. That the court having found as a fact that said Nathan Babcock, after the conveyance aforesaid, personally and by letter, and that the defendants by their circulars, cards and advertisements, did solicit the patronage of customers of the old firm to the new firm, erred in ruling "that such an attempt to divert their custom was not an unlawful interference with the plaintiffs' rights."

Of course in the use of similar names, signs, advertisements, labels and cards, there is a wide field for efforts to mislead the public. There is the slight resemblance which would deceive only the most careless and the almost perfect reproduction which would deceive all save the most careful person of a thousand. And it must always remain a question of fact, as to whether the resemblance rises to the degree which constitutes it an injurious deception. Under our practice in this case the Superior Court inspected the card, saw the style and size of type, noted what is said and what is left unsaid, and heard evidence as to confusion of names, as to the misleading of possible customers and as to all other matters, and from the whole deduced and conclusively determined the resulting fact that no person would be led by the card to believe that the printing presses therein mentioned are manufactured by the plaintiffs, or that they have ceased to manufacture, or that the Babcock Printing Press Manufacturing Company had upon their cessation from the manufacture taken up and continued the business which they had dropped. By that finding this court is bound, and it answers the first three reasons for appeal.

In the contract terminating the partnership relation which had existed between Cottrell and Babcock, it is provided that no business shall thereafter be carried on in the name of that firm; thus reserving to each the full right to the use of his name. Cottrell did not require Babcock to agree, and the latter did not agree, to abstain from the manufacture of printing presses. By purchasing the good-will merely, Cottrell secured the right to conduct the old business at the old stand, with the probability in his favor

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that old customers would continue to go there. If he desired more he should have secured it by positive agreement; the matter of good-will was in his mind; presumptively he obtained all that he desired. At any rate the express contract is the measure of his right; and since that conveys a good will in terms but says no more, the court will not upon inference deny to the vendor the possibility of successful competition by all lawful means with the vendee in the same business. No restraint upon trade may rest upon inference. Therefore, in the absence of any express stipulation to the contrary, Babcock might lawfully establish a similar business at the next door, and by advertisement, circular, card, and personal solicitation, invite all the world, including the old customers of Cottrell & Babcock, to come there and purchase of him; being very careful always, when addressing individuals or the public, either through the eye or the ear, not to lead any one to believe that the presses which he offered for sale were manufactured by the plaintiffs, or that he was the successor to the business of Cottrell & Babcock, or that Cottrell was not carrying on the business formerly conducted by that firm. That he may do this by advertisements and general circulars courts are substantially agreed, we think. But some have drawn the line here and barred personal solicitation. They permit the vendor of a good-will to establish a like business at the next door, and, by the potential instrumentalities of the newspaper and general circulars, ask the old customers to buy at the new place, and withhold from him only the instrumentality of highest power, namely, personal solicitation. To deny him the use of the newspaper and general circulars is to make successful business impossible, and therefore is to impose an absolute restraint upon the right to trade. This the courts could not do except upon express agreement. But possibly the old customers might not see these; and in some cases the courts have undertaken to preserve this possibility for the advantage of the vendor and found a legal principle upon it. Other courts have been of the opinion that no legal principle can be

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made to rest upon this distinction; that to deny the vendor personal access to old customers even, would put him at such disadvantage in competition as to endanger his success; that they ought not upon inference to bar him from trade either totally or partially; and that all restraint of that nature must come from his positive agreement. And such we think is the present tendency of the law.

The plaintiffs cite *Burrows* v. *Foster*, 32 Beavan, 18; *Labouchere* v. *Dawson*, 13 L. R., Eq. Cas., 332; *Quinn* v. *Cooper*, 14 Ch. D., 596; and *Leggott* v. *Barrett*, 43 Law Times, N. S., 641. The Court of Appeal, in *Pearson* v. *Pearson*, 27 L. R., Ch. D., 145, commented upon the last three of these cases in 1884. In that case Theophilus Pearson, as trustee of a will, carried on a business which had been carried on by the testator under the name of James Pearson. By an agreement made to compromise a suit, James Pearson, a son of the testator, and a beneficiary under his will, agreed to sell to Theophilus Pearson all his interest in the business, and in the property on which it was carried on; and it was provided that nothing in the agreement should prevent James Pearson from carrying on the like business where he should think fit and under the name of James Pearson. Theophilus Pearson brought an action to enforce this agreement and to restrain James Pearson from soliciting the customers of the old firm. An injunction was accordingly granted by KAY, J., on the authority of *Labouchere* v. *Dawson*, Law Reps., 13 Eq. Cas., 322, and the cases in which it had been followed. It was held by BAGGALLAY and COTTON, L. Js. (LINDLEY, L. J., dissenting,) that *Labouchere* v. *Dawson* was wrongly decided and ought to be overruled, and that even apart from the proviso in the agreement, the plaintiff was not entitled to the injunction which he had obtained. The judges remarked substantially as follows:—

BAGGALLAY, L. J., said:—"In this case the defendant agreed to sell to the plaintiff his interest in a business, which agreement was carried into effect by an order of the 27th of March, 1884, in another action. In the present

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action Mr. Justice KAY has granted an injunction restraining the defendant from issuing a certain circular and from privately by letter, or personally, or by traveller, asking any person who prior to the 27th of March, 1884, was a customer or correspondent of the late firm whose business was that day sold to the plaintiff, to deal with the defendant or not to deal with the plaintiff. The defendant has not appealed as to the circular, but has appealed from the latter branch of the injunction. If the first clause of the agreement, which was confirmed by the order of the 27th of March, 1884, stood alone, I should be of opinion that the sale included the defendant's interest in the good-will, and I will first deal with the case as if that clause stood alone. Treating the case as a simple sale of the defendant's interest in the good-will, then if *Labouchere* v. *Dawson* is to be treated as laying down the law correctly, the plaintiff is entitled to retain his injunction. I have before expressed doubts as to the decision in that case, and the argument which we have now heard not only has not removed those doubts, but has led me to the conclusion that they were well founded. I am aware that the decision in that case has been followed on two or three occasions; it has been approved by one judge and disapproved by another; but it has never been either approved or disapproved by the Court of Appeal collectively. In that case an agreement in writing was entered into for the sale of a brewery at Kirkstall, and the plant, fixtures, utensils and machinery in and about the same, and the good will of the brewery business theretofore carried on upon the premises. Lord ROMILLY there laid down that the seller of a business with its good-will may, in the absence of any express agreement to the contrary, carry on the same business wherever he pleases, and solicit customers in any public manner, but that he must not apply to any of the old customers privately, by letter, personally, or by traveller, asking them to continue their custom with him and not to deal with the vendees. His lordship went on the principle that persons are not at liberty to depreciate the thing which they have sold. Be-

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fore that decision the law was to be collected from the cases of *Churton* v. *Douglas*, Johnson, 174, and the earlier cases of *Cook* v. *Collingridge*, Collyer on Partnership, 2d ed., p. 215; *Cruttwell* v. *Lye*, 17 Ves., 335; and *Johnson* v. *Helleley*, 2 DeG. J. & S., 446. The effect of Lord HATHERLEY'S judgment in *Churton* v. *Douglas* is that the vendor may carry on the same business where and as he pleases, and deal with the customers of the old firm, provided only that he does not represent himself as carrying on the old business or as being the successor of the old firm. It is admitted that *Labouchere* v. *Dawson* went beyond anything to be found in the earlier cases. There are three decisions on the subject by Sir GEORGE JESSEL. In *Ginesi* v. *Cooper & Co.*, 14 Cha. Div., 599, it was distinctly laid down by that learned judge that a trader who had sold his business and the good-will of it could not deal with the old customers. The injunction, however, as granted, did not go that length, which may be the reason why there was no appeal. In *Leggott* v. *Barrett*, 15 Cha. Div., 306, Sir GEORGE JESSEL granted an injunction to restrain the defendant from applying to any customer of the firm privately, or by letter, personally or by a traveller, asking such customer to continue to deal with the defendant or not to deal with the plaintiff, or from actually dealing with such customer as a customer. There was no appeal from the first part of the injunction, but the defendant appealed from the second part, and the Lords Justices JAMES, BRETT and COTTON all agreed that there ought not to be any injunction against dealing with the customers of the firm. As the defendant submitted to the first part of the injunction the Court of Appeal did not deal with it, but Lords Justices JAMES and COTTON suggested doubts as to its propriety. In *Walker* v. *Mottram*, 19 Cha. Div., 355, Sir GEORGE JESSEL extended the doctrine of *Labouchere* v. *Dawson* to a case where the good-will had been sold, not by the trader himself but by his trustee in bankruptcy. The Court of Appeal held that the doctrine could not be extended to compulsory sales, and that the bankrupt could

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not be restrained from soliciting the customers of the old business. My colleagues, Lords Justices LUSH and LINDLEY did not in that case express any dissent from *Labouchere* v. *Dawson*, but used expressions which may be read as tending to show that they approved of it. I expressed my opinion that it went beyond what any of the previous decisions would have sanctioned, and I reserved my judgment as to its correctness in case the question should ever come before the Court of Appeal. Thus the matter was left in 1881, the Court of Appeal never having in any case given collectively an opinion upon *Labouchere* v. *Dawson*. The case which I then suggested has now occurred. The point calls for our decision, and I feel bound to say that in my opinion, *Labouchere* v. *Dawson* was not correctly decided. It went beyond a number of decisions of a higher court, and I think without sufficient reason. It has been argued that as it has stood for twelve years and been acted upon, it ought not to be overruled, but should be treated by this court as binding and open to be reviewed only by the House of Lords. In support of this the respondent relied much on *Pugh* v. *Golden Valley Railway Company*, 15 Cha. Div., 330, where no doubt stress was laid on the fact that a decision had been standing unimpeached for twenty years, and it was said that it was very undesirable to disturb a rule which had been so long acted upon. The court, however, did not proceed solely or even mainly on that ground; they were of opinion that the decision referred to was right and they followed it. The decision in *Labouchere* v. *Dawson* has not stood wholly unquestioned, and I do not think that we are bound to follow it merely because it has stood for twelve years without being authoritatively overruled. Taking the case then on the first clause of the agreement alone, I am of opinion that the plaintiff is not entitled to the second branch of the injunction. But assuming the first clause, taken *per se*, to amount to a sale of the goodwill, are not its consequences modified by clause third? That clause, which expressly gives the defendant a right to carry on any business wherever he goes under the name of

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James Pearson, having regard to its terms, I think that, even assuming *Labouchere* v. *Dawson* to be right, the defendant has done nothing which would entitle the plaintiff to the second branch of the injunction. I rest my decision however upon this—that *Labouchere* v. *Dawson* was wrongly decided, and that under the first clause taken alone the plaintiff is not entitled to the injunction."

COTTON, L. J., said:—"Mr. Justice KAY granted this injunction considering that he was bound by the authorities. The case of the plaintiff is founded on contract and the question is—what are his rights under the contract? There is no express covenant not to solicit the customers of the business; but it is said that such a covenant is to be implied. I have a great objection to straining words so as to make them imply a contract as to a point upon which the parties have said nothing particularly, when it is a point which was in their contemplation. From what is this implied covenant to be inferred? It is said that there was a sale of the good-will, and according to the proper meaning of the word 'good-will' I think that there was. The plaintiff purchased all the interest of the defendant in certain old pottery works. Taking good-will in the sense given by Lord ELDON in *Cruttwell* v. *Lye*, 17 Ves., 335, 346, 'the probability that the old customers will resort to the old place,' we find that here the purchaser has a right to the place and a right to get in the old bills; so the purchaser gets the good-will as defined by Lord ELDON. But the word 'good-will' is not used, and when a contract is sought to be implied we must not substitute one word for another. Such a right as is here contended for might be inferred from a contract to sell the 'good-will,' and yet not be inferred from such a contract as we have here. But suppose the word did occur, what is the effect of a sale of 'good-will?' It does not *per se* prevent the vendor from carrying on the same class of business. But in *Labouchere* v. *Dawson* it is laid down that it implies a contract not to solicit the old customers. I think that decision wrong. In *Cruttwell* v. *Lye* the point did not directly arise, for the

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sale was by assignees in bankruptcy; but Lord ELDON says in that case—'The good-will which has been the subject of sale is nothing more than the probability that the old customers will resort to the old place. Fraud would form a different consideration; but if that effect is prevented by no other means than those which belong to the fair course of improving a trade in which it is lawful to engage, I should by interposing carry the effect of an injunction to a much greater length than any decision has authorized or imagination ever suggested.' It is involved in this that if the good-will is sold and fraud is used to prevent the sale from having full effect, the court will interfere; but if customers are prevented by fair means from coming to the old place it will not interfere. In *Kennedy* v. *Lee*, 3 Mer., 441, 452, expressions are used which are material as regards a contract in the present form. 'The words *concern* and *inheritance* are used inartificially, and cannot be construed as having any reference but to the actual subjects of valuation. And when the plaintiff offers to take the business himself, he could not have forgotten that the defendant's own estate lay contiguous to the partnership property, and therefore his introducing no stipulation with reference to the fact of its contiguity is a clear intimation that when he wrote this letter he had no intention, in offering to take the partnership property, to purchase with it the good-will, in the sense of restricting the defendant from carrying on trade in its vicinity. In that sense at least, therefore, the good-will of the trade was not the subject of contract or treaty even, between the parties.' This, it is true, seems rather to favor the view that a sale of good-will might imply a covenant not to carry on the same trade in the neighborhood. In *Cook* v. *Collingridge*, Collyer on Partnership, 2d ed., p. 215, a partnership business was sold by order of the court, with liberty for any of the partners to bid, and Lord ELDON made an elaborate order by which, after a declaration that there was no obligation restraining any of the partners from carrying on the same business after the sale of the business of the late partnership, and no

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obligation to restrain them from uniting in a new partnership in the same business after such sale, and that the claim to have any estimated value put upon any subject that could be considered as described by the term 'good-will' could not be supported on the same grounds or principles as those upon which a compensation or value was in that establishment received from a partner buying the share of the partner going out of the business of this establishment and retiring from trade or business altogether, it was declared 'that in this case, if the property of the then present establishment were sold, and the then present partners, or any of them, with any other persons, engaged in a new establishment carrying on the same trade or business, (which they were at full liberty to do,) it was obvious that if by good-will were meant the value of the chance that the customers of partners retiring altogether would deal with those who purchased from such retiring partners and succeeded to their establishment, a good-will of that nature could not be valued on the same principles, as the persons retiring, but not retiring altogether from trade, had also a chance of conveying the old customers with their new establishment, which must most materially affect, if it did not destroy, the chance that the persons purchasing the old establishment would retain many of the customers of the old establishment.' A partner then, in Lord ELDON's opinion, might 'convey' the customers from the purchaser. He must not do so by unfair means; and it is unfair if he represents that he is carrying on the old business; but I think that Lord ELDON was against the notion that the vendor of the good-will of a business, in the absence of express contract, is to be restrained from carrying on a similar business in the way in which he might lawfully carry it on if there had been no sale of the good-will. Lord ROMILLY rests his decision in *Labouchere* v. *Dawson* on the principle that a man cannot derogate from his own grant. But it is admitted that a person who has sold the good-will of his business may set up a similar business next door and say that he is the person who carried on the old

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business, yet such proceedings manifestly tend to prevent the old customers going to the old place. I cannot see where to draw the line; if he may by his acts invite the old customers to deal with him and not with the purchaser, why may he not apply to them and ask them to do so? I think it would be wrong to put such a meaning on 'good-will' as would give a right to such an injunction as has been granted in the present case. I have thought it right to rest my judgment on the ground that *Labouchere* v. *Dawson* is not to be followed, but the present case is less favorable to the plaintiff than that case, for not only have we no contract against carrying on the business, but the third clause shows it to have been in the minds of the parties that the defendant should carry on business, and I think that this stipulation entitles him to get customers in any fair way of managing his trade. It is urged that *Labouchere* v. *Dawson* has so long been treated as settled law that we ought not to disturb it. It is true that for eight years that decision does not appear to have been questioned by any judge, and there is no doubt it has been followed by other judges in courts of first instance. It was however doubted in *Leggott* v. *Barrett*, 15 Cha. Div., 306, by Lord Justice JAMES and myself, and has never received the sanction of the Court of Appeal. I think that under these circumstances we ought not to treat it as binding and encourage parties to shape their contracts on the authority of a case which the House of Lords may determine to have been erroneously decided. It is not generally desirable to decide an important point on an interlocutory application; but as we come to the conclusion on a question of law that the plaintiff is not entitled to the injunction, it is, we think, right for us to decide the matter now."

LINDLEY, L. J., said:—"The rights of the parties in this action depend on the agreement into which they have entered. That agreement was not an ordinary contract for sale, but an agreement to settle disputes between the parties. If we look at the position of the parties we find

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that the plaintiff, Theophilus Pearson, as trustee, had carried on this business, and that James Pearson, the defendant, was one of the *cestuis que trust*, had helped in the business, and had been employed in it as a traveller. By the agreement James Pearson gives up all his interest in the business for £2,000. Pausing there, although the good-will is not in terms mentioned in the agreement, I think that it is included; for a man who sells all his interest in a business cannot retain any interest in the good-will. Then by clause third it is provided that nothing in the agreement shall be deemed to restrict or prevent James Pearson from carrying on the business of a potter, earthenware manufacturer, or any other business, at such place as he may think fit, and under the name of James Pearson. That is an important stipulation which obviously was introduced for the benefit of James Pearson. By it he says in substance —Though I have sold to you all my interest in this business I am to have liberty to carry on business in my own name where I please. That means,—I am to be as free to carry on business as if I had not sold to you, and in the same way as if I had not sold to you. I think, therefore, that this case is not governed by *Labouchere* v. *Dawson*, and that the defendant, assuming that case to have been rightly decided, may yet solicit the custom of any. As to *Labouchere* v. *Dawson*, there has been a difference of opinion. For my own part I am of the opinion that it was rightly decided. It is true that, as was pointed out in *Walker* v. *Mottram*, 19 Cha. Div., 355, it went beyond the preceding cases; but did it go beyond them so far as to be wrong? It was on the principle that a person who has sold the good-will of his business shall not derogate from his own grant by doing what he can to destroy the good-will which he has sold. It is true that if this principle were logically carried out it would prevent the vendor carrying on the same sort of business as he has sold; and if the court had held that he could not I do not think that the decision could have been complained of. It startles a non-lawyer to be told that if he buys a business and its good-will, the

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seller can immediately enter into competition with him next door. The courts however have held that this can be done; but I think that Lord ROMILLY was right in not applying this doctrine to a case where the vendor directly applies to his old customers to induce them to continue dealing with him instead of the purchaser. Sir GEORGE JESSEL and the Lord Justice LUSH were of the same opinion; but I believe there are other judges besides my learned brothers who think the decision in *Labouchere* v. *Dawson* wrong."

The plaintiffs cite *Hall's Appeal*, 60 Penn. St., 458, and *Angier* v. *Webber*, 14 Allen, 211. In the first case it is said that "good faith requires of a party who has sold the good-will of his business that he should do nothing which tends to deprive the purchaser of its benefit and advantages. The bill charges and the evidence shows that he is holding himself out to the public by advertisement as having removed from his former place of business, No. 1313 Vine street, to his present place of business, No. 1539 Vine street, where he will continue his former business. It is clear that he has no right to hold himself out as continuing the business which he sold to the plaintiff, or as carrying on his former business at another place to which he has removed."

In *Angier* v. *Webber* the defendant sold the good-will of a business to the plaintiff, and stipulated in writing not to do anything "which should in anywise impair or injure said interest and good-will." It was held that it was a violation of this agreement to carry on the same kind of business at a place near the old one.

In *Bergamini* v. *Bastian*, 35 Louis. Ann., 60, there was a sale of a commercial establishment, together with the good-will thereof. The court said:—"Holding, as we do, that he was not in the least precluded by any stipulation in his contract with the plaintiff from resuming the business of a saloon and lunch house in any portion of the city, we must recognize his right to resort to ordinary means of advertising his business, and to other modes of soliciting patronage or custom; and the evidence, which we have read carefully

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and considered materially, fails to show that he directed his efforts to draw custom from Bergamini more than from any other dealer in the same line of business."

In *Hanna* v. *Andrews*, 50 Iowa, 462, the court said:—"What the appellee agreed to do was to transfer his list of lands and correspondence and the good-will of his business, and give letters of introduction. If we should concede that the sale of the good-will of a business, without restriction upon the seller, would raise an implied agreement not to re-engage in the same business in the same place, such concession would not, we think, aid the plaintiff. By the terms of the appellee's contract it was allowable for him, after three years, to re-engage in the land agency business, and the only question is as to what extent he may do so. It appears to us that when the appellant provided for the return of the appellee to the business after three years, he opened the door to the appellee to come in and compete with him in every respect. The appellee, if applied to, could certainly accept the agency of the lands in question. He could certainly compete for the agency by general advertisement, by acquaintance and by fidelity to business. The courts, we think, could not properly undertake to draw the line between such competition and that which should be carried on by more or less direct solicitation."

In *Barrett* v. *Percival*, 5 Allen, 345, the marginal note says that "a bill of sale of a stock of goods in a store and the good-will of the vendor's trade and all the advantages connected with the store, does not import an agreement by the vendor not to engage in a similar business; and parol evidence is incompetent to prove such an agreement as a part of the consideration for the price named in the bill of sale." The court said:—"The other objection is equally decisive. The parties having reduced their contract to writing, their rights under it must depend on the true interpretation of its terms, irrespective of any parol evidence of what took place previously to or at the time of the making of the agreement. Looking only at the written contract, we are unable to see any clause which can be

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construed into an agreement by the defendant's testator to refrain from engaging in a similar business to that which he sold to the plaintiffs. There was no express agreement to that effect, nor can any be implied from that clause of the bill of sale by which the vendor conveys the good-will of his trade and all the advantages connected with the store and premises. It was nothing more than a sale of the custom or trade which appertained to the place where the vendor was then carrying on his business. This was the real subject matter of the contract between the parties, and it cannot be construed as imposing any personal restraint on the vendor, or as restricting his right to transact a similar business in another place at a subsequent time. Whenever such is the intent of the parties, it is carried into effect by an express stipulation which, if not in undue restraint of trade, may be valid and binding. But we know of no case where any such agreement has been raised by mere implication arising from the sale of the good-will of a person's trade in connection with a particular place of business where it has been carried on."

In *White* v. *Jones*, 1 Abbott's Practice Reps., N. S., 337, it is said:—"The sale by Jones to White on the dissolution of their copartnership of his interest in it, and of the good-will of the entire business, did not deprive Jones of the legal or equitable right to engage in and prosecute a similar business in the vicinity of the place of business of the dissolved firm. This seems to be so well settled that nothing more is necessary than to refer to some of the prominent cases affirming this doctrine. *Crutwell* v. *Lye*, 17 Ves., 344; *Davis* v. *Hodgson*, 25 Beav., 177; *Churton* v. *Douglas*, 1 H. V. Johnson, 176; *Howe* v. *Searing*, 6 Bosw., 354; *Dayton* v. *Wilkes*, 17 How. Pr., 510. The complaint does not allege that the defendant in prosecuting his business at 710 Broadway represents it to be the same business which the dissolved firm carried on at 658 Broadway, or that he is conducting business at 710 Broadway as successor to the late firm of Jones & White. It does allege that Jones has opened letters, etc., directed to Jones & White, to Jones,

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White & Co., and to Jones, White & McCurdy, intended for the plaintiff; that such letters were from customers of the late firm of Jones & White, and contained orders for goods; and that Jones has filled such orders and received payment for the goods ordered; and judgment is prayed that Jones be enjoined from receiving or opening any letters or orders directed as aforesaid, or from filling the orders, or from in any way interfering with the business of the former firm or the good-will thereof; and for damages. The defendant has a right to establish and carry on in his own name a business similar to that of the late firm so long as he does no act to lead customers into the belief that he is carrying on business as the successor of the old firm, or that when dealing with him they are dealing with White or with the person succeeding to the business of the late firm of Jones & White."

If, therefore, we subject the defendant to the obligation which rests upon Nathan Babcock, the plaintiff's fourth reason of appeal remains without foundation.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

THE CONNECTICUT SPIRITUALIST CAMP-MEETING ASSOCIATION *vs.* THE TOWN OF EAST LYME.

New London County, May T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

A camp-meeting association, chartered for religious, charitable and social purposes, with power to hold, lease and sell real estate and to erect wharves and keep and operate steam, sail and other boats in connection with its camp grounds, purchased a large tract of land for a camp ground and erected a central building upon it, known as the pavilion, two stories in height, the lower story of which was an open hall, used on Sundays exclusively for religious services, and on week days for social gatherings and amusements, for admission to which a small fee

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was sometimes charged, with a place for the sale of refreshments; the upper story containing lodging rooms which were occupied without charge by the speakers of the association and for a small charge by other visitors; all the receipts from the sale of refreshments, from admission fees, from the lodging rooms and from its boats, going into the general treasury and being used for the general purposes of the association. Held that the building was not exempt from taxation as a church, under Gen. Statutes, p. 154, sec. 12.

The statute does not intend to exempt any building earning money applicable to secular uses.

The association, by instruments in the form of a lease, conveyed numerous lots, for a price paid in advance, to persons who erected cottages thereon. The leases were to the lessees and their heirs and assigns, but were forfeitable on the breach of certain conditions. Held that the title of the lessees was a base or determinable fee, and that the lots and the buildings on them were to be taxed as the property of the lessees and not as that of the association.

[Argued May 26th—decided July 27th, 1886.]

ACTION in the nature of an appeal from the doings of the board of relief of the defendant town; brought to the Superior Court in New London County, and heard before *Torrance, J.* Facts found and judgment rendered for the plaintiffs, and appeal by the defendants. The case is fully stated in the opinion.

S. Lucas and *C. W. Butler*, for the appellants.

J. Halsey and *J. M. Hall*, for the appellees.

PARDEE, J. The plaintiff was incorporated by the legislature of this state in 1882, under the name of the Connecticut Spiritualist Camp-Meeting Association, with power to take by purchase, gift or bequest, and to hold and enjoy, both real and personal estate of whatsoever nature, and to sell, lease, divide and otherwise dispose of the same, and the income therefrom, for religious, charitable and social purposes, to own and operate steam, sail and other boats in connection with the association's camp grounds, and to construct and maintain wharves and docks for use in connection with the business of the association. Its capital stock was fixed by the charter at eight thousand dollars, divided into

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shares of forty dollars each, transferable as provided by the by-laws. In the year 1882 the association purchased a tract of land containing about thirty-six acres, in the town of East Lyme, for a camp-meeting ground, which, since its purchase, has been and is now used by the members of the association as a camp-meeting ground during the summer season. Some time before the first of October, 1883, the association erected upon this tract a building known as the pavilion or tabernacle, which building it has ever since owned and used. This building the assessors of the town of East Lyme assessed as property of the association subject to taxation. The association appealed from such assessment to the Superior Court on the ground that the building was exempt from taxation as a church or place of worship. The Superior Court held it to be so exempt, and the town of East Lyme has brought the case before this court upon an appeal from that judgment.

The building is sixty feet long and two stories in height. The upper story is divided into twenty-seven small rooms, which are used as lodging rooms, principally by the speakers and preachers of the association, who pay nothing for such use, and by visitors, who are charged a small sum. The lower story is an open hall and is mainly used for the holding of the public religious services of the association and its other meetings, when such services and meetings are not held in a grove near by. On one side of this hall a counter has been fitted up, where, when the room is not used as a place of worship or for public meetings, refreshments are sold by the association. The hall is also used by members of the association and their children and visitors as a place for dancing and parlor-skating, for admission to which a small fee is charged. On Sunday the hall is used solely for religious exercises and public worship.

Because of the powers and privileges granted to and accepted by the corporators they became and are a trading or financial corporation. As such it erected the building known as the "pavilion." This it uses for religious worship exclusively on Sundays and on week days when re-

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quired; but on other week days it opens it for public amusement and for pecuniary profit. The receipts for this latter use go into the corporate treasury and are mingled with those from sales or leases of land and wharves, from the use of steam and sail boats, and from any other business in which the corporation may engage. These aggregated receipts it may devote either to religious, charitable or social purposes. The last use is one of wide reach; indeed it is difficult to place limitations upon it. With all that is charitable within it, it has great possibilities which are not charitable in any sense; which are purely secular. The statute exempts buildings or portions of buildings *exclusively* occupied as churches. Gen. Statutes, p. 154, sec. 12. If a trading or financial corporation owns a building and permits its use for purposes of religious worship and yet retains and exercises the right to use it for purposes of public amusement and corporate profit and apply the receipts therefrom to secular uses, the building is not within the exemption.

The determination of the question presented does not depend upon the proportion which the time given to the religious, bears to that given to the secular use; nor upon the amount of resulting income; because the statute does not intend to exempt any building earning money applicable to secular uses. Upon the facts therefore there was error in exempting the "pavilion."

A further question is made with regard to the party who should be taxed for the cottages erected upon the camp-meeting ground. These lots were leased by the association to the different occupants, for a sum paid down in advance for the entire term of the lease; the lease being to the lessee and "his heirs and assigns forever," but forfeitable upon the breach of certain conditions. Upon these lots the lessees have erected cottages. We think the title of the lessees to be what is known in law as a determinable or base fee, and that the lessees are to be regarded as the owners, and that the lots and buildings upon them are to be taxed as their property and not that of the association. In 4th Kent's

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Commentaries, 5th ed., p. 9, it is said—"A qualified, base or determinable fee (for I shall use the words promiscuously) is an interest which may continue forever, but the estate is liable to be determined, without the aid of a conveyance, by some act or event, circumscribing its continuance or extent. Though the object on which it rests for perpetuity may be transitory or perishable, yet such estates are deemed fees because it is said they have a possibility of enduring forever."

There is error in the judgment complained of, so far forth as the exemption of the building known as the pavilion is concerned.

In this opinion the other judges concurred.

CHARLES U. COTTING *vs.* THE NEW YORK & NEW ENGLAND RAILROAD COMPANY.

New Haven Co., June T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS AND GRANGER, Js.

A railroad company for the purpose of raising money to pay a large floating indebtedness, issued under legislative authority and sold for cash nineteen thousand shares of preferred stock, dividends on which to the amount of seven per cent. annually were to be paid from the net earnings of the company before any dividends on the common stock, the seven per cent., or any part of it, where not paid by dividends, to accumulate. A general statute provided that no corporation should declare any dividend while its capital was impaired. There had been a large deficiency prior to the issuing of the new stock. Held that a dividend could be made on the preferred stock out of the net earings of the road since the issuing of the same, without regard to the prior deficiency.

[Argued June 3d—decided July 20th, 1886.]

AMICABLE SUIT upon an agreed statement of facts; brought to the Superior Court in New Haven County, and

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reserved for the advice of this court. The question submitted was as to the right of the defendant company to declare a dividend on its preferred stock while the capital stock of the company was impaired. The case is fully stated in the opinion.

H. D. Hyde, of Boston, and *A. Brandegee*, for the plaintiff.

It is provided by statute that no "corporation shall declare any dividend while its capital is impaired, and all officers who shall vote in favor of declaring such dividend, in case such dividend is declared, knowing or having the means of knowledge that such capital is impaired, shall be jointly and severally liable in an action on this statute for all losses resulting from said declaration of dividend, and be guilty of a misdemeanor." Gen. Stat., p. 280, sec. 16. The General Assembly in 1884 passed the following special act with regard to the present railroad company:—

"Said railroad company is authorized, by consent of a majority in interest of the whole amount of its stock, the same to be represented in person or by proxy at a meeting duly called for that purpose, to issue not exceeding fifty thousand shares of preferred stock of the par value of one hundred dollars each, the holders of which shall be entitled to receive out of the net earnings of the company dividends of seven per cent. per annum, the same to be paid in semi-annual instalments in such sums as the directors of said corporation may determine: and if the net earnings of any year shall not be sufficient to pay said dividends, the same shall be cumulative and payable out of the net earnings of any subsequent year, but without interest; said dividends and accumulations to take priority over the dividends on all other stock of the company, until, in addition to said dividends on said preferred stock, there shall be paid an equal dividend upon the common stock, after which any dividend declared by said company shall be divided equally between said preferred and common stock."

Prior to the passage of this special act it is clear, under

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the General Statutes, if applicable, that no dividend could be paid upon the common stock of the company so long as the deficiency of $704,095.45 mentioned in the submission exists. It appears by the submission that the net earnings of the company for the six months ending March 31st, 1886, amount to the sum of $93,413.38, and that there are no debts or liabilities now due or payable on which the same is needed. The number of shares of preferred stock issued is 19,000, bearing dividends at the rate of seven per cent. per annum, and there is due upon the same a six months' dividend amounting to $66,500. The special act, as agreed in the submission, was passed for the purpose of enabling said company to pay its floating debt, amounting to the sum of about two million dollars, and to discharge the receiver, who was then in possession of the property of the company. It could be of no service to the company unless it should enable it to market the preferred stock authorized, and thereby pay the floating debt and discharge the receiver. To do this the company was authorized to pay seven per cent. upon its preferred stock, with the right to further dividends after the common stock. The special act was therefore an emergency act to save the corporation and prevent the foreclosure of its mortgages, and is to be construed in the light of the emergency and the purpose for which it was passed.

If the legislature had intended that the preferred stock should receive dividends only when there was no impairment of capital, and when the dividends had been earned, it would have said so. The act provides that the holders of preferred stock "shall be entitled to receive out of the net earnings of the company dividends of seven per cent. per annum, the same to be paid in semi-annual instalments in such sums as the directors of said corporation may determine; and if the net earnings of any year shall not be sufficient to pay said dividends, the same shall be cumulative and payable out of the net earnings of any subsequent year."

The purchaser of preferred stock is clearly entitled to all

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the benefits of the statute authorizing its issue, and the only limitation upon his right is, that the net earnings shall be sufficient to pay the dividends, and that the payments shall be made each year, if possible. The company, at the time the act was passed, was in the hands of a receiver, and had a floating debt of about two million, which the sale of the preferred stock has paid, from which the legislature and the purchaser of preferred stock had a right to infer that there might be an impairment of capital for several years; and if that impairment be made up out of net earnings before any dividends could be earned and applied to preferred stock, neither the legislature nor the company could have reasonably believed that the preferred stock would have found a market in time to have relieved the necessities of the company and to have prevented a foreclosure.

The General Statutes say there shall be no dividends declared while the capital is impaired. With this law in force the corporation is doomed and foreclosure of its mortgage inevitable. The legislature intervenes by a special act, and gives the corporation special power and authority for a special purpose, and the special act must be construed with reference to the existing state of affairs and such special purpose. To give it any other interpretation is to make the act nugatory and worthless. To construe the act as authorizing the directors to pay dividends on preferred stock out of the net earnings without reference to the impairment of capital, is the only construction consistent with the situation of the company at the time the act was passed, and with the purpose for which it was passed. A special act of itself indicates that the existing law is deficient or lacking in some respect, and is passed to supply that deficiency. The corporation was tied hand and foot under the then existing laws. The special act was to release it, and the court, in construing the statute, will keep this fact constantly in mind.

It is difficult to cite authorities relating to special acts, for each act is enacted with reference to the peculiar circumstances of each case, which rarely are found to exist in

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a subsequent case, and the real meaning of the act must be determined by the court upon a consideration of the special circumstances under which it was passed, and without much assistance from analogous cases. The following cases support the construction claimed by the plaintiff: *Dent* v. *London Tramway Co.*, L. R., 16 Ch. Div., 353; *Williams* v. *Parker*, 136 Mass., 204; *West Chester & Penn. R. R. Co.* v. *Jackson*, 77 Penn. St., 321; *Nickals* v. *New York, &c., R. R. Co.*, 15 Fed. Rep., 575; *Town of Granby* v. *Thurston*, 23 Conn. 420; *State* v. *Norwich & Worcester R. R. Co.*, 30 id., 290; *Stoddard* v. *Shetucket Foundry Co.*, 34 id., 542.

S. E. Baldwin, for the defendant.

1. Dividends cannot be declared on an impaired capital. "It is a fundamental rule that dividends can be paid only out of the profits, or the net increase of the capital of a corporation, and cannot be drawn upon the capital contributed by the shareholders for the purpose of carrying on the company's business. * * * The managing agents, and even the holders of a majority of shares, have no authority to diminish the prescribed capital of the company, by distributing a portion of it among the stockholders in the shape of dividends." Morawetz on Private Corporations, § 344; 2 Redfield on Railways, § 240; Thompson on Stockholders' Liabilities, §§ 18, 19. "The stock of a corporation is its only basis of credit. Unlike a partnership, its members generally are not individually liable for its debts. * * * Hence it is of vital importance that the law should rigidly guard and protect the capital stock. Otherwise, especially in these days, when so large a portion of the business of the country is carried on by corporations, confidence, on which the prosperity of the country largely depends, would be seriously impaired. Hence it is that in equity the capital stock of a corporation is now regarded as a trust fund for the payment of debts. The creditors have a lien upon it, which is prior in point of right to any claim which the stockholders, as such, can have upon it; and courts will be astute to detect and defeat any scheme or device which is

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calculated to withdraw this fund, or in any way to place it beyond the reach of creditors." *Crandall* v. *Lincoln*, 52 Conn., 73, 94. Our statutes expressly recognize these principles, and provide an adequate sanction. Gen. Stat., p. 280, sec. 16. A statute equally explicit has existed since 1828 in New York, another of the states by which the company is chartered. Rev. Stat. of N. York, ch. 18, part. 1, tit. 4, § 2. This statute has been recently construed by the Court of Appeals of that state, in a suit brought to enjoin the Western Union Telegraph Co. from declaring a stock dividend, and the views we have presented sustained and enforced. *Williams* v. *Western Union Telegraph Co.*, 93 N. York, 162, 188. The defendant company, chartered by four states, is subject to the laws of each of them, and is in each state for all the purposes of local government a domestic corporation. *Stone* v. *Farmers' Loan & Trust Co.*, 116 U. S., 307, 333. It is therefore subject to the provisions of the general statutes of Connecticut and New York as fully as if both states had precisely the same laws.

2. Unless the Preferred Stock Act of 1884 has relaxed these general rules of law, and modified the provisions above cited from the public statutes, it would seem that no dividend can be declared out of the preferred stock of the company any more than on its common stock, while its capital remains impaired. Preferred stock is, as to dividends, preferred to ordinary stock. "But it is stock, and part of the capital stock, with the characteristics of capital stock. One of such characteristics is that no part of the property of a corporation shall go to reimburse the principal or capital stock, until all the debts of the corporation have been paid. It would require the clearest language to admit of the application of a different rule to any capital stock. * * * The holders of preferred stock have the same relation by virtue of the certificate to the corpus of the property which they have to its net earnings. Their position in regard to both is one inferior to that of all creditors. They are not preferred as to reimbursement of principal, or as to a right to net earnings over any one but the holders of common

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stock. The interest to be paid to them is not to be paid absolutely, as to a creditor, but only out of net earnings, the same fund out of which the dividends on common stock are to be paid. Though called "interest," it is really a dividend, because to be paid on stock, and out of net profits. * * * Creditors may resort to the body of their creditor's property for interest as well as principal. But these holders of the preferred stock are limited, for any increase or interest, to the net earnings. There is nothing in the certificate which clothes them with a single attribute of a creditor, while it specially gives them, as stockholders, an equal interest with the stockholders in the net earnings in each year, after paying therefrom seven per cent. on each share of stock, preferred and common." *Warren* v. *King*, 108 U. S. Reps., 389, 396, 398. In the foregoing case the stock certificates made the preferred stock "a first claim upon the property of the company after its indebtedness," and spoke of their seven per cent. as "interest," yet it was held that they had no rights to the corpus of the railroad property, or against subsequent creditors, in case of a foreclosure. A preferred stockholder has the right to vote and share in directing the affairs of the corporation, and a right to share in its surplus profits, if any, after each class of stock has received a dividend, and such rights are inconsistent with the position of a creditor. The act of 1884 entitles the plaintiff to a dividend out of the net earnings. But such net earnings can only come from a net increase of the capital or principal assets, so that it is worth more, or at least on the books of the corporation is valued as worth more, than the amount of the capital stock issued. The term "net earnings," in the sense intended by the act, obviously means that both operating expenses and fixed charges shall be deducted from the gross earnings before the "net earnings" can be ascertained, and then, before they can be divided, come up the further questions of impairment of capital and the proper time to declare a dividend. "Net earnings" is the same thing as "net profits." *Phillips* v. *Eastern R. R. Co.*, 138 Mass., 129. The balance

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sheet of the company shows that it owes over $16,000,000. Most of this is secured by mortgage, and not yet payable. About $355,000 is apparently payable presently, and is overbalanced by some $500,000 now due to the company. But all are debts due now, and certainly payable some day. Suppose that there were floating debts now not only payable but pressed for payment, to the amount of the dividend claimed. Would it be contended that such creditors could be postponed, or the funds withdrawn to which they would naturally resort,—cash, rather than an equity of redemption in a railroad under fifteen millions of mortgages? In the case of the Rutland Railroad this question was presented. A second mortgage, having been foreclosed, was turned into stock, the charter authorizing the issue of a preferred or guaranteed stock in exchange for the first mortgage bonds. This stock was to be entitled to receive seven per cent. dividends from the "earnings and income" of the road. Such stock was issued, and the new company having earned enough to pay the dividends, during a certain period, a preferred stockholder brought suit to compel payment. The new company, however, had run up a small floating debt, and claimed that no dividend could be declared till this was paid, and so the court held. *Chaffee* v. *Rutland R. R. Co.*, 55 Verm., 110. Another recent case in point is that of the Belfast and Moosehead Lake Railroad, in Maine. There was a preferred stock of about $380,000, and the by-laws provided that "dividends on the preferred stock shall first be made semi-annually from the net earnings of said road, not exceeding six per centum per annum, after which dividend, if there shall remain a surplus, a dividend shall be made upon the non-preferred stock," &c. The road cost over a million, and in 1882 had $10,000 on hand in cash, and a sinking fund of $26,000. Its total liabilities were $150,000 mortgage bonds due in 1890, its capital stock which was almost $648,000, and a note of $101,000, to its principal stockholder, given in 1871, which had been paid down to $87,000. It was leased and had a net income of about $36,000 from the rent, out of which it was paying

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four and one-half per cent. dividends on the preferred stock, and using the balance to reduce the note. Both preferred and common stockholders sued for dividends from this balance, but the court refused to order any to be declared. *Belfast & Moosehead Lake R. R. Co.* v. *Belfast*, 2 Eastern Rep., 79. In this case it will be observed that the company had a capital unimpaired, and indeed a large surplus of fixed assets over the total amount of its capital stock and debts, and yet the court left it, with annual net earnings of $36,000, to pay the preferred stockholders only 4½ per cent., or $17,100, instead of 6 per cent. or $22,800, and to give the common stock nothing, because the directors preferred to apply the balance on what was practically a funded debt, and for a sinking fund to pay their mortgage bonds. The provisions of the act are not to be construed like those found in many charters authorizing preferred stock, where the dividends are limited in any year to the net earnings of that particular year. In the present case the full dividends are to be paid from October 1, 1885, as and whenever from the profits of any year or any series of years there are funds sufficient for the purpose. This takes it out of the reason of those cases where, because it was "now or never," preferred stockholders were allowed to claim a dividend, which would otherwise go to increase or strengthen the capital. *Nickals* v. *New York, Lake Erie & Western R. R. Co.*, 15 Fed. Rep., 575, 579, 580; *Dent* v. *London Tramway Co.*, L. R., 16 Ch., Div. 353.

CARPENTER, J. This case must be determined by its own peculiar circumstances. We find no case so nearly like it that it may fairly be regarded as a precedent.

At the beginning of the year 1884, the New York and New England Railroad Company, with a capital stock amounting to about $20,000,000, par value, and a funded debt of over $16,000,000, secured by mortgages, found itself embarrassed by a floating debt of nearly $2,000,000, for the immediate payment of which it had no means. To avoid suits and attachments, and if possible to prevent a fore-

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closure of the mortgages, the property and affairs of the company were placed in the hands of a receiver. The receiver had in his possession the franchise and property of the company, subject to the mortgages, which had an earning capacity; and the possibility of the net earnings being more than sufficient to pay the interest on the funded debt, was the only source of means for the payment of the floating debt.

It was believed that the road would be able to earn enough to pay the operating expenses and fixed charges and also to pay the interest on the floating debt. Its present ability to do more was doubtful. In that state of things obviously the payment of the principal of the floating debt would have to be indefinitely postponed. It was not reasonable to suppose that the affairs of the company could continue in that condition for any considerable time. It was necessary that some scheme should be devised by which the floating debt could be paid. In this emergency the act of 1884 was passed, which authorized the company, in addition to the then existing authority, to use the proceeds of the sales of the second mortgage bonds previously authorized, but not then issued, "for the purpose of paying any present or future liabilities of said company, or to use said second mortgage bonds as collateral security for money borrowed for that purpose." It also authorized the company, by consent of a majority in interest of the whole amount of its capital stock, to issue not exceeding fifty thousand shares of preferred stock of the par value of one hundred dollars each. The company had its option to resort to either one of the methods authorized; but it was not expected that both would be resorted to, nor was it practicable to do so.

The latter mode was adopted, and preferred stock to the number of nineteen thousand shares was sold for cash, with the avails of which the floating debt was paid. Dividends on the preferred stock to the amount of seven per cent. annually were to be paid from the net earnings of the company; and the time during which the holders were entitled to such dividends commenced to run October 1st, 1885.

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Consequently from that day the net earnings were pledged to the payment of such dividends. The net earnings for the first six months, ending March 31st, 1886, were more than sufficient to pay three and a half per cent. on the preferred stock. The company is willing to pay this dividend, provided it can be legally paid.

The general statute provides that "no corporation shall declare any dividend while its capital is impaired, and all officers who shall vote in favor of declaring such dividend, in case such dividend is declared, knowing or having the means of knowledge that such capital is impaired, shall be jointly and severally liable in an action on this statute for all losses resulting from said declaration of dividend, and be guilty of a misdemeanor."

The ninth paragraph of the case as stated is as follows:—"Said defendant company's general balance sheet on March 31st, 1886, showed a balance of $704,095.45, charged to profit and loss account, which represents a deficiency in its earnings, as compared with its operating expenses and fixed charges, during a period prior to October 1st, 1885." The question submitted is whether, until that deficiency is made good, any dividend can lawfully be declared and paid to the holders of the preferred stock.

The case further shows that the "sum of $93,413.38 is now on hand in the treasury of the defendant, in cash, and there are no debts or liabilities now due and payable, which the sum is needed to liquidate."

Obviously, if the second mortgage bonds had been resorted to for the purpose of raising the necessary funds, no such question could have arisen. The holders of such bonds, whether holding them in fee or as collaterals, would have been creditors and clearly entitled to interest from the net earnings, regardless of any deficiency in the accounts. While this is by no means conclusive, yet it tends to show that it was the intention of the legislature that the net earnings should be pledged to secure those who might advance money to pay the floating debt. It was immaterial to the state whether the money was raised in the one form or in

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the other. The important thing to be done, in the interest of all concerned, was to raise money upon adequate security. We can hardly suppose that the legislature contemplated less security in one form than in the other. There is therefore some reason for believing that it was the will of the legislature that the holders of the preferred stock should have the same security that the holders of the second mortgage bonds would have had if such bonds had been issued under the act; and they certainly would not have been affected by the deficiency in the accounts. Nevertheless, if the holders of the preferred stock hold it as such stock is usually held, with no unusual or extraordinary rights and privileges, they must submit to the legal incidents of such stock; and among those incidents is this, that they are merely stockholders and not creditors; and that no dividends can be lawfully declared and paid to them but from net profits or surplus; and net profits or surplus ordinarily means what is left after making good the capital. It is unnecessary to cite authorities, for on this point we agree with the learned counsel for the common stockholders.

It was doubtless competent for the legislature in providing for an emergency like this, to authorize the issue of preferred stock upon such terms, within due constitutional limits, as it pleased. The vital question in the case then is, whether the legislature intended the issuing of ordinary preferred stock, or preferred stock the holders of which should be entitled to extra rights and privileges. We are of the opinion that the latter was intended. The act, referring to the stock, says:—"the holders of which shall be entitled to receive out of the net earnings of the company dividends of seven per cent. per annum, the same to be paid in semi-annual instalments, in such sums as the directors of such corporation may determine; and if the net earnings of any year shall not be sufficient to pay said dividends, the same shall be cumulative and payable out of the net earnings of any subsequent year, but without interest; said dividends and accumulations to take priority over the dividends on all other stock of the company, until, in addition to said divi-

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dends on said preferred stock, there shall be paid an equal dividend upon the common stock, after which any dividend declared by said company shall be divided equally between said preferred and common stock."

Thus the intention is clear that the annual net earnings shall be pledged for the payment of the dividends on the preferred stock for that year and any arrearages for previous years; thus securing to the holders of that stock payment of such dividends in full for every year before any dividends can be paid to the holders of the common stock.

The term "net earnings" may be, and often is, the equivalent of surplus or net profits; but we think it is not used in that sense here. As we have noticed, it is net earnings for a limited time, and not the net earnings for the whole period of time the corporation has existed. The latter may properly be called surplus or profits. To ascertain the surplus on the 31st day of March, 1886, the state of the whole account must be considered, including of course the amount charged to profit and loss prior to October 1st, 1885; but to ascertain the net earnings for the six months ending March 31st, it is only necessary to deduct from the gross earnings the operating expenses for that time, including repairs and a proportional part of the fixed charges. That in view of the circumstances is a reasonable interpretation; for it must be presumed that the legislature intended measures that should be effectual to give relief to the company. Now if it had been intended that a prior deficiency of nearly three quarters of a million should be considered in determining the net earnings, we think the legislature would have said so in express terms, or in language sufficiently broad and comprehensive to include such a deficiency. Had it done so it is highly probable that the stock would not have been taken, and thus the object of the legislature would have been defeated. As the language of the act will admit of the interpretation we have given it, and will make it more effective than any other construction, it seems to us that it is the more reasonable one.

Again. The act is an enabling one; it is also special,

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applying only to this corporation and to those who may contract with it as therein prescribed. Its sole purpose being to authorize the making of certain contracts, it becomes important to inquire how the parties immediately concerned understood and applied it. Manifestly it should be enforced as both contracting parties understood it at the time, if the language used will fairly bear the meaning they gave to it, and especially if the act as thus construed is not contrary to public policy. We see nothing in it which contravenes public policy. True, the policy of the law will not permit corporations, while they continue in business, to distribute their capital among stockholders in the form of dividends; and it is not the privilege of preferred stockholders thus to consume the common stock. We do not intend so to construe this act as to allow that to be done in the case of this corporation. Hence we limit the decision to the deficiency which existed at the time of issuing the preferred stock. Should a deficiency hereafter come into existence it will stand upon a very different footing. The present deficiency existed and was known to the legislature when the act passed; the company with knowledge of its own condition entered into this contract; the common stockholders thus virtually said to subscribers to the preferred stock—"The present deficiency in the accounts shall be no obstacle to your dividends." Good faith requires that this understanding should be carried into effect. That we have correctly interpreted this transaction is apparent from the terms of the contract as contained in the certificates of stock. An examination of the certificate will show us clearly how the contracting parties construed the act. The material part is as follows:—"These shares of preferred stock are part of an issue not exceeding fifty thousand shares of one hundred dollars each, represented by certificates differing only in the year of issue. The holder of this certificate is entitled to seven per cent. annual dividend out of the net earnings of the company from the first day of October in the year above written, payable semi-annually and cumulative, without interest, before a dividend is paid

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upon the common stock or upon subsequent issues of preferred stock. To entitle the holder hereof to a full annual dividend, this certificate must be surrendered at the time the last instalment of the same is paid, and exchanged for a certificate of the next year's issue."

There are three peculiar features of this certificate. In the first place, it is issued only for one year. Whenever a full dividend for one year is paid, it must be surrendered, cancelled, and a new one issued for the succeeding year. In this respect, and so far as dividends are concerned, it is a mere certificate of indebtedness. The object of this is not very apparent, but was probably designed to promote convenience in keeping the accounts. The stock account will show what dividends are paid in full and what are in arrears. This was considered desirable on account of the second peculiar feature of the certificate, which is, that dividends are cumulative. Ordinary preferred stock payable from the surplus, or net profits, takes its chances with common stock; and if, from any cause, a dividend fails, it is gone. But here the agreed dividend, however long payment may be deferred, keeps its place as a lien upon the net earnings, and must be paid in full before any payment can be made to the holders of the common stock. In this respect the preferred dividends closely resemble the interest on bonds. This evinces an intention that the holders of preferred stock shall have special advantages. In form stock is sold and issued, and the purchasers become stockholders, but in substance, as to dividends, they have the advantages of creditors. Then, in the third place, the dividends are to be paid from the net earnings from a given time—October 1st, 1885. At that time this deficiency existed, but as it did not represent a debt calling for immediate payment, the legislature said to the company—"You may raise money in either one of the two ways indicated, by pledging your net annual earnings as security, and whichever way you may adopt the apparent deficiency shall not affect the security."

The company accepted the proposition and embodied it

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in the certificates of stock. We cannot doubt that the parties to the contract so understood it. Clearly it should be enforced as the parties intended it. Otherwise we shall substitute for the contract which the parties did make, one which they did not make. In that event one party will surely be defrauded.

The Superior Court is advised that the company may lawfully declare and pay the proposed dividend.

In this opinion the other judges concurred.

ORRANDO P. DEXTER *vs.* WILLIAM E. MCCREADY.

Fairfield County, March T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

Reasonable care is care proportioned to the danger to be guarded against.

It is not the duty of the court to instruct the jury that certain facts, if proved, will constitute negligence, but to leave all the evidence to the jury for them to decide upon it whether the conduct in question was that of an ordinarily careful person in the circumstances.

There is no different rule for determining what is negligence in a plaintiff from that which is applied in the case of a defendant.

It is a common and proper practice for the judge, in charging the jury, to state the claims of both parties upon all the questions of fact.

[Argued June 17th—decided July 20th, 1886.]

ACTION for an injury from a collision of the defendant's horse and carriage with the horse and carriage of the plaintiff; brought to the Court of Common Pleas of Fairfield County, and tried to the jury before *Hall, J.* Verdict for the defendant and appeal by the plaintiff for error in the charge of the court. The case is sufficiently stated in the opinion.

J. S. Seymour, for the appellant.

J. B. Hurlbutt, and *G. Stoddard*, for the appellee.

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PARK, C. J., The defendant's horse took fright and ran away, and his carriage collided with the plaintiff's horse and carriage in the public street of Norwalk, and the plaintiff's property was injured.

It appears in the case that on the trial of the cause each party claimed that the other was negligent, and that the collision was the result of such negligence.

It further appears that all the questions involved in the case were submitted by counsel to the jury as questions of fact, and that no questions of law were in controversy between the parties.

The counsel for the plaintiff made but one request of the court to charge the jury, which was as follows:—"It was not enough for the defendant to take such care of his horse on a crowded thoroughfare, as would have been sufficient on a lonely country road or on his own land; that in proportion as the probability increased that his horse might be frightened, or might start or be interfered with, and others injured, in that proportion must his care increase."

The substance of this request is, that the defendant was bound to exercise care in proportion to the danger that existed of his horse doing harm to others. All this is comprehended by the phrase, the defendant was bound to exercise reasonable care in all the circumstances then existing. Reasonable care requires care to be exercised in proportion to the danger of doing harm to others. Whatever may be the dangerous circumstances, reasonable care must be exercised to prevent harm. The court charged the jury as follows:—"In deciding whether one exercises ordinary care, the jury will consider all the facts proved, all the surrounding circumstances, and say whether the conduct of such person was that of a person of ordinary prudence and discretion under such circumstances. In judging whether the defendant was guilty of negligence his conduct should be considered, not only with reference to the facts of which he had actual knowledge and to his actual surroundings at that moment, but in view of what was reasonably likely to happen. In the means adopted to prevent the escape of his

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horse, the defendant was not only bound to consider the character and disposition of his horse, and the fact that he was in the public street, but to anticipate what might naturally happen in such a place, the chance of noises and other occurrences at which his horse might be startled, and the danger to the persons and property of those passing, or who would be likely to be passing or driving in the street, should his horse escape." Surely, the charge of the court was a full response to the request of the plaintiff.

This would seem to put an end to the plaintiff's appeal, for no other requests were made of the court to charge the jury, and all other questions were submitted to them by counsel as questions of fact, except that certain claims were made by the plaintiff's counsel in his argument to the jury regarding ordinary or reasonable care, which were not controverted by the defendant.

But it is said that the court erred in the following charge to the jury:—"It is not the duty of the court to state particular facts as constituting, if found proved, negligence, but to leave all the facts, all the circumstances, to the jury, as the means and evidence by which the jury will decide whether the conduct of the parties was that of ordinarily careful and prudent persons under the circumstances."

Our answer to this claim is, that the plaintiff himself conceded on the trial that the question was one of fact for the jury to determine, and he surely cannot now claim the contrary.

But if the question was properly before us, the case of *Park* v. *O'Brien*, 23 Conn., 576, fully settles the law to be in accordance with the charge of the court. In that case the plaintiff left a spirited horse unhitched and unattended in the public street. The defendant in passing with his horse and carriage jostled the plaintiff's carriage, which caused the plaintiff's horse to run away, and the horse while running overturned the plaintiff's carriage, and inflicted the injury for which the plaintiff complained. On the trial of the cause the defendant requested the court to charge the jury that the plaintiff was guilty of negligence, as a

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matter of law, in leaving so spirited a horse in the public street unhitched and unattended. But this court held the law to be otherwise.

Many other cases establishing the same doctrine might be cited from our own court and elsewhere, but the above case is sufficient.

The plaintiff further contends that the court erred in stating to the jury the claims of the defendant regarding the evidence. This is so far from being erroneous that it is regarded as the duty of the court to state the claims of both parties upon all questions of fact that arise in a case, in order that the jury may clearly understand them. Such is the common practice of the courts.

It is further contended that the court erred in giving to the jury the same rule to ascertain negligence in the plaintiff. as the court gave to ascertain negligence in the defendant. We know of no rule that makes a distinction in this regard between the parties in a cause. We think this claim is unfounded.

And, finally, we think the charge of the court regarding all the other claims that have been made is strictly correct, so obviously so that it needs no comment.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

EARL A. SMITH AND ANOTHER *vs.* THE CITY OF WATERBURY AND OTHERS.

New Haven Co., June T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS AND GRANGER, Js.

The 24th amendment of the state constitution prohibits the legislature from increasing the compensation of any public officer during his continuance in office. Held that by continuance in office was meant continuance in office under one appointment.

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A city attorney was appointed in 1877 and held the office until July, 1881, when he was re-appointed. Held that he could take the benefit of an increase of compensation allowed by a statute passed before his last appointment.

A city ordinance provided that the city attorney should receive a certain salary in lieu of all other compensation. A later statute gave him fees for the trial of cases for the city. Held that as the statute related only to a small portion of the duties of the attorney it could not have been intended as a substitute for the former provision, and was to be regarded as cumulative.

And held that the statute was not to be construed as applying only to cases in the local court.

Held also that a trial before the railroad commissioners was to be regarded as coming within the provision of the statute.

[Argued June 8th—decided July 8th, 1886.]

SUIT for an injunction against the payment by the treasurer of the defendant city of an order in favor of Stephen W. Kellogg, who was also made defendant; brought to the Superior Court in New Haven County, and heard before *Phelps, J.* Facts found and judgment rendered for the defendants. Appeal by the plaintiffs. The case is fully stated in the opinion.

J. W. Alling, for the appellants.

S. W. Kellogg and *J. O'Neil*, for the appellees.

CARPENTER, J. Stephen W. Kellogg was city attorney for the city of Waterbury from 1877 to 1883. In 1881, by an act of the legislature it was provided that "the city attorney shall be entitled to fees for his services in cases tried for said city." It is contended in behalf of the plaintiff that this act is inoperative as to Mr. Kellogg for the reason that it is in conflict with the 24th amendment to the constitution of the state prohibiting the legislature from increasing the salary of any public officer during his continuance in office.

Was this a continuance in office within the meaning of the constitution? He was first appointed city attorney in 1877 and held the office in fact until July, 1881. Parol evi-

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dence was offered and received to prove that he was re-appointed in 1879. A question is made as to the admissibility of that evidence, but it is unimportant because he in fact held the office and discharged its duties from 1879 to 1883, and the question does not relate to the legality of his appointment, but to his right to charge fees, not from 1879 to 1881, but from 1881 to 1883. On the first Monday in July, 1881, he was duly appointed, the judge making the appointment fixing the term of his office at two years. From 1877 to 1881 the attorney was appointed by the judge of the City Court. After that he was appointed by the judge of the District Court. The two courts were substantially the same under different names, and the same person was judge in both courts. They were the same so far as this controversy is concerned.

The statute is silent in respect to the term of office of the city attorney, but the judge who appointed him held office for two years. We think his appointee would hold office for at least the same time unless sooner removed. Whether the judge could appoint absolutely for two years, thus depriving himself of the power of removal, is a question we have no occasion to discuss. The attorney in fact under each appointment held his office for two years. In 1881, when the City Court ceased to exist, he was appointed by the judge of the District Court without prescribing the tenure of his office, which office he in fact held for two years, when his successor was appointed. His term of office was practically the same as that of the judge who appointed him.

By "continuance in office" the constitution means continuing in office under one appointment. When Mr. Kellogg was appointed in 1879 he continued to hold under that appointment until the judge's term of office expired, which was on the first Monday in July, 1881. On that day he was re-appointed by the judge of the District Court. Afterwards he held under that appointment and not under an appointment previously made. It follows that the constitution does not prevent the operation of the statute of 1881 in re-

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spect to fees charged by Mr. Kellogg during his last term of office.

A city ordinance passed in 1880 provides that the city attorney shall receive a salary in lieu of all other compensation. The act of 1881 gives him fees for the trial of cases. The plaintiffs claim that the act should be construed as giving him the option to take his salary or trial fees, but should not be construed as giving him both. We do not think the statute should be so construed. Unlike the ordinance the statute is not in terms in lieu of all other compensation; and does not in terms require him to elect which he will receive. The ordinance expressly fixes the compensation for all of his official duties; the statute relates only to a small portion of those duties—the trial of cases. That difference excludes the inference that the latter was designed as a substitute for the former. The only rational construction is that the statute was intended to be cumulative.

It is further contended that the act of 1881 is to be construed as applying only to cases tried in the District Court. The language of the act does not so limit it. The city is liable to have litigations before other tribunals. Indeed the same case may be tried in the City Court and also in the Superior Court and in the Supreme Court of Errors. We can hardly impute to the legislature an intention to give trial fees in the District Court and not in the higher courts.

There are included, in the amount allowed to Mr. Kellogg, fees charged for the trial of certain matters before the railroad commissioners. Another objection is that the act of 1881 will not justify those charges. The language of the act is—"in cases tried for said city." Bouvier defines a "case" to be "a contested question before a court of justice; a suit or action; a cause." Webster defines it to be "a state of facts involving a question for discussion or decision; especially a cause or suit in court." These definitions are sufficiently comprehensive to include matters pending before railroad commissioners. They are a special tribunal authorized by statute to hear and determine certain matters pertaining to railroads. Towns and other commu-

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nities and individuals often have important interests involved in such matters; and these interests are generally determined and the rights of the parties settled after formal and expensive trials. Such a matter may properly be called a case, and the tribunal before which the questions involved are discussed and by which they are decided may with equal propriety be called a court of justice; not an ordinary court to be sure, but a special tribunal authorized to administer justice in a class of cases which experience proves cannot so conveniently and so satisfactorily be tried before the regular courts.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

THE STATE *vs.* JOHN MANEY.

New Haven Co., June T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

It is a general rule that the testimony of an accomplice ought to be corroborated as to some fact tending to connect the prisoner with the offense; but the testimony of an accomplice may be so strong and convincing as to justify a verdict of guilty without corroboration.

The testimony of an accomplice had been corroborated as to important facts connecting the prisoner with the offense. Held that evidence was admissible corroborating his testimony as to minor facts not connecting the prisoner with the offense, his credibility as to his entire testimony being a matter for the jury to determine.

The judge in his charge to the jury said:—The testimony of the accomplice comes to you under such circumstances as to call for the most careful scrutiny. As a general rule it is unsafe to convict upon such testimony alone. It ought to be corroborated in material facts connecting the prisoner with the crime; but the degree of credit to be given to his testimony and the amount of corroboration necessary to render it satisfactory, are matters to be considered and determined by the jury. They have the right upon his naked testimony to find a verdict of guilty, but ought never to do so unless such evidence is so clear, strong and convincing that it removes every reasonable doubt

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from their minds. But taking this to be the rule, the state claims that there is no occasion for its application in the present case, because the witness has been corroborated as to material facts. The judge then called their attention to the corroboration claimed. Held that the fair import of the whole charge was, that if the jury, after making due allowance for the suspicious circumstances under which the testimony was given, were fully convinced of the prisoner's guilt, they might return a verdict of guilty; that the charge made it clear to them that the testimony of the accomplice was not to be weighed in the same scales with that of an ordinary witness; and that, if the charge taken by itself was open to question, yet as there was confirming evidence sufficient for the jury to find that there was corroboration as to material facts, the jury could not have been misled by it.

[Argued June 1st—decided September 11th, 1886.]

INFORMATION for the burning of a barn; in the Superior Court in New Haven County. Tried to the jury on the plea of not guilty, before *Andrews, J.*

The barn was the property of Francis H. Shaw, and the burning was charged to have taken place at Meriden on the evening of Sunday, April 26th, 1885. Sundry witnesses were introduced on the part of the state who testified as follows:—

Matthew Frawley testified:—I reside in Meriden. I am twenty-seven years old. On Sunday, the 26th day of April last, I was at the house of John Maney nearly all day. Maney keeps a saloon. That day I was not in his saloon. We staid in his sitting room. I was there drinking with Maney and with others who came there for drinks. I drank that day several times. At about six o'clock in the afternoon Maney said to me, "Mat., come here, I want to see you!" We went down cellar. He then said, "Mat., will you go over and set Shaw's barn afire to-night?" He says, "If you will go over and do it you shall never want for a dollar so long as I have got it." Then he took a half pint bottle full of whisky and gave it to me. He got a pint bottle and partly filled it with kerosene oil and gave that to me. He drew the kerosene from a barrel. He had to tip up the barrel to get the oil to run. I guess the barrel was nearly empty. He put the bottle right under the faucet and drew it in that way. He could fill the bottle only about

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half full. I took both these bottles. He pulled out a quarter from his pocket and said, "That is all I have got now; you can get a drink with that in the morning. You will find a window to the barn under the wagon shed with a light of glass broken out. You can pour the kerosene in there and light it and then run away." He took the bottles from a shelf in the corner of the cellar. There was a lot of other bottles of the same kind on the shelf. I then went to my own house. Leach was with me at my house. Leach and I drank the half pint of whisky, the whole of it. At about half past seven o'clock I went over to Shaw's barn. I found the window there broken just as he said. I got up, put my hand in, pushed back the spring, raised the window and got into the barn. I lighted a match to see the way. I went up the stairs to the hay mow. I set the hay on fire. I went back the same way, got out of the window and ran away. I did not use the oil. As I was running away I threw the bottle of oil away, back of Breckenridge's barn. I had not taken the cork out of it. (The State's Attorney produced a flat-shaped pint bottle or flask of glass, tightly corked and partly filled with kerosene oil.) I think that is the bottle I had. It looks like it. I think it is the one. That is the one Maney gave me.

On cross-examination the witness described the cellar of Maney with great particularity, and said that he had never been in it at any other time than the one in question. He also stated that he was arrested for this offense on the 8th day of May, and that at the office of the chief of police in Meriden he told the story of his connection with the burning of the barn substantially as he had told it in court, and that he then told about throwing away the bottle of oil back of Breckenridge's barn.

Other witnesses testified to the fact that the barn of Mr. Shaw was burned on the 26th day of April, 1885, at about 8 o'clock in the evening. It also appeared that another barn belonging to Mr. Shaw and standing on the same ground had been burned a few months earlier.

R. M. Ford testified:—I am chief of police in Meriden.

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On the 8th day of May last I assisted in a search of Maney's cellar for liquor. We found several packages of liquor there which were seized. There was a barrel of kerosene there. I turned the faucet and found it was kerosene. I held my hand under the faucet and then put it to my tongue. I could not tell whether it was a full barrel or not. I did not put my hand on the barrel. I think it was a blue barrel. I am not certain. There was a shelf there in the corner of the cellar on which there was quite a number of empty bottles—pint and half pint bottles—like the one here (pointing to the bottle identified by Frawley.)

This witness also described Maney's cellar and the description was substantially the same as that given by Frawley.

Wm. N. McNamara testified:—I reside in Boston. I am a private detective. I was employed by the chief of police in Meriden to investigate the burning of Shaw's barn. I made inquiries. I visited Maney's place several times. I represented to him that I had escaped from the police in Boston. We had a good many talks together. He said he used to do a good business at his place till the Shaws testified against him and got his license revoked. I told him I thought that was pretty hard. He said he was getting his revenge out of them. And he asked me what I thought of the job? I asked him to tell me all about it. He said it was Shaw's barn. He said, "I hate that man like hell, and I am going to have my revenge out of him if it costs me my life." I then told him I did not know as I blamed him, they had been so hard on him. He said, "I didn't have to do it myself; I have not put my hand out myself." Frawley was sitting in the room not far away. Maney said in a low tone, pointing to Frawley, "Mat. here is the boy that does the job. He is a good boy and did the job well, and I paid him for it. He shall never want for anything as long as I live." At another time Maney said to me he would give $1,000 to burn up Shaw's house and him with it. His exact words were, "To burn him and his house to hell." A night or two afterwards I was there. I said to him, "You

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have got square with them now, haven't you?" He said, "No, the burning the barn is only just the beginning; you wait and see what is coming." I communicated to the chief of police from day to day what I learned. There was a detective by the name of Sullivan who was with me two or three of the last visits I made and he heard some of Maney's talk.

This witness testified to other conversations with Maney of the same general character as those above recited.

John T. Sullivan testified:—I live in Hartford. I was employed as a detective in this case. The witness testified to hearing the words used by Maney that "Mat. here is the boy that does the job," etc., as stated by the witness McNamara.

Edwin Puffer testified:—I am a policeman in Meriden. I heard the story of Frawley at the police office after he was arrested on the 8th day of May last. I heard him tell about throwing away the bottle of kerosene oil behind Mr. Breckenridge's barn. I went to the place the same day, and found the bottle which has been shown here in court. That is the bottle (pointing to the one which had been identified by Frawley). That is the mark I put on it.

Mrs. Bridget Maney, wife of the accused, was called as a witness in his behalf, and on cross-examination testified:—There was a barrel of oil in the cellar. On Saturday, the 25th of April, I drew out from it to fill my lamp. I drew all I could get. I did not tip up the barrel.

Katey Maney, daughter of the accused, on cross-examination testified:—On Sunday, the same day that Shaw's barn was burned, along in the afternoon, a man came to our house to get some kerosene oil. He wanted a quart. I went down cellar to get it. I could get none from the barrel. It did not run. I did not tip up the barrel.

To the production of the bottle of oil, and its identification by Frawley, and to the testimony of the witness Puffer that he found the bottle at the place indicated by Frawley, and the testimony of the chief of police, the defendant objected, but the court admitted it.

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The defendant offered testimony tending to show that a full barrel of kerosene oil was put into Maney's cellar on the 2d day of May which was tapped on the 4th day of May, and claimed that that was the barrel of oil which Mr. Ford found there.

Upon this part of the case the court charged the jury as follows: Frawley was the active agent in this crime, and his story comes to you under such circumstances as to call for the most careful scrutiny. In the argument a good deal of stress has been laid upon what is claimed to be a rule of law,—that the story of an accomplice ought to be received with great care, and that undoubtedly is the rule. Our Supreme Court quite a number of years ago laid down this rule in language better than I can give it myself, and in order that you may have it exactly I will read it to you. *State* v. *Wolcott*, 21 Conn. R., 275–281. In order to enable you to find a verdict against the prisoner it is necessary that the public prosecutor produce before you evidence to satisfy your minds beyond any reasonable doubt that they are guilty of the offense charged against them. (In this case there were two prisoners). An accomplice is an admissible witness, but as he comes before the court under suspicious circumstances, his testimony ought to be received with great caution. As a general rule, it will be unsafe to convict upon the testimony of an accomplice alone, uncorroborated by other testimony. It ought to be corroborated in material facts connecting the prisoners and each of them with the crime; but the degree of credit to be given to the testimony of an accomplice, and the amount of corroboration necessary to render it satisfactory, are matters to be considered and determined by the jury. Much will depend upon his manner of testifying, his manner of answering the interrogatories put to him, and the consistency of his story with the facts proved by other witnesses." This was the charge of the court to the jury that tried the case. The Supreme Court in passing upon this language, say this:—"The testimony of an accomplice is admissible, and of course, to some extent, is presumed to be credible. The

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law would not admit proof which it had decided, *a priori*, should not be believed when admitted. If credible at all it may be sufficiently so to produce belief and conviction, and this is not unfreque· tly the fact. The degree of credit which is due to an accomplice is exclusively for the jury to say. The courts frequently do, and ought to, advise caution in reposing confidence in the naked testimony of an accomplice; but this is rather in the exercise of a proper judicial discretion than because the law demands it. What will amount to a corroboration has been a matter of some discussion in the books. Any evidence, aside from the testimony of the accomplice himself or connected with it, which appears reasonable, not merely that the crime charged has been committed, but that the accused participated in it, may satisfy the mind. And frequently facts of no great prominence will be sufficient to do this." Now if I should attempt to make a rule out of this language of the Supreme Court it would be something like this: That the jury may hear the testimony of an accomplice, and that upon the naked testimony of an accomplice they have the right to find a verdict of guilty, but that they ought never to do so unless they find such evidence to be so clear, strong and convincing that it removes from their minds every reasonable doubt of the guilt of the accused. Now, taking that to be the rule, the state say there is no occasion for its applicatiou in this case, because they say that Frawley is corroborated. And first they say he is corroborated by the circumstances which he relates and which are found to be true by the testimony of other witnesses; that he described the cellar correctly, its character and size, the shelf with the bottles on it, with the size, shape, and kind of the bottles, the contents of the cellar, the kerosene barrel, its color, position, and the fact that it was almost empty; and they say he is further corroborated by Maney's threats to do injury to Shaw, as well as by certain correspondences in the testimony itself, apart from the testimony of the detective, and that he is fully and clearly corroborated by both the detectives. The theory of the state is that Frawley set fire

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to this barn, being instigated to do so by the prisoner. I have already said to you that the case must be proved in both these respects beyond a reasonable doubt, and that it is your duty to return a verdict of not guilty unless you are persuaded beyond all reasonable doubt that the prisoner did do the thing which this claim imputes to him. As to what constitutes a reasonable doubt, you will understand that it is not a fanciful doubt, not a mere possibility or uncertainty, but that it is a doubt for which a reasonable man can see some grounds. If you entertain any such doubt as that, you ought not to convict the prisoner. If on the other hand you have no such doubt, you should render a verdict of guilty.

The jury returned a verdict of guilty, and the defendant appealed to this court. The following reasons of appeal were assigned:—

1. The court erred in admitting the testimony of the policeman Puffer as to the finding of the bottle of kerosene, and in permitting the production and identification of the bottle of kerosene before the jury.

2. The court erred in charging the jury as follows: "Well now, if I should attempt to make a rule out of this language of the Supreme Court, it would be something like this: That the jury may hear the testimony of an accomplice and they may find a verdict upon it, that is, upon the naked testimony of an accomplice, but that you ought not to do it unless you find such evidence so clear, strong, and convincing as that it removes from your mind all reasonable doubt as to the guilt of the accused."

W. C. Case and *W. H. Ely*, with whom was *E. A. Merriman*, for the appellant.

1. Corroborative testimony, to be admissible, must first show, or tend to show, that crime has been committed, and must connect, or tend to connect, the accused with the crime, and identify the person accused independently of the story of the accomplice. It is not admissible merely because it shows, or tends to show, that the man who committed

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the offense and tries to make the defendant the responsible party in the commission of the offense, knows how the deed was done, and truly tells what he did at the time he committed and while committing the crime. If it only tends to show that the so-called accomplice gives a true account of his own acts and conduct, it is not admissible against the accused. In *Rex* v. *Addis*, 6 Car. & Payne, 388, the court in laying down the rule in regard to the admissibility of evidence to corroborate an accomplice, says: "The corroboration of an accomplice ought to be as to some fact or facts, the truth or falsehood of which goes to prove or disprove the offense charged against the prisoner." In *Regina* v. *Farler*, 8 Car. & Payne, 106, Lord ABINGER, C. B., in summing up, said: "Corroboration ought to consist in some circumstance that affects the identity of the party accused. A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the person, that is really no corroboration at all. If a man was to break open a house and put a knife to your throat, and steal your property, it would be no corroboration that he stated all the facts correctly, that he had described how the person did put a knife to the throat and did steal the property. It would not at all tend to show that the party accused participated in it." See also *Rex* v. *Wilkes*, 7 Car. & Payne, 272. The same rule is recognized in this country, and the decisions of the greatest weight sustain our claim. In *Commonwealth* v. *Bosworth*, 22 Pick., 397, MORTON, J., in delivering the opinion of the court, said: "We think the rule is that the corroborative evidence must relate to some portion of the testimony which is material to the issue. To prove that an accomplice had told the truth in relation to irrelevant and immaterial matters, which were known to everybody, would have no tendency to confirm his testimony involving the guilt of the party on trial." See also *Commonwealth* v. *Holmes*, 127 Mass., 424; *Marler* v. *The State*, 68 Ala., 580; *Watson* v. *Commonwealth*, 95 Penn. St., 424; *State* v. *Graff*, 47 Iowa, 384; *Welden* v. *The*

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State, 10 Texas App., 400; Best on Evidence, § 171; 1 Greenl. on Ev., § 381. We have then the rule that the corroboration must be by proof of some fact tending to connect the defendant with the commission of the offense, independently of the testimony of the accomplice, and the test is to throw out all other evidence and see whether the evidence introduced tended to show that the defendant was connected with the offense. Applying this test, we find that the evidence objected to was clearly inadmissible. Taken by itself, it shows that on the 8th day of May, twelve days after the fire, a bottle with kerosene oil was found in a certain place, and that place too far from the fire to show that the bottle had any connection with it. There are no distinguishing marks on the bottle to show that it came from Maney, any more than there is to show that it came from any other liquor seller in Meriden or any other place. It is just as strong evidence against any liquor seller in Meriden, or any man who ever bought a pint of liquor or had a pint of kerosene oil, as it is against Maney. Further, taken by itself there is nothing to show that the bottle had anything to do with the fire, or how it came to the place where it was found. The most that it can possibly show is that some person had a pint bottle and some oil; that some person put the oil in the bottle, but whether the man who owned the bottle also owned the oil or not it does not show, and it shows further that some one put the bottle with the oil in a place far removed from the scene of the crime; and that is all it does show. And so long as it shows that, and that only, it cannot be admitted to corroborate Frawley or for any other purpose. And the evidence of Puffer that he found it where Frawley said he threw a bottle, only shows that Frawley gave a correct history of the crime, and this does not connect Maney with the crime any more than it does anyone else. *Rex* v. *Wilkes*, 7 Car. & P., 272; *Regina* v. *Farler*, 8 id., 106. It is no answer for the state to say that the jury might convict on the uncorroborated testimony of the accomplice, for if the evidence was introduced for the purpose of corroborating

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Frawley in spite of the objection of the defendant, and was not properly admissible, the defendant is entitled to a new trial. "Although a jury may convict on the uncorroborated testimony of an accomplice, yet the admission, against the defendant's objection, for the purpose of corroborating the testimony of an accomplice, of evidence which does not connect the defendant with the crime," is a ground for a new trial. *Commonwealth* v. *Holmes*, 127 Mass., 424. It is no answer to the defendant's claim for a new trial to say that there is strong proof against him without this, for no one can tell what convinced the mind of the jury of the guilt of the accused. The bottle of kerosene and Puffer's story may have had more weight with them than any other part of the case. Certainly no one can say that it did not, and as this is a criminal case, and there has been error in the ruling of the court below, the defendant is entitled to a new trial. The jury must be convinced, beyond a reasonable doubt, by legally admissible evidence, that the accused is guilty of the offense charged, and so long as there is mingled with admissible evidence some that is inadmissible, no one can say that the jury were convinced by the evidence properly admitted, and did not take into consideration the evidence improperly admitted. In criminal cases courts do not refuse new trials because there is, in their minds, sufficient evidence to convict without the evidence improperly admitted, but give the accused a new trial if evidence has been improperly admitted, and leave the weight of the testimony properly admitted to be passed upon and determined by the jury. *Commonwealth* v. *Bosworth*, 22 Pick., 397; *Hughes* v. *The State*, 58 Miss., 355; *Rosenwerg* v. *The People*, 63 Barb., 637, 640; *State* v. *Allen*, 1 Hawks, 6; *State* v. *Merrill*, 2 Dev., 278; *Coleman* v. *The People*, 58 N. York, 555, 561.

2. Was the charge of the court a proper charge? The law most favorable to the state, while admitting that the jury may convict on the testimony of an accomplice alone, always couples with the admission the declaration that the accomplice's evidence ought to be corroborated, and holds

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that it is better to acquit than convict a man against whom the testimony of an accomplice only is introduced, no matter how clear that testimony is. So universally is this declaration made in the opinions of this state and others, while admitting the right of the jury to so convict, that it has become practically a qualification of the rule, and shows that the law does not look upon the testimony of an accomplice with the same degree of favor that it does on other evidence. But the charge of the court puts such testimony on a par with other kinds, and says, merely, if you are convinced beyond a reasonable doubt, by the testimony of an accomplice, of the defendant's guilt, that is sufficient, stating exactly the same rule that applies to all kinds of evidence, and containing no caution, no advice, and showing no distinction between testimony of an accomplice and other testimony. It certainly cannot be true that the law gives the same weight to the testimony of an accomplice that it does to that of a perfectly free, unbiased person, one of unimpeachable and unquestionable character and reputation, and yet the same rule which was laid down by the court in this case would obtain in the case of a man of the highest integrity and character. No matter how good a man's character might be, his story would have to be so clear, strong, and convincing, that it would remove from the minds of the jury every reasonable doubt of the guilt of the accused, and to lay down a rule for the guidance of the jury which puts the testimony of an accomplice on a level with that of a man of unspotted reputation and character, must be contrary to law, and must necessarily mislead the jury in regard to the amount of faith to be put in the story of a man confessedly guilty of the crime for which he seeks to make another man responsible. "Courts ought to advise caution in reposing confidence in the naked testimony of an accomplice." *State* v. *Wolcott*, 21 Conn., 281. The court below did not advise caution, but without hinting that any caution was necessary the court laid down a rule which applies to all kinds of testimony, when the law requires that in addition to the universal rule there should be, in cases

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where an accomplice testifies, a caution in such language as to show that an accomplice when giving his testimony is not on a par with men of unblemished character.

T. E. Doolittle, State's Attorney, *contra*, cited *State* v. *Wolcott*, 21 Conn., 280; *State* v. *Stebbins*, 29 id., 472; *State* v. *Williamson*, 42 id., 265; *People* v. *Guidici*, 100 N. York, 510.

CARPENTER, J. The prisoner was charged with arson. The principal witness against him was Matthew Frawley, who testified that he burned the barn, having been hired to do so by the prisoner; that he spent the greater part of the day at his house; that in the evening he took him into his cellar, proposed to him that he burn the barn and furnished him with some whisky and with a bottle partly filled with kerosene oil; that he took the oil from a barrel nearly empty, so that he had to tip the barrel and then could not fill the bottle; that he fired the building without using the oil, and subsequently threw it away, describing the place. He also described the cellar minutely, and, as it appears by the testimony of other witnesses, correctly. The bottle was found by an officer in the place pointed out by the witness, and was as described by him. It was produced in court and identified by him.

The production of the bottle in court and its identification by the witness, with the testimony as to the finding of it, and as to its condition, were objected to, but admitted. The first question in the case is, whether they were properly admitted.

The rule is that an accomplice ought to be corroborated as to some fact tending to connect the prisoner with the offense. The question now raised, in one aspect of it at least, is, whether it is error to allow the attorney for the state to corroborate his evidence as to a fact which is in issue, but which does not inculpate the prisoner.

The credibility of an accomplice in respect to all his testimony is for the jury. They may require corroboration in

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respect to that part of it in which he states his own connection with the crime. Manifestly, if the defense had questioned that, the evidence objected to would have been admissible for that purpose. But the credibility of such a witness is for the jury as to all that he says. Hence any fact or circumstance which tends to corroborate in a slight degree any part of his testimony, is admissible. It was so held in *State* v. *Wolcott*, 21 Conn., 272. In that case the accomplice detailed two conversations which he had with the prisoners, or one of them, in which they related to him conversations which they had had with third parties. The third parties were admitted to testify that they in fact had such conversations, although there was nothing in either conversation in itself which tended to criminate the prisoners. The court, by CHURCH, C. J., say they "showed a privity and connection, and a conspiracy between Dickerman and the prisoners," and that Dickerman "was their confidant to whom they imparted their plans and their movements as he had testified." Still, all the inculpating testimony came from the accomplice, so that the case is an authority for holding that he may be corroborated as to any material fact in issue, although that fact does not connect the prisoner with the offense. In that case, as in this, there was other corroborating evidence which did inculpate the prisoners. In that case it was not held, and we do not hold in this, that corroboration as to facts which do not inculpate the prisoner will be sufficient, but simply that evidence which corroborates as to any fact in issue is admissible for what it is worth. Bishop on Criminal Procedure, § 1170, says:—"Not inconsistently with these views it is permissible also to submit to the consideration of the jury evidence tending to show the accomplice's probable credibility in his narration, though coming short of the required corroboration."

But we cannot say that the evidence objected to in this case has no tendency to connect the prisoner with the crime. The witness was corroborated as to the cellar, its condition and things in it; particularly as to the bottles and the barrel of kerosene oil. The fact that the bottle of oil was found

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in the place he pointed out shows that he had it as he said he had; and that fact, in connection with the fact that there was on that day an empty barrel from which a small quantity of oil could be taken by tipping it, and that there were also in the cellar empty bottles of similar size and shape, renders it probable that he got the oil at the time and place named. The fact being established that he had the bottle of oil and that he got it in the prisoner's cellar, the inquiry is a pertinent one, of whom did he receive it? and for what purpose? In answer to these questions the accomplice says he received it of the prisoner, and for the purpose of firing this barn. And here he is corroborated by the prisoner's declarations made to the detectives. The testimony of the detectives however goes further than that, and, if believed by the jury, fastens the crime upon the prisoner.

The question is not therefore whether this evidence is admissible as supplying the corroboration which the evidence of an accomplice needs at a point which connects the prisoner with the crime, for the corroborating evidence of that character had already been furnished; but whether the testimony of an accomplice may be corroborated in other and minor points, which do not, taken by themselves, touch the prisoner. And this is a question, not arising under the law peculiar to accomplices, but under the general rules of evidence with reference to witnesses who from any cause stand before the jury with their credibility seriously impaired. Thus, suppose doubt were thrown upon the whole story of the accomplice, and it was claimed by the defense that he did not set the barn on fire, would it not on general principles be admissible to prove, by a person who saw him do it, that his story was true? And yet this would not connect the prisoner with the crime.

The remaining question arises upon the charge of the court to the jury. The learned counsel for the prisoner complain that the charge of the court puts the testimony of an accomplice "on a par with other kinds, and says merely, if you are convinced beyond a reasonable doubt, by the testimony of an accomplice, of the defendant's guilt, that is

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sufficient; stating exactly the same rule that applies to all kinds of evidence, and containing no caution, no advice, and showing no distinction between testimony of an accomplice and other testimony." If that is a right view of the charge there is doubtless foundation for the complaint. But we do not so interpret the charge.

The court first told the jury that "Frawley was the active agent in this crime, and his story comes to you under such circumstances as to call for the most careful scrutiny. In the argument a good deal of stress has been laid upon what is claimed to be a rule of law,—that the story of an accomplice ought to be received with great care; and that undoubtedly is the rule. Our Supreme Court quite a number of years ago laid down this rule in language better than I can give it myself, and in order that you may have it exactly I will read it to you."

The court then proceeded to read the charge of the Superior Court to the jury in the case of *State* v. *Wolcott*, 21 Conn., 272, and from the opinion of the Supreme Court sustaining that charge. Of course the jury must have understood that the court adopted the portions read from that case as a part of his instruction to them.

In that charge, consequently in this, we find these words:—"An accomplice is an admissible witness, but as he comes before the court under suspicious circumstances his testimony ought to be received with great caution. As a general rule it will be unsafe to convict upon the testimony of an accomplice alone, uncorroborated by other testimony. It ought to be corroborated in material facts connecting the prisoners and each of them with the crime; but the degree of credit to be given to the testimony of an accomplice, and the amount of corroboration necessary to render it satisfactory, are matters to be considered and determined by the jury." That charge was sustained by this court in the former case and we must regard it as correct in this.

Immediately after reading from the report of that case the court said:—"Now if I should attempt to make a rule

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out of this language of the Supreme Court it would be something like this—that the jury may hear the testimony of an accomplice, and that upon the naked testimony of an accomplice they have the right to find a verdict of guilty, but that they ought never to do so unless they find such evidence to be so clear, strong and convincing that it removes from their minds every reasonable doubt of the guilt of the accused."

This is the portion of the charge which is complained of. If this was the whole charge, or if we were required to consider the rule thus formulated apart from what precedes and what follows it, there would be difficulty in sustaining it. But we cannot presume that the judge intended to withdraw from the jury the caution he had already given them. They must have understood that the scales in which the evidence of an accomplice is to be weighed are different from those in which other evidence is weighed. It is true the testimony of an accomplice may be so strong and convincing as to justify a verdict of guilty without corroboration; and that was what the jury were told. They were also instructed to exercise caution in weighing his testimony. That negatives the claim that his testimony was placed upon the same footing as that of other witnesses. We think therefore that the fair import of the whole charge is, that if the jury after making due allowance for the suspicious circumstances under which the testimony is given, are fully convinced of the prisoner's guilt, they may return a verdict of guilty.

Again. The case was not submitted to the jury upon the naked testimony of the accomplice, for the court had previously told the jury that his testimony should be received with caution, and that it ought to be corroborated in material facts connecting the prisoner with the crime; and immediately after laying down the rule just alluded to, the judge said to the jury,—"Now, taking that to be the rule, the state say there is no occasion for its application in this case, because they say that Frawley is corroborated." He then called attention to the corroborating evidence, which

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we can see was amply sufficient to justify the jury in finding that the witness was corroborated as to material facts. Now we must presume that the jurors did their duty, that they considered the case as it was presented to them, that they required the accomplice to be corroborated, and that they considered the corroborating evidence and regarded it as sufficient. To suppose otherwise and assume that they founded their verdict upon the naked uncorroborated testimony of the accomplice, imputes to them a culpable neglect of duty and a manifest violation of their oaths.

We find no error in the judgment.

In this opinion the other judges concurred.

WILLIAM W. HOLMAN *vs.* THE CONTINENTAL LIFE INSURANCE COMPANY.

Hartford District, May T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, JS.

A non-forfeiture life insurance policy for the term of ten years for $1,000 contained a provision that the policy should lapse upon the non-payment of any annual premium and of interest annually in advance on any outstanding premium notes which might be given; but that, after the payment of two annual premiums, in case of default the company would convert the policy into a paid-up one for as many tenth parts of the sum originally insured as there had been annual premiums paid when the default was made, provided application for such conversion was made within one year after the default. The insured had paid two annual premiums, a part in cash and the remainder in premium notes which were outstanding. He made default in the payment of the next premium and applied to the company for a paid-up policy. The company thereupon endorsed upon the policy that it was to pay $200, "subject to the terms and conditions expressed in the policy." Thereafter the insured paid the interest on the outstanding premium notes annually for two years, but paid no interest thereafter. Held—1. That the endorsement upon the policy was equivalent to a paid-up policy. 2. That the policy as thus endorsed

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was to be construed as forfeitable upon the non-payment of the interest on the outstanding premium notes.

[Argued May 18th—decided July 27th, 1886.]

ACTION upon a policy of life insurance; brought to the Court of Common Pleas of Hartford County, and reserved, on the plaintiff's demurrer to the defendant's answer, for the advice of this court. The case is fully stated in the opinion.

H. B. Freeman, for the plaintiff.

By the payment of two annual premiums, the plaintiff purchased a "paid-up" policy, non-forfeiting in its terms, and the following endorsement was made on the original policy: "This policy having lapsed after two annual payments, is hereby recognized as binding upon the company for two tenths, or two hundred dollars, subject to the terms and conditions expressed in this policy, and in the quitclaim to the company, bearing even date with this entry." Payment of the policy is refused, because there has been a failure to pay in advance the interest on the outstanding premium notes.

This claim of forfeiture cannot be sustained. Forfeitures are not favored in the law. After many and conflicting decisions, it is now settled that the forfeiture clause, for the non-payment of premium, and the interest on premium notes in a life insurance policy, is not in the nature of a penalty, but is to be enforced and the policy declared void. But it must be clearly provided for in the policy. Courts will not extend, by implication or construction, the operation of a condition, the breach of which involves a forfeiture, to a case *not clearly within it.* May on Insurance, § 408. Forfeiture is an extreme remedy, and is not to be inferred upon any unnatural presumption. The original policy having lapsed and become converted into a "paid-up" policy, the "non-forfeiture" clause is thenceforth a controlling feature of the contract. This feature is made alluring and attractive. And there is no clause of the policy that can

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be construed to nullify the effect of the non-forfeiture stipulation. To construe the policy otherwise would make it a delusion and a snare, "mislead the insured, and fraudulently expose him to the very danger from which he would reasonably understand he was to be delivered, by the saving process of conversion worked in the policy."

The Northwestern Mutual Life Insurance Company raised this very question in seven different states, and their claim of forfeiture for the non-payment of interest was always decided against them. These several cases decide "that as often as a complete annual premium shall be paid the policy shall become a paid-up policy for one tenth of the whole amount insured, *not subject to the condition or contingencies, so far as payments are concerned, which continue to the remainder or unpaid part of the policy.*" *Ohde* v. *N. West. Mut. Life Ins. Co.*, 40 Iowa, 364; *Hull, Adm'r.*, v. *The same*, 39 Wis., 406; *Symonds* v. *The same*, 23 Minn., 500; *N. West. Mut. Life Ins. Co.* v. *Little*, 56 Ind., 509; *Fithian* v. *N. West. Mut. Life Ins. Co.*, 4 Misso. App., 390; *N. West. Mut. Life Ins. Co.* v. *Ross*, 63 Geo., 199; *Same* v. *Bonner*, 36 Ohio St., 66. This defendant has already raised this question of forfeiture in two states, and it has in both been decided adversely to its claim. *Cowles* v. *Continental Life Ins. Co.*, before Supreme Court of New Hampshire, January, 1885, 14 Ins. Law Journal, 674; *Bruce* v. *The same*, Supreme Court of Vermont, February, 1886, 4 Eastern Reporter, 453.

T. M. Maltbie, for the defendant, cited *Life Ins. Co.* v. *Bonner*, 36 Ohio St., 51; *Life Ins. Co.* v. *Robinson*, 40 id., 270; *Baker* v. *Union Mut. Life Ins. Co.*, 43 N. York, 283; *Attorney Gen.* v. *Nor. Am. Life Ins. Co.*, 82 id., 172; *Russum* v. *St. Louis Mut. Life Ins. Co.*, 1 Misso. App., 228; *Knickerbocker Life Ins. Co.* v. *Dietz*, 52 Maryl., 16; *Same* v. *Harlan*, 56 Miss., 512; *Pitt* v. *Berkshire Life Ins. Co.*, 100 Mass., 500; *Williams* v. *Republic Ins. Co.*, 19 Mich., 469; *Patch* v. *Phœnix Mut. Life Ins. Co.*, 44 Verm., 481; *N. York*

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Life Ins. Co. v. *Statham*, 93 U. S. Reps., 24; *Klein* v. *Life Ins. Co.*, 104 id., 88; *Thompson* v. *Life Ins. Co.*, id., 258.

LOOMIS, J. The complaint in this case seeks to recover the amount due under a so-called "paid-up" policy of insurance on the life of William W. Holman, for the benefit of his wife. The demurrer to the defendant's answer raises the question whether the defense therein set forth is sufficient in law to prevent a recovery by the plaintiff, and this depends entirely upon the contract of the parties. By the terms of the contract as originally made the defendant was to receive an annual premium of one hundred and eight dollars and seventy-two cents during the continuance of the policy for the term of ten years, payable, as appears from the margin, partly in cash and partly by note. At the end of the term, or upon the previous death of the insured, the defendant was to pay one thousand dollars, "deducting therefrom all indebtedness to the said company on account of this policy, if any, then existing," subject to sundry express conditions and agreements mentioned in the policy, the third and fourth of which only are involved in this case. These are as follows:—

"*Third.* If the said assured shall not pay the said annual premiums on or before noon of the several days hereinbefore mentioned for the payment of the same, and the interest annually in advance on any outstanding premium notes which may be given for any portion thereof, or shall not pay, at maturity, any notes or obligations given for the cash portion of any premium or part thereof,—then, and in every such case, this policy shall cease and determine, and said company shall not be liable for the payment of the sum insured, or any part thereof, except as hereinafter provided."

"*Fourth.* If, after the receipt by the company of two or more annual premiums upon this policy, default shall be made in the payment of any subsequent premium when due, then, notwithstanding such default, this company will convert this policy into a 'paid-up' policy for as many tenth parts of the sum originally insured as there shall have been

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complete annual premiums paid when such default shall be made: Provided that this policy shall be transmitted to and received by this company, and application made for such conversion within one year after such default."

The defendant's answer, after admitting the issuing of the policy, its terms and demand and refusal to pay, as alleged in the complaint, further alleged that—

"2. On the first day of April, 1874, the plaintiff had paid to the defendant in cash a portion of two annual premiums, and had given to the defendant premium notes for the remaining portion of said premiums, which notes were then and are now outstanding and unpaid.

"3. Thereafter the plaintiff made default in the payment of premiums, and transmitted said policy to the defendant, and with his wife, Rebecca J. Holmes, applied to the defendant to adjust the insurance under said policy, according to the stipulations thereof, by reducing the amount thereof to $200; and in said application agreed to pay the defendant, annually, in advance, the interest on all outstanding notes given in part payment of annual premiums.

"4. Thereupon the defendant made the following endorsement upon said policy of insurance: 'This policy having lapsed after two annual payments, is hereby recognized as binding upon the company for two tenths thereof, or $200, subject to the terms and conditions expressed in this policy and in the quitclaim to this company, bearing even date with this entry;' and returned said policy to the plaintiff, who accepted the same.

"5. Thereafter the plaintiff paid the interest on said outstanding premium notes, annually, in advance, until the year 1876, when he ceased to pay the same, and has not since paid the same.

"6. Said policy provided that if the assured should not pay the interest annually, in advance, on any outstanding premium notes given for any portion of the annual premiums on said policy, then said policy should cease and determine, and said company should not be liable for the payment of the sum insured or any part thereof.

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"7. By reason of the failure and neglect of the plaintiff to pay the interest annually, in advance, on said outstanding premium notes in the year 1876, and thereafter, said policy of insurance has ceased and determined, and the defendant is not liable for the payment of the sum insured, or any part thereof."

The plaintiff's reply was as follows:

"The plaintiff demurs to the answer of the defendant, as the facts therein stated are insufficient in the law, because the paid-up policy upon which complaint is brought was non-forfeiting by its terms, and contained no provision that the failure to pay interest on the outstanding premium notes should work a forfeiture of said paid-up policy, and the same is nowhere averred in said answer."

The special ground of this demurrer presents the precise question involved in the case, namely,—Does the paid-up policy contain a provision that the failure to pay interest on the outstanding premium notes shall work a forfeiture of the policy?

This question is different from the one considerably discussed in other jurisdictions, namely—What will entitle the insured to a paid-up policy, and what provisions as to forfeiture should it contain? The parties have settled these questions themselves by giving and accepting the reduced insurance; and if the policy thus accepted contains a provision whereby the failure to pay interest will make it void, then the plaintiff by his pleadings impliedly admits that he has no case, even though he would have been entitled to a different policy under the original contract.

The new contract, whereby the insurance was reduced to two hundred dollars, states that the company recognize the policy binding for that sum, "subject to the terms and conditions expressed in this policy and in the quitclaim to this company bearing even date with this entry." This, in effect, is the same thing as a new policy, containing the terms and conditions of the old one as far as applicable. Now among these conditions is the clear stipulation that "if the assured shall not pay the interest annually in ad-

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vance on any outstanding premium notes, this policy shall cease and determine." In what manner did this provision become eliminated from the paid-up policy?

It cannot be claimed to be inapplicable, because there is a subsisting obligation to pay this interest annually in advance recognized not only in the original policy but in the quitclaim, whereby the plaintiff and his wife, when they applied for the reduced insurance, made a fresh promise and agreement to pay this interest, and this quitclaim is referred to and made part of the new contract, and the promise on the part of the company is made subject to it as a condition.

But a specious argument always urged against this view by counsel for the insured and sometimes sanctioned by courts, is founded upon what is called the absurd paradox of forfeiting a non-forfeitable policy. The name "non-forfeiting" has undoubtedly been sometimes used to mislead applicants for insurance, and some of the cases refer to the fact that agents for insurance companies have made declarations and issued circulars to the effect that, after the payment of two annual premiums, the policy would be binding on the company without any further attention on the part of the holder.

But no such fact appears in this case, and upon the admitted facts it is certain that the insured was not misled, for he voluntarily offered to pay and did actually pay interest annually in advance on the paid-up policy until the year 1876. It is manifest that both parties at the time and for several years subsequently construed the contract alike. There was no trap, therefore, into which the plaintiff was unwarily led.

But courts need not be misled by mere appeals to prejudice. The contract is not to be construed by its mere label, but by its written terms, and upon referring to these we see at once that the policy is non-forfeitable only to a very limited extent.

No one has ever claimed that it extends beyond the payment of an annual premium and interest, and even in these respects it is non-forfeitable only at the option of the holder, who must transmit the policy to the company and make

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application for its conversion into a paid-up policy within one year after default. But a glance at the policy will show that even after the conversion the insured can have no security against forfeiture except by observing the conditions. If without the consent of the company he travels outside of the prescribed limits mentioned; if he engages in certain specified hazardous occupations; if he becomes intemperate or is addicted to vice of any kind to the extent of permanent impairment of his health; if he is convicted of felony; if he dies by his own voluntary act or in consequence of a duel or under the sentence of the law, the paid-up, non-forfeitable policy could not for a moment avail, but would thereby become null and void.

Any argument, therefore, founded merely upon the use of the term "non-forfeitable," is of little weight. We must, as in all other cases, construe the contract by the language used in it. In this case the question is confined to the language of the saving clause, which is the fourth. Does that save the insured from the consequences of a failure to pay interest, the same as it does in the case of failure to pay future annual premiums? The third clause, which it is indispensable to consider in this connection, clearly specifies two distinct defaults, either of which will forfeit the policy; first, failure to pay the annual premiums when due, and, second, failure to pay interest in advance on outstanding premium notes. So far the meaning cannot be mistaken. Now how does the saving clause which follows affect the question? It only relieves the insured (after the payment of two or more annual premiums) from one of those defaults—"the payment of any subsequent premium when due." Not a word is said about interest. The saving clause, therefore, is not co-extensive in its operation with the preceding forfeiture clause, as it should be to justify the plaintiff's construction. It is not easy to conceive why the parties, having clearly in mind the distinction between the two causes of forfeiture mentioned in the third clause, should in the next, in terms, confine the relief to one only, if they intended to place both on the same ground. To accept the

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plaintiff's view would be for the court virtually to insert what the parties omitted. If it be suggested that the distinction between interest and premium note was unnecessary, the answer is twofold. In the first place, the parties have made such a distinction, and presumably had it in mind all through, and in the second place, the distinction is well founded, for the interest contract is not a mere incident of the note, but distinct from it; it is payable in advance at the beginning of each year, without reference to the time when the notes become due. And herein is a distinction of some importance between the case at bar and some of the cases from other jurisdictions, where the premium note was payable at a future day with interest without separate contract as to the latter. In such case the interest, being a mere incident of the note, could not be separately recovered, and there would be some reason for holding that if the note was to be paid only by deducting it from the policy upon its final adjustment, the interest also must follow the same course, for it must follow the note.

But is the distinction which we have assumed that the policy in question makes, reasonable and just? The requirement to pay interest annually is indispensable to the success of this system of insurance where credit is given. The annual premium for the risk here was $108.72. The policy was a participating one, under which the insured was to receive his fair proportion of dividends. The company could not treat this matter as entirely isolated from all other policies. Some stable basis must be found upon which an intelligent estimate could be made of the company's ability to pay losses, expenses and dividends. Such basis can only be found in the assumption that the company will certainly receive the annual premium in money or a fair equivalent in the way of annual interest. The reception of the note payable at a future day cannot possibly be the same thing as payment in money unless interest is paid on the credit annually. The relief from forfeiture provided for in the policy is based upon the equitable idea that the reduced policy represents the proportionate amount of insurance

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fully paid for upon a cash basis. If the insured wishes to be secure from forfeiture, he may pay the annual premiums in money. If he insists on a credit, he may take a reduced policy, which exempts him from the payment of future annual premiums, but he is still subject to the rigorous condition to pay interest or lose the benefit of his policy.

In support of these views we cite sundry cases from other jurisdictions.

The case of *Knickerbocker Life Insurance Co.* v. *Dietz*, 52 Md., 16, decided in April, 1879, is very strong for the defendant. The original policy in substance was the same in every respect as the one under consideration. It was dated May 5, 1868, and under it the insured paid premiums in cash and notes up to May 5, 1873, when he surrendered the policy and obtained a new one for five tenths of the amount originally insured. The second policy stated that it was issued in consideration of the surrender of the previous one, and accepted by the insured upon the express condition and agreement that if the interest should not be paid on or before the day named, the policy should be null and void. The interest was not paid on the 5th of May, 1874, and the policy was cancelled by the company. Soon after this the insured tendered the interest due, but the company refused to receive it.

The questions arose under a bill in equity, alleging that no interest was required to be paid May 5th; that the clause that made the new policy void on non-payment of interest was inconsistent with the true meaning of the contract; that the stipulation as to forfeiture was in the nature of a penalty, against which a court of equity should relieve, and praying for such construction of the contract and for a decree for the payment of the amount of the policy less the notes and interest. It will be seen that the position of the case before a court of equity was more favorable for the claimant than that of the present case, but the court held there was no relief. GRASON, J., in delivering the opinion of the court, said: "The theory on which the amount of the premium is fixed, * * * is that, assuming that a

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man of a given age has a prospect of living a certain number of years, as shown by experience and observation, the premium charged is such a sum as, invested annually at a certain rate of interest and compounded, will, at the expiration of that time, amount to enough to pay the policy and cover the expense of the company. To accomplish this result the premium must be punctually paid and invested, and the interest re-invested at the assumed rate. Otherwise the ability of the company to pay the policy, instead of being a matter of reasonable certainty, becomes a mere matter of chance, the business of life insurance ceases to have any scientific or accurate basis, and a policy of insurance becomes a mere wager on the life of its holder. The prompt payment of interest on premium notes is as necessary to the successful working of an insurance company, as well as to the security of the insured, as are the payment of the premium notes themselves. If one policy holder can fail to pay his interest, any number of them may do the same, and the ruin of the company would be the inevitable result. The time for the payment of interest on premium notes is of the essence of contracts of insurance."

The case of *Knickerbocker Insurance Co.* v. *Harlan*, 56 Miss., 512, decided in January, 1879, was an action on a paid-up policy which recited that it was issued in consideration of the surrender of the original policy (the provisions of which were similar to those in the case at bar), and which stipulated that if the interest on the premium note was not paid before a specified day, the policy should be null and void. The company pleaded the forfeiture of the paid-up policy by reason of the non-payment of interest; to which plea the plaintiff demurred, precisely as in the case at bar. The court below sustained the demurrer upon precisely the same arguments as are urged in behalf of the plaintiff in the present case, but the judgment was reversed in the Supreme Court, mainly upon the ground that, under a proper construction of the new policy, the right to recover the sum assured by it was to be earned only by the prompt payment in future of the interest on the premium note, and

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that it made no difference that the amount of the note was already due the company on the old policy.

In *Alabama Gold Life Insurance Co.* v. *Thomas*, 74 Ala., 578, decided in December, 1883, the action was upon a paid-up policy, as contained in an indorsement upon the original policy, the terms of which were as follows: "In consideration of the payment on the within policy of four annual premiums, less note for $169.20, given for balance due on premium loans to Nov. 11, 1872, said policy is entitled at maturity to a paid-up value of four tenths of the sum insured, subject to deducting note above described, interest upon which is payable annually in advance." It was held that the indorsement was to be construed, together with the original policy, as constituting one contract, and that thereby the parties made a clear agreement that the policy should be void in the event of the failure to pay interest. It was held, as in the Maryland case before cited, that "the payment of interest was of the essence of the contract; that the calculations of insurance actuaries fixing the rates of insurance are based on the theory of prompt payment, so as to afford opportunity for such re-investment as to reap the fruits of compound interest upon the company's moneyed capital."

Insurance Co. v. *Robinson*, 40 Ohio St., 270, was an action based on the refusal of the company to grant an application for a paid-up policy pursuant to the provisions of a policy containing provisions identical with the one at bar, so that this case presents the question as to the rights of the parties under a non-forfeiting policy like the one in this case prior to the indorsement made upon it. The default on the part of the insured was simply as to interest on the premium notes. He had paid previously four annual premiums, part in cash and part by note, in the manner provided. GRANGER, C. J., in delivering the opinion of the court said:—"The third condition before us is plain. It clearly states that, upon a failure to pay the interest in advance, the policy should be void. The fifth adds that in such case all payments thereon and all dividends and credits accruing

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therefrom shall be forfeited to the company. But the insured claims that the fourth condition modifies the third. This fourth condition makes no reference to interest, either expressly or by reasonable implication. Having failed to pay the interest due on four notes he in effect was in default for a part of each of four annual premiums, besides the one that became due on March 7th, 1876. This interest formed no part of the annual premium due on that day. Its punctual payment was necessary to complete the payment of the premiums due in the four preceding years. * * * We are unwilling to so construe a stipulation worded so plainly, and with such evident care, as to make of no moment a default which the third condition declared of enough importance to destroy the life of the policy."

In *Attorney General* v. *North Amer. Life Ins. Co.*, 82 N. York, 172, decided in September, 1880, the question arose in reviewing the decision of a referee appointed to adjust the claims against an insolvent life insurance company in the hands of a receiver. It appeared that in lieu of certain policies upon which notes had been given for part payment of annual premiums, paid-up policies had been issued containing a provision that in case the interest should not be paid as agreed the policies should become void. Where there was such default in the payment of interest the referee rejected the claims, and the Court of Appeals unanimously sustained the ruling. EARL, J., in delivering the opinion, in answer to the claim that the condition relied upon by the insurance company was unconscionable, and that a case of forfeiture was presented against which a court of equity should relieve, said, among other things:—"It was a contract between the parties that these policies should be carried only so long as interest should be promptly paid upon the notes; and if not paid, that the company should cease to be liable. * * * The provision is not an unusual one. * * * Here was an insurance company doing business throughout the country. Prompt payment of its obligations was deemed important to it. If premiums to such an insurance company are not promptly paid, it may be agreed that the policy may

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be forfeited. If notes be taken for premiums, payable at a definite time, the policy may be avoided for non-payment. If notes be taken which are to run to the maturity of the policy and then be adjusted, the policy may be avoided for non-payment of the interest. All these cases stand upon the same footing, and a court of equity can, upon principle, no more relieve against a forfeiture in one of them than in either of the others. The case of the claimants may be treated as if the interest represented premiums to be paid during the running of the policies. * * * There is much authority sustaining the decision of the referee. *Anderson* v. *St. Louis Mut. Life Ins. Co.*, 5 Bigelow, 527; *Martin* v. *Ætna Life Ins. Co.*, id., 514; *Patch* v. *Phœnix Mut. Life Ins. Co.*, 44 Verm., 481; *Knickerbocker Life Ins. Co.* v. *Harlan*, 8 Ins. L. J., 349; *Nettleton* v. *St. Louis Life Ins. Co.*, 6 id., 426; *Smith* v. *St. Louis Mut. Life Ins. Co.*, 2 Tenn. Ch., 742."

Patch and Wife v. *Phœnix Mut. Life Ins. Co.*, 44 Verm., 481, decided in 1872, was an action of assumpsit upon a paid-up policy issued in exchange for an endowment policy upon which two annual premiums had been paid, partly by two notes. The exchange was made pursuant to a memorandum on the back of the first policy to the effect that the company would purchase any of its policies upon which two annual premiums had been paid and issue a new policy for the equitable value of the policy surrendered, "thus making *all* policies *non-forfeitable*." On the margin of the paid-up policy was this statement:—"This policy is conditional on the interest on two notes given in part payment for two premiums paid on No. 10,603, being paid in advance." PIERPONT, C. J., in delivering the opinion, among other things, said:—"The interest upon the notes, by their terms, is to be paid annually, and it is such interest that the memorandum refers to and requires to be paid in advance. Any other construction would be a manifest violation of the meaning and intent of the parties to this contract. The defendant having taken the notes in the place of the money, it could not reasonably be expected that the defen-

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dant would do less than to secure the payment of the interest thereon, by making the new policy dependent upon its payment. Treating the memorandum as a part of the policy, and the whole to be considered the same as though it was included in the body of the instrument, the interest upon the notes becomes practically a premium upon the policy, payable annually in advance; and on failure to pay the same, the company ceases to be liable and the policy is forfeited."

Russum v. *St. Louis Mut. Life Ins. Co.*, 1 Mo. App., 228, decided February 28th, 1876, was an action on the original policy, conditioned—1. That default in the payment of future annual premiums should not avoid, but it should be proportionately reduced; 2. That if the insured should fail to pay annually in advance the interest on premium notes the policy should be void. GANTT, P. J., in delivering the opinion of the court said:—"If the insured had paid the interest on his note on December 2d, 1871, he would, we think, have been entitled to recover two tenths of the sum insured, deducting the unpaid note. Having failed to make that payment the policy is forfeited and the company discharged. We think it impossible to escape this conclusion. * * * It is urged that the two provisions of this policy are inconsistent and contradictory, and that the one which leads to a forfeiture must be rejected; but the clauses are not inconsistent. * * * All that is needed is for the insured to bring himself within the terms of both. The first is intended to save a forfeiture, which generally would be incurred by the failure to pay the annual premium. To this extent it is a privilege or advantage to the assured. The second proviso insists upon rigorous conditions—in respect of what? Only of so much of any unpaid premium as the assured, instead of paying in cash, takes the indulgence of only paying interest on at six per cent. If he does not wish to incur the hazard of a forfeiture on account of this part of the premium, his remedy is easy; he can presently pay his note for the premium, and, without more, he has a paid-up, non-forfeitable policy for a fixed portion of the sum con-

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templated by the instrument when originally issued. If he wishes, instead of this, to take the chances of gain, he must at the same time incur the hazard of loss, and cannot complain if he be held to the terms of the contract he has deliberately made."

Other pertinent cases might be cited, but these will suffice to show that the views of the majority of this court have a very strong support in other jurisdictions; and while we concede that the opposing views of the plaintiff are sustained by some courts entitled to very great respect, we think the weight of judicial authority is the other way.

The first case cited in behalf of the plaintiff, to which we will refer, is *Fithian* v. *North Western Life Ins. Co.*, 4 Mo. App., 386, decided October 23d, 1877, by the same court that decided *Russum* v. *St. Louis Mut. Fire Ins. Co.*, (*supra*,) the year previous. It was held that non-payment of interest did not forfeit the policy in that case, and some of the reasoning at first blush seems different from that in the first case; but LEWIS, J., who delivered the opinion, concurred in the previous one, and no allusion whatever is made to the other case. It would seem improbable that it was the intention of the court to overrule the first case or that it was considered inconsistent with the last one, and upon examination of the policy we see good ground for a distinction. The first stipulation was that in case of default the company would pay as many tenths of the original sum as there should have been complete annual premiums paid; then followed the provision—"If said premiums, or the *interest* upon any note given for premiums, shall not be paid on, &c., * * * then in every such case the company shall not be liable for the payment of the *whole sum assured* and for such part only *as is expressly stipulated above*." Here both notes and interest are put on the same ground, showing that no distinction was intended, and the company in terms is made liable as stipulated—that is, for so many tenths of the original sum insured; and there were other provisions in the policy adverted to in the opinion showing that no forfeiture was to arise because of any default in payments, whether of

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notes or interest. This case it will be seen may therefore be widely distinguished from the one at bar, in that the policy in terms secures a proportionate part against forfeiture, while here, as we have seen, it is expressly forfeited for non-payment of interest, with no relief provided.

The same distinction may also be made in regard to the cases of *Hull, Admr.*, v. *North Western Life Ins. Co.*, 39 Wis., 406; *North Western Mut. Life Ins. Co.* v. *Little*, 56 Ind., 504; *Ohde* v. *North Western Life Ins. Co.*, 40 Iowa, 357; *Symonds* v. *Same*, 23 Minn., 491; *North Western Mut. Life Ins. Co.* v. *Ross, Admr.*, 63 Geo., 199; and *The same* v. *Bonner*, 36 Ohio St., 51. In all these cases the policies were the same as in the case cited from 4 Mo. App., (*supra.*)

Of all the cases therefore cited in behalf of the plaintiff only two remain which are weighty in the opposing scale. The first and the stronger case is that of *Cowles* v. *The Continental Life Ins. Co.*, (the present defendant,) decided July 31st, 1855, by the Supreme Court of New Hampshire, reported in New England Reporter, Vol. 1, No. 10, p. 247, where the action was assumpsit on a paid-up policy identical in its provisions with the one now in suit and where the defense was the same. It is therefore irreconcilably in conflict with the positions we have taken.

In the brief but forcible opinion delivered by DOE, Ch. J., there is no reference to the authorities. The basis upon which the reasoning rests will fully appear from the following quotation:—"A significant clause of the contract is a conspicuous marginal advertisement describing the writing as a 'Non-Forfeitable Endowment Policy.' The forfeiture clause qualified by the provision for a 'paid-up' policy does not mean that the reduced 'paid-up,' 'non-forfeiture' insurance is annually forfeitable for non-payment. The strict construction for which the defendant contends would leave the insured exposed to a danger from which the reduction and conversion of the policy would be generally understood to relieve him; and it is not to be presumed that the document was ingeniously drawn up for the purpose of fraudulently obtaining money by non-forfeiture pretences. All

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parts of the contract taken together can be, and should be, reasonably and liberally understood as designed to accomplish the scheme of non-forfeiture for non-payment which men in general would believe the policy invited them to accept."

The other case is *Bruce* v. *The same*, decided February 26th, 1886, by the Supreme Court of Vermont, and reported in The Eastern Reporter, Vol. 4, No. 6, p. 452. This was a bill in chancery to compel the delivery of a paid-up policy and payment of the amount due. The court gave the same construction to the original policy as was given in the New Hampshire case, but certain circulars issued by the company, and the fact, found in the case, that the company regarded the premium notes as given for a loan of money, seem to have been influential with the court.

This case however recognizes a distinction, already adverted to, and which we think applicable to the case now under consideration. POWERS, J., in giving the opinion said:—"The case at bar is unlike *Patch* v. *Ins. Co.*, 44 Verm., 481. There the question arose upon the construction of a paid-up policy, issued in place of a former one surrendered, which contained an express stipulation that certain sums of interest should be paid in advance. The action was assumpsit on the paid-up policy, and no question was made whether the paid-up policy was in such form as the insured was entitled to. Such as it was he accepted it, and the action was upon it in the form it was issued and accepted."

It is manifest that our argument in some particulars has gone beyond the strict requirements of the present case, and has tended in some measure to show that the form of paid-up policy issued to the plaintiff and accepted by him was in accordance with the original policy; but in view of the adverse construction of the same kind of policy by the courts of New Hampshire and Vermont, and the want of unanimity among the members of this court upon this subject, we think it best to leave that part of the discussion an open question for future consideration should the matter again arise, and to restrict the present decision to the pre-

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cise question stated at the opening of our discussion, whether the paid-up policy involved in this suit contains a provision whereby the failure to pay interest has accomplished the forfeiture of the policy.

We advise that the answer of the defendant to the complaint is sufficient.

In this opinion PARK, C. J., and PARDEE, J., concurred. CARPENTER and GRANGER, Js., dissented.

THE TOWN OF BRIDGEWATER *vs.* THE TOWN OF ROXBURY.

Hartford District, March T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

Where the person who made entries which are admissible in evidence is beyond the reach of process or is incompetent to testify, it is the same as if he were dead, and his handwriting may be proved.

To make entries upon an account book admissible it is not necessary that the transaction to which they are applied should be directly between the original creditor and debtor.

Nor that they should be against the interest of the person making them.

In the case of an entry against the interest of the person making it, the entry is admissible at whatever time it was made; but in the case of an entry that becomes admissible only because made in the course of business, it is essential that it should have been made at the time of the transaction to which it relates.

In a suit for supplies furnished by the plaintiff town to a pauper of the defendant town, a selectman of the latter testified to having employed a physician to attend upon the pauper and to his having been afterwards paid by the town, but he could not fix the date of the attendance, which became important. Held that entries upon the account book of the physician, (who had since become mentally incompetent,) made in the regular course of his business, charging the town for his attendance upon the pauper, with the date, and crediting the town with payment, were admissible for the purpose of showing the time when the service was rendered.

They were also admissible to corroborate the testimony of the selectman.

Also as evidence of the fact that the medical service was rendered.

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The entries made by the physician were not to be excluded on account of his interest as an inhabitant of the defendant town. No controversy with regard to the pauper had then arisen, and it was not reasonable to suppose that the entries were made in anticipation of any benefit to the town.

A possibility of a corrupt motive always exists in respect to human acts, but some probability of it ought to appear in order to exclude entries fairly and regularly made.

Where a town employs a physician to attend upon a person who is in fact a pauper and is in need of medical attendance, it is not necessary that the pauper should know that the physician is to be paid by the town. And so with any supplies furnished.

[Argued March 3d—decided April 10th, 1886.]

ACTION to recover for supplies furnished to paupers claimed to belong to the defendant town; brought to the Court of Common Pleas of Litchfield County, and tried to the court before *Warner, J.* Facts found and judgment rendered for the defendant. Appeal by the plaintiff. The case is fully stated in the opinion.

L. D. Brewster and *J. H. McMahon*, for the appellant.

J. Huntington and *A. D. Warner*, for the appellee.

LOOMIS, J. This is a complaint to recover for supplies furnished Esther A. Snyder and her three minor children.

The alleged pauper was born in the defendant town in 1853, of parents, Chauncey and Patty Wilmot, who at the time of her birth had their settlement in New Milford. Chauncey Wilmot died in 1858 in the town of Roxbury without having gained a settlement there. Soon after Patty, the mother, with her minor children, moved from the defendant to the plaintiff town and remained there until May, 1860, and then with her children returned to the defendant town, where she lived in a shanty built by her son Daniel for her and her children to occupy, and there remained for about twenty years. Esther A., the pauper in question, was married November 27th, 1871, to LaFayette Snyder, a person of full age, but who had at the time no settlement in any town in this state.

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Upon these facts it was conceded that the pauper in question would take the settlement of her mother, if the latter had gained one by commorancy in the defendant town after the decease of her husband. And it was also conceded that such settlement had been gained by the mother unless prevented by two payments made by the town for medical attendance upon Patty in the years 1865 and 1866.

Upon this subject the court finds:—"In 1865, Patty being sick and needing medical aid, Doctor Downs, a physician of Roxbury, informed a selectman of Roxbury that she was sick and that he, the doctor, could no longer attend to her unless the town would pay him. The selectman thereupon directed the doctor to render her medical assistance and charge the same to the town, she being unable to pay the doctor and having no property. Afterwards the doctor, on the 26th day of April, 1865, rendered to her medicine and attendance and charged therefor $1.50 to the town of Roxbury, which was paid to him by the town September 29th, 1865. On the 16th of July, 1866, the doctor rendered a like attendance upon Patty while sick and charged therefor $1.50, which the town paid him in 1867, she having no property."

The question whether medical aid was needed and furnished, being a question of fact exclusively for the trial court, has thus been settled. Whether the evidence was of sufficient weight to justify such finding is not a question which this court can review in this proceeding, but the admissibility of the evidence, if objected to, is properly before this court.

To prove the facts found by the court the defendant offered as a witness one who was a selectman of the defendant town for the years 1865 and 1866, who testified in substance that he was selectman during those years and that he gave instructions to Dr. Downs to doctor Patty during that time; that the doctor came to him in 1865 or 1866, he thought it was in 1865, and stated that Patty was sick, and that he could no longer attend upon her without pay for further services, and that thereupon he directed the doctor to attend

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her and told him the town would pay him; that the doctor brought in his bill afterwards for the year, and it was paid; that the selectmen had no record of it, but that he thought the bill was $1.50. No error is predicated upon the admission of this evidence. But the defendant further offered, and the court admitted against the plaintiff's objection, the entries in the account books of Dr. Downs, after proving that the doctor at the time of trial had become mentally incompetent to testify or transact any business, and that the books offered were his books, kept by him in his own hand, and that the charges were made in the regular order and course of business, with like charges and credits against divers other persons and patients; that the charges were entered first in a day book and posted into a ledger; that the entries in question were:—

"April 26, 1865. Town of Roxbury, Dr. To visit Patty Wilmot and med., $1.50.

"Sept. 29, 1865. Cr. By town order to balance account to this day, $16.98.

Also, "July 16, 1866. Town of Roxbury, Dr. To visit Patty Wilmot, $1.50." "1867. Cr. By town order, $8.00."

Were these entries admissible? We think they were. 1. To show the time when the services were rendered, and the fact and date of payment. In these respects it was necessary to supplement the testimony of the selectman, who left the date uncertain even as to the year. The time was quite important in order to break the six years self-supporting commorancy after May, 1860, and again before March 27th, 1871. 2. It was admissible to corroborate the testimony of the selectman. Suppose the defendant had rested upon the testimony of the selectman alone, and there had been no such entries on the doctor's books, would not the absence of such entries furnish very strong inferential evidence that there was no such medical attendance ever rendered or paid for? *Morrow* v. *Ostrander*, 13 Hun, 219. If then the absence of such entries would greatly impair the selectman's testimony, their existence must necessarily furnish strong support.

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If the evidence was admissible for either of these purposes the ruling of the court is sufficiently vindicated. But the question discussed by counsel was whether these entries were admissible as tending to show the fact that medical services were rendered to Patty Wilmot and paid for by the town? It is highly probable that the court below gave effect to the evidence as the question assumes, and therefore we will discuss it as if it was of controlling importance.

We think the evidence was admissible for these purposes, in addition to those mentioned previously. In *Abel* v. *Fitch*, 20 Conn., on p. 96, this court, (ELLSWORTH, J., delivering the opinion,) stated the rule as follows:—"Entries by persons since deceased, having full and peculiar means of knowledge, made at the time, in the regular course of business, in the usual and proper place and manner, especially if in the discharge of one's duty, are admissible to the jury as part of the *res gestæ*." In Abbott's Trial Evidence, p. 322, it is said:—"An entry or memorandum, whether in a book or any other form, made in the usual course of business, and at about the time of the transaction, by a person not a party to the action, who is shown to have had means of personal knowledge of the fact recorded, is competent evidence of such fact—1. If the person who made it is produced and verifies the hand-writing as his own, and testifies that it was so made, and correct when made, although he may have no present recollection whatever of the transaction; or, 2. If the person who made it is dead, and his signature or hand-writing is proved, and he does not appear to have had any interest to falsify." A distinction applicable to this last qualification will be referred to hereafter. See also 1 Greenleaf on Evidence, § 116. There is some disagreement in the authorities as to the necessity of calling the person who made the entries, if he is living, though he may be without the jurisdiction. But in this state, and in several other jurisdictions, the reasonable rule has been adopted that if the person making the entries is beyond the reach of process, or is incompetent to testify, it is the same as if he were dead. *Bartholomew* v. *Farrell*, 41 Conn.,

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109; *New Haven & Northampton Co.* v. *Goodwin*, 42 id., 230; *Livingston* v. *Tyler*, 14 id., 499; *Aller* v. *Berhaus*, 8 Watts, 77; *Crouse et al.* v. *Miller*, 10 Serg. & Rawle, 158. We do not see why the case at bar does not fall directly within the rules referred to.

As a case analogous in principle and illustrative of the application of the rule in this jurisdiction, we cite *Ashmead* v. *Colby*, 26 Conn., 289, where the petitioners claimed that the respondents had combined to defraud them in the sale of land in Virginia as containing gold, and that *B*, one of the respondents, at different times when the petitioners were about to examine the tract, had mingled gold dust with the soil in particular places, and then caused them to examine the soil in those places and find the gold thus placed there. As a part of the evidence going to establish this fact, they offered an account book kept at a neighboring mine by a clerk since deceased, containing entries of sales of gold dust to *B*, just before the times when they made the examinations, for the purpose of showing that *B* had gold dust in his possession at those times which he might have so used. Now if the entries on the books of this mining company, of which the respondents had no control, containing charges of the sale of gold dust, would prove the delivery to and possession of the gold dust by the person referred to, why will not the charges for medical attendance and medicine furnished to Patty Wilmot prove that she was the recipient of these things?

But we are here reminded of one of the claims in behalf of the plaintiff, that this kind of proof can only apply where the transaction is directly between the original debtor and creditor. This limitation however was first made as one of the numerous rules that have obtained in the United States regulating the admission of the party's own entries in his own books, which were to be supported by the suppletory oath of the party himself in cases where originally he could not otherwise testify in his own behalf. See *Poultney* v. *Ross*, 1 Dall., 138, decided by the Court of Common Pleas

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in Pennsylvania in 1788, and *Deas* v. *Darby*, 1 Nott & McC., 436, decided in 1819.

The principle can have no proper application to contemporaneous entries by third parties in the usual course of business. But even under the former system, if an order to deliver goods to a third person was proved by evidence *aliunde*, the delivery could be proved by the books and suppletory oath. *Mitchell* v. *Belknap*, 23 Maine, 475.

In the case at bar there was independent evidence as to the order to render medical services and medicine to Patty Wilmot; and moreover it was the statutory duty of the selectmen to order such relief if she was a pauper. *Welton* v. *Wolcott*, 45 Conn., 329. In *Coffin* v. *Cross*, 3 Dane's Abr., 322, decided in Massachusetts in 1800, the plaintiff's books and oath were held admissible to prove the fact that medicine and medical attendance were furnished to a third person, not the defendant. In *Bay* v. *Cook*, 2 Zabr. (N. J.,) 343, a suit was brought by a physician to recover for medicine and attendance for one Sharp, a pauper of the township of Washington, who fell sick in the town of Independence. The defendant was overseer of the poor for the township of Washington and employed the plaintiff to administer to the pauper's necessities. The plaintiff could not recover of the town because no order for relief had been obtained as specially required by a statute then in force. Upon the trial it was held that the physician's book of accounts was admissible, even where the items on the face of the book were not charged on the same day when the services were rendered. In *Leland* v. *Cameron*, 31 N. York, 115, it became important to prove that an execution in a certain case had been delivered to the sheriff, who was dead and whose papers had all been burned with his house. The only evidence was the entry by an attorney in his register, which was held to be competent evidence to prove the fact. In *Warren* v. *Greenville*, 2 Stra., 1129, the book of a deceased attorney containing charges relating to a common recovery were admitted as tending to prove a life estate, where it appeared by the book that the charges had been paid. In *Doe*

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v. *Robson*, 15 East, 32, entries of charges made by an attorney in his books showing the time when a certain lease, prepared for a client of his, was executed, which charges were shown to have been paid, were held to be evidence after the attorney's death to show that the lease (executed under a power to lease in possession and not in reversion, which lease bore date the 31st of August, 1770, and purported to grant a term from the 29th of September then next ensuing,) was not in fact executed till after the 29th of September, inasmuch as the charge for drawing and engrossing the lease was under date of October, 1770. This entry was considered as one against interest, and put upon this ground by Lord ELLENBOROUGH, C. J., and BAILEY, J., who delivered the opinions, and it was found to be against interest because the attorney who entered the charge had also entered a credit showing that a debt to him from another was discharged. Upon the same ground the entries of Dr. Downs might be treated as against interest. There is however the other fact that he was an inhabitant of the defendant town, which we will advert to in another connection.

But it must not be supposed that the admissibility of the entries in question depends on the fact that they were against interest. Many cases give great prominence to this fact because they belonged to that class of entries, but a clear distinction was long ago made, as laid down by PARKE, B., in *Doe* v. *Turford*, 3 Barn. & Ad., 890, to this effect—in case of an entry against interest proof of the handwriting of the party, and his death, is enough to authorize its reception; at whatever time it is made it is admissible; but in the other case (namely, an entry in the course of business,) it is essential to prove that it was made at the time of the transaction to which it relates. In 1 Greenleaf on Evidence, § 120, the same distinction is more elaborately treated and explained.

The contemporaneous character of the entries in question appears on the face of the books, the original entries being made daily in a regular day book in which were entered daily visits and charges coming up on both sides to the dates in question.

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In a note by Mr. Hare, the American editor of the Exchequer Reports, to the case of *Percival* v. *Nanson*, 7 Exch., on p. 4, it is said :—" Entries by a third person in the course of business are in general admissible in this country (United States) after his death, whether they were for or against his interest when made ; and the entries of a deceased agent may consequently be read in support of a suit brought by the principal, even where they are of payments made by and not to the principal."

This proposition is fully supported by the case of *Dow* v. *Savage*, 29 Maine, 117. In *Inhabitants of Augusta* v. *Inhabitants of Windsor*, 19 Maine, 317, it was held that entries by a deceased physician in the regular course of his business are admissible in evidence when corroborated by other circumstances to render them probable, and that it was not necessary that entries to be admissible should be against the interest of the deceased person making them.

We discover a tendency to more liberality in the courts respecting the admission of entries by both parties and third persons.

In 1 Wharton's Law of Evidence, § 246, it is said :—" Original entries of deceased parties in their own books are held (in several jurisdictions of the United States) admissible, even though self-serving, when contemporaneous, and when confined to a transaction within the business of the party."

The distinction previously adverted to disposes of any objection arising from the fact that Dr. Downs was interested as an inhabitant of the defendant town. But we do not think under any rule that has ever obtained in this state that the court upon this finding could say that the deceased physician had such an interest to pervert the fact as ought to exclude his entries. No controversy with any other town respecting this pauper had arisen or was contemplated. The acts both of the selectman and the physician are consistent with a belief on their part that Patty belonged to the defendant town to support and that no other town could be compelled to reimburse it. Indeed the expense at the time

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was apparently against the interest of the town. True, some twenty years later in a controversy with the plaintiff town respecting the settlement of a child and grandchildren of this pauper, the facts became important to exempt the defendant from liability, but is it reasonable to suppose that the physician made these entries in anticipation of any such resulting benefit to the town? A possibility of a corrupt motive always exists in respect to human acts, but some probability of it ought to appear in order to exclude entries fairly and regularly made as these were.

But the further claim is made in behalf of the plaintiff, that though the evidence we have been considering was properly received and the fact established that the town did furnish aid to Patty at the times and in the manner claimed, yet it was not effectual to prevent her gaining a settlement in the defendant town for two reasons—1st. Because it was not shown that she was in a condition to require aid, and 2d. Because it does not appear that she received the aid kowing that it was furnished to her as a pauper.

As to the first point, the facts found specifically by the court are that Patty at the time was sick, that she needed medical aid, that she was unable to pay for it, and that she had no property. It is difficult to conceive what fact is lacking to make her a pauper.

These facts must be accepted by this court as conclusive, unless indeed they are vitiated through an erroneous admission of evidence whereby they were found, which was objected to in the trial court. Though this court may consider the evidence insufficient yet the finding must remain. The only question for review in this connection is whether evidence was improperly received, and even this is not properly reviewable unless it was objected to in the trial court.

Now in addition to the evidence we have been considering, it was further proved—"that from May, 1860, to 1867, she had no visible estate; that she lived in a house eighteen feet by twenty in dimensions, the sides of which were covered with unmatched hemlock boards; the roof was

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covered in part with shingles, the remainder with boards; only one room, a part of which only had any flooring; the ceiling was the roof; and her only business was to work for her neighbors and gather and sell berries in their season. There was no evidence that her children or any one rendered her any aid, except that her son Oliver disposed of some things for her which she brought into the house."

Now this evidence was not objected to, and if it had been it would have been admissible as tending to show that Patty had no property. Indeed it would do more, it would make a very good *primâ facie* case; for the absence of all visible estate for seven years would ordinarily indicate the non-existence of an invisible estate, so far as it related to this world. All the surroundings of this person indicated great destitution, not only of property but of friends to aid as well.

The second reason for rendering the supplies furnished ineffectual is, that it is not shown that Patty received aid as a pauper or knew the town was to pay the doctor. Now it is quite true that the selectmen of a town cannot create a pauper by any mere act of their own; they can relieve one who is a pauper and in need, and they are required to do so by the statute. But no rule of law has ever obtained in this state requiring supplies to be labeled "pauper supplies," or the recipient to be labeled "pauper," or to acknowledge the receipt of supplies as a pauper. An acquiescence on the part of the recipient may be presumed from circumstances showing need and destitution; and where the court is satisfied that relief was furnished to a needy pauper pursuant to duty created by the statute, the town may have the benefit of it, either to interrupt a settlement by commorancy or to lay the foundation of a claim over against another town.

There was no error in the judgment complained of.

In this opinion the other judges concurred.

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ALFRED S. DICKINSON AND WIFE'S APPEAL FROM PROBATE.

Hartford District, May T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS AND GRANGER, JS.

The statute (Gen. Statutes, p. 372, sec. 5,) provides that intestate estates shall be distributed by three distributors under oath appointed by the probate court, "unless all the persons interested shall be legally capable to act, and shall make and file in court a division of the same, made, executed and acknowledged like deeds of land, which instrument being recorded in said court shall be a valid distribution of said estate." Held that a division of such an estate made in writing among the persons entitled to it, all being capable to act and all joining, but where the division was not made, executed and acknowledged like a deed of land, and was not filed and recorded in the probate court, did not preclude a regular probate decree ordering a distribution of the estate.

An order for the distribution of a certain amount as the balance left on the settlement of an administration account, and an acceptance of a distribution made under the order, but where by mistake the amount was not large enough, are not necessarily erroneous, but the distribution may be good so far as it goes, and a further order of distribution made for what remains.

A probate decree appealed from remains in full force until the appellate court reverses it; but the probate court ought properly to be advised as to the action of that court, although a judgment affirming the decree is not necessary.

[Argued May 4th—decided October 5th, 1886.]

APPEAL from probate decrees allowing the administration account upon the estate of Electa Perry, deceased, ordering the distribution of the estate and accepting a distribution made under the order; taken to the Superior Court in Middlesex County. The court (*Stoddard, J.*,) reversed the first decree and affirmed the others, and the appellants appealed to this court. The case is sufficiently stated in the opinion.

C. J. Cole, for the appellants.—1. The statute authorizing heirs to agree on a distribution of the whole estate does not

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affect the right they have at common law to divide or alienate their estates. *Baxter* v. *Gay*, 14 Conn., 122. The object of the statute for the settlement and distribution of intestate estates was to provide a way and means for such settlement and distribution which would protect all the parties, but if the heirs are of full age and agreed, and the rights and claims of creditors do not intervene, there is no reason for the interference of a court of probate. In point of fact a great many estates are fully settled by the heirs among themselves without the intervention of a probate court. Courts do not interfere to set aside the agreements of parties unless it be for fraud or mistake, but rather seek to encourage the amicable settlement of differences, and to confirm and establish such settlements when made. In *Adams's Appeal from Probate*, 38 Conn., 304, the principle which we seek to establish here was sustained. That decision rests partly on the statute, but the theory of the case goes beyond the statute. It was held, under the statute providing for the appointment of guardians by the court of probate, that if a minor of lawful age shall select as guardian a proper person in the judgment of the court of probate, the judge has no discretion in the matter, but it is his duty to approve such choice, and make the appointment accordingly.

2. It is clear that in this case the order of the court of probate has been sufficient to raise a question as to the title to the factory and lands between Eveline R. Dickinson and Noah C. Perry, which must be decided either here or elsewhere. One claims it under the distribution by agreement, the other under the distribution by the court of probate. A court of equity will interpose to remove a cloud upon a title, but should a court of probate having equity powers place a cloud on a title which a court of equity would remove, or should it so make its decree as to carry out the agreement and confirm the acts of the parties, and thus prevent the necessity for further legal proceedings in order to establish the rights of the parties in interest? At all events should not the Superior Court on a review of the case re-

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ceive the evidence upon the one side and upon the other, and determine the question as between the parties, and thus prevent circuity of action and simplify the proceedings in the case?

W. F. Willcox, for the appellees.

LOOMIS, J. The statute with regard to the division of intestate estates among the heirs and next of kin provides that "intestate estate, after deducting expenses and charges, shall be distributed by three disinterested persons, or any two of them, under oath, appointed by the court of probate, unless all the persons interested in said estate shall be legally capable to act, and shall make and file in court a division of the same, made, executed and acknowledged like deeds of land; which instrument, being recorded in said court, shall be a valid distribution of said estate." Gen. Statutes, p. 372, sec. 5. The question in the present case is—whether a division of such an estate made in writing among the heirs and next of kin, all being of age and all joining, but where the division is not "made, executed and acknowledged like deeds of land," and is not filed and recorded in the probate court, supersedes or precludes a regular probate decree ordering such a distribution.

It is not important to the question whether deeds have passed between the heirs, releasing to each his agreed share, or whether the matter rests wholly in a written contract. The mere contract would be binding on the parties executing it, though it would of course require an exchange of deeds to make the title complete on the public records. That heirs may make such a contract and such conveyances, and that they will be valid and binding, was settled by the decision of this court in *Baxter* v. *Gay and wife*, 14 Conn., 119, and is no longer an open question. All the heirs could unite in conveying their rights to a stranger, or one heir could convey his interest to a stranger. If this is so they could certainly convey to one another.

But the question is not whether they could convey to

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each other; but whether such agreement or conveyances would supersede and exclude a later formal distribution by the probate court. As such formal distribution is not necessary to make a valid title on the public records, where all the heirs have executed and delivered to each other cross-deeds conveying all their interest, it may at first blush seem strange that the law should allow the probate court to incumber its records with nugatory decrees of distribution which cannot be enforced. This anomaly arises from the mandatory terms of the statute and from the inability of the probate court under its limited jurisdiction to hear and enforce the claims of parties founded on contracts made between them after the estate shall have vested in the heirs upon the death of the intestate.

In *Holcomb* v. *Sherwood*, 29 Conn., 418, this court decided that where one of the heirs has conveyed away his interest in the real estate before distribution, the court of probate is to ignore the conveyance, and order the distribution made to the heirs as if no conveyance had been made. The conveyance of course stands good, and operates either by way of estoppel or as an assignment of the heir's interest.

We see no reason why the same rule should not be applied here. The distribution, we think, would ordinarily be made in accordance with the division made by the parties themselves; but if it should not, any heir who should get what by the agreement he was not to take, would be bound to convey to the party who took it under the agreement, and any heir failing to get under the distribution what he had taken by the agreement, could by a proceeding in equity compel a conveyance of the agreed part to himself.

It is clear that, if this were not so, a court of probate would have many questions to try which it could not entertain or dispose of, and which would be entirely foreign to probate jurisdiction as now recognized. If, for instance, there had been a voluntary division by written agreement or by deeds, the question might be made whether the agreement or deeds had not been obtained by fraud or duress, or executed under mistake, or, as suggested by the pleadings

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in this case, whether the agreement if originally valid had not been lawfully rescinded, or whether the agreement ought not to be set aside upon equitable considerations. Indeed we can hardly conceive a case where, after such a division had been made by the heirs themselves, any one of the heirs would apply to the probate court for an order of distribution, unless he was prepared to attack the voluntary division upon some of the above mentioned grounds. The recent case of *Hewitt's Appeal from Probate*, 53 Conn., 24, has settled the point that the probate court cannot go into these inquiries. The court of probate has before it the statutory duty of ordering a distribution of an intestate estate, "unless all the persons interested * * * shall make and file in court a division of the same, made, executed and acknowledged like deeds of land; which instrument being recorded in said court shall be a valid distribution of said estate." We think that the court must ignore any division not made in full accordance with this statute requirement.

It is not however to be inferred that the probate court in every case is to disregard such a division and proceed on its own motion to order a distribution. The court will be justified in waiting for some person interested to apply for the order, and, as already suggested, it can hardly be conceived that any heir having made and concurring in such a division would apply for such an order. Where however he does apply, and the order is granted, and on the distribution the voluntary division is ignored, the case becomes one for a court of equity, which, upon the complaint of any party aggrieved, could set aside or establish the conveyances previously made or enforce the written agreement. That court, having full jurisdiction, could hear all the evidence and act finally upon it.

Our conclusion that there was no error in the matters assigned would ordinarily preclude discussion as to other errors. But in this case there is an error and inconsistency in the finding of the trial court that might mislead the probate court in revising the administration account and in ordering another distribution.

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It was our first impression that the error could not be fully corrected without a reversal of the judgment of the Superior Court, but on further consideration we have concluded that such reversal may not be necessary after the matter is fully explained. The appeal from probate was from the decrees accepting the administration account, appointing distributors, and accepting their doings. In the reasons for appeal, among other things, the balance of account found due the administrator of $784.61 was particularly mentioned. In schedule *B* the items of the administrator's charges against the estate appear, and they amount to the sum of $1,984.56. Upon this was a credit of $1,200 for rent of a factory in the hands of the administrator and the above balance was obtained by deducting the latter sum from the former.

Now the finding of the Superior Court is as follows:— "The decree of the court of probate in accepting and allowing the said administrator's account as to all sums and items stated and appearing in schedule *B* in said account, except the last two items therein, to wit, except items of 'funeral expenses, $144.73' and 'estimated expenses settling estate, $75.00,' is reversed, and all said items stated and claimed in said schedule *B*, except as above stated and accepted, are found not to be due, and are disallowed and rejected. The sum of the items hereby disallowed and rejected is $564.83, and in all other respects and particulars said decree is confirmed and established."

The meaning of the court as to the items to be deducted cannot well be mistaken. All the items on the debit side of the account are rejected except the last two, which are named with the amounts. Deducting the two items excepted, which amount to $219.73, from $1,984.56, the whole amount, and we have as the correct sum of the items disallowed and rejected $1,764.83. But the court manifestly errs in stating the sum of the rejected items to be $564.83. The court makes no mention of the credit of $1,200 in the hands of the administrator. It is absurd to suppose that what the administrator acknowledged to be in his hands

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would be rejected in his favor, and besides, the court rejects all the items except the last two, which are named, and we see that they are the last two items on the debit side of the account, which shows that the deduction has reference to that side of the account. How the mistake on the part of the trial judge occurred it is not necessary to conjecture. We think however the footing given may be rejected and corrected by the more certain data contained in the finding, and that the court of probate may and should revise the account accordingly. Upon such revision the result will be as follows:—The property mentioned in schedule *A* for distribution amounts to $7,275.28. The probate court allowed the administrator to deduct $784.61 from this sum as a balance due him, but the finding of the Superior Court shows that instead of the estate owing him he owed the estate. His account credits $1,200 as being in his hands; the court allows him only two items, which together amount to $219.73, which being deducted from the $1,200, leaves in his hands belonging to the estate the sum of $980.27, which sum must be added to the amount of property first mentioned (viz., $7,275.28,) which makes the entire amount to be distributed $8,255.55. The amount distributed was only $6,490.67. The difference, viz., $1,764.83, represents the remaining estate which the court of probate must now order to be distributed upon a just revision of the account according to the data given by the Superior Court. This we think may be accomplished without setting aside the distribution already made. The only objection to that distribution is that the amount was not large enough. It may we think be treated as good so far as it goes. One distribution does not preclude the making of another. The property now to be distributed being all in money, there is not the slightest difficulty in doing equal and exact justice to all the heirs without disturbing what they have already. The court of probate should therefore find the additional amount to be distributed and order its distribution.

There are other defects apparent on the record which it may be well to advert to, although, for reasons to be given,

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we consider them immaterial. The court, in its finding and judgment, takes notice only of the decree accepting and allowing the administration account, and after specifying what items are to be rejected in that account, it is found that "said decree is confirmed and established in all other respects." The other decrees appealed from, namely, the order of distribution, and the appointment, doings and return of the distributors, are not referred to at all in this connection. But as an appeal from probate does not of itself vacate the decrees appealed from, they remain in full force until the appellate tribunal otherwise determines; but the probate court ought properly to be advised as to the action of the higher court in respect to all the decrees appealed from, although a judgment by the Superior Court affirming them is not strictly necessary. In this case the only objection to the decrees respecting the distribution (other than the amount to be distributed,) was that the distribution already made by the parties would render any further distribution by the probate court illegal and void, and when that objection was overruled it was obvious that the Superior Court intended to affirm the distribution in all respects, except as it was incidentally affected by increasing the amount to be distributed, and, as that was found too small rather than too large, it may stand as so far good.

The finding of the court may be criticised in another respect. The record shows a departure from the issue raised by the answer to the sixth reason of appeal. The answer admitted a verbal agreement to divide the personal property (except some articles not appraised,) and also the real estate, and that deeds were drawn and executed by all the heirs to consummate the agreement as to the real estate which were never delivered or exchanged, and that in consequence of certain acts in violation of the agreement by the appellants the appellees refused to carry the agreement into effect. But upon the trial, when the appellants offered evidence to prove the alleged agreement, the appellees objected, upon the ground, in substance, that as there was no pretence that the agreement was made and executed in the manner pre-

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scribed by the statute the evidence was not admissible. The counsel for the appellants, instead of claiming the evidence as admissible to prove the issue, claimed it upon the sole ground that under the equity powers of the court of probate the agreement, if proved, would supersede any other distribution. If the appellant had then claimed the evidence because it would tend to prove the issue raised by the pleadings, there might have been an amendment to avoid the question. Under the circumstances we think the appellant waived his right (if any he had) to stand on the form of the pleadings. The court very naturally decided the question which the counsel submitted, and we do not think that the party should now be allowed to claim that the ruling of the court in rejecting the evidence was erroneous merely on account of the form of the issue raised by the pleadings.

For these reasons we conclude that there was no error in the judgment complained of.

In this opinion the other judges concurred.

RICHARD L. BISHOP *vs.* ELISHA C. BISHOP.

New Haven County, June T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

A payment by a partner on the partnership account in the regular course of the partnership business, can not be made the ground of a legal claim against his co-partner before the partnership accounts are settled.

B was a member and managing agent of a co-partnership which received on storage a quantity of oil belonging to *C*, which he afterwards sold and divided the proceeds among the partners. *C* then brought suit against the company for the value of the oil, making service only on the partners within the jurisdiction, and obtained a large judgment. *B* effected a compromise of the claim, and with the consent of all the partners paid the amount agreed and charged it in his private account against the company. Held that his claim stood

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on the same ground with any other claim of a partner for money advanced for the firm, and was governed by the above principle.

[Argued June 2d—decided July 27th, 1886.]

ACTION for an account and for the recovery of the amount found due; brought to the Superior Court in New Haven County. The only question in the case arose upon an item claimed by the defendant in his account. Facts found and case reserved for advice. The facts are sufficiently stated in the opinion.

W. L. Bennett, for the plaintiff.

L. Harrison, with whom was *E. Zacher*, for the defendant.

PARK, C. J. The controversy in this case presents the question whether a sum of money, paid by one partner in the due course of partnership business, can be made the basis of a legal claim for contribution against his co-partner, before the accounts of the partnership are settled.

The facts upon which the question arises are substantially as follows:—The plaintiff and defendant in this suit, together with certain other parties, were the owners of an oil producing farm in the state of Pennsylvania, called the Foster Farm, and were partners in carrying on the business of the farm, under the firm name of the Foster Farm Oil Company. The business consisted in procuring oil from the oil wells on the farm, and in storing and selling it. The defendant was the superintendent and managing agent of the company, and as such agent made an arrangement with one Bronson, who was a lessee of one of the oil wells on the farm, and who was working it for his own benefit, to store his oil in one of the company's tanks on the farm. Bronson stored a large quantity of his oil in the tank. The defendant, acting for the company, sold Bronson's oil, and divided the proceeds among the members of the company in proportion to their interest in the company and farm. Bronson afterwards brought a suit for the value of his oil

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against the company, describing them as partners doing business under the firm name of the Foster Farm Oil Company, and had service of the process made upon such members of the company as were within the jurisdiction of the court, including the plaintiff and defendant in this suit. He obtained judgment against the company for a large amount; which the defendant, with the knowledge and consent of all the members of the firm, afterwards succeeded in compromising for the sum of eight thousand dollars and some costs. Of this amount one of the members of the firm paid the sum of $2,500 and the defendant paid the balance, and the latter now brings one half of the sum paid by him, namely, the sum of $2,818.75, into his account against the plaintiff in this suit. No settlement of the accounts of the partnership of the Foster Farm Oil Company has ever been made.

These are the principal facts regarding the Bronson judgment; and we think the defendant is not entitled to recover of the plaintiff in this suit one half or any part of the sum paid by him to settle that judgment. The law governing the matter is well settled.

In *Mickle* v. *Peet*, 43 Conn., 65, the marginal note is as follows:—"Until the affairs of the partnership are settled, its assets disposed of, and the avails applied to the payment of all demands against it, it cannot be known what balance will be due from the partnership to any partner. When this balance is ascertained, then, and not before, the law implies a promise on the part of the other partner to pay his proportion of it." The cases of *White* v. *Harlow*, 5 Gray, 463; *Harris* v. *Harris*, 39 N. Hamp., 45; *Ordiorne* v. *Woodman*, id., 541; *Dowling* v. *Clark*, 13 R. Isl., 134; and *Arnold* v. *Arnold*, 90 N. York, 580, are to the same effect.

The reasons why one partner is not entitled to contribution in regard to some item in the partnership account favorable to himself, before the affairs of the partnership are settled, are numerous and cogent. In addition to other reasons that might be given, it is obvious that if one partner may do this in regard to an item favorable to himself,

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so may another partner in regard to an item favorable to himself, and there might be an interminable litigation over the account, and at last all the partners might be compelled to refund the money thus obtained in the final settlement of the partnership accounts; for until then, in the language of our court, it cannot be known whether such partners do not owe the company, notwithstanding the money paid by them on partnership account.

So in this case, it is manifest that until the accounts of the Foster Farm Oil Company are settled, it cannot be known whether the defendant does not owe the company, notwithstanding the money paid by him to settle the Bronson judgment.

Again. This suit was brought to settle the affairs of a partnership between the plaintiff and the defendant alone, and was not brought to settle the accounts of the Foster Farm Oil Company. That company included other partners besides the parties to this suit. It is clear therefore that no item of that account can be considered in this case, even in connection with the agreement of the parties made on the trial that all accounts between them, whether they pertained to the partnership then under consideration or otherwise, should be considered and settled by the committee. Indeed, both parties to the agreement then claimed that the affairs of the Foster Farm Oil Company could not be gone into in this suit; and surely the defendant cannot now be permitted to claim the contrary, even if there was ground otherwise for the claim.

The defendant claims that the payment by him to settle the Bronson judgment was not a partnership transaction, and consequently it is not properly an item in the partnership accounts of the Foster Farm Oil Company, but is separate and distinct therefrom. We think there is no foundation for this claim. The defendant, as managing agent of the company, sold the Bronson oil, and divided the proceeds of the sale among the members of the company. The Bronson suit and judgment were against the company, on the ground that the company was liable. The defendant, act-

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ing for the company, and with the knowledge and consent of all its members, paid and satisfied the Bronson judgment, and charged the amount in his individual account against the company. The transactions were equivalent to buying and selling the Bronson oil for the company, and charging them with the sum paid.

We think the transactions were company transactions, and that they must be regarded as belonging to the company's accounts.

In relation to the Abbot and Harley item, so called, the defendant insists that, inasmuch as the committee allowed that item in the defendant's account, and there having been no remonstrance against the committee's report, its allowance is not the subject of consideration here. But the report of the committee states all the facts in regard to that item, and the Superior Court having reserved the case and all questions of law arising thereon for the advice of this court, we think that item is a proper subject of consideration here. All the foregoing considerations apply with the same force to that item as to the Bronson judgment, and it needs no further comment.

We advise the Superior Court to disallow the sum of money paid on the Bronson judgment by the defendant, and the Abbot and Harley claim.

In this opinion PARDEE, LOOMIS and GRANGER, JS., concurred.

CARPENTER, J., dissenting. It seems to me that the money paid by E. C. Bishop to satisfy Bronson's judgment, ought not to be treated as money paid on account of the partnership of the Foster Farm Oil Company. E. A. Skinner, David Harris, E. C. Bishop and R. L. Bishop were the defendants in that suit. It is true they were described as partners, but it is conceded that several other persons were also interested as partners in that concern, who, being out of the jurisdiction of the court, were not made defendants and were not served with process. The judgment therefore

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was in effect only a joint judgment against the four defendants. They were the only persons liable on that judgment; and if one of them had been compelled to pay the whole, it is clear that he could have maintained a suit for contribution against the other three. When that judgment was satisfied Bronson had no claim against the partners not made defendants. Payment of that judgment resulted in taking Bronson's claim out of the list of partnership liabilities. The parties paying it doubtless have a remedy against the other partners, but that ought not to deprive them of a remedy as against each other.

Moreover of that judgment Skinner paid nothing. Harris paid $2,500. The balance Bronson could have collected of E. C. and R. L. Bishop, or either one of them. E. C. Bishop, acting, not for the Foster Farm Oil Company, but for himself and R. L. Bishop, paid that balance. It seems to me that the payment ought to be regarded as having been made on the joint account of the plaintiff and defendant alone, and that one half the amount so paid, (assuming that Skinner is irresponsible,) should be allowed to the defendant in this action.

CHARLES S. HAMILTON *vs.* GEORGE S. LAMPHEAR.

New Haven County, June T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS AND GRANGER, JS.

S had made a written contract with the defendant to collect for him a certain claim against an insolvent life insurance company at an agreed percentage, and, with the defendant's assent, made an arrangement with *H* (the plaintiff,) an attorney at law, to assist him in the business at a certain lower percentage, accounting to him for the moneys collected and looking to him for payment, and delivered to him his contract with the defendant to hold until he had been fully paid. *H* attended to the business, proved the claim and procured it allowed, and a dividend upon it was paid by the receiver of the insurance company to the defendant. *S* afterwards died. *H* soon after brought a suit against the defendant, upon the contract with *S*, averring that it

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was assigned to and owned by him. While the suit was pending the administrator of the estate of *S* moved to be admitted as a party plaintiff, alleging that he had been duly appointed such administrator, and that the contract in question had been delivered by *S* to *H* under an agreement that the latter should hold and own the same for the purpose of taking out of the moneys collected the amount that was due to him, and that whatever balance was left was to be the property of *S*. The court allowed the administrator to enter as a co-plaintiff and afterwards rendered a joint judgment in favor of *H* and the administrator. Held—

1. That *S* retained an interest in the contract which would have enabled him to sue upon it jointly with *H*, and that his administrator therefore could properly be admitted as a co-plaintiff with *H*.
2. That it was not necessary that the administrator, before being admitted as a plaintiff, should make proof of his appointment; such proof being never necessary in the first instance, as the question remains open for proof on the trial of the case, and such proof being dispensed with under the Practice Act, (sec. 3,) if the defendant does not deny in his answer the right of the plaintiff to sue as administrator.
3. That it was not necessary that the administrator should file a new complaint, as his claim was identical with the one set out in the original complaint.
4. That it did not affect the case that *H* had in his complaint alleged the ownership of the contract by himself, as the administrator in his application to be made a party had alleged his interest in the contract.
5. That it did not affect the case that the suit was in a city court, that the defendant was a non-resident, and that jurisdiction had been acquired only by an attachment of property in the city in *H's* suit; the Practice Act (sec. 19) providing that no change of parties should impair an attachment. The attachment inured to the benefit of the joint parties obtaining the judgment.
6. That it did not affect the right of the court to take jurisdiction of the administrator's part of the case that he was a non-resident. It is enough to give a city court jurisdiction if one of several joint plaintiffs resides in the city.
7. That the declarations of *S*, now deceased, pertinent to the matter in issue, were admissible in evidence, under the act of 1881, (Session Laws 1881, ch. 99, sec. 1.)

[Argued June 2d—decided July 20th, 1886.]

ACTION upon a contract for compensation for legal services; brought to the City Court of the city of New Haven, and heard before *Pickett, Acting Judge*. Facts found and judgment rendered for the plaintiff and another party admitted as a co-plaintiff. The defendant appealed. The case is fully stated in the opinion.

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E. P. Arvine, for the appellant.

C. S. Hamilton, for the appellees.

LOOMIS, J. It appears from the record that the defendant had a claim against the insolvent estate of the American Mutual Life Insurance & Trust Company, and that on the 20th day of February, 1878, he entered into a written contract with one Charles T. Shelton, a counsellor at law, that the latter should attend to the collection of the claim, for the compensation of twenty-five per cent. of the net amount recovered in lieu of all other charges.

Shelton did not, except to a limited extent, attend personally to the matter, but with the assent of the defendant substituted Hamilton, the plaintiff, to prosecute the claim. The agreement between Shelton and Hamilton in substance was, that the latter was to assist in making and presenting proofs of this claim and other like claims, for which he was to receive two per cent. of all the moneys collected on the claims, and was to render other professional services in relation to the same and other matters for a fair compensation; and it was agreed that Hamilton might retain out of the twenty-five per cent. mentioned in the agreement between the defendant and Shelton a sufficient sum, not only to pay him the two per cent., but also to compensate him for other services rendered and to be rendered, more particularly mentioned in the agreement between Hamilton and Shelton. And to forward this last mentioned agreement, the defendant executed and delivered a power of attorney to the plaintiff (Hamilton,) authorizing him to prosecute the claim, to collect dividends and give receipts therefor, &c., but providing that he should look to Shelton for his compensation and pay over dividends collected to him. To secure Hamilton, Shelton delivered to him the written contract he had made with the defendant, to hold until he had been fully paid.

Hamilton, with some assistance from Shelton, fully performed the services contemplated in the agreement between

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Shelton and the defendant and in the power of attorney from the defendant to Hamilton, and obtained before the commissioners on the insolvent estate of the life insurance company an allowance in favor of the defendant and against the insurance company of the sum of $1,862.64, upon which a dividend of $93.15 has been allowed and paid by the receiver to the defendant. The defendant has never paid the twenty-five per cent. or any part of it, either to Hamilton or to Shelton.

This suit was originally brought in the name of Hamilton alone. Shelton died July 29th, 1885, intestate, and afterwards, during the pendency of the suit, at the April term of the City Court, 1886, Cyrus M. Shelton, as administrator of his estate, made formal application in writing to be admitted a party, alleging, among other things, that Shelton died intestate, that the applicant had been duly appointed such administrator and had qualified as such, and also setting forth the substance of the agreement between the defendant and the intestate, and between Hamilton and the latter, and that Hamilton was to hold and own the former contract for the purpose of paying his percentage and other claims in his favor against Shelton, and that whatever balance of the twenty-five per cent. was left was to belong to Shelton and be paid to him or his assigns, and praying that as such administrator he be allowed to become a party plaintiff in this action with Hamilton, and be allowed as such co-plaintiff to prosecute the action to effect. The court granted the application and afterwards rendered a joint judgment in favor of Hamilton and the administrator.

The first question for review is—whether the court erred in granting this application by the administrator to be made a party.

One prominent objection is, that the intestate at the time had no interest in the contract which forms the basis of the action.

But it must be conceded that at first the sole interest was in Shelton, and at the commencement of the suit it was still in him, or in Hamilton, or in both; so that at most the

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error, if any, was a mere case of misjoinder, in regard to which the provisions of the Practice Act, section 16, are so liberal as to offer poor encouragement for such technicalities. The provision is as follows:—"No action shall be defeated by the non-joinder or misjoinder of parties. New parties may be added and summoned in, and parties misjoined may be dropped, by order of the court, at any stage of the cause, as it may deem the interests of justice to require."

But the objection may be more directly met and disposed of. Although the verbal arrangement whereby Hamilton acquired an interest is rather vaguely stated in some particulars, both in the application to be made a party and in the finding, yet in either case it seems very clear that the transfer to Hamilton was not absolute, of all Shelton's right and interest, but left remaining in him still an interest, so that the joinder may be justified under the rules as to the Practice Act as established by the judges. Chapter 1, section 5, provides that "if a part interest in a contract obligation be assigned, the assignor (retaining the remaining interest,) and assignee, may join as plaintiffs." And, of course, if Shelton, the intestate, could have joined in the suit with Hamilton, his personal representative may do the same.

But the defendant goes back a step farther in his technical line of defense, and insists that it was error to admit the administrator as a party without first compelling him to prove his legal appointment to that office. The objection would seem to deny to the court its ordinary discretion as to the order of proof, and to apply to the added party a rule that he would not have been subject to if he had originally brought the suit with Hamilton. The application by the administrator contained, as it should, all the essential allegations as to the capacity in which he desired to prosecute the suit. In the progress of the suit this fact was to be established. It could not prejudice the defendant to admit the new party prior to such proof, for the matter was still open to inquiry. The defendant by denying the fact in his answer could have offered evidence to show that the

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allegation was untrue, but he neither pleaded any denial nor did he attempt to prove it. The plaintiff however, waiving for the benefit of the defendant the requirement of the third section of the Practice Act, that the defendant must deny in his answer the right of a plaintiff to sue as administrator if he would contest the fact, assumed the burden of proof and produced in court the appropriate record evidence of his appointment.

Again, the defendant claims that, as he is a non-resident of the state, nothing but Hamilton's attachment of funds in the hands of the receiver in New Haven could give the City Court of that city any jurisdiction of the case, and that, the administrator having made no such attachment, there was no jurisdiction as to him. But the Practice Act, section 19, provides that no change of parties made by order of the court shall impair any previous attachment. The attachment inures to the benefit of all the joint parties who obtain judgment.

Neither is there anything to the objection that, as the administrator did not reside within the city of New Haven, the City Court could have no jurisdiction over his part of the case. If one of the joint plaintiffs resides within the city it is all that can be required. Otherwise it would happen that a joint obligation in favor of two persons, residing in different cities, could not be sued in either.

Another claim made by the defendant is, that as the administrator filed no pleadings after his admission as a party, no judgment could be rendered in his favor, either alone or jointly with Hamilton. There is nothing to this point, unless it is true that in every case where a third party is admitted as a co-plaintiff in a pending suit he must file a new complaint. This cannot be reasonably required in a case like the present, where the claim of the third party is based on the identical obligation which the other plaintiff is seeking to enforce. The prayer of the administrator was to be admitted a co-plaintiff to prosecute the suit then pending. He adopted the allegations of that complaint except so far as he supplemented and modified them by the allega-

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tions contained in his application. The allegations as to Hamilton's exclusive right and interest in the contract referred to are of course modified by the administrator's averment of an interest in his intestate at the same time. The fact that Hamilton originally alleged that the sole interest in the contract belonged to him does not render invalid a judgment founded upon proof of a joint interest. Had the defendant desired to raise any appropriate issue relative to the administrator's interest, or right to sue, he could easily have done so by tendering pleadings of his own, but he chose to prosecute his defense against the co-plaintiffs without changing his answer at all.

The defendant also seeks to obtain a new trial on account of the ruling of the court admitting in evidence certain declarations of Charles T. Shelton, deceased. The declarations were offered to prove the execution by the defendant of the contract with Shelton. The administrator having become a party to the suit, the declarations of his intestate, if otherwise relevant, were admissible under the act of 1881, which provides that "in suits by or against representatives of deceased persons, declarations of the deceased relevant to the matter in issue may be received as evidence." Session Laws of 1881, ch. 99, sec. 1. No claim is made that the evidence was not relevant to prove the execution of the contract, but the sole objection is that there was no issue in the pleadings between any representative of the intestate and the defendant, which is the same groundless objection we considered in another connection.

There was no error in the judgment complained of.

In this opinion the other judges concurred.

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FREDERICK R. WHEELER AND WIFE *vs.* EDWARD T. BEDFORD.

Fairfield County, March T., 1886. PARK, C. J., CARPENTER, LOOMIS, GRANGER and BEARDSLEY, Js.

Where privileges of a public nature are also beneficial to private property, as in the case of land upon a public square, the enjoyment of them will be protected against encroachments by injunction.

And the owner of such private property is a proper party complainant in applying for such injunction. He is not a mere volunteer assuming to protect the rights of the public, but is seeking to protect his own private interests.

And it makes no difference that it is the statutory duty of the town authorities to remove nuisances and encroachments, and that he could apply to them.

That remedy is not the adequate remedy at law which excludes equitable jurisdiction.

Adequate remedy at law means a complete remedy to which the complainant may resort at will and which he can control.

[Argued March 17th—decided September 11th, 1886.]

SUIT for an injunction against an encroachment upon and inclosure of a part of a town common by the defendant, an adjoining proprietor, the plaintiffs also being adjoining owners; brought to the Court of Common Pleas of Fairfield County.

The defendant demurred to the complaint on the ground that it did not show any such special and private injury to the plaintiffs as distinct from the injury to the public as amounted to irreparable damage, and on the further ground that the plaintiffs had adequate remedy at law in the proceedings provided for by statute for the removal by the public authorities of encroachments and nuisances of the kind complained of. The court (*Hall, J.*,) sustained the demurrer and rendered judgment for the defendant. The plaintiffs appealed. The case is sufficiently stated in the opinion.

H. S. Sanford and *C. Thompson*, for the appellants.

1. The complaint sets forth that the common "is of great

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and special value to the plaintiffs and their property in affording a wide and pleasant prospect and abundance of pure air," and that the encroachments will be "of special and irreparable injury to the plaintiffs and their said property, diminishing the market value of the property and depriving them of all the advantage of having a frontage on the public square." The advantages and value of such a location are obvious. The injury set forth is clearly a special injury, distinct from that which the public will suffer; and the injury is clearly one which the law regards as irreparable. *Frink* v. *Lawrence*, 20 Conn., 117; *Hawley* v. *Beardsley*, 47 id., 574; *Trowbridge* v. *True*, 52 id., 199; *Trenor* v. *Jackson*, 46 How. Pr., 389.

2. The authority of the selectmen to remove encroachments is given by Gen. Statutes, p. 253, sec. 2. The court says of this statute in *Tomlinson* v. *Leavenworth*, 2 Conn., 292, "The statute is not imperative. It merely provides that it shall be lawful for the selectmen to remove encroachments,—that they shall have the power to do it,—and this renders it optional with them to do it or not." The act of 1879 (Session Laws 1879, p. 445,) gives the county commissioners jurisdiction over encroachments on highways, but it is questionable whether it covers the case of public squares; and it is optional with them whether to order the encroachments removed, besides which there must be a complaint of six citizens approved by the State's Attorney. Under neither statute is the remedy what the law regards as "adequate and complete." *Boyce's Exrs.* v. *Grundy*, 3 Pet., 215; *City of Hartford* v. *Chipman*, 21 Conn., 488; *Town of Burlington* v. *Swarzman*, 52 id., 181. Such a remedy must be one that the plaintiff can, at his own pleasure, put in operation and control. Kerr on Injunctions, § 8; High on Injunctions, § 30.

G. Stoddard and *W. D. Bishop, Jr.*, for the appellee.

1. The injury stated in the complaint, that the building of the stone wall along the highway, taking in a part of the public green, would restrict the pleasant prospect from the

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plaintiffs' house, and thus depreciate the market value of their property, is not such an injury as would justify the court in granting an injunction. It is not enough that the plaintiffs' rights are violated; there must be actual and serious damage. *Bigelow* v. *Hartford Bridge Co.*, 14 Conn., 579; *Whittlesey* v. *Hartford, Prov. & Fishkill R. R. Co.*, 23 id., 433; *Irwin* v. *Dixion*, 9 How., 27. And it is not enough that danger of irreparable injury is alleged; the court must see that there is real danger of such an injury. Hilliard on Injunctions, 25; *Branch Turnpike Co.* v. *Supervisors of Yuba County*, 13 Cal., 190; *Coe* v. *Winnepisiogee Manf. Co.*, 37 N. Hamp., 257. And the court say in *Attorney Gen.* v. *Nichol*, 16 Ves., 338, that diminution of value is not enough. And in *Squire* v. *Campbell*, 1 Mylne & Craig, 486, the Lord Chancellor says:—"It is not, as is said in one case, because the value of the property may be lessened, and it is not, as is said in another, because a pleasant prospect is shut out, that this court is to interfere. It must be an injury very different in its nature and origin to justify such an interference." The real injury is to the public, if there be any injury, and the plaintiffs cannot sustain their suit unless they show clearly a special and peculiar damage distinct from that suffered by the public at large. *O'Brien* v. *Norwich & Wor. R. R. Co.*, 17 Conn., 375; *Frink* v. *Lawrence*, 20 id., 120; *Clark* v. *Saybrook*, 21 id., 313, 327; *Gilbert* v. *Mickle*, 4 Sandf. Ch., 357; *Lexington & Ohio R. R. Co.* v. *Applegate*, 8 Dana, 299.

2. The plaintiffs have ample remedy in the statutory provision for the removal of encroachments from highways and parks by the public authorities. Gen. Statutes, p. 253, secs. 1, 2; Acts of 1879, p. 445. The former statute gives the power to the selectmen of the town, the latter in certain cases to the county commissioners. Either board has full power in the matter. "No relief will be granted by injunction where a statute has made provision for all the circumstances of a particular case." Hilliard on Injunctions, § 31. See also 2 Story Eq. Jur., §§ 923, 924 *a*, 925;

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Brown's Appeal, 66 Penn. St., 155; *Wooden* v. *Wooden*, 2 Green's Ch., 429.

PARK, C. J. This case presents the question whether the owner of a dwelling house and the land on which it stands, fronting on a town common or public park, its situation upon which greatly enhances its value, can maintain injunction proceedings against his neighbor, who seeks to destroy the common by enclosing a large part of it for his own use.

Although in this case the intended appropriation is confined to a part only of the public ground, still the principles of equity that would restrain the attempted appropriation of the entire common would restrain the attempt to appropriate a substantial portion of it; for the injury to the plaintiffs in each case would be the same in kind, the difference being only in degree.

The complaint alleges that the "public green or town common is of great and special value to the plaintiffs and their property in affording a wide and pleasant prospect, an abundance of pure air, and a situation on a public square, and increasing the uses to which the land of the plaintiffs may be put." And again, it alleges that "said encroachments, if allowed to be completed and to remain, will be of special and irreparable injury to the plaintiffs and their said property, in that it will destroy the said public green, and be of great damage to their said land, diminishing its market value, and depriving the plaintiffs of all the advantages derived from having a frontage on the public square and green aforesaid."

The demurrer to these allegations requires us to assume them to be true, and to consider the case accordingly.

We have then a case where it appears that the common in front of the plaintiffs' land and dwelling house adds greatly to the beauty of the outlook from the house and to the value of the property, and the question is, have the plaintiffs the right to an injunction to prevent the destruction of this enhanced value of their property, and of the

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enjoyment which the common affords to the inmates of their dwelling house?

We fully agree with the counsel for the defendant, that to entitle the plaintiffs to maintain this proceeding they must show that the contemplated acts of the defendant, if committed, will be of special damage to them,—a damage in which the public will not share.

Suppose the common in front of the plaintiffs' premises adds, for the reasons mentioned, one thousand dollars to their value. It follows that, if the common is destroyed, the plaintiffs will be injured to that extent in the diminished market value and diminished enjoyment of their property. But the public will not participate in that loss or be in any way affected by it.

The plaintiffs' right to maintain this suit is limited to the prevention of such loss as would be special and peculiar to themselves. Story, in his work on Equity Jurisprudence, § 927, in describing the cases where injunctions will be granted, among other things says:—"Where privileges of a public nature, and yet beneficial to private estates, are secured to the proprietors contiguous to public squares, or other places dedicated to public uses, the due enjoyment of them will be protected against encroachments by injunction." High on Injunctions, § 551, says:—"The right which it is sought to protect by injunction may result from a dedication of land to public uses, as well as from express grant or adverse possession. Thus where land has been dedicated to the use of the public as a public square, the owners of lots adjoining, who have purchased their lots and made improvements relying upon such dedication to public use, are entitled to the aid of equity to restrain the erection of private buildings on the square. Nor will the original proprietors who have dedicated land to be used as a public square, afterwards be allowed to appropriate it to their own private use. And an adjoining lot owner is a proper party complainant to a bill in equity to enjoin such appropriation. Such a complainant, being one of the inhabitants of the town, and holding property con-

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tiguous to the square, is not a mere volunteer assuming to protect the rights of others, but is injured in his individual rights, and is entitled to the aid of equity to protect his own interests."

If this can be said of public squares recently dedicated to public use, how much more strongly can it be said of squares that have existed for many generations, like the present one.

See also *Brown* v. *Manning*, 6 Ohio, 298; *Hills* v. *Miller*, 3 Paige, 254; *Corning* v. *Lowerre*, 6 Johns. Ch., 439; *Trustees of Watertown* v. *Cowen*, 4 Paige, 510.

But the defendant's main defence against this proceeding is based upon the claim that the plaintiffs have adequate remedy at law, arising from the fact that ample provision for the removal of nuisances and encroachments from highways by the public authorities is made in the statutes of the state, and it is said that the plaintiffs can have redress by application to those authorities.

But suppose the authorities are unwilling to institute proceedings. Where then will be the ample remedy? They are not bound to redress the plaintiffs' private grievances. They act solely for the public, induced by public considerations, when they act at all.

"Adequate remedy at law" means a remedy vested in the complainant, to which he may, at all times, resort, at his own option, fully and freely, without let or hindrance. This has been held many times by the Superior Court.

We think the court below erred in adjudging the complaint to be insufficient.

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

In this opinion the other judges concurred.

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SAMUEL F. MCFARLAND *vs.* CHARLES B. SIKES.

Hartford District, March T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

Proof that, at the time a note was executed and put into the hands of the payee, an agreement was made that it should be returned to the maker upon a certain day if he should then demand it, does not contradict or attempt to vary the terms of the note, and the agreement may be proved by parol evidence.

A delivery of a legal obligation made upon condition does not become a legal delivery until the condition is fulfilled. Such a condition does not in any manner conflict with the terms of the obligation, and an observance of it is essential to the validity of the obligation.

[Argued March 2d—decided April 2d, 1886.]

ACTION upon a note; brought to the Superior Court in Tolland County, and tried to the jury before *Stoddard, J.* Verdict for the plaintiff and appeal by the defendant for error in the charge of the court. The case is sufficiently stated in the opinion.

C. H. Briscoe and *J. P. Andrews*, with whom was *D. Marcy*, for the appellant.

J. L. Hunter and *B. H. Bill*, for the appellee.

PARK, C. J. This is a suit upon a note of three hundred dollars. On the trial in the court below the defendant offered evidence to prove, and claimed to have proved, that previously to the execution and delivery of the note the plaintiff, who was a grand juror of the town of Ellington, where the defendant resided, and was acting as the attorney of one Mary Quinn, accused the defendant of having made an assault upon the person of the said Mary, and threatened him with a criminal prosecution unless he settled with her for the injury; that the defendant thereupon admitted that he had done wrong in the matter and offered one hundred dollars to settle it; that the plaintiff demanded

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three hundred dollars, which the defendant was unwilling to pay; that the defendant was without counsel and asked to be allowed till the following Tuesday to consider the matter, and offered to give his note for three hundred dollars to be held by the plaintiff till then, and if he did not then appear, to be held by the plaintiff as a settlement for the injury to the said Mary, but if he should appear, to be returned to him to be cancelled; that thereupon the plaintiff wrote the note in suit, which the defendant executed and delivered to the plaintiff to be held by him upon the conditions stated; and that the defendant at the same time declared that he should appear and demand a return of the note. The defendant also offered evidence that on the following Tuesday he appeared before the parties and demanded the return of the note, but that the plaintiff refused to surrender it.

With reference to this evidence the defendant requested the court to charge the jury "that if the note was delivered to the plaintiff with the understanding between him and the defendant that it was to be delivered up to the latter on his demand on the Tuesday following, and the defendant demanded its return on that day, the plaintiff cannot recover, and the verdict must be for the defendant." The court did not so charge the jury, but substantially that if they should find all the facts claimed by the defendant to be proved they did not constitute a defense to the action.

We think the court erred in refusing to charge as requested, and in charging as it did. The error was in applying to the case the familiar and well established rule that parol evidence is inadmissible to contradict or vary a written contract.

A written contract must be in force as a binding obligation, to make it subject to this rule. Such a contract cannot become a binding obligation until it has been delivered. Its delivery may be absolute or conditional. If the latter, then it does not become a binding obligation until the condition upon which its delivery depends has been fulfilled. If the payee of a note has it in his possession, that fact would be *primâ facie* evidence that it had been delivered;

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but it would be only *primâ facie* evidence. The fact could be shown to be otherwise and by parol evidence.

Such parol evidence does not contradict the note or seek to vary its terms. It merely goes to the point of its non-delivery. The note in its terms is precisely what both the maker and the payee intended it to be. No one desires to vary its terms or to contradict them.

In the case of *Benton* v. *Martin*, 52 N. York, 570, the court say:—"Instruments not under seal may be delivered to the one to whom upon their face they are made payable, or who by their terms is entitled to some interest or benefit under them, upon conditions the observance of which is essential to their validity. And the annexation of such conditions to the delivery is not an oral contradiction of the written obligation, though negotiable, as between the parties to it or others having notice. It needs a delivery to make the obligation operative at all, and the effect of the delivery and the extent of the operation of the instrument may be limited by the conditions with which the delivery is made."

In the case of *Schindler* v. *Muhlheiser*, 45 Conn., 153, the head note is as follows:—"The defendant had given the plaintiff his note for certain real estate conveyed to him by an absolute deed by the plaintiff. Held, in a suit on the note, that parol evidence was admissible, on the part of the defendant, to show that the conveyance was not intended as a sale, but was made by the plaintiff for a certain purpose of his own and upon an understanding with the defendant that the land was afterwards to be conveyed back, and that the note was given at the time under an agreement that it was not to be paid."

The defense in that case was really that the note had never been delivered as a note, binding upon the defendant. The delivery was merely formal, and was so understood by the parties.

See also *Adams* v. *Gray*, 8 Conn., 11; *Collins* v. *Tillou*, 26 id., 368; *Clarke* v. *Tappin*, 32 id., 56; *Post* v. *Gilbert*, 44 id., 9; *Hubbard* v. *Ensign*, 46 id., 585.

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We think the court erred in refusing to charge the jury as requested by the defendant.

The view we have taken of this question renders it unnecessary to consider the other questions made in the case.

There is error in the judgment appealed from, and it is reversed and a new trial ordered.

In this opinion the other judges concurred.

EDGAR T. DAMON *vs.* GEORGE W. DENNY.

New Haven Co., June T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS AND GRANGER, Js.

The law will not permit a plaintiff to have two suits pending against a defendant for the same cause of action. The existence of the first is ground for abating the second.

And in determining whether the first suit is for the same cause of action with the second, parol evidence is admissible.

And where the pending suit is one in which it is legally possible for a judgment to be rendered upon the cause of action alleged in the second and was brought for the purpose of obtaining such a judgment, the plaintiff is bound to exhaust the possibilities of that suit before subjecting the defendant to the cost of a second suit.

[Argued June 2d—decided July 20th, 1886.]

ACTION for breach of a warranty of the condition of certain apples sold, and for false representations with regard to them; brought to the City Court of the city of New Haven. Plea in abatement of the pendency of another suit for the same cause of action; plea sustained, and judgment for the defendant, (*Pickett, J.*) Appeal by the plaintiff. The case is fully stated in the opinion.

H. Daily, for the appellant.

A. D. Penney, for the appellee.

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PARDEE, J. On March 30th, 1855, the plaintiff instituted a suit against the defendant, alleging that he had expended for him three hundred dollars; had sold and delivered to him goods, wares and merchandise of the same value; had bargained and sold to him goods, wares and merchandise of the same value; and that he had never paid therefor; demanding two hundred dollars damages.

On December 29th, 1885, that suit still pending, the plaintiff instituted this, alleging in effect in the first count that on March 27th, 1885, the defendant warranted to the plaintiff that certain apples were in good marketable condition; that relying upon the warranty the plaintiff purchased them and paid the defendant 367\frac{50}{100}$ therefor; that the apples were not marketable, and that the defendant knew that fact; that the plaintiff sold and delivered some of the apples to his customers as marketable; that he was compelled to take them back; that his reputation suffered thereby; and that he expended two hundred and twenty-five dollars in sorting, packing and carting them. In the second count, that the defendant falsely and fraudulently represented the apples to be marketable; that induced thereby the plaintiff bought and paid therefor 367\frac{50}{100}$; that the defendant knew his warranty to be false and untrue; that the apples were of no value; and that he suffered in reputation and expended money as set forth in the first count.

The defendant pleaded in abatement the pendency of the first suit, and that it is for the same cause of action as that set forth in this. The plaintiff replied, in effect, that the first suit is not for any of the causes of action set forth in this, but for an entirely different cause. The defendant re-affirmed the truth of his plea. Upon the trial the defendant introduced the file in the first suit and then offered himself as a witness for the purpose of proving that he never had more than one transaction with the plaintiff, and that previous to that suit. To this evidence the plaintiff objected as irrelevant, immaterial and inadmissible; that it tended to contradict the file in the first suit; that the file must speak for itself; and that the issue must be tried solely

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upon the comparison of files in the two suits. The court admitted the evidence, and the defendant testified in effect that the only transaction between them occurred on the 28th of March, 1885, and concerned a car load of apples. No other evidence was offered by either party. The plaintiff asked the court to find as a fact that it had not been proven that the suits were for the same cause; but the court found as a fact that the first suit was pending, that it was effective, and for the same cause as this, and adjudged that this abate. The plaintiff appeals because of the admission of evidence, and of the finding and ruling aforesaid.

Under our Practice Act a plaintiff can attach the property of a defendant and summon him into court, upon a complaint which, while it must disclose a good cause of action, may do so in a very general way and be almost barren of details. It rests with the defendant to say whether the plaintiff shall have judgment without more, or whether he shall supply full details. The allegation in the first suit is in words as few and general as possible; it is in effect that the plaintiff has expended a sum of money which it is the legal duty of the defendant to re-pay; it is sufficient to sustain a judgment without more if the defendant refrains from requiring more.

If the service of a complaint thus drawn fails to effect an adjustment and a trial must ensue, the act enables the defendant to require and the plaintiff to supply the omitted details, so that the complaint shall have the fullness, precision and truthfulness of ancient pleadings without their prolixity.

If the act permits a plaintiff to ask for and receive and enforce a judgment upon so general a statement of his claim, if he should thereafter institute a second suit, and in his complaint state a cause of action with particularity of detail, there must remain to the defendant the right to prove, even by oral testimony, that this last cause of action was the only one existing at the time of the first judgment and was the foundation upon which that rested. *Supples* v. *Cannon*, 44 Conn., 424, and cases cited in the reporter's note

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thereto; *Dutton* v. *Woodman*, 9 Cush., 255; *Bigelow* v. *Winsor*, 1 Gray, 299; *Phillips* v. *Berrick*, 16 Johns., 136; *Washington Packet Co.* v. *Sickles*, 5 Wall., 592. The law no more permits a plaintiff to have two suits pending against a defendant for the same cause than it permits him to have two judgments. Therefore there is equal necessity for parol testimony as a defense against the former as against the latter wrong. In his first suit the plaintiff alleged that he had paid out and expended three hundred dollars for the benefit of the defendant and that the latter justly owed him that sum. To this the Practice Act permits him to add, by way of amplification, that the defendant received money from him for worthless apples and imposed upon him the expenditure of an additional sum by reason of the delivery of the same to him; and that in equity and good conscience he should repay the money. A judgment based upon the cause alleged in the second suit was legally possible in the first. If so, and if to redress that wrong was the purpose of the first, it was the duty of the plaintiff to exhaust the possibilities of that before subjecting the defendant to the cost of a second. And if the latter can prove that the transaction which is the basis of the second suit occurred before the bringing of the first and is the only one which has occurred between the parties, and the plaintiff omits to add anything to the general allegation in the first, or offer evidence upon the plea interposed in the second, it remains legally possible to the court to find that the latter is for a cause for which the plaintiff had a pending suit.

There is no error in the judgment complained of.

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

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WILLIAM DONAGHUE *vs.* JOHN H. GAFFY.

Hartford District, May T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

A libel is a false and malicious publication concerning a person, which exposes him to public ridicule, hatred or contempt, or hinders virtuous men from associating with him.

The defendant published of the plaintiff and his brother, who were a firm of wholesale liquor dealers, the following :—"To the Liquor Dealers of Hartford: In order that you may be on your guard against the base treachery of a concern you may be doing business with, I desire to state a few facts in regard to my experience with this firm. I refer to Donaghue Bros., consisting of William and Edward Donaghue. I have been in the habit of buying nearly all my goods of them for years, but because I quit buying of them, they went to the savings bank, of which I rented my place, and offered ten dollars more a month than I was paying, and, after getting their lease, served a notice on me to immediately vacate. The firm is not worthy of our support, being guilty of foul and unfair dealings to get square, as they say, with one who exercises the right to trade where he likes, and I sincerely believe they deserve that kind of warfare known as 'boycotting,' and request those who believe in the fair thing, as between man and man, to give their support to some other house. For further particulars call on the undersigned. J. H. GAFFY." In an action for a libel in this publication it was held that it was not a libel *per se*, and that the plaintiff could not recover without proof of special damage.

In actions for libel there is a substantial agreement in the decisions of the courts that the court may be required to pass upon the effect of the language of a publication by a demurrer to the declaration, as also when the question is whether the verdict is contrary to the evidence. Where the question is not thus raised the courts differ upon the question whether the court or the jury shall determine the question of libel or no libel.

But where the publication is in terms so clear that no circumstances are required to make it clearer, the better rule seems to be that the question of libel or no libel is one of law to be determined by the court.

[Argued May 4th—decided July 27th, 1886.]

ACTION for a libel; brought to the Superior Court in Hartford County. The case is the same one reported in 53 Conn. R., p. 43, except that the case as it then stood was an action brought by William Donaghue and Edward Donaghue as joint plaintiffs. When it went back for a new trial the

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complaint was amended by dropping the name of Edward Donaghue as a plaintiff, leaving William Donaghue as the sole plaintiff. The case was tried to the jury, upon the general issue, before *Sanford, J.*, who, upon motion of the defendant, granted a nonsuit, and rendered judgment for the defendant. The plaintiff appealed, assigning as error—1. That the court refused to allow the publication complained of to go to the jury for their determination as to whether the matter therein contained was libelous or not. 2. That if the jury have no voice in determining whether a publication of this nature is libelous or not, then this circular should have been held by the court as libelous *per se*, and the evidence as to the injury to the feelings and reputation of the plaintiff should have been admitted.

The case is fully stated in the opinion.

C. E. Perkins and *J. G. Calhoun*, for the appellants.

1. It is the province of the jury to decide whether this circular is libelous or not. The English rule upon this subject has been settled for nearly half a century. Fox's libel act was passed in 1792, and it is there provided (32 Geo. III., ch. 60,) that in all criminal proceedings for libel the jury shall be the judges of the question of libel or no libel under the definition of the court. The passage of this statute so turned the drift of legal opinion that in 1840 the leading case of *Baylis* v. *Lawrence*, 11 A. & E., 920, established definitely the same rule in civil cases, it being there held that the judge is in no way bound to state to the jury his own opinion on this point; that in fact it would be wrong for him to lay down as a matter of law that the publication complained of was or was not a libel. And this rule has not been questioned or departed from since. In the United States the same rule is usually followed in criminal cases, the right of the jury being established in many instances by constitutional provisions and statutes. But in civil actions there is a marked variance of opinion and practice, some of the states, like Massachusetts, California and Maine, adhering to the English rule, while others, as Penn-

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sylvania, Georgia, Wisconsin and Vermont, holding that the question of libel or no libel is to be decided by the court. *Shattuck* v. *Allen*, 4 Gray, 540; *State* v. *Goold*, 62 Maine, 509; *Van Vactor* v. *Walkup*, 46 Cal., 124; *Miller* v. *Butler*, 6 Cush., 75; *Dickey* v. *Andros*, 32 Verm., 55. Such being the division of opinion on the question away from home, it is evident that little assistance is to be derived from these decisions in determining which of the two views has been adopted by our own state. It is of course admitted that the court may be required to pass upon the effect of the language by a demurrer to the declaration, where the question of justification is involved or where the publication charges a crime, but the present case has to do only with a publication which has a tendency to arouse bad passions, and to bring a man into contempt and ridicule before his fellow men. The first case in Connecticut in which the point is raised is *Mix* v. *Woodward*, 12 Conn., 262, in which the libel charged the plaintiff with malpractice in packing a jury. All that is said in the opinion on this point is as follows:—"But the court decided that the words if published of the plaintiff did necessarily import that he had actually been guilty of malpractice in packing a jury, and that the words were on the face of them libelous. And it is contended that in this the court erred; that the words do not necessarily import this, but only that the plaintiff had been deprived of his office on a charge of having packed a jury; and that what was the defendant's meaning was a question of fact for the jury to decide. * * * It is very difficult to see how the court could have avoided putting a construction on this publication. How could the question in regard to the justification be determined without construing the libel?" The question was next raised in *Haight* v. *Cornell*, 15 Conn., 82. It was there admitted that the writing complained of was a libel if it was a malicious publication, and the court say: "Having set up in justification that it was a communication privileged by the occasion, the object and intent of the defendants in making it became material to the case, and were necessarily and properly re

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ferred to the jury." But the matter in dispute is only fairly reached and decided in *Graves* v. *Waller*, 19 Conn., 90. The court below, after defining and explaining libel, instructed the jury that "they might consider the whole libelous matter in connection with the circumstances proved or admitted, and say what was the meaning of the writing; what it imputed to the plaintiff as to motives, objects, principles, acts and character; and if they were such as to make the writing libelous according to the definition of libel expressed by the court, they would find the matter libelous and sufficient to sustain the action." The Supreme Court, in sustaining the charge, say:—"The court could not with any propriety have charged the jury in a different manner. They were told they might consider the whole matter together in connection with the circumstances proved or admitted, and from the whole say whether the writing in question was libelous according to the definition given. Any other course would have been alike embarrassing to the jury, unjust to the plaintiff, and puerile in the court." This is the last decision in this state upon the question. It is only eight years later than *Baylis* v. *Lawrence*, and the conclusion is reasonable that the English case was the foundation of the opinion in *Graves* v. *Waller*, and that Connecticut is to be considered as having adopted the doctrine of the King's Bench. The statute declaring the rights of juries provides that the court "shall submit all questions of fact to the jury, with such observations on the evidence for their information as it may think proper, without direction as to how they shall find the facts." Gen. Statutes, p. 442. In order to determine the question of whether this publication is a libel or not it is necessary to ascertain whether it has a tendency to bring ridicule and contempt on the plaintiff and to injure him in the estimation of his fellow-men. This is purely a question of fact. Whether a person appears contemptible or ridiculous cannot be a question of law, and whether among persons generally certain charges would lessen their opinion of the plaintiff is as much a question of fact as whether a person accused of

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negligence has exercised such care as persons generally would exercise. *Jenner* v. *A'Becket*, 25 L. Times, N. S., 464.

2. If it is the province of the court to decide whether or not a writing is a libel, is this circular libelous? Libel has been four times defined in our state, (*Stow* v. *Converse*, 3 Conn., 341; *Hillhouse* v. *Dunning*, 6 id., 407; *State* v. *Avery*, 7 id., 268; *Lindley* v. *Horton*, 27 id., 61;) and in nearly the same language, as "a false and malicious writing, published of another, which renders him contemptible or ridiculous in public estimation, or exposes him to public hatred or contempt, or hinders virtuous men from associating with him." It is not necessary that the matter complained of be sufficient to lay the foundation for an action of slander; it is enough if the defendant induce an ill opinion to be had of the plaintiff, or make him contemptible or ridiculous. The following are instances in which writings, not charging a crime, infectious disease or malfeasance in office, are yet held to be libelous, because they contain those imputations which are calculated to villify a man and injure his reputation.—That the defendant had made the plaintiff "pay a note twice." *Shelton* v. *Nance*, 7 B. Monr., 128. That the plaintiff "will not sue in a certain county because he is known there." *Cooper* v. *Greeley*, 1 Denio, 347. An obituary notice of a living person. *McBride* v. *Ellis*, 9 Rich., 313. Saying of a witness, "I believe he knew his statement was not true." *Coombs* v. *Rose*, 8 Blackf., 155. Stating that the plaintiff "was once in difficulties." *Cox* v. *Lee*, L. R., 4 Exch., 284. Charging the plaintiff with *ingratitude*, even though the facts on which the charge is based be stated and they do not bear it out. *Cox* v. *Lee*, *supra*; *Hoare* v. *Silverlock*, 12 Q. Bench, 624. Stating of a young nobleman that he drove over a lady and killed her, and yet attended a public ball that very evening. *Churchill* v. *Hunt*, 1 Chitty, 480. Writing a letter charging his sister with having unnecessarily made him a party to a chancery suit, and adding "it is a pleasure to her to put me to all the expense she can." *Fray* v. *Fray*, 17 C. B., N. S., 603. Imputing to a Presbyterian "gross intol-

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erance" in not allowing his hearse to be used at the funeral of a Roman Catholic servant. *Teacy* v. *M'Kenna*, Irish R., 4 C. L., 374. Writing of a lady that she has her photograph taken incessantly, and receives a commission on the sale of such photographs. Odgers on Libel and Slander, 23. Circulating a report that the plaintiff had placed his grown daughter on a rail *a la cavalier*. *Colby* v. *Reynolds*, 6 Verm., 489. See also *Haight* v. *Cornell*, 15 Conn., 74; *Clark* v. *Binney*, 2 Pick., 115. The circular published by the defendant, it is true, charges the plaintiff with nothing criminal or illegal, but it does accuse him of doing a base, contemptible act. The libel lies in the malicious accusation that the plaintiff is one who entertains and nurses malignant, hostile and contemptible feelings, who is so far governed by jealousy of competitors in trade that he will do mean, unnecessary and costly acts for the sake of revenge. It contains a direct charge of unworthy and base conduct. The defendant could only have designed to produce a public opinion of contempt and dislike.

It may be claimed by the defendant that the former decision in this case settled the question that this circular is not libelous *per se*, but it is apparent that the question, as presented there, was entirely different from the one now before the court. It was there held that the action was brought by a firm for a libel upon its members as partners, and therefore no injury to the reputation or feelings of either plaintiff was admissible. The only damage which could be recovered was for injury to the business of the firm, and no question of motive or of improper personal conduct could arise or be in issue. We do not suppose the court intended to go far beyond any question which could possibly arise in that case, and hold that in a different action, one brought by an individual for injury to his reputation and feelings, when the act alleged, though legal in itself, was alleged to be done from malicious and revengeful motives, no action could be maintained. We submit that the rule as to libel *per se* is entirely different in a case where an individual is attacked for doing a legal act from malicious and revengeful

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motives, from that where a partnership is attacked upon the same ground. The intent and motive is a personal act affecting the character and conduct of the individual, and not a partnership act. There may be many libelous publications against an individual who is a member of a firm, and they may indirectly cause persons to cease trading with the firm, yet the partnership could not sue for such damage; they would not be libels *per se* on the partnership, but it would be extraordinary to claim that because they were not libelous *per se* against the partnership they were not as against the individual. So there may be publications relating to a partnership which are not libelous *per se* as to it, but which seriously affect the feelings and reputation of an individual member of the firm, and are libelous as to him. It would open a broad field if an enemy of a member of a firm could publish abusive circulars against the members as partners, and then defend on the ground that the business of the firm had not suffered. Unless the court is prepared to go so far as to say that a false and malicious publication alleging acts to have been done from mean, malicious and revengeful motives is not libelous *per se* because the acts themselves are not illegal, we submit that the court below erred.

G. G. Sill and *H. O'Flaherty*, with whom was *D. L. Aberdein*, for the appellee, contended.—That the publication was not libelous *per se;* citing *Donaghue* v. *Gaffy*, 53 Conn., 43; Folkard's Starkie on Slander, 4. That damages could therefore be recovered only where special and alleged; citing Odgers on Libel and Slander, 291, 309, 318; *Bostwick* v. *Nickelson*, Kirby, 65; *Cook* v. *Cook*, 100 Mass., 194; *Pollard* v. *Lyon*, 91 U. S. Reps., 225. That the only damage alleged was to the firm, and that the plaintiff could not recover in his own name for this; citing *Le Fanu* v. *Malcolmson*, 1 H. L. Cases, 637; *Solomons* v. *Medex*, 1 Stark., 191. That proof of the plaintiff's mental suffering would have been inadmissible, even if alleged; citing Odgers on Libel and Slander, 309, 313; *Lynch* v. *Knight*, 9 H. L.

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Cases, 592; *Beach* v. *Ranney*, 2 Hill, 312; *Terwilliger* v. *Wands*, 17 N. York, 57; *Anon.*, 60 id., 262.

PARDEE, J. This is a complaint for libel. The issue was closed to the jury, and judgment rendered against the plaintiff as in case of nonsuit; he appeals. Upon the trial the plaintiff introduced evidence tending to prove that the defendant published of him a circular in words as follows:

"To the Liquor Dealers of Hartford and vicinity: In order that you may be on your guard and protect yourselves against the base treachery of a concern you may be doing business with, I desire to state a few facts in regard to my experience with this firm. The concern I refer to is Donaghue Bros., consisting of William and Edward Donaghue. I have been in the habit of buying nearly all my goods of them for years, but because I quit buying of them they went to the Middletown Savings Bank, of which I rented my place, and offered ten dollars more a month than I was paying, and, after getting their lease of the premises, served a notice on me to immediately vacate. Considering the mean and unfair manner in which this firm have treated me, I have wondered to myself whose turn will come next, should anybody feel like exercising their right to buy of whom they like. I believe it is time to speak out and warn the trade against a firm who, because we buy of somebody else, subject ourselves to the same treatment I have received. The firm of Donaghue Bros. are not worthy of our support, being guilty of foul and unfair dealings to 'get square,' as they say, with one who exercises that right that every honest man has who pays his bills, to trade where he likes, and I sincerely believe they deserve that kind of warfare recently inaugurated in a little green isle across the sea, known as 'boycotting,' and request those who believe in the fair thing, as between man and man, to give their support to some other house. For further particulars call on the undersigned. *J. H. Gaffy.*"

The plaintiff also offered evidence tending to prove that, at the time of said publication, he was engaged in the

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wholesale liquor business in Hartford, with his brother Edward, as co-partners, under the firm name of Donague Bros., and claimed from that evidence that the libel was published as well of and concerning the plaintiff as of and concerning the firm. The plaintiff then offered to prove injury and damage to his reputation and feelings caused by the publication, to which evidence the defendant objected, on the ground that the circular, if a libel, was not a libel against the plaintiff as an individual; and second, because the complaint contained no allegation of injury to the feelings and reputation of the plaintiff as an individual, nor any allegation as to special damage. The court sustained the objection and refused to admit the evidence, and the plaintiff excepted. The plaintiff claimed that the circular was libelous *per se*, and that he might recover in the suit without proof of special damage; but the court held otherwise.

The plaintiff, at his request, was permitted to offer evidence of any damage caused by the circular to the business of the firm, or to his interest as a partner thereof; but, after permission given, he did not offer any such evidence. The defendant moved for a nonsuit, because no evidence of any damage had been given, and no special damage had been shown. The plaintiff objected thereto, and claimed that he had a right to have the question submitted to the jury, whether, if they found the circular to have been published as alleged, it had a tendency to hold him up to scorn and ridicule, and throw a contempt upon him, which might affect his reputation and comfort. But the court held otherwise, and gave judgment of nonsuit against the plaintiff, on the ground that no damage had been proved. To all of which the plaintiff excepted.

The plaintiff in his brief claims that there are two errors in the rulings of the court—1st, in refusing to allow the jury to determine whether the publication is or is not libelous; 2d, in rejecting evidence as to injury to his reputation and feelings, and in holding that the circular is not libelous *per se*. As to the first. In civil causes for libel there is a substantial agreement in the decisions of the courts that the

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court may be required to pass upon the effect of the language of a publication by a demurrer to the declaration as a whole, or to a count in particular; also, when the question is whether the verdict is contrary to the evidence. Otherwise, in some states the rule is that the court shall determine the question as to libel or no libel. *Hunt* v. *Bennett*, 19 N. York, 173; *Pittock* v. *O'Neil*, 63 Penn. St., 253; *Pugh* v. *McCarty*, 44 Geo., 383; *Gabe* v. *McGuiniss*, 68 Ind., 538; *Gregory* v. *Atkins*, 42 Verm., 237; *Gottbehurt* v. *Hubacheck*, 36 Wis., 515. In others the jury. *Shattuck* v. *Allen*, 4 Gray, 540; *Van Vactor* v. *Walkup*, 46 Cal., 124; *State* v. *Goold*, 62 Maine, 509.

Of course, it is for the jury to say whether or not there has been a publication referring to the plaintiff, whether or not it is malicious and false, and whether or not the sense and meaning are as charged. But if the publication is expressed in terms so clear and unambiguous that no circumstances are required to make it clearer than it is of itself, we think the better rule is that the question of libel or no libel is one of law to be determined by the court, and we think we are not concluded to the contrary by the decisions of this court. The case of *Twombly* v. *Monroe*, 136 Mass., 464, seems to recognize a possibility that questions of fact may be so entirely absent from a cause that the question of libel or not shall remain one purely of law to be disposed of by the court as by a nonsuit or its equivalent; the court saying: "We are satisfied with the rule that at the trial of civil actions against libel it is only when the court can say that the publication is not reasonably capable of any defamatory meaning, and cannot reasonably be understood in any defamatory sense, that the court can rule, as matter of law, that the publication is not libelous, or withdraw the case from the jury, or order a verdict for the defendant." In the jurisdictions in which the question is submitted to the jury in the first instance, it often comes upon motion in arrest or other like form to be reviewed and re-determined by the court of last resort as a pure question of law. It would seem to be better, therefore, that it should

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be so treated from the beginning, and thus avoid a possible unseemly result, namely, the submission of a question of law to the jury and a reversal of their determination thereon by the court. For instance, in England, in *Parmeter* v. *Coupland*, 6 Mees. & Wels., 105, the judge, after telling the jury what in point of law constituted a libel, left it to them to say whether the publications in question were calculated to be injurious to the character of the plaintiff. The jury having found a verdict for the defendants, the Court of Exchequer set it aside because the jury had erred upon that point. In *Mulligan* v. *Cole*, L. R., 10 Q. B., 549, a civil suit for libel, the judge directed a nonsuit upon the ground that the publication was not capable of the defamatory meaning attributed by the innuendo. It was held that the nonsuit was properly granted, MELLOR, J., saying of the publication: "I cannot help thinking that, to an ordinary person, it would convey no more than the legitimate information, and that no such defamatory meaning as that imputed by the innuendo, nor any other defamatory meaning, was intended to be expressed." In *Capital & Counties Bank* v. *Henty*, 5 C. P. Div., 514, the question of libel or no libel was left to the jury; they failed to agree, and were discharged. On motion to enter judgment for the defendants, it was held by the Common Pleas Division that the publication was susceptible of the meaning alleged, that there was evidence to support the innuendo and also of express malice, and that the case must go again to the jury. On appeal, it was held in the Court of Appeal, reversing the decision of the court below, "that there was no evidence that the circular was defamatory in either a primary or a secondary sense, and that, even if there was any such evidence, the circular was issued on a privileged occasion, and there was no evidence of express malice." On appeal to the House of Lords, L. R., 7 Appeal Cases, 741, it was held, affirming the decision of the Court of Appeal, "that in their natural meaning the words were not libelous; that the inference suggested by the innuendo was not the inference which reasonable persons would draw; that the onus lay

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on the bank to show that the circular had a libelous tendency; that the evidence, consisting of the circumstances attending the publication, failed to show it; that there was no case to go to the jury; and that the defendants were entitled to judgment."

As to the second point. This court has defined a libel as being a false and malicious publication of a person which exposes him to public ridicule, hatred or contempt, or hinders virtuous men from associating with him. This publication is by a retail seller concerning wholesale sellers of liquor. It charges that the plaintiff, moved to anger because the defendant ceased to be a purchaser from him and his partner, overbid him in the matter of a lease, and compelled his removal. The sting of the publication is that this act was born of a desire on the part of the plaintiff rather to get the defendant out of, than to get himself into, a particular place of business. But to overbid is permissible in law—permissible even when the motive is to supplant another in the possession of an advantageous location and an established run of custom. Of course these acts fall far short of the requirements of the golden rule, as do many others in the heat of competition in trade. The publication is a hostile comment upon the manner in which the plaintiff used, within the pale of the law, the power inseparable from the possession of money; it is a declaration that, in his eagerness to accumulate, he disregards the interests of others. The public will read the circular and disapprove of the plaintiff's methods in business, but it does not impute to him any act which will expose him to their hatred or contempt, or will cause them to separate themselves from him, in the sense or to the degree required by the law of libel. In the absence of special damage he has no cause of action.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

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THE CITY BANK OF NEW HAVEN'S APPEAL FROM COMMISSIONERS.

New Haven County, June T., 1886. PARK, C. J., CARPENTER, PARDEE LOOMIS and GRANGER, Js.

Notes were made by one of two partners, indorsed by the other, discounted at a bank, and the proceeds placed to the credit of the firm. The firm having gone into insolvency the question arose upon a claim of the bank upon its estate, whether the firm was indebted on the notes or only the individual partners, the trustee in insolvency claiming that the maker owed the firm and delivered the notes to it on account of his indebtedness, and the bank that the notes were made in that form for a special reason but were intended as the notes of the firm. The court charged the jury that if the maker was indebted to the firm and made the notes as a means of paying his debt the bank could not recover, that the question was one of fact, that the notes on their face showed an indebtedness of the individual partners and not of the firm and that the burden of proof was on the bank to show that they were intended as a joint obligation of the partners. Held, on an appeal by the trustee, that the charge covered the whole ground, so far as the rights of the estate were concerned, and that the court did not err in refusing to charge that, upon the facts claimed by the trustee, the contract between the bank and the firm was, as a matter of law, a purchase of the notes and not a loan of money by the bank.

The judge charged the jury that if the proof preponderated in favor of the plaintiff their verdict should be in his favor, but if they found a preponderance the other way and in favor of the defendant, their verdict should be for the latter. Held, taken by itself, to be erroneous in not instructing the jury how to find if there was an equipoise of proof; but that it was clear from other parts of the charge that the jury could not have been misled upon the point and that therefore the defendant was not harmed by the error.

[Argued June 4th—decided July 8th, 1886.]

APPEAL from the doings of commissioners on an insolvent estate in disallowing a claim of the appellants; taken to the Superior Court in New Haven County, and tried to the jury before *Phelps, J.* Verdict for the appellants, and appeal to this court by the appellee. The case is sufficiently stated in the opinion.

T. E. Doolittle and *W. L. Bennett*, for the appellant (original appellee).

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J. W. Alling, for the appellees (original appellants).

LOOMIS, J. E. E. Hall and his son of the same name were co-partners in the grocery business at New Haven under the firm name of "E. E. Hall & Son" from the year 1878 to 1885, and during all that time kept their account with the appellant bank in the name of the firm. During this time the bank discounted or advanced the money upon four promissory notes of $2,500 each, and renewed them from time to time, charging the same to the account of the firm. In 1885 the firm became insolvent and all its assets and the property of the individual members of the firm were assigned for the benefit of creditors, and the bank presented its claim for the amount of the four notes to the commissioners on the assigned estate of the firm, claiming that the paper discounted was in fact partnership paper and that the avails of the notes went for the benefit of the firm. The commissioners rejected the claim and the bank appealed to the Superior Court, where the case was tried to the jury and a verdict rendered in favor of the appellant bank to recover the amount of the four notes.

The questions for review before this court relate to the instructions given by the trial court to the jury.

The counsel for the appellee made eight specific requests to the court to charge the jury. Seven of these were adopted without modification, but the eighth request was not complied with. It was as follows:—"If the jury should find that E. E. Hall, Senior, acting for himself, executed the notes in question and procured them to be endorsed by his son, and then delivered them to the firm of E. E. Hall & Son, for the purpose of enabling the firm to replace money which he owed it, and if the firm of E. E. Hall & Son then offered said notes for discount at the City Bank, and the said bank discounted them and placed the proceeds to the credit of E. E. Hall & Son, the law is so that the contract between the City Bank and the firm of E. E. Hall & Son was a contract of bargain and sale only, and was not a loan of money to the firm, and the right of

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action of the bank is confined to such rights as they have as holders of the notes."

We do not think it was error to ignore this request. The seven requests that were complied with covered the entire case for the appellee and gave due effect to every fact in regard to which there was the slightest evidence. The substance of these requests was that the appellants could not recover unless they proved to the satisfaction of the jury that their debt was due from the partnership and not from the individuals composing the firm; that the partnership is a distinct thing from the partners themselves, and if the jury should find that the father and son were indebted to the plaintiffs as individuals upon the same notes, one as maker and the other as indorser, it cannot be presumed from this fact alone that the partnership was indebted for the notes; that upon their face the notes produced in court show an indebtedness of E. E. Hall, Senior, and E. E. Hall, Junior, as individuals, and do not show any indebtedness of the partnership; that the burden of proof was upon the bank to prove that the notes were not what they appeared to be, the individual notes of the two Halls, but their joint obligation as partners; that if the father was indebted to the firm and the money on the notes was obtained by him for the purpose of repaying his indebtedness, the verdict must be for the appellee; that if the bank discounted the notes at the request of the father and upon his individual credit, and the money was obtained by him and placed to the credit of the firm to replace money drawn by him from the firm which he was under obligation to replace, the verdict must be for the appellee; that if the partnership obtained the benefit of the money from the discount of the notes it is not to be concluded from this fact alone that the partnership is liable, though the fact may be evidence tending to prove that the money was borrowed by the firm; but that if E. E. Hall, Senior, borrowed the money upon his individual credit to reduce his obligation to the firm, the verdict must be for the defendant notwithstanding the fact that the firm was benefited by the transaction.

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In adopting all these requests the charge was as favorable to the defendant as was possible without injustice to the plaintiffs, and if the additional request had also been adopted it would have gone beyond the just requirements of the case, even as claimed by the defendant, and would have misled the jury.

All the other seven requests impliedly concede that the question, whether the contract with the bank was by and with the partnership or with the individuals composing it, was a question of fact for the jury upon the whole evidence. But the request under consideration confines the jury to an exceedingly restricted view of the facts even as claimed by the defendant, and upon that partial view the court, as matter of law, is asked to declare what the contract was and what it was not—that it was a contract of bargain and sale and was not a loan to the firm. If, however, we take the case as stated, the legal conclusion asserted would by no means follow.

If we analyze the proposition we shall see that it consists of two distinct parts. The first speaks only of the acts of E. E. Hall, Senior, in executing the note, the indorsement of it by the son, the purpose of it, and the delivery to the firm; and all this without any notice to or knowledge on the part of the bank. So far it lacks every element of a contract. There is neither a meeting of the minds of the parties nor any communication whatever between them. In the other part of the proposition the parties, the firm and the bank, are brought together. There is however no reference to what has been done, or its purpose, and no explanation or even conversation is given. We find the firm however as such, in its own name, now offering the notes for discount, and the bank discounting them for the firm and placing the proceeds to their credit. It seems to us manifest that even the facts, just as assumed in the request, are more consistent with a contract of loan by the bank to the firm than they are with a contract of bargain and sale of the notes. If now we add to the statement facts claimed or admitted to have been proved by the

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bank as to the course of dealing, particularly the fact that when each note became due the check of the firm was presented to pay it and each renewal was negotiated by and in behalf of the firm without notice to the bank that it was an individual matter, very little doubt can be entertained as to the correctness of the verdict, and none at all if the facts embraced in other requests of the appellee were not established by the evidence and the claims of the appellants were so established.

The remaining question relates to that part of the charge where the jury were told:—"If you find that the proof preponderates in favor of the bank that the paper was partnership paper, discounted as such, and credit given to the firm at the time, then your verdict should be for the appellants; but if you find a preponderance the other way and in support of the claims which are made by the appellee, then your verdict should be for him." The first part of the charge was strictly correct and the verdict for the plaintiffs must be presumed to have been based on such preponderance, and if so there is no occasion for a new trial. But the latter part is not strictly correct. If there was a preponderance for the defendant he must of course have a verdict, but the instructions are faulty in not telling the jury what they must do if there should be an exact equipoise in the evidence. The verdict in such case should have been for the defendant, but taking the charge just as it is given there could in such case have been no verdict at all. If the case stood here it would be extremely improbable that the defendant was aggrieved. Civil causes are ordinarily determined by preponderance of evidence. An exact equipoise in the minds of the triers must be extremely rare, and there is nothing in this case to suggest the possibility of such a thing. But whatever might be our conclusion if the passage from the charge above cited stood alone as the only light to guide the jury, yet taking the whole charge together, it is extremely improbable that the jury were misled, for at the outset the judge says:—"Upon the theory upon which the bank stands here, the burden is upon it to

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satisfy you by a fair *preponderance of proof* that this paper was partnership paper, and that it was discounted by it, as they claim it was, and upon the credit of the firm," &c. The judge then emphasizes it by repeating:—"I say the burden is upon the appellants,—the bank in this case,—to satisfy you on this point by a *fair preponderance of proof* before they are entitled to an allowance of their claim." Then attention is again called to the rule as fully accepted by the bank:—"The bank claims, gentlemen, that they have established all these facts by a *fair preponderance of testimony*." And finally, after the judge had concluded the charge as given in his own language, he read and adopted as correct the seven requests of the appellee to which we have already referred, the fourth of which asserts that the burden of proof is upon the plaintiffs, &c.

Under these circumstances we think the appellee was not aggrieved and is not entitled to a new trial on account of the slight inaccuracy of the charge in the passage complained of. In this conclusion we are sustained by the decision of this court in *State* v. *Morris*, 47 Conn., 179.

There is no error in the judgment.

In this opinion the other judges concurred.

ISAAC B. TOBEY *vs.* ISAAC W. HAKES, JR.

Hartford District, Oct. T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, JS.

The writ of mandamus will not be issued to compel the secretary of a private corporation to allow a stockholder to transfer his stock on the books of the corporation.

And as a general rule it will not be issued where the applicant has other adequate remedies.

[Argued October 7th—decided December 6th, 1886.]

APPLICATION for a writ of mandamus to compel the de-

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fendant, as secretary of a private corporation, to allow the plaintiff to make a transfer of stock of the corporation on its books and to issue a certificate therefor; brought to the Superior Court in Hartford County. The defendant demurred to the application, and the court, (*Andrews, J.*,) sustained the demurrer and dismissed the application. The plaintiff appealed.

H. E. Pardee, for the appellant.

T. M. Maltbie, for the defendant.

CARPENTER, J. This is an application for a mandamus to compel the secretary of the Utica Cement Manufacturing Company, a private corporation, to allow the plaintiff to transfer stock on the books of the company to a purchaser, and to issue a certificate therefor. The Superior Court denied the application, and the plaintiff appealed.

Regularly the writ of mandamus lies against a public officer to compel the performance of a public duty. *American Asylum* v. *Phœnix Bank*, 4 Conn., 172. HOSMER, C. J., says in that case:—"It never lies to restore to a private office or to execute a private right." It being a prerogative writ there can be no doubt that at common law it was thus limited. In *Fuller* v. *Plainfield Academic School*, 6 Conn., 532, the writ was held to lie against an incorporated school—"a corporation established by the supreme power of the state for public and beneficial purposes." The question we are now considering was not made in that case. It was claimed that the defendant was an eleemosynary corporation of private endowment, and that the court had no power to review the action of the trustees. But it was held that, being a corporation with a special charter from the General Assembly, it was controllable by the laws of the land, to be administered by competent tribunals. It seems to have been tacitly conceded that the object of the corporation was for the public good, and that the office of trustee was of a public nature. In *Duane* v. *McDonald*, 41 Conn.,

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517, this court said:—"We see no necessity for extending the common law remedy of mandamus beyond its original and well established limits." In *Parrott* v. *City of Bridgeport*, 44 Conn., 180, it again said:—"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."

This suit is against a private corporation, and its object is to enforce a mere private right. It is in no sense a proceeding to enforce the performance of a public duty. We have no precedent in this state for allowing this writ to compel the transfer of stock in a private corporation, and the authorities elsewhere are against it. *Cushman* v. *Thayer Manuf. Co.*, 76 N. York, 365; *Town* v. *Nichols*, 73 Maine, 515; *State* v. *People's Building Association*, 43 N. Jersey Law, 389; *Bank* v. *Harrison*, 66 Geo., 696.

There is another ground on which the writ was properly refused. It is familiar law that the writ will not ordinarily issue if the plaintiff has other remedies. If the corporation improperly refuses to transfer the stock it is clearly liable for the damages in an action at law. If that remedy is not adequate, or if for any reason he is entitled to the specific stock purchased, a court of equity will entertain jurisdiction and grant relief.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

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GEORGE M. WOODRUFF AND OTHERS, COMMISSIONERS, *vs.* JULIUS CATLIN.
THE SAME *vs.* MARY GRAHAM.

Hartford District, Oct. T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

The tracks of two railroads crossing a city street at grade and the public safety requiring a change, the General Assembly passed an act appointing a board of commissioners with power to adopt some plan for bridging either the street or the tracks and altering the location of either so far as necessary, in its own name to take lands necessary for the purpose, to procure the appointment by the court of appraisers of the property taken, and to apportion the expense among the corporations interested; the property taken to vest in the particular corporation occupying it for its highway or track, and to be paid for before being occupied, and the award of damages, when recorded in court, to have the effect of a judgment. Held—

1. That the word "taken," in the constitutional provision that "private property shall not be taken for public use without just compensation therefor," means the actual assumption by the party taking it of exclusive possession, at the termination and as the result of judicial proceedings.
2. That the act in question sufficiently secured compensation to the owner of the land taken in making actual payment of the assessed damages a prerequisite to the passing of any right to it to the corporation taking it.
3. That the legislature had power to give to its commissioners a standing in court to ask that land might be subjected to the use of the different corporations interested, and could impose upon each the same obligation in relation thereto that would have resulted from their asking for and receiving the land in their own names.
4. That in apportioning the expense to be incurred by the taking of land the commissioners had power to require either of the corporations to pay to either of the others a certain portion of the sum paid by the latter for land taken; and a requirement that the city should pay a portion of the damages assessed for land taken by the railroad companies would not be in conflict with the constitutional prohibition of municipal aid to railroads.

[Argued October 13th—decided November 23d, 1886.]

APPLICATIONS by commissioners appointed by the General Assembly, to Judge *Carpenter*, a judge of the Superior Court, for the appointment of appraisers of land taken for

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an alteration of a street and railroad tracks in the city of Hartford.

There were two applications with regard to land of the defendant Julius Catlin, one pertaining to land taken for the use of The New York & New England Railroad Company and the other to land taken for the use of The New York, New Haven & Hartford Railroad Company. There were also two applications with regard to land of the defendant Mary Graham, one pertaining to land taken for the use of The New York & New England Railroad Company and the other for land taken for the use of the city. All the cases were heard together as one case, both below and in this court.

The resolutions of the General Assembly upon which the proceedings were founded are given in full in the opinion of the court. By them the applicants were appointed a board of commissioners with power to adopt some plan for the removal of a dangerous nuisance in the city of Hartford, consisting of the crossing of Asylum street, in the heart of the city, by the tracks of the two railroads mentioned at grade. The commissioners were authorized in their own name to take lands necessary for the purpose, to procure the appointment by a judge of the Superior Court of appraisers of the land so taken, and to apportion the expense among the three corporations interested. The land taken was to vest in the particular corporation occupying it for a highway or for its railroad tracks, and the damages assessed in favor of the owner of land so taken were to be paid before the land was occupied, and the award of damages, when recorded in court, was to have the effect of a judgment.

The defendants demurred to all the applications. That of the defendant Catlin was upon the following grounds:—

1. Because the legislature has not the power to oblige the city of Hartford to pay for lands taken by said railroad companies for railroad purposes, or for expenses incurred by said companies in changing their grades, or other similar work, as the same is contrary to the twenty-fifth amendment to the constitution of this state, and also to the fourteenth

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amendment to the Constitution of the United States, and the eleventh section of the bill of rights of the constitution of this state.

2. Because if the legislature has such power, it cannot delegate it to the persons appointed commissioners.

3. Because the legislature cannot delegate to the commissioners the power proposed to be given to them by said resolutions, to decide what plan shall be adopted for a bridge, nor what lands shall be taken for said railroads, and what amount the city shall pay therefor, without the consent of said city.

4. Because no sufficient provision is made for the payment of any damages which may be assessed for the taking of the land to be taken, nor how much shall be paid by said railroad, or the city, or which one shall pay for the same.

5. Because there is in said resolutions no provision obliging said railroad companies to take the lands hereby proposed to be taken, and to lay their tracks thereon, or to pay for the same, except so far as it is provided that it shall have the effect of a judgment; but it does not provide that it shall be a judgment of any court, or that any court or other authority may issue execution; so that said provision is inoperative, and no other provision for payment is made.

6. That a judgment against the New York & New England Railroad Company would be valueless, as said corporation has no property in this state, not incumbered, upon which an execution could be levied.

The grounds of the demurrer of the defendant Mary Graham were stated as follows:—

1. Said resolutions provide, *inter alia*, for the taking of land for railroad purposes, the title to which shall vest in certain railroad corporations, and that the city of Hartford shall pay to said railroad companies a portion of the damages appraised for said land so taken by them, and of the expenses and charges connected with the changing of the railroad tracks from their present location, all of which is contrary to the provisions of the twenty-fifth amendment to the constitution of the state of Connecticut.

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2. In and by said resolutions the legislature has attempted to delegate to a commission the arbitrary power of deciding what land shall be taken for the purposes named therein, and of compelling certain municipal and railroad corporations, *in invitum*, to take said land and pay therefor, without any voice in the selection of said lands.

3. In and by said resolutions the legislature has attempted to give to the applicants the right to condemn and take private property for a public use, but compels the owner to look to other parties for the compensation therefor.

4. Said resolutions do not provide that any party shall pay for the land when condemned, nor do they give to the owner of the land taken any legal means of enforcing payment therefor; and even if they do, a judgment against the New York & New England Railroad Company could not be satisfied in this state, as all its property is covered by large mortgages.

5. Said resolutions only authorize, if at all, a taking of land for one single and entire public use, but the applicants are now seeking in and by these proceedings, and others pending before the same judge, both against this respondent and also against other parties, to condemn and take adjoining lands under the alleged authority of these same resolutions of the General Assembly, for three distinct public uses, while it may be so that land condemned for two of said uses may be taken and paid for by the parties for whose benefit said land is condemned, and yet the land taken for the other use may not be taken, and so the consummation of the whole purpose contemplated by said resolutions be impossible.

The demurrers were overruled by the judge and the applications held sufficient. The defendants appealed to this court.

C. E. Perkins and *C. E. Gross*, in support of the demurrers.

First. These proceedings are only for the appointment of appraisers to estimate the value of the land taken, but if the

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resolutions are unconstitutional they are wholly void, and there is no authority for the present proceeding. It is well settled that if a material and essential part of an act is unconstitutional the whole act is void. Cooley on Const. Lim., 177; *State* v. *Wheeler*, 25 Conn., 299. Here the part of the resolutions which we claim to be unconstitutional is clearly a vital part of them.

Second. These resolutions, in compelling the city to pay the railroad companies such sum, toward the expenses of altering the location and grade of their tracks, as the commissioners may fix, is unconstitutional and void. The question is not whether the state can give money which it raises by general taxation to a railroad, nor whether it can authorize a city to use moneys which it raises by taxation for other than local purposes, but whether the legislature can oblige the tax-payers of a city to give their money to a railroad company to help it pay for lands and new tracks, without their consent. We say it cannot.

1. The twenty-fifth amendment of the state constitution prohibits any city from making any "donation" to any railroad company. The object of the amendment was to prevent any kind of assistance from cities to railroad companies, the prohibition including the subscribing for stock, the purchase of bonds, and the loaning of credit, as well as the making of a donation. But by these resolutions the railroad companies are to take and own lands and the city is to give the companies a part of the money to pay for them. The city owed the railroads nothing. It has agreed to pay nothing. It has not even been asked if it is willing to pay. It is a forced gift—a "benevolence" as it used to be called in England. It is no less a mere donation that the legislature orders it. *Taylor* v. *Porter*, 4 Hill, 140; *Wilkesbarre Hospital* v. *Luzerne County*, 84 Penn. St., 55; *Taylor* v. *Commissioners of Ross County*, 23 Ohio St., 22; *Wyscaver* v. *Atkinson*, 37 id., 80, 97; *Mosher* v. *Ackley School District*, 44 Iowa, 122.

2. It is not within the recognized limits of legislation for a legislature to pass an act compelling a city to give money

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to a railroad company. *People* v. *Batchellor*, 53 N. York, 128. This is a leading case on the question. The legislature passed an act *requiring* a town to subscribe to the stock of a railroad company and pay for it in its bonds, and the court held that this was beyond the power of the legislature. It was claimed that the state had the power to oblige a town to make public highways, that a railroad was in a sense a public highway, and that therefore the state could make a town assist in building a railroad; but the court said that though railroad companies are *quasi* public corporations, and railroads *quasi* public highways, sufficiently so to allow the power of eminent domain to be exercised in their behalf, yet they were not so in the sense that highways in a town were. "The towns through which the latter run may be compelled to keep them in repair for the common use of the public." But a railroad, though partly public, is also partly private. They are sufficiently public to warrant the legislature in *authorizing* towns to assist them, but not so much so as to allow them to be *forced* to contribute. The court also held that towns could not be forced to expend the money of their tax-payers for any other purposes than those public municipal purposes for which they were organized, nor to make contracts for any other purpose. The money of the town or its tax-payers was their property, and could be taken or obliged to be expended only for certain public local purposes. Numerous other authorities are to the same effect. *Hoagland* v. *Sacramento*, 52 Cal., 142; *Tyson* v. *Halifax*, 51 Penn. St., 9; *Hasbrouck* v. *Milwaukee*, 13 Wis., 37; *Mills* v. *Charleton*, 29 id., 400; *People* v. *Chicago*, 51 Ill., 17; *People* v. *Common Council of Detroit*, 28 Mich., 228; *People* v. *Haws*, 37 Barb., 440; *Atkins* v. *Randolph*, 31 Verm., 226; *Brunswick* v. *Litchfield*, 2 Maine, 32; *Bowdoinham* v. *Richmond*, 6 id., 115; *Hampshire* v. *Franklin*, 16 Mass., 84; *Lowell* v. *Boston*, 111 id., 454; *Berlin* v. *New Britain*, 9 Conn., 175; *Weismer* v. *Village of Douglas*, 64 N. York, 91; *Loan Asso.* v. *Topeka*, 20 Wall., 655; Cooley's Const. Lim., 230; 1 Dillon Municp. Corp., §§ 10*a*, 11, 12.

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3. It is taking property without due process of law and without providing for the payment of just compensation, as required by our state constitution. It is the general law that a statute or resolution cannot authorize the exercise of eminent domain, unless it provides in express terms for the certain payment of compensation. *Thatcher* v. *Dartmouth Bridge Co.*, 18 Pick., 501; *In re Mt. Washington Road Co.*, 35 N. Hamp., 134; *Eastman* v. *Amoskeag Co.*, 44 id., 143; *People* v. *Haines*, 49 N. York, 590. The constitutional provision requiring compensation does not execute itself. Mills on Eminent Domain, § 128; *Watson* v. *Trustees of Pleasant Township*, 21 Ohio St., 667; *Boston & Lowell R. R.* v. *Salem & Lowell R. R.*, 2 Gray, 1; *Gray* v. *St. Paul, &c. R. R. Co.*, 13 Minn., 315. This is also the rule as laid down by this court. *Hooker* v. *New Haven & Northampton Co.*, 14 Conn., 160; *Denslow* v. *Same*, 16 id., 103; *Clark* v. *Saybrook*, 21 id., 324. Compensation must be made either by actual payment, or by providing an ample fund out of which the right to receive the damages allowed shall be *certain*. The compensation, then, which our constitution requires must be certain. We then ask what is compensation? A mere judgment is held not to be compensation. Mills on Eminent Domain, § 131; *Powers* v. *Armstrong*, 19 Geo., 427. Neither is the right to sue compensation. "The constitutional provision requiring just compensation is not satisfied by imposing upon the owner the burden of pursuing an expensive remedy, and leaving him exposed to the risk of obtaining judgment and satisfaction." Mills on Eminent Domain, § 132; *In re Mt. Washington R. R. Co.*, 35 N. Hamp., 134; *Avery* v. *Fox*, 1 Abbott U. S. R., 254. Nothing except money, actually paid or deposited, from which deposit payment is certain, will satisfy the law. *Butler* v. *Sewer Commissioners*, 39 N. Jer. Law, 665; Cooley on Const. Lim., 559. Do these resolutions under which these proceedings are instituted provide for any such "just compensation" as the law requires? If not, they are unconstitutional and void, and these proceedings must be dismissed. Three, but practically only two, resolutions have been

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passed by the legislature looking to the execution of the work contemplated—that is, bridging the railroad grade crossing on Asylum street; one approved April 4th, 1884, which was slightly amended March 26th, 1885, and the other approved February 19th, 1886. By the first, the New York, New Haven & Hartford Railroad Company and the New York & New England Company are enjoined by the mandatory order of the legislature to execute the work. In case they cannot agree with the city as to the manner of the execution, a commission therein appointed is empowered and instructed on behalf of the state to decide and order as to the manner in which the work shall be done by the railroad companies and the city of Hartford, with power to apply to any court of competent jurisdiction to procure the enforcement and execution of its orders. In this resolution there are two provisions for the taking of private property, as follows: "*Sec.* 3. Said railroad companies and said city may jointly or severally take any lands which they shall deem necessary to properly carry out said improvement, in the same manner as is now provided by the statute for taking land for railroad purposes." "*Sec.* 6. In case the party by whom the changes are to be made or work done cannot agree with the owner of any land or other property required to be removed or taken under the orders of said commissioners, the same, including property already appropriated or used for railroad purposes, may be removed or taken, and the damages assessed in the same manner as is now provided in case of land taken by railroad companies for railroad purposes." By the resolution of 1884, and as amended in 1885, it will readily be seen that the commission has no power to *execute* the work. Its powers are *quasi* judicial, entirely directory and supervisory. The legislature has delegated to it merely the power to decide what shall be done and by whom, with the additional power of compelling through the courts the execution of its decisions, by the parties whom the commission order to do the work. If land is necessary, the courts by mandamus upon the application of the commission can compel the railroad companies, or

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the city, creatures of the legislature, to proceed in accordance with the statute and condemn and pay for the land taken. Thus far the rights of the property owner are preserved. But by the resolution of 1886 the powers of the commission are very much changed and enlarged. The commission is now made an arm of the government, and authorized, as agents of the state, to execute the work, or at least a portion of it. The legislature had undoubtedly the power to appoint a "board of commissioners for the state" to condemn and take private property for a public use, provided the act was in other respects sufficient and constitutional. In the exercise of this power the commissioners are the servants and agents of the state. Mills on Eminent Domain, § 64; *Brimmer* v. *Boston*, 102 Mass., 19. They are not the agents of the railroad companies nor of the city. As against these corporations the proceedings are *in invitum*. The proceedings are not instituted by the railroad companies, nor by the city of Hartford, nor by their agents. The legislature had no power to appoint *agents* for these corporations without their consent. It can only compel the corporations to abide by and adopt the work done by the commissioners for their use and benefit, so called. The legislature could not appoint these commissioners as agents of the two railroads and then authorize them as the agents of one railroad to take the property of the other. "The legislature cannot compel one man to sell to another." *Todd* v. *Austin*, 34 Conn., 91. The commissioners are the agents or servants of the state, to whom is delegated the power which is to be exercised by them "for the state." These agents are authorized to condemn and take private property, for a public use, but there is no provision that they or the state shall make "just compensation." True, the declaration is made that the taking is for the use and benefit of certain of the defendants, but that is only the ulterior purpose. The title is not to vest in the railroad company until that company pays for the land. Suppose the company refuses to pay, and the courts decide hereafter not to compel it to pay. This only shows that these pro-

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ceedings are not by or on behalf of the railroad companies. They are brought by a commission for the state, for a public use. The ulterior purpose to which the use may be devoted, and the fact that the cost may hereafter be collected from parties benefited, are both immaterial at present. The only cases in which the right of eminent domain can be exercised are those, in which either the sovereign proceeds directly through its own officials or through a commission, or in which public corporations, or those which are sometimes called *quasi* public corporations, are permitted through a delegation of power to take land for their own and the public use. In no one of these cases has a court ever upheld the power to exercise the right unless provision for compensation was coupled with the power; with this exception only, that in a few cases, where the state or a municipal corporation has sought to take the land, the courts have said that the presumption was, *in the absence of any provision for payment*, that the state or municipal corporation would pay, and the remedy of the individual was certain. Mills on Eminent Domain, § 126; Cooley on Const. Lim., 560–562. But in these resolutions we have an attempt to provide for compensation. Under the 3d section of the resolution of 1884, the corporation have the right to proceed and condemn the land, and if they do, the general law obliges them to pay. Under the 5th and 6th sections of the same resolution the commission had the right to compel the railroad companies to bring such proceedings. But under the resolution of 1886 they institute these proceedings in their own names. While the commission is authorized to do this, the owner is obliged to look to other parties for his compensation. The commission is authorized in its own name to institute and prosecute proceedings *for the taking of* and *appraisal of damages for* any land which may be necessary. *The proceedings for appraising damages* to persons whose property is condemned *are to be in the same manner and form* as those prescribed by law for appraising damages for taking land for railroad purposes, *excepting as modified by this resolution.* Now, what are these modifica-

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tions? They appear in section two, and also in the fact that the resolution does not require compensation to be made when the land is condemned, by the party taking. Let us examine the provisions of the first section. "All property *taken* under said proceedings shall be deemed to be *taken* by the party for whose benefit the proceedings are had," (which may not be determined for some time,) "and upon their completion *and the payment* of the damages, the right, title, and interest *so taken*" (previously by the commissioners) "shall, by virtue of said proceedings, then vest immediately and directly in the party" so paying, *etc.* In other words, the commission is to condemn and take, and then by mandamus compel the railroad companies to pay for the same. If they do, the land previously taken by the commission and unpaid for up to this time, it is claimed, will then vest in the party paying therefor, but not until that time. Now we are not discussing the question *when* payment shall be made, but the question *whether any provision for certain payment is made.* The commissioners are not obliged to pay, and there is no mandatory provision requiring the railroads or the city to pay. Again, the provisions of section two are not like the provisions of the general railroad law, for the legislature has expressly modified them. Where shall the appraisal of damages be returned and recorded? Who can issue execution? Will such a judgment be recognized by any one anywhere? The New York & New England has a very large railroad mortgage upon its property, covering, by the decisions of this court, all its property necessary for the successful operation of the road. How can an execution against that railroad company be satisfied in this state? Will such a judgment, not being of any court, be recognized in Massachusetts? But this is the only provision for payment in the resolution, and it is not such a provision for "compensation" as the law requires. *Phifer* v. *Carolina Central R. R. Co.*, 72 N. Car., 433; *Hooker* v. *N. Haven & Northampton Co.*, 15 Conn., 326. The plaintiffs may answer that the railroad companies may voluntarily pay the damages appraised, and thus the

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law will be satisfied. To this I reply that such guess-work will not make the provision for compensation *certain*, and the fact that the railroads are not joined as co-plaintiffs, but are made defendants, shows conclusively that they are hostile, and will not make voluntary payments. In closing we adopt the words of the court in its opinion in the case of *Butler* v. *Sewer Commissioners*, 39 N. Jer. Law, 673, decided in 1877:—"I think the attempt to exercise such a power in this act is clearly inimical to the constitutional provision, and that the act does not provide a method of compensation within its purview and is therefore insufficient to support any proceedings for condemnation."

H. C. Robinson and *S. O. Prentice*, for the appellees.

PARDEE, J. These are two cases, argued together, of proceedings for the condemnation of land for railway and highway uses.

The New York, New Haven & Hartford Railroad and the New York & New England Railroad cross Asylum Street, a much used highway in the city of Hartford, at grade.

In 1885 the legislature of this state passed the following resolution:—"That a resolution of the General Assembly, approved April 4th, 1884, providing for a bridge at the railroad crossing at Asylum Street, Hartford, be amended by inserting in section one, in the fifth line, after the word 'railroads,' the words 'or for the carrying of said tracks, and structure therefor, over said Asylum Street,' and in section four, in the thirteenth line, by adding, after the word 'order,' the words 'the carrying of said tracks, and structure therefor, over said Asylum Street,' so that said sections, as amended, shall read as follows:—

"*Sec.* 1. The city of Hartford, the New York, New Haven & Hartford Railroad Company, and the New York & New England Railroad Company, shall construct a bridge, or other suitable structure, with proper approaches, so as to carry Asylum Street, in said city of Hartford, over the tracks of said railroads, or for the carrying of said tracks

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and structure therefor over said Asylum Street, at or near their present intersection with said street.

"*Sec.* 4. If said city and said railroad companies shall not, within said period of three months, agree as aforesaid, and submit their said agreement in writing to the railroad commissioners, and obtain their approval thereto, then the railroad commissioners, Morgan G. Bulkley, and Henry C. Robinson, both of said Hartford, who are hereby constituted and appointed a board of commissioners for the state for said purpose, are empowered and instructed to decide what changes shall be made in the manner in which and the place where, in the present line of said Asylum Street, the tracks of said railroads cross the street, in order to abolish the present grade-crossing and insure the safety of the public thereat, and to determine by whom, and within what time, said changes shall be made. Said commissioners are hereby authorized to order the carrying of said tracks, and structure therefor, over said Asylum Street, and direct such a change in the grade of said street in its present line and direction as they judge necessary and proper to the end aforesaid, and to order said railroad companies, or either of them, or the receiver or other person or persons operating either of said railroads, to lay out, construct, and maintain a new line or lines of railroad for a distance not exceeding one half mile each side of said street, and within three hundred feet of the center line of the present tracks of said railroads, and may require any or all of the present tracks within said limits to be taken up and removed. Said commissioners are hereby authorized and empowered to order and direct a new highway to be laid out across said railroads, and for such distance on either side thereof as they may direct, in place of or in addition to said Asylum Street. Said commissioners are empowered to make any and all orders relating to said improvement, and to all matters and things appertaining thereto, which they may deem necessary and proper, in the same manner and to the same extent as this General Assembly might do and direct; and they may direct by whom, when and how the work shall be performed,

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and who shall pay for the same, and what proportion of the entire expense, including land damages, each party shall pay and bear; and they may, in the event of any disagreement between the parties, determine the cost of the whole or any portion of the works, and make any and all orders as to the manner and amounts of payments which they may judge reasonable; provided, however, that in no event shall said city of Hartford be required to pay any portion of the cost of any changes in the present depot, or of the construction of any new depot, and not exceeding one half of all the other expenses, including land damages, incurred under this resolution."

In 1886 the legislature passed the following additional resolution:—

"Resolution conferring additional power upon the board of commissioners upon the railroad crossing at Asylum Street, Hartford.

"Upon the report of the board of commissioners, raised by the provisions of a resolution providing for a bridge at the railroad crossing at Asylum Street, Hartford, passed at the January session, A. D. 1884, it appearing that said board has, in compliance with the terms of said resolution, approved and adopted a plan for said improvement; that it is necessary in the prosecution of said plan to acquire for the purposes of the improvement various pieces of property now owned by sundry parties; that a portion of said property will in all probability have to be condemned and taken by process of law; and that such property can be most expeditiously, conveniently, and economically condemned and taken under proceedings instituted by said board in its own name:—Be it resolved:—

"*Sec.* 1. That said board of commissioners is hereby, in addition to the powers already conferred upon it, authorized and empowered to institute and prosecute in its own name, but for the use and benefit of the several parties to said improvement, as the case may be, proceedings for the taking of, and appraisal of damages for, any land or other property, including any already appropriated for railroad or

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highway purposes, which in its judgment may be necessary or proper to be taken for the purposes of the improvement which has been or may be ordered by said board under authority of said resolution. The proceedings for appraising damages to persons whose property is condemned shall be in the same manner and form as those prescribed by law for appraising damages for taking land for railroad purposes, excepting as modified by this resolution. The approval of any plan or adoption of any vote or order which contemplates, necessitates or directs the use of any property not already owned or appropriated by the party, in the judgment of the board, needing the same for the purposes of the improvement, shall be a sufficient condemnation of such property to the purposes and uses of the several parties needing the same, and sufficient evidence that the same is taken for purposes of public convenience and necessity, and shall fully justify the appointment of appraisers to estimate damages, and their appraisal as aforesaid. All property taken under said proceedings shall be deemed to be taken by the party for whose benefit the proceedings are had, and upon their completion and the payment of the damages appraised, the right, title and interest so taken shall, by virtue of said proceedings, vest immediately and directly in the party for whose benefit and uses said condemnation is made as aforesaid, in the same manner and to the same extent as though said proceedings had been lawfully begun and prosecuted by and in the name of such party.

"*Sec.* 2. The appraisal of damages made upon any proceedings as aforesaid shall, when it has been made, returned and recorded, have the effect of a judgment, and execution may issue at the end of sixty days from the time when such return is made, in favor of the party to whom damages may be appraised, and against the party for whose use and benefit the property appraised is appropriated.

"*Sec.* 3. When any payments have been or are to be made for property taken as aforesaid, said board of commissioners may make any order which it may deem proper, directing any party to said improvement to contribute to

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any other party such sum or sums as it may fix and determine, to apply towards said payments.

"*Sec.* 4. Said board may incur any expenses which it shall judge proper to the performance of their duties under said resolution, and to the wise and economical construction of said improvement, and any expenses so incurred shall be borne and paid by the parties to said improvement, in such proportions as said board may order.

"*Sec.* 5. The decision or action of said board, had by a majority thereof, shall, in all matters appertaining to their duties under said resolution and the amendments thereto, be regarded as the decision and action of said board, and as such shall have full force and authority.

"*Sec.* 6. This resolution shall not be construed as modifying or limiting the powers of said board in any respect as they have heretofore existed, save as expressly provided herein."

The commissioners therein named have instituted a proceeding for the condemnation of two pieces of land owned by Julius Catlin—one for the use of the New York, New Haven & Hartford Railroad Company, and the other for the use of the New York & New England Railroad Company; also a proceeding for the condemnation of two pieces of land belonging to Mary Graham—one for the use of the New York & New England Railroad Company, and the other for the use of the city of Hartford for a new highway.

To the petition of the commissioners for the appointment of appraisers Mr. Catlin and Mrs. Graham filed demurrers. The grounds of demurrer in the case of Mr. Catlin are as follows:—

"That the said acts of the legislature, under which said proceedings are commenced, are illegal and void:—

"1. Because the legislature has not the power to oblige the city of Hartford to pay for lands taken by the said railroad companies for railroad purposes, or for expenses incurred by said companies in changing their grades, or other similar work, as the same is contrary to the twenty-fifth amendment to the constitution of this state, and also to the

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fourteenth amendment to the constitution of the United States, and the eleventh section of the bill of rights of the constitution of this state.

"2. Because if the legislature has such power, it cannot delegate such power to the persons appointed commissioners.

"3. Because the legislature cannot delegate to said commissioners the power proposed to be given to them by said act, to decide what plan shall be adopted for a bridge, or what lands shall be taken for said railroads, and what amount the city shall pay therefor, without the consent of the said city.

"4. No sufficient provision is made for the payment of any damages which may be assessed for the taking of the land to be taken, or how much shall be paid by said railroad, or the city, or which one shall pay for the same.

"5. There is in said resolutions no provision obliging said railroad companies to take the lands hereby proposed to be taken and to lay their tracks thereon, or to pay for the same, except so far as it is provided that it shall have the effect of a judgment; but it does not provide that it shall be a judgment of any court, or that any court or other authority may issue execution; so that said provision is inoperative, and no other provision for payment is made.

"6. That a judgment against the New York & New England Railroad Company would be valueless, as said corporation has no property in this state, not unincumbered, upon which an execution could be levied."

The grounds of the demurrer in the case of Mrs. Graham are stated as follows:—

"The respondent Mary Graham demurs to the sufficiency of this application, because:—

"1. The resolution providing for a bridge at the railroad crossing at Asylum Street, Hartford, passed by the General Assembly at its January session, 1884, together with each and all of the acts or resolutions subsequently passed amendatory thereto, is unconstitutional and void, for the following reasons:—

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"(*a*) Said resolutions provide, *inter alia*, for the taking of land for railroad purposes, the title to which shall vest in certain railroad corporations; and that the city of Hartford shall pay to said railroad companies a portion of the damages appraised for said land, so taken by them, and of the expenses and charges connected with the changing of the railroad tracks from their present location, all of which is contrary to the provisions of the twenty-fifth amendment to the constitution of the state of Connecticut.

"(*b*) In and by said resolutions the legislature has attempted to delegate to a commission the arbitrary power of deciding what land shall be taken for the purposes named therein, and of compelling certain municipal and railroad corporations, *in invitum*, to take said land and pay therefor, without any voice in the selection of said lands.

"(*c*) In and by said resolutions the legislature has attempted to give to the applicants the right to condemn and take private property for a public use, but compels the owner to look to other parties for the compensation therefor.

"(*d*) Said resolutions do not provide that any party shall pay for the land when condemned, nor do they give to the owner of the land taken any legal means of enforcing payment therefor; and, even if they do, a judgment against the New York & New England Railroad Company could not be satisfied in this state, as all their property is covered by large mortgages.

"2. Said resolutions only authorize, if at all, a taking of land for one single and entire public use; but the applicants are now seeking, in and by these proceedings, and others pending before the same judge, both against this respondent and also against other parties, to condemn and take adjoining lands under the alleged authority of these same resolutions of the General Assembly, for three distinct public uses; while it may be so that land condemned for two of said uses may be taken and paid for by the parties for whose benefit said land is condemned, and yet the land taken for the other use may not be taken, and so the consummation

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of the whole purpose contemplated by said resolutions be impossible."

The act, in scope and purpose, concerns protection of life. Neither in intent nor fact does it increase or diminish the assets either of the city or of the railroad corporations. It is the exercise of the governmental power and duty to secure a safe highway. The legislature having determined that the intersection of two railways with a highway in the city of Hartford at grade is a nuisance dangerous to life, in the absence of action on the part either of the city or of the railroads may compel them severally to become the owners of the right to lay out new highways and new railways over such land and in such manner as will separate the grade of the railways from that of the highway at intersection; may compel them to use the right for the accomplishment of the desired end; may determine that the expense shall be paid by either corporation alone or in part by both; and may enforce obedience to its judgment. That the legislature of this state has the power to do all this, for the specified purpose, and to do it through the instrumentality of a commission, it is now only necessary to state, not to argue.

From the character of the use of a right of way by the city for a highway, and of the use of a like right by the railroad companies for railways, there arises the necessity that each should be the sole owner of the right actually used by it; and the judicial proceedings are so framed as to bring about that result. Three corporations create the nuisance and are responsible to the public for its existence in, as yet, unmeasured and unknown proportions. Therefore it cannot now be said or assumed that because, for the specified reason and purpose, the railroad acquires sole ownership of the right to use land, it is under any obligation to pay the entire cost of such right. That depends upon the extent of its obligation to the public in the matter of abatement of the nuisance, to be measured by the commission. Of necessity too the three corporations must acquire, each for itself, a right of way by condemnation. The statutory pro-

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ceedings for that purpose must end in requiring each to pay the owner for the right taken for itself. The fact of such payment, in this instance, proves nothing, as to the extent of the obligation of the corporation making it, in reference to the nuisance. If, after making it in form, in obedience to the statutes, the commission should require either of the other corporations to reimburse a portion of the sum so paid, it will be neither a loan nor a gift. It is but the apportionment of the amount to be raised by the three for the common purpose of abating the nuisance, made circuitously, because the intervening rights of strangers must be respected and acquired by due process of law.

If the sum set against the city should happen to exceed the cost of the necessary new highway and bridge, the excess is in no sense a gift or loan to the railroads. The city has done no more than discharge its obligation to the public; no more than pay a debt due wholly from itself; has paid nothing to or for either railroad. Each railroad when it has paid its assessment, has discharged its obligation to the public; paid all that it owed. That the debt due from the railroads is found to be less than the cost of land for new tracks, and that from the city to be more than the cost of land for new highways and bridges, is quite immaterial upon the question before us. It is a matter of payment of debts by the several corporations to the public; not of transfer of property from any one of them to any other. For, when the act in question is fully executed, the city will have received nothing, by way of loan or gift, from either railroad corporation; nor will either of the latter have received any loan or gift from the city; each one will have paid its debt to the public growing out of the wrong jointly inflicted by them upon the public. The sum assessed upon and to be paid by the city is not controlled by the cost of any particular portion of the work; but it measures the responsibility of the city for the nuisance—measures its pecuniary obligation to the public, as determined by the legislature. For this reason we think the act does not vio-

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late the constitutional provision against municipal aid to railroads.

The constitution provides that "the property of no person shall be taken for public use without just compensation therefor." In its application to the condemnation of land for railway use, the word "taken" in the constitution means the exclusion of the owner from use and possession and the actual assumption of exclusive possession by the railroad corporation at the termination and as the result of judicial proceedings. The act in question provides that "all property taken under said proceedings shall be deemed to be taken by the party for whose benefit the proceedings are had, and upon their completion and the payment of the damages appraised, the right, title and interest so taken shall, by virtue of said proceedings, vest immediately and directly in the party for whose benefit and use said condemnation is made as aforesaid, in the same manner and to the same extent as though said proceedings had been lawfully begun and prosecuted by and in the name of such party." By the combined force of this act and of the general statutes the commissioners may institute judicial proceedings which may terminate in vesting in the city and the railroad corporations severally the right to use certain specified pieces of land for railway and highway purposes, if they will pay the appraised value thereof. But the meaning of the act before us is that, after appraisal completed, actual payment of the same is to be made to the owner as a necessary prerequisite to the passing of any right to or interest in the land to the corporation—to the right to occupy or use it; to the right to remove or disturb the soil; to the right to put any structure thereon. The court would enjoin the corporation from any invasion of the owner's right of possession before payment.

The enforcement of the command of the legislature upon the municipal and railroad corporations to abate the nuisance, necessitates judicial proceedings, because the land of individuals is to be taken by right of eminent domain. For this reason, for the specified purpose and to this extent, the

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legislature may give to its own commission standing in court to ask that land may be subjected to the use of each and may impose upon each the same obligation to obey any order of the court in this behalf and to pay the amount of the appraisal, and then to use the land for the specified purpose, as would have been upon them if they had voluntarily asked and received in their own names. This is not an imposition of an agent to ask for a binding judgment upon them in any matter of contract or right, as between either of them and an individual, or a corporation, or the state itself. It is the use, in a permissible manner, by the legislature, of the governmental power to compel each corporation to contribute to the cost of the abatement of the dangerous nuisance which it now maintains. No property is to be taken from either, no right is to be taken or even diminished; only they are to so use their rights as not to endanger public safety. Neither in seeming nor in fact does the act provide for the condemnation of land for the use or in behalf, either of the commissioners or the state. Neither the state nor the commissioners are to own any right in it; but the commissioners are empowered so to ask that all resulting acquisition of right, all resulting obligation to perform duties, make payments, and use land, are to and upon the corporations severally.

The act has a single end in view—to separate the grade of the railroads from that of the highway at intersection. To accomplish this the commission is empowered to require and has required the railroads and the city severally and independently to become the owners of the right to use such separate pieces of land as may be necessary for new railways and new highways and bridges. The proceeding is in the line of this requirement.

For our present purpose we have the right to assume that the commission will not change the plan adopted, and that the legislative order will continue in force against each of the three offending corporations. We should not be justified in assuming that the legislature will be unable to enforce

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its mandate against all and, upon that assumption, declare the act void.

The Superior Court is advised that there is no error in the judgment complained of.

In this opinion the other judges concurred.

THE STATE *vs.* EDWARD ASCHER.

Hartford District, October T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

The act of 1882 (Session Laws of 1882, ch. 107, part 6, sec. 1,) forbids all persons, without a license therefor, to sell intoxicating liquors "by sample, or by soliciting or procuring orders." Held that a contract for a sale, made in this state by a travelling agent of a firm in another state, of liquors to be delivered in such other state, is a violation of the statute.

[Argued October 5th—decided November 23d, 1886.]

COMPLAINT for selling intoxicating liquors; brought to a justice of the peace, and, by appeal of the defendant, to the Superior Court in Tolland County, and tried to the jury in that court, on the plea of "not guilty," before *Beardsley, J.*

The prosecution was brought under the act of 1882, which provides that "any person who, without a license therefor, shall, by sample, by soliciting or procuring orders or otherwise, sell any spirituous or intoxicating liquors, * * * shall be fined for the first offense not more than fifty dollars," &c. The complaint charged a sale of intoxicating liquors by the defendant, "by sample, and by soliciting and procuring orders," to one Frederick Einsidel, without having a license therefor.

On the trial of the case the state offered evidence to prove that in November, 1885, the accused went to Rockville, in the town of Vernon, and there, as agent of Swartz

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Bros., a wholesale liquor firm in New York city, solicited Einsidel to become the purchaser of intoxicating liquors of Swartz Bros.; that by reason of such solicitation Einsidel gave the accused an order for the purchase of such liquors, and the accused forwarded the order to Swartz Bros., in New York city, and that they afterwards, pursuant to the order, delivered the liquors into the possession of Einsidel.

The accused, at the time, was and still is a citizen of the state of New York, and a resident of New York city, and he claimed and testified in his own behalf that at the time he was in the employ of Swartz Bros. upon a salary, as their agent to solicit orders for the sale of intoxicating liquors, which orders were to be forwarded by him to them in New York for their approval, and if approved, to be there filled by them; and that as such agent he called on Einsidel, at Rockville, and solicited of him an order on Swartz Bros. for the intoxicating liquors in question, to be by them delivered to Einsidel, by delivering them to a common carrier in New York, directed to Einsidel at Rockville, to be transported from New York at the risk and expense of Einsidel; that, by reason of the solicitation Einsidel then gave the accused such an order for the liquors, and the accused took it and forwarded it to Swartz Bros. in New York city, and they approved it and delivered the liquors so ordered to Einsidel, by delivering them to a common carrier in New York city, directed to Einsidel at Rockville; that Einsidel paid the freight on the liquors from New York to Rockville, and in fact received the liquors, and paid Swartz Bros. therefor. Neither the accused nor Swartz Bros. were licensed to sell liquors in any town in this state.

The counsel for the accused requested the court in writing to charge the jury as follows:—"The statute under which the accused is charged prohibits the sale of intoxicating liquors by sample, by soliciting or procuring orders therefor or otherwise, without a license. To constitute a sale of personal property, especially under a penal statute, there must be a transfer of title for a certain consideration. Orders for goods may be received, but until they are trans-

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ferred and set apart for the purchaser, the sale is incomplete. An agreement to sell is only executory until the contract is completed by delivery. When, as in the present case, the act of selling without license constitutes the offense, it must appear affirmatively, not only that a sale in the proper sense of the term was actually made, but it must be located within this state. Although sales were effected through the agency of the accused, yet if they are not proved to have been made in this state, he cannot be convicted. The place of sale is the point at which goods ordered or purchased are set apart and delivered to the purchaser, or to a common carrier, who, for the purposes of delivery, represents him. And if in this case the jury shall find that the accused, as an agent for his employers in New York, merely solicited from the purchaser an order for liquors, and forwarded it to his employers in New York, and thereupon they filled it, and delivered the goods to a common carrier, directed to the purchaser at Vernon in this state, according to the order, the sale was in New York. And if the accused, as such agent, had authority merely to receive and transmit to his principals in New York orders for liquors, to be sent by common carriers to purchasers in this state, his employers completing the contract by delivering them to common carriers in New York, and the purchaser agreeing to pay the freight, this would not constitute a sale in Connecticut. The only agreement to sell, or act of sale, would be in New York."

The court did not so charge the jury, but charged them as follows:—"There is no material dispute, as I understand it, between the plaintiff and the accused in regard to the facts. It is agreed, indeed testified to by the accused, that he went to Vernon and solicited, as agent for Swartz Bros. of New York city, (being paid a salary by them for his services,) Einsidel to become a purchaser from Swartz Bros. of certain spirituous liquors; that, upon such solicitation, Einsidel gave an order to the accused for certain spirituous liquors, to be furnished by Swartz Bros.; that that order was transmitted to their house by the accused, and, in pur-

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suance of the order, the goods were forwarded, and went into the possession of Einsidel. These are the agreed facts in the case; the only question is a question of law as to their legal effect. If, acting as agent for Swartz Bros., living and having their place of business in New York city, the accused came to Rockville and solicited the person named in this complaint to purchase intoxicating liquors from them, and as such agent took his order upon Swartz Bros., given upon such solicitation, and the liquors were afterwards delivered by Swartz Bros., in pursuance of the order so obtained, the defendant is liable, and that although such delivery took place in New York."

The jury returned a verdict of guilty, and the defendant appealed to this court on the ground of error in the charge and in the refusal to charge as requested.

D. Marcy and *J. G. Calhoun*, for the appellant.

The offense of which the defendant was convicted was not the soliciting of an order for the sale of liquors, but an actual sale upon an order obtained by such solicitation. The law having made the sale the offense, the well-settled law as to what constitutes a sale of personal property was applicable and decisive. The request of the defendant for instructions to the jury presented this law, and the court erred in refusing to charge in accordance with the request. The law of sales as thus presented has been held to be applicable to a sale of liquors of the exact kind found in this case, and it was held that the sale was not complete until consummated by delivery. *Finch* v. *Mansfield*, 97 Mass., 89; *Garbracht* v. *The Commonwealth*, 96 Penn. St., 449. The same principle is applied by the very statute in question in the provision that the delivery by the vendor or his agent within the limits of a town of any intoxicating liquors shall be deemed a sale of such liquors within such town, although the contract for the sale of such liquors be made outside the limits of such town." The legislature here makes the delivery the sale and not the contract for the sale. It is a settled rule that penal laws are to be

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strictly construed. The legislature passed the act knowing of this rule, and that in using the word "sell" it was using a word familiar to the common law and of a well-established meaning.

B. H. Bill, State's Attorney, for the State.

CARPENTER, J. This is a prosecution for selling spirituous liquor contrary to law. The facts are concisely stated in the charge to the jury:—"It is agreed, indeed testified to by the accused, that he went to Vernon and solicited, as agent for Swartz Bros. of New York city, (being paid a salary by them for his services), Einsidel to become a purchaser from Swartz Bros. of certain spirituous liquors; that upon such solicitation, Einsidel gave an order to the accused for certain spirituous liquors, to be furnished by Swartz Bros.; that that order was transmitted to their house by the accused, and, in pursuance of the order, the goods were forwarded and went into the possession of Einsidel. These are the agreed facts in the case. The only question is a question of law as to their legal effect. If, acting as agent for Swartz Bros., living and having their place of business in New York city, the accused came to Rockville and solicited the person named in this complaint to purchase intoxicating liquors from them, and as such agent took his order upon Swartz Bros., given by reason of such solicitation, and the liquors were afterwards delivered by Swartz Bros., in pursuance of the order so obtained, the defendant is liable, and that although such delivery took place in New York."

The defendant was convicted and appealed to this court. His grievance is that he was convicted of an unlawful sale, while, as he contends, he effected no sale within the meaning of the statute in this state. He says that he only solicited and obtained an order in this state, and that the sale was completed by a delivery of the liquors by his employers to the purchaser in the state of New York.

The statute of 1882, part 6, section 1, (Acts of 1882,

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p. 185,) provides that "any person who, without a license therefor, shall, by sample, by soliciting or procuring orders, or otherwise, sell any spirituous and intoxicating liquors, shall be fined for the first offense not more than fifty dollars, &c." The same statute, part 4, section 11, provides that "no person shall sell any spirituous and intoxicating liquors by sample, by soliciting or procuring orders, or otherwise, within this state, without taking out a license therefor in the manner provided in this chapter; but nothing in this act contained shall prohibit any dealer in spirituous and intoxicating liquors, duly licensed under the provisions of this act, from soliciting and procuring orders in any town in this state in which such liquors may be legally sold."

The question is, what did the legislature mean by selling by sample, or by soliciting or procuring orders? A majority of the court think that it intended to prohibit just such a sale as was made in this case. If the statute is to be so construed as to limit its operation to sales completed by delivery in this state, of course a vast majority of sales by soliciting orders will not be embraced in the statute. We think that the legislature, taking notice of the fact that wholesale dealers in New York and elsewhere out of this state generally sell their wares through agents going from place to place soliciting and procuring orders, intended to prohibit such sales. Otherwise the facilities for making such sales are so great, extending to every town and hamlet in the state, that the efficiency of the license law would be materially impaired. Dealers in neighboring states, without license and without restriction, could sell and cause to be delivered in any and all parts of the state liquors to any extent. Hence the legislature was careful to guard against such a result by prohibiting, as it does in the eleventh section, all sales without a license and all sales in a no-license town. It allows a licensee under the act to solicit and procure orders in any town in which such liquors may legally be sold. All others are absolutely prohibited from selling in any way. Licensed dealers therefore are restricted in such sales to license towns, while the construction con-

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tended for by the defendant would open every town in the state to the free and unrestricted sale by soliciting orders to all dealers out of the state. Such results could not have been intended by the legislature, and a construction which will lead to such consequences ought to be avoided.

It will be useful to compare the present statute with those previously existing. They were as follows :—"Any person, without a license therefor, who shall sell * * * any intoxicating liquor * * * shall be fined not less than fifty dollars, &c." Revision of 1875, p. 520, sec. 41. "If any person, in violation of this act, by himself, his servant or agent, shall, for himself or for anybody else, directly or indirectly, or on any pretence, or by any device, sell, or, in consideration of the purchase of any other property, give to any other person any spirituous or intoxicating liquor," &c. Revision of 1866, p. 695, sec. 17.

Thus it appears that under those statutes a completed sale was essential. It is at least doubtful whether a person coming into this state and soliciting an order, which order was filled by a delivery of the property out of the state, committed any offense under those acts. There was no technical sale until the property was selected and delivered, either to the purchaser or to some one for him. The delivery being out of the state, the argument that the sale was not completed in this state, and therefore that there was no offense, would seem conclusive. In this state of the law, and in view of the fact that sales were largely and even generally made by procuring orders, the legislature in 1882, for the first time, put into the enacting clause of the statute the words—"by sample, by soliciting or procuring orders." For what purpose? There can be but one rational answer: to prohibit all sales by soliciting orders except such as the act expressly allows. Licensed dealers are in terms allowed to sell by orders in license towns. They and all others are prohibited from so selling in no-license towns. We ought not to, and we cannot, so construe the statute as to discriminate against our own citizens. To avoid that it is indispensable that foreign and domestic

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dealers should be placed upon the same footing. Do foreign dealers desire to do business in this state? Then let them establish their business here and procure a license.

The claim that the legislature intended only such sales as should be consummated by a delivery in this state cannot be allowed. It is a matter of common knowledge that sales effected by drummers are usually, if not always, consummated by a delivery at the vendor's place of business to a common carrier; and while such delivery for all civil purposes completes the sale made by the drummer, vests the title in the purchaser, and gives the seller a right to the purchase money, yet for all police purposes it is competent for the legislature to say that the acts done by the drummer shall of themselves constitute a sale and therefore an offense. And we think the legislature intended so to say, and to make all such acts an offense, whether the delivery was in or out of the state. By doing so the word "sell" is used in the same sense in which it is generally used by business men in relation to this subject matter. In common language a drummer *sells* goods; he *sells* by sample; he *sells* by soliciting and procuring orders; the dealers *sell* by drummers as their agents. Now if the statute does not reach all such cases then it falls short of reaching the evil aimed at, and the intended remedy is a failure.

It will be observed that the question before us is not—what ought to be the law? but—what is it? It may be that the statute will sometimes operate harshly; but such considerations are for the legislature rather than the courts.

There is no error in the judgment complained of.

In this opinion PARDEE and LOOMIS, JS., concurred.

PARK, C. J., (dissenting.)—On the trial of this case the facts were not in dispute. They were substantially as follows:—

The defendant procured an order from one Einsidel of the town of Vernon in this state to be sent to Swartz Brothers

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of the city of New York for the sale of spirituous liquors by them in that city to Einsidel, if they should be disposed to fill the order. The order was sent, and Swartz Brothers sold the liquors to Einsidel according to the order. The liquors were sent to Einsidel at Vernon at his expense by Swartz Brothers, and Einsidel paid for them and for their transportation. The defendant had no authority from Swartz Brothers to sell spirituous liquors for them, and he neither made nor attempted to make, with Einsidel, any contract of sale regarding the liquors. He was in the employment of Swartz Brothers to procure and forward orders for the sale of spirituous liquors by them in the city of New York, and all that he did in the matter complained of was in strict accordance with his employment. Neither the defendant nor Swartz Brothers had a license to sell spirituous liquors in any town in this state.

Do these facts constitute a breach of the statute of 1882, which provides that "any person who, without a license therefor, shall, by sample, by soliciting or procuring orders, or otherwise, sell or exchange, or shall offer or expose for sale or exchange, or shall own or keep with intent to sell or exchange, any spirituous or intoxicating liquors," shall be fined, &c. The question then is, did the defendant sell to Einsidel the spirituous liquors in question, when he procured from him the order sent to Swartz Brothers, or when Swartz Brothers afterwards in fact sold the liquors in New York to Einsidel, and forwarded the same to him?

It is conceded by the majority of the court that the act of the defendant did not amount to a sale when the order was procured and sent; but the claim is that the sale was consummated when the sale was made in New York, and the liquors had arrived at Einsidel's place of business in Vernon.

But what kind of a sale was it? All that the defendant did was to procure the order and send it. He had no authority to do anything more. He could make no contract of sale, much less make a sale, of the liquors of Swartz Brothers. What kind of a sale was it? The defendant

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must have sold the liquors in question or there would be no violation of the statute; this is conceded.

It seems to me that the statute itself should put an end to all controversy in regard to the meaning in it of the word "sell." Its language substantially is—"No person shall sell, &c., without a license therefor," that is, without a license for the sale. The statute has in view sales only which persons may be licensed to make. It seems to me this is clear. Now, licenses are provided for sales in fact, and for such sales only, and when the statute declares, "without a license *for the sale that is made*," it means a sale in fact, made by the party, which he might have been licensed to make.

I think therefore, that the act of the defendant in simply procuring the order and sending it to his employers in New York, does not constitute a sale within the meaning of the act, although followed by a sale by Swartz Brothers in New York, and by a forwarding of the liquors to Vernon at the purchaser's expense.

If the defendant had been authorized to make a contract of sale of the liquors in question, and he had made it, or if he had made it without being authorized, and in either case the liquors had been sent and delivered to Einsidel in fulfillment of the contract, then I think it might be said that the defendant had sold the liquors within the meaning of the statute. But I cannot think that if one should say to his neighbor, who was desirous to obtain the best of liquors for his own consumption—"Go to *A. B.* in New York and purchase your next supply," and even if he should urge him to do so, and the neighbor should go to *A. B.* in consequence and purchase and bring home his supply of liquors, that the neighbor who made the solicitation would render himself amenable to this statute, on the ground that he had sold the liquors to his neighbor without a license therefor. He would be so liable if the construction is correct which the majority of the court have given to the statute.

But it is said that the eleventh section of the act strongly supports the view taken by the majority of the act in ques-

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tion. I am unable to see it. That act is as follows:—"No person shall sell any spirituous and intoxicating liquors, by sample, by soliciting or procuring orders, or otherwise, within this state, without taking out a license therefor in the manner provided in this chapter." If the statute had stopped here, would any one claim that there was anything in its operation against any licensed person? Its prohibition is wholly against unlicensed persons. But the statute goes on to provide as follows:—"But nothing in this act contained shall prohibit any dealer in spirituous and intoxicating liquors duly licensed under the provisions of this act, from soliciting and procuring orders in any town in this state in which such liquors may legally be sold."

Manifestly the object of this last clause was, to make it clear beyond the possibility of a claim to the contrary, that licensed persons were not included in the first clause of the statute. Again, the first clause is a sweeping prohibition of sales, in the manner described, by unlicensed persons everywhere in the state, leaving it to be inferred, to some extent, that licensed persons may make such sales anywhere, as well in no-license towns as in license towns; and to prevent such inference the last clause may have been inserted, confining their sales by soliciting orders to license towns.

Again, it is said that the construction which the defendant claims should be given to the statute would destroy to a great extent its efficiency, and would involve an unjust discrimination in favor of non-residents of the state. But such considerations as these should be addressed to the legislature, to induce it to enact a further statute on the subject, if the present one does not go far enough; they throw little light upon the present inquiry, what the statute really means. No statute can prevent the buyers of spirituous liquors from going to New York to make their purchases, if they are so disposed, as was the fact in the present case. Suppose Einsidel had taken the order after he had given it to the defendant, and had gone himself to New York, and had there made the purchase in person, and had brought home with him the liquors in question, would the

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defendant then have been liable? Suppose Swartz Brothers had been sellers of dry goods, and an order had been given by Einsidel to the defendant for a quantity of cotton cloth, with all the incidents of the present case. The defendant in procuring and sending the order would have been acting for Einsidel, as his agent, and the case would have been the same as though Einsidel had made and sent his own order, and had directly made the purchase. Surely it could not be said that the defendant was the seller of the cloth.

It seems to me that the case of *Garbracht* v. *The Commonwealth*, 96 Penn. St., 449, is directly in point, and is a strong authority for the defendant.

I think there is error.

In this opinion GRANGER, J., concurred.

THE SAND-BLAST FILE-SHARPENING COMPANY *vs.* ASA S. PARSONS.

Fairfield County, Oct. T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

The statute with regard to foreign attachment (Gen. Statutes, p. 397, sec. 2,) provides for such attachment "where a debt is due from any person to such defendant." Held that the word "due" is not used in the restricted sense of "payable." There must however be an existing indebtedness.

Where there is a condition precedent to the liability there is no indebtedness.

P entered into a contract with *R* by which the latter was to sell for him licenses to use a patent, which were to be paid for by drafts on New York payable to the order of *P*, *R* to receive a commission on sales within ten days after *P* should receive payment, which commission was to be in full of all his services and expenses. *R* sold licenses to a party who was to pay for them in three installments, each by a draft on New York, in three, six and nine months. The first installment had fallen due and been paid and *R*'s share paid him out of the money. Before the next installment fell due or any draft had been given for it,

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P was factorized as the debtor of *R*. Held that there was no existing indebtedness that could be taken by foreign attachment.

[Argued October 26th—decided December 17th, 1886.]

ACTION of *scire facias* upon a foreign attachment; brought to the Superior Court in Fairfield County, and heard before *Beardsley, J.* Facts found and judgment rendered for the defendant, and appeal by the plaintiffs. The case is fully stated in the opinion.

J. C. Chamberlain, for the appellants.

G. Stoddard and *W. S. Haviland*, for the appellee.

CARPENTER, J. This is a complaint in *scire facias* upon a process of foreign attachment, alleging that the defendant was indebted to one Ryan at the time the process in the original suit was served. The answer denies such indebtedness. The Superior Court found the issue for the defendant, and the plaintiff appealed.

In May, 1882, the defendant, who was the owner of a patented invention for sharpening files, constituted Ryan his agent on certain specified terms and within certain limits, to sell licenses and shop-rights to use the invention on the line of railroad companies. Ryan was not to collect or receive any money for the sale of licenses or machines, but was to cause the same to be paid for by drafts on New York, drawn by the purchaser and payable to the defendant; and was not to make any bills, or contract any against the defendant, but was to pay all his own expenses, and receive for his services and expenses only the commissions provided for. The contract then provides as follows:—"The party of the second part (Ryan) is to be paid by the party of the first part (Parsons) a commission of fifty per cent. on mileage of railroad track in the territory of Asa S. Parsons; thirty-five per cent. on length of roadbed (miles) in the territory of the Sand-Blast File-Sharpening Company, and thirty-three and one third per cent. on mileage of track in

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the territory of William A. Foster, from the proceeds of the sale of a license to a railroad company, within ten days after the party of the first part receives payment for the license sold and machine or machines furnished, which sum is to be payment in full for all services and expenses of the party of the second part under this agreement."

Acting under this agreement Ryan, on the 21st day of August, 1882, obtained a contract with the New York, Lake Erie & Western Railroad Company, and placed a machine in their works. That contract was between the railroad company and Parsons, and provided that the railroad company should pay to Parsons the sum of thirty-six hundred dollars, in three installments of twelve hundred dollars each, by draft on New York, payable to the order of Asa S. Parsons, in three, six and nine months after date.

The first installment was paid December 7th, 1882, and the percentage thereof due to Ryan was paid to him on the same day. The next day, December 8th, the second and third installments being unpaid, and no drafts having been given for them, the factorizing process was served.

The sole question in the case is, whether there was any debt due from Parsons to Ryan on that day. We think it is very clear that there was not. The contract carefully excludes any indebtedness before Parsons receives payment, or at least a draft on New York. We are not called upon to consider what would be the effect of his having received the drafts, as it is found that he had not received them. Ryan is "to receive for his services and expenses *only* the commissions hereinafter provided for," and those commissions are payable "from the proceeds of the sale of a license to a railroad company." Not only was the event prescribed on which alone the debt was to come into existence, but the very fund from which it is to be paid is definitely fixed by the contract. The payment to Parsons was a condition precedent to any liability. Until such payment there was no debt. It is unlike an existing debt which is liable to be defeated by a condition subsequent. The statute is, that "where a debt is due from any person to such

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defendant," it may be attached by this process. Gen. Statutes, p. 397, sec. 2. The word "due" is not used in the restricted sense of *payable*, but it does import an existing obligation.

There is no error.

In this opinion the other judges concurred.

FRANKLIN H. BROWN *vs.* ORRIN POLAND AND WIFE.

New London County, Oct. T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

The statute with regard to replevin of goods unlawfully detained (Gen. Statutes, p. 484, sec. 2,) requires the filing of an affidavit by the plaintiff stating "the true value of the goods which it is desired to replevy." A later section gives a form of affidavit which requires a description of the property, but omits the words—"which it is desired to replevy." An affidavit, upon a writ of replevin of articles of furniture, described the articles in the same terms as the writ, but did not state that they were the goods which it was desired to replevy. Held—1. That it was enough that the affidavit was in the precise form authorized by the statute. 2. That it would be presumed that they were the same goods desired to be replevied until the contrary was shown.

A married woman hired a quantity of household furniture, agreeing to return the goods if she changed her residence. She decided to change her residence, but her husband refused to allow the goods to be returned. She then, in the name of the lessor, made demand upon him for the goods to be delivered to the lessor, but he refused. Replevin was brought by the lessor without other demand. Held—1. That the husband's right to the possession of the goods was only through his wife, and no greater than hers, and that as she had no right he had none. 2. That a demand was not necessary to make his detention of the goods wrongful, but that the demand by the wife in the lessor's name and his refusal, were evidence of the wrongfulness of his possession.

[Argued October 19th—decided December 17th, 1886.]

REPLEVIN for sundry articles of household furniture; brought to the Court of Common Pleas in New London

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County. A plea in abatement that there was not a proper affidavit attached to the writ was overruled by the court, and the case tried to the court upon a general denial before *Mather, J.* Facts found and judgment rendered in favor of the defendant Ellen E. Poland and against the defendant Orrin Poland. The latter appealed to this court. The case is fully stated in the opinion.

C. F. Thayer and *C. W. Comstock*, for the appellant.

S. Lucas, for the appellee.

CARPENTER, J. This is an action of replevin for articles of household furniture. The defendant pleaded in abatement that there was no affidavit as to the value of the goods and the right of the plaintiff to the immediate possession of them. The answer was a general denial. The court adjudged the plea insufficient.

There is an apparent irregularity in this, as the truth of the plea and not its sufficiency was put in issue. There was in fact an affidavit and that is a part of the record. The truth of the plea seems to depend upon the sufficiency of the affidavit. The second paragraph of the plea by reference to the affidavit makes it in effect a part of the plea; so that the court was justified in regarding the sufficiency of the affidavit as the same thing with the sufficiency of the plea. This is manifestly the view which the counsel for the defendant took of it, because they say the court erred in adjudging the plea insufficient, not because the sufficiency of the plea was not put in issue, but because, as they say, the affidavit was insufficient. That was the real question in the court below, and that is the real question here. The precise objection seems to be that, although the affidavit describes the goods, states their value, and the right of the plaintiff to the immediate possession thereof, yet it is defective because it does not in terms say that they are the goods "which it is desired to replevy."

The act of 1863, (Session Laws of 1863, p. 45,) requires

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the oath of the plaintiff or his agent that he verily believes the plaintiff to be the true owner of the property sought to be replevied, or entitled to the immediate possession of the same. The act of 1864, (Session Laws of that year, p. 73,) prescribed the form of the affidavit, conforming strictly to the act of 1863.

In the revision of 1875, (Gen. Statutes, p. 484, sec. 2,) the statute was intentionally changed so as to require the affidavit to state the true and just value of the goods or chattels which it is desired to replevy, and that the affiant believes that the plaintiff is entitled to the immediate possession of the same. In the next section the form of the affidavit is given, which requires the property to be described, and omits the words "which it is desired to replevy." The legislature has said that an affidavit in that form shall be sufficient. The plaintiff followed that form and we cannot say that it is insufficient. The goods desired to be replevied are described in the complaint. The affidavit attached to the complaint describes the same goods. It will be presumed that they are the goods desired to be replevied until the contrary appears.

After the plea in abatement was overruled the defendant answered over and the case was tried on its merits. It appears that on the first day of January, 1885, the plaintiff was the owner of the goods, and that Ellen E. Poland, one of the defendants and the wife of the other, was in possession of the goods as lessee. The lease provided that if she changed her residence the lease should terminate; and that if she contemplated a change of residence she should give notice to the plaintiff and return the goods to him. Some time after January first she decided to change her residence and in the name of the plaintiff made a demand upon her husband, Orrin Poland, for the delivery of the chattels, but he refused to deliver them to the plaintiff on her demand. No other demand was made.

The plaintiff claimed that "without other demand than that made by Ellen E. Poland, in the name of the plaintiff, there was no wrongful detention of the chattels by Orrin

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Poland." The court ruled otherwise and the defendant excepted.

We think the ruling was correct. The record says:— "The plaintiff proved title to said chattels in said Ellen E. Poland, at the time of her marriage, and the execution by her of exhibit *A*, and no other testimony was offered to establish his title to said chattels." Exhibit *A* is a bill of sale of the chattels from Ellen E. Poland to the plaintiff made in 1885. The defendants were married in the state of New Hampshire in 1882. The defendant claimed and asked the court to rule as matter of law that "the plaintiff had proved no title to the goods and chattels sought to be replevied." The court did not so rule, but rendered judgment for the plaintiff. This question was not one of law but of fact. Finding the issue for the plaintiff was equivalent to finding title in the plaintiff. The record discloses no fact which shows such finding to be erroneous.

Assuming then, as we must, that the plaintiff owned the goods, did the defendant wrongfully detain them from him? Confessedly the only title or right which the defendant had was that which he held in right of his wife. He had no greater or other right than she had. Her right was that of lessee and was limited to one place. When she decided to change her residence her lease terminated, and it was her duty to return the property to the plaintiff. The husband, holding in right of his wife, was charged with the same duty. When he refused to return the property he stepped outside of his marital rights and held the property in his own right or without right. As he had in his own right no title his detention was of course wrongful. His refusal to return the property on demand of the wife was sufficient evidence of his wrongful detention. The plaintiff was under no obligation to give notice or make a demand. His right and the defendant's duty were absolute, not contingent. The office of a demand in this case was not to make the defendant's possession wrongful, but to furnish evidence that it was wrongful. Of course it was unnecessary if the wrongful possession could be otherwise shown,

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and it was shown, under the circumstances, by the wife's demand and his refusal.

There is no error.

In this opinion the other judges concurred.

MARIA A. MEAD *vs.* HENRY JOHNSON.

Fairfield County, Oct. T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, JS.

Replevin lies only for specific property, distinguishable from other property of the same kind.

And the plaintiff must have a general or special property in the particular thing sought to be replevied.

It will not lie to recover damages for a mere breach of contract in not delivering property. There must be a tortious taking or detention of it.

[Argued October 26th—decided December 17th, 1886.]

REPLEVIN for twenty gallons of cider brandy; brought, by appeal from a justice of the peace, to the Court of Common Pleas in Fairfield County, and tried to the court before *Hall, J.* Facts found and judgment rendered for the defendant. Appeal by the plaintiff. The case is fully stated in the opinion.

H. W. Taylor, for the appellant.

J. B. Hurlbutt, for the appellee.

CARPENTER, J. The defendant was in the business of making cider and distilling cider brandy. The plaintiff furnished him with apples and money, for which he agreed to deliver to her twenty-eight gallons of proof cider brandy. There was no agreement that the brandy should be made from the apples so furnished, and it does not appear that

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these apples were made into brandy at all. At the time the suit was brought the defendant had no proof brandy, but had more than twenty-eight gallons above proof. The officer replevied no goods, but served the process as an attachment.

The defendant for answer denied the allegations of the complaint.

Upon the trial in the court of Common Pleas the plaintiff claimed that the action of replevin was the proper remedy upon the facts proved, and that she was entitled to recover under the ninth section of the statute with regard to replevin. Gen. Statutes, p. 487. The defendant claimed otherwise. The court overruled the claims of the plaintiff and rendered judgment for the defendant. The plaintiff appealed.

The main question in the case, and the only one we have occasion to consider, as the view we take of that disposes of the case, is whether upon the facts replevin is the proper remedy.

Prior to 1863 writs of replevin were allowed in this state only to recover cattle or other animals impounded, and goods attached. Compilation of 1854, p. 140, sec. 253. In 1863, (Session Laws of that year, p. 45,) the action was extended to any goods which were unlawfully detained from the owner or other person entitled to the possession. The statute now in force is:—"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, &c." Gen. Statutes, p. 484.

Obviously the plaintiff must have a general or special property in some particular goods, which must be described. Bouvier says:—"The chattel also must possess *indicia* or ear-marks, by which it may be distinguished from all others of the same description; otherwise the plaintiff would be demanding of the law what it has not in its power to bestow. Replevin for loose money cannot therefore be maintained; but it may be supported for money tied up in a bag, and taken in that state from the plaintiff.

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The case does not show that the plaintiff ever owned or had a special property in any cider brandy. The most that it shows is, that the defendant had agreed to deliver brandy of a certain quality to the plaintiff; but it had never been separated from other brandy and set apart for the plaintiff; indeed it does appear that the defendant himself had no such brandy in his possession. He had brandy in his possession of higher proof which could have been reduced to the quality which the contract called for. But before any title can vest in the plaintiff it must be reduced, and the required quantity must at least be set apart for the plaintiff's use. This the law cannot do.

The action of replevin is founded in tort. There must be a tortious taking or detention of property; a mere breach of contract is not sufficient. Hence it is no remedy to enforce a contract or recover damages for its non-performance. This was clearly so under the old practice, and that is unaffected by the Practice Act, section 32, page 9. This suit seems to have been instituted originally for the sole purpose of enforcing specifically a contract, and to have been prosecuted solely for the purpose of recovering damages for its breach—a manifest departure from the object of a replevin suit.

The plaintiff claims that the ninth section of the replevin act applies to the case and gives her a right to a judgment. The clause relied on is as follows:—"If any of the property described in the writ is not replevied, but the plaintiff proves a general or special property therein with a right to its immediate possession, and that it is wrongfully detained by the defendant, and claims full damages therefor, the value of such property with damages for its detention may be included in any judgment which the plaintiff may recover; and it shall be so stated upon the record."

Here the plaintiff encounters the same insurmountable obstacle; she has failed to prove a general or special property in the goods described. The same inherent vice remains —an attempt to recover damages for a breach of contract in

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an action of replevin. That statute was not designed to extend the action of replevin to a case like this.

There is no error.

In this opinion the other judges concurred.

JAMES A. WILCOX AND OTHERS' APPEAL FROM PROBATE.

Hartford District, October T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

A testator, after making bequests to his widow, his daughter and certain other near relatives, gave the residue of his estate to three trustees, of whom his daughter was one, who were to hold the property during the life of the daughter and pay her the income, and on her death without children attaining the age of twenty-one, the trust was to cease and the property to be divided into sixteen equal shares and distributed among relatives named; and in case a vacancy should occur among the trustees a trustee to fill it was to be "nominated to the judge of probate by at least one third of the devisees above named." Held—1. That by "devisees above named" the testator intended only those who were ultimately to participate in the trust fund, and not all the beneficiaries under the will.—2. That the probate court had the right for good cause to refuse to appoint a person regularly nominated as a trustee.—3. That the mere fact that a person nominated as a trustee lived in another state was not a sufficient reason for rejecting him.

[Argued October 6th—decided December 29th, 1886.]

APPEAL from two probate decrees, one appointing a certain person as trustee under a testamentary trust and the other refusing to appoint another person; taken to the Superior Court in Hartford County, and heard before *Andrews, J.* Facts found, and the decree first mentioned reversed, and no action had on the other. Both parties appealed. The case is fully stated in the opinion.

C. E. Perkins, for the original appellants.

T. M. Maltbie, for the original appellees.

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CARPENTER, J. A testator made provision for his own family, a brother, a nephew, and a niece; and then gave the residue of his property in trust for his daughter. At her decease, without children, the property so held in trust is to be divided into sixteen equal shares which are given to the persons named. Immediately following the disposition of the trust property is the twenty-second clause of the will, which reads as follows:—"I give and devise all the said trust fund, and also to include all the estate of every kind which I shall own at my decease, not otherwise disposed of by this will, to the above named devisees in manner as above named, to said devisees, to them and to their several heirs forever." In the twenty-third clause he provides for a family monument. In the twenty-fourth clause he repeats substantially his disposition of the trust fund as follows:—"It is to be understood, and it is my will, that after the decease of my wife Cordelia, and after the decease of my daughter Adelaide E., said Adelaide E. leaving no heirs of her body, such trust is to cease, and all of my estate of every kind is to be divided into sixteen equal shares, and to be distributed to the devisees above named or to their heirs, to be to them and their heirs forever."

The following clauses, to and including the thirty-first, relate to matters not material to our present inquiry. The thirty-second clause, so far as material, is as follows:—"Should a vacancy occur of a trustee as above named, by death or otherwise, it is my will that a trustee to fill such vacancy shall be nominated to the judge of probate by at least one third of the devisees above named, and in like manner from time to time as such vacancy may occur, so that there shall be at all times at least two trustees during the continuance of said trust, to have charge of said trust fund."

A trustee's place became vacant. Ten of the seventeen persons to whom the sixteen shares of the trust fund are given, nominated to the judge of probate as a suitable person to fill the vacancy, Lucius T. Wilcox of Illinois. Five of said persons, uniting with the widow and daughter, nomi-

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nated John W. Stedman. The probate court appointed Mr. Stedman and refused to appoint Mr. Wilcox. An appeal was taken from the decree appointing Mr. Stedman; and also from the order refusing to appoint Mr. Wilcox. The Superior Court reversed the decree appointing Mr. Stedman, but took no action on the decree refusing to appoint Mr. Wilcox. Both parties appealed to this court.

Two questions are involved in the case on which both appeals depend:—1. Does the expression, "*devisees above named*," in the thirty-second clause of the will, include all the beneficiaries previously named, or does it include only those who are ultimately to participate in the trust fund? 2. Has the court of probate a discretion to refuse to appoint a suitable person duly nominated according to the terms of the will?

First. We think that the twenty-second and twenty-fourth clauses use the expression, "devisees above named," as referring exclusively to those who are entitled to the fund at the termination of the trust. Counsel for the appellees contend that in the twenty-second clause it includes both the widow and daughter, but concede that they are excluded in the twenty-fourth clause. We think it is used in the same sense in both. In the ninth the testator describes the trust fund and names the trustees. In the tenth he disposes of the income during the continuance of the trust. In the eleventh, at the termination of the trust he divides the principal into sixteen equal shares. In the twelfth to the twentieth inclusive he names seventeen persons who are to take those shares, one of the shares being given to two persons jointly. In the twenty-first, which has no connection with this subject, he gives a note to a nephew. In the twenty-second he resumes and sums up the disposition he has made of the body of the trust property. It will be noticed that he describes the property in nearly the same language he uses in the ninth and eleventh clauses—"All the said trust fund, and also to include all the estate of every kind which I shall own at my decease, not otherwise disposed of by this will, to the above named devisees in manner as above named,

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to said devisees, to them and to their several heirs forever." There is here no reference to income. The language used is appropriate to the gift of a fee, and not appropriate to the gift of a life estate. The property referred to in this clause is mainly, if not wholly, the trust fund; and as the daughter takes no fee in that she is evidently not one of the devisees here intended.

In the twenty-third clause he again drops the subject and provides for a monument. In the twenty-fourth, lest he should be misunderstood, he simply reiterates what he has done by way of an explanation,—"It is to be understood, &c." In this clause the reference is expressly to property which is to be disposed of, and to persons who are to receive it after the death of the daughter. Of course she cannot be intended as one of the "devisees above named." Obviously the ninth, eleventh, twenty-second and twenty-fourth clauses refer to the same property—the principal of the trust. The eleventh, twenty-second and twenty-fourth refer to its final disposition. The word "devisees" in the last two sections refers to the persons who are to take the property therein described. The income is not mentioned, and there is no occasion to allude to the person who is to take it. The thirty-second clause, in which the same expression is used, relates to the same fund and is practically a continuation of the same subject matter. It should therefore receive the same construction, unless there is something in the case which clearly indicates a contrary intention. The only ground of distinction seems to be that the two former clauses relate to the disposition of the fund after the trust ceases, while the latter relates to the management of the trust while existing. We see nothing in that distinction which requires us to give the latter expression a different meaning. The testator might for that reason have used it in a different sense, but we fail to discover sufficient evidence that he in fact did so.

If we assume, as perhaps we may, that the testator's intention was that those interested in the fund should nominate trustees to fill vacancies, and consider that as the

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reason for this provision in the will, then the widow will be excluded as well as the brother, nephew and niece. She has no interest in the trust fund. She is expressly excluded by the eighth clause—"What I have herein given to my wife Cordelia to be in lieu of and in full of her dower in my estate, and in full of her portion in all of the estate, real and personal, that I shall own at my decease."

The exclusion of the daughter is less specific, but may fairly be inferred. She is in no sense a devisee of the principal of the trust fund. The income only is given to her. As recipient of the income the testator would naturally desire that her interests should be fully protected. To that end he made her one of the trustees, and, in the thirtieth clause of the will, was careful to provide against any change in the investments except by the "united trustees." That afforded reasonable protection to her interests.

On the other hand he had regard to the interests of those in remainder. Thomas J. Wilcox, one of the trustees, was also a remainder-man. Watson L. Wilcox, whom the testator appointed to succeed Thomas J. or Lucius Wilcox as trustee, was also a remainder-man. He evidently believed that he could safely commit the management of the trust to those interested in it. As all could not participate, he allowed all some influence, not a potent one, in nominating successors.

This construction excludes the widow and daughter from participating in nominating a trustee. The devisees remaining who nominated Mr. Stedman are less than one third of the whole. It follows that he was improperly appointed, and that there is no error in reversing that decree.

We think however that the Superior Court erred in not deciding the issue on the appeal from the order or denial of the court of probate in refusing to appoint Mr. Wilcox. That "denial" was distinctly appealed from, as well as the decree making an appointment, and an issue is raised on that appeal. We think it was the duty of the court to hear and determine that issue. Failing to do so is an error of which the appellants may justly complain. It was their

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right to have that issue passed upon. That of itself entitles them to a new trial, unless we can see from the record that they are entitled to no relief on that issue. That presents the second question, whether the court of probate is bound to appoint a suitable person duly nominated as the will directs.

The statute of 1885, (Session Laws of that year, ch. 110, sec. 92,) by implication gives the power to testators not only to appoint trustees for testamentary trusts, but also to provide for the manner of filling vacancies. Such a provision is made in this will and no question is made as to its validity. The statute provides that if no such provision is made the court of probate may appoint, thus by clear and necessary implication recognizing the testamentary mode as the one to be pursued, when it exists to the exclusion of the statutory mode. The testator has indicated his will in this matter in a manner not to be mistaken or misunderstood, that the appointment shall be made upon the nomination of at least one third of the parties in interest, provided a suitable and competent person is nominated. The court of probate would doubtless have power to reject the nominee for any cause impeaching his integrity or capacity. It may fairly be inferred from the fact that the action of the court of probate is invoked, that the testator intended that the nomination should be rejected for good cause shown. It is not a case for the exercise of discretion, but a case calling for the exercise of legal judgment.

Now in this case ten of the seventeen devisees named have united in nominating Mr. Wilcox, and he is the only person named by one third. No fact is disclosed showing him to be an incompetent or improper person for the place. The only objection here urged against him is that he does not reside in this state. But the testator himself appointed a non-resident, and he has not restricted the devisees in making a selection to residents. So far as we know the property may be so situated or so invested that it is desirable to have a trustee residing in the state of Illinois. On the other hand a non-resident may be an improper person

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to appoint by reason of his being at a great distance from the scene of his duties, or by reason of the great expense attending the discharge of those duties.

We cannot say that mere non-residence is a sufficient cause for rejecting a nomination. As the case now stands it seems to have been the duty of the court of probate to appoint Mr. Wilcox.

For these reasons there is no error in reversing the judgment of the court of probate appointing Mr. Stedman; but the judgment of the Superior Court, so far as it allows the judgment of the court of probate denying the application to appoint Mr. Wilcox to stand, is erroneous, and must be reversed, and a new trial as to that matter ordered.

In this opinion the other judges concurred.

FREDERICK A. NOTHE *vs.* FREDERICK NOMER.

New London Co., March T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

The defendant agreed to purchase certain real estate for the plaintiff, for which the latter furnished him $345 of the $550 to be paid. The defendant purchased the property for the sum agreed and took a deed to himself, mortgaging it back for the unpaid part of the price. The defendant then made a quitclaim deed, had it recorded, and delivered it to the plaintiff, but by mistake had put in another name than that of the plaintiff. The error being discovered the defendant altered the name in part, still leaving it incorrect, and delivered the deed to the plaintiff, who could not read or speak English, and he, supposing the deed to be valid, went into possession of the premises and remained in possession for several months. After a while the invalidity of the deed was discovered and the plaintiff called on the defendant for a new deed, informing him that he was ready to pay the balance of the price, but the defendant refused to give it, and finally he demanded back the money paid unless the deed was given. The defendant refused to give the deed or pay back the money. In an action for the recovery of the money it was held—

1. That as the defendant refused to carry out the agreement the plaintiff had a right to treat it as rescinded.

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2. That the plaintiff's having taken possession and held it so long, did not, in the circumstances, stand in the way of his abandoning the contract and demanding back the money.
3. That the defendant's absolute refusal to give the deed removed the necessity on the part of the plaintiff of tendering the balance of the price when he demanded the deed.

If a bill of particulars is not specific enough the defendant can move to have it made more so; but the objection comes too late after the case has been tried.

[Argued May 27th—decided June 18th, 1886.]

ACTION to recover money on an account stated; brought to the Court of Common Pleas in New London County, and tried to the court before *Mather, J.* Facts found and judgment rendered for the plaintiff. The defendant appealed. The case is sufficiently stated in the opinion.

T. M. Thayer and *C. F. Thayer*, for the appellant.

S. Lucas, for the appellee.

PARK, C. J. The plaintiff and the defendant are Germans, and when the transaction in this case occurred the plaintiff could not read or speak the English language, but the defendant could do both.

The defendant, knowing that the plaintiff desired to purchase certain real estate, represented to him that he, the defendant, could make the purchase for the sum of five hundred and fifty dollars. The plaintiff engaged the defendant to make the purchase, and gave him the sum of three hundred and forty-five dollars in part payment of the purchase price. The defendant made the purchase for the sum mentioned, and paid the grantor the sum of three hundred and twenty dollars in cash and gave his note for the balance. The defendant took a deed of the premises in his own name, and mortgaged them to the grantor to secure the note; which mortgage still remains on the property.

Thereupon the defendant made a quitclaim deed of the property, and executed it and had it recorded on the town records, but by mistake inserted therein the name "*Adolph*

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Noda," instead of the name of the plaintiff. Soon after the defendant delivered the deed to the plaintiff, when the latter discovered the mistake, and gave the deed back to the defendant, telling him of the mistake in the name. The defendant took the deed, promising to have it corrected; and the plaintiff, relying on the promise, soon after went into the possession of the premises. The defendant had the name *Adolph* erased from the deed, and the name *August* inserted, but the name *Noda* was not disturbed, and the deed in this condition was returned to the wife of the plaintiff, who laid it away for safe keeping. There was no new execution or acknowledgment of the deed. The plaintiff's full name was Frederick August Nothe. He had a son whose name was Adolph Nothe.

About four months after these transactions the plaintiff discovered that the deed returned to his wife was fatally defective, and then informed the defendant that he would pay him the balance due on the property for a good title to it; but the defendant refused to do anything more about the title. The plaintiff afterwards made repeated requests of the defendant for a good title, and was as repeatedly refused, till at last the plaintiff told him that he must give him a good title to the premises or pay him back the money he had paid on the property; but the defendant refused to do either. The plaintiff thereupon demanded back the money he had paid the defendant, which the latter refused to return; and afterwards this suit was brought.

The defendant refused absolutely to carry out his part of the contract by giving the plaintiff a good title to the property, and this was equivalent to an abandonment of the contract on his part, and it gave the plaintiff the right to rescind the contract, and recover back the money he had paid on it; for one party to a contract is never bound to fulfill it, when the other party absolutely refuses to perform his part of it. He may rescind the contract, as the plaintiff did in the present case, when he demanded back the money, and recover the money paid under it, or perform the contract, and recover damages for a breach of it. He

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may pursue either course, for both are open to him; for when a party to a contract absolutely refuses to go further under it, he thereby abandons the contract, and cannot afterwards complain if the other party treats the contract as rescinded.

In the case of *Lyon* v. *Annable*, 4 Conn., 350, Chief Justice HOSMER says:—"It is a principle well established that if the purchaser has paid any part of the purchase money, and the seller refuses to complete his part of the contract, the purchaser may make his election, either to affirm the contract, by bringing an action for its non-performance, or disaffirm it *ab initio*, and bring an action for money had and received to his use."

The plaintiff would have been bound to tender the balance of the purchase money, as a condition precedent to the right to claim a good title to the property, if the defendant had not waived it by his absolute refusal to do any thing more regarding the title. In such a condition of things a tender would have been useless, for the refusal in effect so declared it.

The defendant insists that the plaintiff, after going into possession of the property under the contract, and continuing in possession during a period of three months, thus receiving a benefit from the contract, could not afterwards rescind the contract and recover the money paid under it.

But the plaintiff went into possession of the property in consequence of promises made by the defendant to give him a good title; and while he remained in possession he supposed that the deed, returned by the defendant and in the keeping of his wife, gave him such title. Surely the defendant cannot take advantage of his own deception, either knowingly or ignorantly practised upon a man incapable of reading the deed, or learning what was in it from any member of his family; for the case finds that none of them could read it. The defendant is chargeable with deception or fraud, and what was done in consequence of it stands as though it had never been done.

The defendant further insists that the complaint and the

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bill of particulars did not sufficiently apprise him of the plaintiff's cause of action, or of the facts he intended to prove.

If the bill of particulars was not specific enough the defendant could easily have had it made more so by application to the court. He chose to go to trial upon the complaint as it was. His answer was a general denial of the facts alleged. He made no objection to the testimony. He evidently knew as much about the case as he cared to.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

FRANKLIN SHERWOOD AND WIFE *vs.* FANNY S. WHITING AND OTHERS.

Fairfield County, Oct. T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

A misdescription in a deed does not affect its operation so long as the property intended to be conveyed is otherwise so described that it can be identified.

Especially is this so where the mistake is in some statement of fact with regard to the title, and not in the description of the property.

A made a conveyance to *B* of a quantity of real estate described thus:—"All the real estate of *D* deceased, which was distributed to *E* and afterwards conveyed by *E* to me." In point of fact *E* had conveyed to *A* before the distribution and not after, but his deed fully described the land conveyed to *A*. Held, in a suit for the correction of the deed, that it needed no correction.

And held that the question whether the conveyance by *E* to *A* was not made to defraud creditors and whether therefore *E* could recover the property back, did not enter into the question whether the deed of *A* was sufficient to convey the property.

[Argued October 26th, 1886—decided January 26th, 1887.]

SUIT for the reformation of a deed; brought to the Superior Court in the county of Fairfield. Facts found and case

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reserved for advice. The case is sufficiently stated in the opinion.

J. C. Chamberlain, for the plaintiffs.

H. J. Curtis and *J. A. Joyce*, for the defendants.

PARDEE, J. In 1848 Oran Sherwood of Fairfield died intestate, leaving real estate, a widow, and four children. Of these last was Franklin Sherwood, the plaintiff. On March 1st, 1856, he conveyed his undistributed interest in his father's estate to his mother, saying in his deed that he intended "to convey my entire undivided title and interest in and to all the estate of my father, the said Oran Sherwood, late deceased, within said tract of land, as heir at law of my said father therein." This conveyance was made for the purpose of concealing the property from his creditors. On June 16th, 1856, distribution was made. On February 19th, 1883, his mother, desiring and intending to reconvey to him precisely what he had conveyed to her, executed and delivered a deed to his wife, for his benefit, in which she described the property as follows: "All the real estate of Oran Sherwood deceased, which was distributed to Franklin Sherwood in the distribution of said estate, and afterwards conveyed to me by said Franklin Sherwood by sundry deeds, as recorded in Fairfield land records." In point of fact Franklin Sherwood had conveyed to her *before* not *after* distribution. Mrs. Sherwood, the grantor, is dead. Franklin Sherwood asks in effect that her heirs at law may be compelled to execute a corrected deed. They resist, and insist that inasmuch as he conveyed the land to his mother for a fraudulent purpose equity will leave him where he placed himself. If we should concede that if Mrs. Sherwood had refused to reconvey the land to her son the court would not come to his relief, this case would not be disposed of. She made a conveyance; if that is legally sufficient in form the plaintiff's title is unassailable; and for the purpose of determining the question as to its suffi-

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ciency in form the tests, and only those, are to be applied which would be applied to a deed executed upon a valuable consideration. Every concession which would be made in behalf of the latter is to be made in behalf of the former. And, if the deed had been made to a purchaser for full and valuable consideration, we think the heirs of the grantor could not obtain the assistance of any court in an effort to inherit both the consideration and the property. There is and can be no doubt or question as to the identity or location of the piece of land in which Franklin Sherwood had an interest. In his deed to his mother he gave the boundaries and contents; he stated that there had then been no distribution, plainly implying that there would be; such distribution was made and recorded; by this his part was set to him by metes and bounds; and the mother in her reconveyance declares that she intends to restore to him precisely that which he conveyed to her, and refers to the recorded distribution, where it is described to a certainty in every particular. Having secured absolute certainty by giving metes and bounds and quantity and naming visible monuments, by way of supererogation the grantor undertakes to mention a certain event in the history of the title to that land and mistakenly states that it occurred before the conveyance to herself when in fact it occurred after. The mention affects no metes or bounds or monuments, no courses or distances; no doubt as to identity is raised. Every person reading it had either actual or constructive notice of the mistake in stating the order of those events; for both distribution and deed were upon the public records and declared that order. There is no finding that any person has acquired any right or interest in or title to the premises by conveyance from either Oran Sherwood or his mother, or by adverse occupation, which conflicts with the plaintiff's claim of ownership. As a matter of law, as a rule of construction, this needless and erroneous mention of an incident in the history of the title to a piece of land is to be held to have no force as against the mention of metes, bounds, courses, distances

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and visible monuments, when the question is whether the deed is sufficient as to form to convey the land intended.

It is the duty of courts to uphold rather than to destroy deeds. It is the fundamental canon of interpretation of contracts to discover and give effect to the intention of the parties. In the case before us the finding makes it certain that the mother intended to reconvey to her son precisely that interest in his father's estate which he had conveyed to her before distribution. When a piece of land is so described that a surveyor's chain can be stretched along its boundaries with absolute certainty as to each course, distance and monument, a transposition of dates in stating previous conveyances constituting the chain of title, will not cloud or affect that certainty, nor destroy the operative force of a conveyance.

We cite a few of the many instances given in the reports where courts, in the discharge of their duty to find and carry out the intent, have declared that certain words of description in deeds are to be of no effect, which apparently are far more likely to give rise to a doubt as to identity than is the erroneous word in the deed before us. In *Worthington* v. *Hilyer*, 4 Mass., 196, the words of description are,—"all that my farm of land in said Worthington on which I now dwell, being lot No. 17, in the first division." The land demanded in that action was not included in lot No. 17, yet the court held that it passed, the first being sufficient to ascertain the estate intended to be conveyed, and that the additional description inconsistent with the former was to be rejected, because, if it were to be considered as an essential part of the description, the deed would be void for repugnancy. In *Cato* v. *Thayer*, 3 Greenl., 71, the question was as to one of the lines of the town of Dresden, which was described as a course "north-northwest, including the whole of Gardiner's farm"; and the court held that the whole farm was included, although intersected by a line running north-northeast, because the farm was to be considered as a monument. In *Keith* v. *Reynolds*, 3 Greenl., 393, the description was,—"a certain tract of land or farm

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in Winslow, including in the tract which was granted to Ez. Pattee," and afterwards there was added a particular description by courses and distances, which did not include the whole farm. It was contended that the particular description should prevail, in preference to the other, which was more general and uncertain; but it was decided that the first description was certain enough, and that it was to be adopted rather than the description by courses and distances, which was more liable to errors and mistakes. In *Lodge* v. *Lee*, 6 Cranch, 237, the description was,—"all that tract or upper island of land called Eden"; and then it was added, "beginning at a maple tree," and describing the land conveyed by bounds, courses and distances; but so as not to include all the island. The court held that the whole island passed. In *Jackson* v. *Barringer*, 15 Johns., 471, the grant was,—"the farm on which *J. J. D.* now lives," which was bounded on three sides, and to contain eighty acres in one piece. The farm contained a hundred and forty-nine acres; and the decision was that the whole farm passed. In *Swift* v. *Eyres*, Cro. Car., 546, the land conveyed was described as "all the grantor's lands lying in Chesterton, viz. seventy-eight acres of land, with all profits, tithes, &c."; and then were added the words, "all which lately were in the occupation of Margaret Peto." It was found that the tithes of these glebe lands were never in the tenure of Margaret Peto, though other lands and tithes were. But it was held, notwithstanding, that the lands and tithes first described passed. In *Eliot* v. *Thatcher*, 2 Met., 44, note, the land conveyed was thus described,—"all my real property or homestead so called lying and being in Dartmouth, together with about thirty acres of land, let the same be more or less; for more particular boundaries reference may be had to a deed given by Clark Ricketson to David Thatcher of the above mentioned premises." It appeared that the grantor was seized only of a part of the land which he bought of Ricketson, but he had bought some land adjoining thereto, being in the whole about thirty acres, and it was decided that the whole passed; it being held that the

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word "homestead" was a sufficiently certain description, and that the grant ought not to be limited and restrained by the subsequent reference to Ricketson's deed, it being a well known rule of construction of deeds that a precedent particular description shall not be impaired by a subsequent general description or reference, and that deeds are to be construed according to the intentions of parties; and that if there be any doubt or repugnancy in the words, such construction is to be made as is most strong against the grantor, because he is presumed to have had a valuable consideration for what he parts with. In *Hastings* v. *Hastings*, 110 Mass., 280, *A*, the owner of a farm, conveyed in 1853 by deed "the farm on which I now live, and is the same which was deeded to me by *J. G.*, March 15th, 1810, reference being had to said deed." A lot of land which had formed part of the farm for forty years was not included in the deed of March 15th, 1810, but had been conveyed to *A* by *J. G.* by a deed dated January 11th, 1810. It was held that this lot passed by the deed of *A*. In *Melvin* v. *Proprietors, &c.*, 5 Met., 15, the heirs of *K* gave deeds to *C* of land which they described as the "estate on which *C* now lives," or the "estate called the *C* farm," and "being the same which was conveyed by *M* to *K* by deed" bearing a certain date; and it was shown that *C*, as lessee of *K* and otherwise, had previously occupied the whole farm for many years. It was held that the deeds conveyed the right and title of the heirs to the whole farm, although the deed from *M* to *K*, which was therein referred to, did not include the whole. The court says:—"Another rule of construction is, that if the description be sufficient to ascertain the estate intended to be conveyed, it will pass, although some particular circumstance be added inconsistent with the description. * * * If the land had been conveyed by reference to known monuments and boundaries it would be clear that a subsequent reference to the mortgage deed would not operate by way of restriction; and we think there is no good reason why the description in these deeds, the boundaries of the farm conveyed being certain and undoubtedly well known to the

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parties, should not be held equally conclusive." In *Deacons &c.* v. *Walker*, 124 Mass., 69, *A* mortgaged a "farm" known as the "*T* place,"—"together with all the buildings thereon, including mills, water-power, machinery and fixtures belonging thereto"—"being the same estate which was conveyed to me by *B* by her deed" duly recorded, "to which said deed and the record thereof reference is made for a description of said premises." The deed from *B* did not include a small parcel of land on which stood the only mill of *A* with the connected buildings, but did include the dam and pond which furnished power to the mill. It was held that this parcel passed by the deed to *A*. The court said:—"Reference is made to the Holden deed, not for the purpose of fixing the metes and bounds, as if describing the lot conveyed, but to show the grantor's chain of title." In *Andrews* v. *Pearson*, 68 Maine, 19, in a conveyance of a "homestead farm," one of the parcels composing it was described as "twelve and a half acres out of lot numbered eight in the first range." It was held that the whole parcel passed although it in fact contained twenty-five acres: The court said:—"Freeman Allen was the owner of a farm of ancient and well-defined boundaries. He undertook to convey it to the plaintiff. He first described it as his 'homestead farm.' He then undertook to give a further description of it by naming the several parcels or portions of which it was composed. One of them is described as twelve and a half acres out of a lot numbered eight in the first range. This portion of the farm in fact contained twenty-five acres. The question is whether this mistake left half of this parcel unconveyed. We think not. We think it falls within the principle '*falsa demonstratio non nocet*'; a mere false description in one particular, where enough remains to make it reasonably certain what premises were intended to be conveyed, will not defeat the conveyance." In *Union* v. *Skinner*, 9 Missouri Appeals, 189, it is held that "when one sells a lot by its number as laid out in a recorded plot, and in giving a further description mis-states the boundary line thereof, the monument will prevail and the further false

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description be rejected." In *Green Bay &c.* v. *Hewett*, 55 Wis., 96, a grantor by deed conveyed to the plaintiff and its successors and assigns forever all his claim, right, title and interest in or to a piece of land; in a subsequent clause he declares that the interest and title intended to be conveyed by the deed is only that acquired by virtue of a deed to him; this last conveyed to him only an undivided half. It was held that his whole interest passed. In *Wiley* v. *Lovely*, 46 Mich., 83, a deed described the land conveyed as lot seventy-seven of the original plot of the village as recorded; this plot contained only twenty-nine lots; another plot, unrecorded, designated the lot as seventy-eight; another unrecorded plot contained the lot, and it was shown that it had been held, taxed and dealt with for more than twenty-five years as lot seventy-seven. It was held that the error in description did not invalidate the conveyance. In *Dwight* v. *Tyler*, 49 Mich., 614, it was held that "when a deed contains a wrong description, but the land can be identified by inquiry based on land-marks referred to, the title held by the grantor is not merely equitable but legal, and may be incumbered as such."

The Superior Court is advised that the deed to Mary A. Sherwood, one of the plaintiffs, in its present form is effective to convey to her all of the right, title and interest in the estate of Oran Sherwood which Franklin Sherwood conveyed to his mother, including the land upon which the right of dower rested. For that reason and for no other that court is advised to dismiss the petition.

In this opinion the other judges concurred.

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ANDREW MORRIS *vs.* ALONZO T. BEARDSLEY AND OTHERS.

Fairfield County, Oct. T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, JS.

A piece of land on the sea shore was divided between two distributees of an estate by a line extending through the upland to the shore line but not running through the flats between high and low water mark. The shore was a convex curve. Held—1. That the law supplied the rule for the division of the flats. 2. That by that rule the line was to run perpendicularly to the shore line from the point of division at that line to low water mark. 3. That in determining the curve of the shore its general trend for a considerable distance was to be considered, omitting to notice small indentations and projections.

[Argued October 27th, 1886—decided January 26th, 1887.]

ACTION for trespass to land; brought to the Court of Common Pleas in Fairfield County. Facts found and case reserved for advice. The general principles laid down by the court will be sufficiently understood from the opinion: the special facts could not be understood without a map.

C. Thompson and *A. M. Tallmadge*, for the plaintiff.

D. F. Hollister, and *R. E. DeForest*, for the defendants.

PARDEE, J. Land of the plaintiff adjoins that of the defendant. The former complains that the latter has trespassed by driving piles upon his land. The two pieces of land are a part of the shore of Bridgeport harbor; in 1837 both formed a part of the intestate estate of Ira Curtis, deceased, which included upland. In the distribution the part of the shore now owned by the plaintiff was described in these words, viz:—"Also the westerly half of the water lot lying south of the above described piece;" the "above described piece" being a portion of the upland. The deed of the distributee to a predecessor of the plaintiff in title describes the upland and shore together as follows, viz:—

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"The homestead of E. Wilcox, in quantity one hundred and thirty-five rods, north in part on land of Ruth Ann Curtis and in part on land of Lewis Curtis, east in part on highway five rods and twelve and a half links, in part on land of Robert Whittemore, in part on land of Lewis Curtis, south in part on land of Samuel Whittemore, and in part on the channel of Bridgeport harbor, west in part on highway and in part on Benjamin Pilgrim, including water lot on south end of said piece." The deed to the plaintiff describes his shore lot in the following language, viz.:—"A certain piece of land situated in East Bridgeport, in said town of Bridgeport, bounded on the channel of Bridgeport harbor, north on land this day deeded to said Andrew Morris, the eastern and western boundaries running parallel with the boundaries of the upland, the same being a water lot in front of land this day deeded to said Andrew Morris." In the distribution the lot now owned by the defendants was described as follows, viz.:—"Also the east half of the water lot belonging to said estate lying southerly of the house of Samuel Whittemore." The distributee granted and described it as "south of Samuel Whittemore, and set off to me from the estate of my father as the easterly water lot, north and east on highway, west on water lot of Thomas C. Wordin, and south on channel of harbor or river." The deed from Ali Andrews to the defendants describes their lot as follows, viz.:—"A certain water lot so called lying in East Bridgeport, south of the homestead formerly occupied by Samuel Whittemore, * * * east on Pembroke street, south on the channel of harbor or river, and west on the property of Andrew Morris; meaning hereby to convey all my right, title and interest in all that piece or parcel of land and mud flats deeded to me by Lewis Curtis, * * * the said Lewis Curtis having obtained title to the same by distribution from the estate of his father * * * ." The location of the dividing line has not been affected by adverse occupancy; and as the distribution is the origin of both titles, to it we first look for light on the question before us. We there find one lot described as the "westerly half of the water

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lot lying south of the above described piece;" the other as the "east half of the water lot belonging to said estate, lying southerly of the house of Samuel Whittemore." That is, one is on the east, the other is on the west side of the dividing line. But no monument or mark is named at either terminus; no course is specified; no measurement is given by which the surveyor can locate it.

Of course the owner of a tract of the shore can divide, convey and establish dividing lines as he may find purchasers. But if the owner of upland divides it into two pieces, each having a sea front, and conveys to different grantees, and also conveys to each the appurtenant tract of the shore, and says no more about the dividing line, the parties have joined in leaving its precise location to be determined by the rules of law. Of course there was ownership of upland and the adjacent shore before any highway existed. The rule of law which established separating lines between the proprietors of the shore was in operation then as now. It is not in the case that any one of these proprietors has ever made a conveyance which interfered with the continual operation of such rule; and by it the present proprietors must be governed, as have been all their predecessors. By the distribution the distributees acquired no right to interfere with the operation of it; therefore they could convey no such right to any person. The laying out of highways did not affect it. If a way was laid across the portion of the shore belonging to any individual he still had access to the sea across it; if barred he had pecuniary compensation for the loss; land taken was paid for; there remained to him his previous right on either side thereof; and the line of separation between him and an adjoining proprietor remained unchanged and subject to the rule. If since the distribution any one holding title there under him, conveyed shore rights and bounded them upon a highway, whatever may be the effect of the limitation as between him and his grantee, it did not move the separating line between him and adjoining proprietors upon the other side having title originating in the same distribution. As has been said, in

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1837 there belonged to the estate of Ira Curtis, deceased, a piece of land upon Bridgeport harbor with the appurtenant shore. Upon the map this piece of land is shown to be a small portion of a projection of land into the sea; the high water line being a segment of a curve; speaking of course of the general trend of it, taking a considerable distance into account and omitting to notice small indentations and projections. For the purposes of this case we may regard this curved line as crossing Stratford avenue near the Yellow Mill bridge, and again at a point some distance west of the intersection of East Main street with the same avenue. Assuming that the piece of upland was divided and the portions set to different distributees, and also to each the right in the shore appurtenant to each, without more, as the result of the rule of common law applicable to this particular case, the line separating the shore rights, starting from the point where the line separating the pieces of upland intersects the convex high water line, would leave that line by a right angle, (an expression which is sufficiently accurate to convey our meaning,) and proceed directly to an intersection with the low water line. Of course on convex lines of high and low water the latter would be the longer; each upland proprietor has his full measure of right upon each; whether he reaches the channel by a longer or shorter line is the accident of his location, and he must accept the result.

The case does not furnish sufficient data for specific advice to the Superior Court. We advise that court to obtain these data, and establish the separating line between the parties according to the above rule.

In this opinion the other judges concurred.

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THE TRUSTEES OF THE STORRS AGRICULTURAL SCHOOL *vs.* MINERVA B. WHITNEY AND OTHERS.

Hartford District, Oct T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

W conveyed to a charitable corporation a quantity of land in this state, to be used for the charitable purpose for which the corporation was organized, with a proviso that if it should abandon such use it should pay the market value of the property as it received it to the selectmen of the town of *M*, to constitute a fund of which the selectmen and their successors in office should be trustees, the interest of which should be applied by them to the aid of indigent young men fitting themselves for the ministry. The corporation accepted the property and used it for the purpose intended for about ten years, when it abandoned the use of it, but did not pay the value over to the selectmen of *M*. Soon after the corporation and the selectmen quit-claimed to the widow of the original donor all their interest in the land. Held that the land remained charged with the incumbrance in favor of the selectmen of the town.

This second charity was not void as contravening the rule against perpetuities by reason of the uncertainty when it would vest, because it was preceded by a charity, and one charity thus made contingently to succeed another does not fall within the reason of the rule against perpetuities.

The charity being a valid one, the declining of the selectmen to accept the trust could not affect it.

The gift "to aid indigent young men in fitting themselves for the evangelical ministry," held not to be void for uncertainty.

[Argued October 6th, 1886—decided January 26th, 1887.]

SUIT for the removal of a cloud from a title; brought to the Superior Court in Tolland County. Facts found and case reserved for advice. The case is fully stated in the opinion.

E. H. Hyde, Jr., presented the case in behalf of the plaintiffs. No argument was made on the other side.

PARDEE, J. The Connecticut Soldiers' Orphan Home was incorporated in 1864 for the charitable purpose of providing

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a home, support and education for orphans or destitute children of soldiers and other citizens of this state. In 1866 Edwin Whitney conveyed to the corporators thereof and their successors, two pieces of land in the town of Mansfield, to be by them used for the purposes specified in their act of incorporation, with this proviso, *viz.*:—"Always provided, that if at any time said grantees or their successors in office shall abandon the use of said premises for the purpose intended and specified in their said act of incorporation, then said grantees and their successors shall pay the market value of said property derived from the grantor to the selectmen of said town of Mansfield, and the same shall constitute a fund of which said selectmen and their successors in office shall be trustees, the interest of which shall be applied by said selectmen to aid indigent young men of said town of Mansfield in fitting themselves for the evangelical ministry. But no more than one hundred dollars shall be furnished to any one person during his whole course of study. And provided further, that in case the interest of said fund shall not be absorbed by education to indigent young men of said Mansfield as aforesaid, then the surplus shall be applied by said selectmen in aid of other indigent young men in this state fitting for the evangelical ministry." The corporators accepted the gift and administered the trust to the specified use until 1875, when they ceased to do so. No part of the value of the property donated by Mr. Whitney has been paid by them or any one else to the selectmen of the town of Mansfield, as required by the proviso in Mr. Whitney's deed. The town of Mansfield subsequently directed its selectmen to decline the trust and quit-claim all of the interest of the town in the property to the widow of Mr. Whitney, the donor. They did so in 1876. In 1878 the Connecticut Soldiers' Orphan Home quit-claimed its interest in the property to Mrs. Whitney, and she subsequently conveyed it to Augustus Storrs. In 1881 the legislature established the Storrs Agricultural School, and appointed trustees for the management thereof, with power to take donations of land or other property in behalf of the state for the use

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of the school. The plaintiffs are such trustees. In 1881 Augustus Storrs conveyed the premises to them as such trustees for the establishment of said school. They have instituted this proceeding for the purpose of obtaining a judicial determination of the question whether the state has an unincumbered title to the property. The case is reserved for the advice of this court.

Mr. Whitney by deed conveyed the premises in question to the Connecticut Soldiers' Orphan Home, to it and its successors, upon a charitable use, "in consideration of the benevolent ends embraced in the act of incorporation and from a desire to aid in carrying out the same." Desiring to make it certain that either this identical property, or the value thereof in money, should perpetually serve a charitable use, and not being certain that the first named use would be long continued, he inserted the proviso in his deed. The legal effect of his conveyance, taken as a whole, is the gift of property in fee to one corporation for a charitable use; the right to perpetual retention and use if it chooses to exercise it, with a conditional limitation annexed upon its determination not to use. Upon such determination the donor provided for the continued use of his gift for charity by requiring the first board of trustees to pay the value of it in money to a second for a different but equally charitable use. He foresaw and provided for the probability that the Orphans' Home corporation would expend money in the erection of additional buildings upon the land donated by him; upon abandonment he only required it to pay to the trustees for the second charitable use such sum of money as would represent his gift. He parted with his entire interest in and right or title to the land, reserving nothing—no right of re-entry for forfeiture either to himself or his heirs or assigns. Everything went from him by deed irrevocable; but in parting with the land he put an ineffaceable perpetual charitable stamp upon it. This stamp went upon the record and therefore became known to all men. Any person thereafter taking a conveyance of that land before a sum of money equal to the market value of that

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which Mr. Whitney gave had been paid to the trustees for the second charitable use, did so with knowledge that there was in legal effect an incumbrance thereon, undischarged, equal to that sum; that upon the happening of a possible event the trustees for a specified charity would come into possession of the right and power to compel the holder of the title to the land either to yield it up to them or pay the value of the original gift.

The formal rejection of the gift by the town of Mansfield is of no consequence; there is no gift to the town, and therefore no opportunity for rejection. If the persons who should at any time hold office as selectmen of that town should decline the trust, such declination would not affect it; the trust remains, and the court would supply trustees upon proper application in behalf of any member of the specified class of beneficiaries. A charitable use will not be permitted to fall because the named trustee declines; nor because of delay upon the part of beneficiaries in asking for their rights. If the donor had provided that upon the cessation of use by the corporation the land or its representative value in money should be paid to his descendants, this latter provision would have offended the statute against perpetuities, for the reason that a century might elapse before such cessation; being void, there would have remained to the Orphans' Home an absolute fee free from all limitations or incumbrances. The gift of property first to one charitable use and then to another upon the determination of the first trustee no longer to use, as was done in this case, does not offend the statute of perpetuities. The law favors charitable uses. It does so with knowledge that in most cases they are intended to be practically perpetual; and it is willing to permit what of evil results from the devotion of property to such length of use in consideration of the beneficent results flowing therefrom. As one charitable use may be perpetual, the gift to two in succession can be of no longer duration nor of greater evil. The property is taken out of commerce, but it instantly goes into perpetual servitude to charity. The effect is practically the same as

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if the gift had been to a specified charitable use during the pleasure of the trustees, then to another charitable use, both by the ministration of the same trustees or their successors. Moreover the Orphans' Home corporation has power at any time to make an absolute unincumbered title in fee simple to a purchaser at its pleasure by abandoning the specified use and paying the incumbrance to the trustees for the second charitable use. Practically therefore this particular piece of land is no more inalienable than is that which is subjected to a mortgage by an individual for private uses; no more removed from channels of commerce. In *Jocelyn* v. *Nott*, 44 Conn., 55, it is said that all devises or grants, whether for charitable uses or otherwise, must vest, if they vest at all, within the time limited by the statute of perpetuities. In that case there was a devise of land to trustees to hold until a society should be formed and erect a church. It was held that as there was no limitation as to time and no certainty that the event would ever occur, and the property was inalienable until then, the devise was void as tending to create a perpetuity. But in the case before us the property instantly vested, and a charitable use sprang into being at once. In each of the following cases, namely, *Brattle Square Church* v. *Grant*, 3 Gray, 142, *Wells* v. *Heath*, 10 id., 17, and *Society for promoting Theological Education* v. *Attorney General*, 135 Mass., 285, there was a devise to a charitable use with a proviso that in case of misapplication the gift should go to the kindred of the donor. Each proviso was held to be void as offending the statute against perpetuities. But in each case the gift over was for a commercial not a charitable use; and the law will not in behalf of such forgive the offense against the statute. In *Odell* v. *Odell*, 10 Allen, 7, the court says:—"But a gift may be made in trust for a charity not existing at the date of the gift, and the beginning of whose existence is uncertain, or which is to take effect upon a contingency which may possibly not happen within a life or lives in being and twenty-one years thereafter." In *Ould* v. *Washington Hospital*, 35 U. S. R., 303, and in *Inglis* v. *Sailors' Snug Harbor*,

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3 Peters, 142, there were devises to trustees to hold until charters should be given to corporations, then to convey title to them upon charitable uses. In the last case the court said:—"Here is clearly contemplated a future vesting, to depend upon a capacity to take to be created by a legislative act. If the passing of that legislative act had been restricted by the will in point of time to the lives of the individuals filling these offices at the death of the testator, on what possible ground could the devise be impeached? Does then the law invalidate the devise for want of such restriction or some equivalent to it? It is perfectly clear that the law of England does not and never did as relates to charities." And in each case the devise was upheld. See also *Coit* v. *Comstock*, 51 Conn., 352. In *Jones* v. *Habersham*, 107 U. S. R., 174, the testator devised property to several corporations upon charitable uses, providing that if any one of them should attempt to sell, alienate or otherwise dispose of the property contrary to the conditions imposed, the testator's legal representatives should enter, and in that event he devised "the said property so entered upon and repossessed unto the Savannah Female Orphan Asylum." The court says:—"There is nothing in this clause by which the heirs at law or next of kin can be benefited in any possible view. If the conditions against voluntary alienation and levy of execution are invalid, the previous devises stand good. If these conditions are valid the devise over to the Savannah Female Orphan Asylum, an undoubted charity, will take effect; for as the estate is no more perpetual in two successive charities than in one charity, and as the rule against perpetuities does not apply to charities, it follows that if a gift is made to one charity in the first instance, and then over to another charity upon the happening of a contingency which may or may not take place within the limit of that rule, the limitation over to the second charity is good. *Christ's Hospital* v. *Grainger*, 16 Sim., 83; *S. C.*, 1 Macn. & Gord., 460; 1 Hall & Twells, 533; *Executors of McDonogh* v. *Murdoch*, 15 How., 367, 412, 415; *Russell* v. *Allen*, 107 U. S. R., 163." In *Russell* v.

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Allen, *supra*, the court said :—" The objection to the validity of the gift before us as tending to create a perpetuity, is fully met by the cases of *Inglis* v. *Sailors' Snug Harbor*, *Executors of McDonogh* v. *Murdoch*, and *Ould* v. *Washington Hospital*, above cited, which clearly show that a gift in trust for a charity not existing at the date of the gift, and the beginning of whose existence is uncertain, or which is to take effect upon a contingency that possibly may not happen within a life or lives in being and twenty-one years afterwards, is valid, provided there is no gift of the property meanwhile to or for the benefit of any private corporation or person." In *Ould* v. *Washington Hospital*, 95 U. S. R., 313, the court says:—" Charitable uses are favorites with courts of equity. The construction of all instruments where they are concerned is liberal in their behalf. *Mills* v. *Farmer*, 19 Ves., 487 ; Perry on Trusts, sec. 709. Even the stern rule against perpetuities is relaxed for their benefit."

Dr. Franklin left legacies to the cities of Philadelphia and Boston to be lent to young married artificers, with sureties, to be repaid by yearly installments of one tenth with interest, and directed that this should go on for one century, and with a part of the fund for another century, at the expiration of which he gave the principal to the city and commonwealth. In 1827 Chief Justice GIBSON spoke approvingly of this disposition of property. *Witman* v. *Lex*, 17 Serg. & R., 91. In *Executors of McDonogh* v. *Murdoch*, 15 How., 367, there was a bequest to the cities of New Orleans and Baltimore in fee for education of the poor in those cities ; in case of wilful violation of any condition imposed by the testator the property to go to the states of Louisiana and Maryland for the education of the poor in those states. Held, in cases of failure of the devise to the cities, the limitation over to the states would have been operative. In *Christ's Hospital* v. *Grainger*, 1 Macn. & Gordon, 460, there was a bequest to the corporation of Reading on certain trusts for the benefit of the poor of the town, with a proviso that, if the corporation should for one whole year

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neglect to observe the direction of the will, the gift should be utterly void, and the property be transferred to the corporation of London in trust for a hospital in the town of London. After the corporation of Reading had acted in disregard of the direction of the will to the knowledge of the corporation of London and the hospital, for more than twenty years, a suit was instituted on behalf of the hospital, claiming the property under the proviso. Held—first, that a contingent limitation over of property from one charity to another is not within the principle of the rule against perpetuities, and therefore that the limitation in question was no infringement of that rule. Secondly, that the limitation might well take effect notwithstanding the rule that a charitable purpose shall not be disappointed by the neglect of the trustee, the testator in the case having expressly made the gift over to depend upon the conduct of the trustee. The Lord Chancellor said:—"It was then argued that it was void as contrary to the rule against perpetuities. These rules are to prevent, in the cases to which they apply, property from being inalienable for certain periods. Is this effect produced and are these rules invaded by the transfer in a certain event of property from one charity to another? If the corporation of Reading might hold the property for certain charities in Reading, why may not the corporation of London hold it for the charity of Christ's Hospital in London? The property is neither more nor less alienable on that account." In 1 Jarman on Wills, 505, in a note to the American edition, it is said as follows:—"But a gift may be made in trust for a charity not existing at the date of the gift and the beginning of whose existence is uncertain, or which is to take effect upon a contingency which may possibly not happen within a life or lives in being and twenty-one years afterwards, provided there is no gift of the property meanwhile to or for the benefit of any individual or any private corporation. In the case of Downing College, a gift to trustees to buy ground, obtain a royal charter, and found a college, was established twenty years after the testator's death by Lord WORTHING-

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TON and Lord CAMDEN, after taking the opinion of Lord Chief Justice WILMOT and Sir THOMAS SEWELL, M. R., followed up by decrees of Lord LOUGHBOROUGH thirty years later, after five unsuccessful applications to the crown for a charter; and a charter was not in fact obtained until more than fifty years after the death of the testator; after which further directions in the cause were made by Lord ELDON. *Attorney General* v. *Downing*, Wilmot, 1; *S. C.*, Dick., 414; Ambl., 550, 591; *Attorney General* v. *Boyer*, 3 Ves., 714; *S. C.*, 5 id., 300; 8 id., 256. So Lord THURLOW held that a legacy for the purpose of establishing a bishop in America was good, although none had yet been appointed. *Attorney General* v. *Bishop of Chester*, 1 Brown C. C., 44. In *Inglis* v. *Sailors' Snug Harbor*, 3 Pet., 99, a devise and bequest in trust out of the rents and profits to build a sailors' hospital as soon as the trustees could judge that the proceeds of the estate would support fifty or more sailors, (first obtaining an act of incorporation, if necessary,) and to use the income of the property forever for supporting the hospital and maintaining the sailors therein, was sustained by the Supreme Court of the United States; and although there was some difference of opinion among the judges upon other points, none of them expressed any doubt of the validity of the disposition upon the ground of remoteness. And in *Sanderson* v. *White*, 18 Pick., 336, Chief Justice SHAW said:—'When a gift is made with a view to found a hospital or college not in being, and which requires a future act of incorporation, the gift is nevertheless valid, and the law will sustain it and carry it into effect. Upon this principle it has been held in England that if a gift is made to one charity in the first instance and then over to another charity upon the happening of a contingency which may not take place within the limit of the rule against perpetuities, the limitation over to the second charity is good, because no individual is concerned and no private use involved; the estate is no more perpetual in two successive charities than in one charity; and so the law against perpetuities and remoteness has no application and

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there is nothing to restrain the donor from applying such limitations and contingencies in point of time to his charitable gift as he pleases. *Society for Propagation of the Gospel* v. *Attorney General*, 3 Russ., 142; *Christ's Hospital* v. *Grainger*, 16 Sim., 100; *S. C.*, Macn. & Gord., 464; 1 Hall & Twells, 539. A similar decision has been made by the Supreme Court of the United States under the civil law as established in Louisiana. *Executors of McDonogh* v. *Murdock*, 15 How., 367.' "

In Gray upon Perpetuities, sec. 592, it is said as follows:—"The question of remoteness may present itself in connection with charitable trusts in three shapes. A gift to a charity may be followed by a remote gift to an individual; a gift to an individual may be followed by a remote gift to a charity; and a gift to a charity may be followed by a remote gift to another charity. And in each of these cases there may or may not be a change of trustee. So that we have six typical forms:—(1.) To *A* on a charitable trust; on a remote contingency to *B* for his own use. (2.) To *A* on a charitable trust; on a remote contingency in trust for *B*. (3.) To *A* for his own use; on a remote contingency to *B* on a charitable trust. (4.) To *A* in trust for *B*; on a remote contingency to a charitable trust. (5.) To *A* on a charitable trust; on a remote contingency to *B* on another charitable trust. (6.) To *A* on a charitable trust; on a remote contingency on another charitable trust."

"*Sec.* 597. The first four cases, therefore, form no exceptions to the rule against perpetuities. But in the last two cases, where the change is from one charity to another, it seems to be settled that there is an exception to the rule. Where there is no change of trustee it might indeed be urged, on the grounds stated above, that no question of remoteness arises, but the reasons of the decision given above seem to forbid this; and in *Christ's Hospital* v. *Grainger*, it was distinctly ruled that a direction in a will that on a contingency, which might be in the indefinite future, a legacy, giving to the town of Reading a charitable trust, should be transferred to the city of London on another charitable

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trust, was good. The law of this case has been spoken of with approval in *Odell* v. *Odell*, and *Jones* v. *Habersham*, and so are the text books generally.

"*Sec.* 598. Although this case of *Christ's Hospital* v. *Grainger* is the only decision in which the gift of a legal interest to be held on a charitable trust coming after a prior gift of the legal interest to another trustee on another charitable trust has been held valid, and although the case where there is no change of trustee might possibly be distinguished, yet the decision has stood so long unquestioned that it is likely to be followed."

In section 602 the author says:—"That if a remote gift to a charity after a gift to another charity is good, because they are by nature inalienable, then a gift to charity after a gift to an individual should be good; the individual can alienate the whole of his present interest, and the remote interest is no more and no less inalienable than when limited after a gift to another charity. Yet after a gift to an individual a gift to charity may be unquestionably bad for remoteness."

The gift over to the second charitable use is not void for uncertainty. It is to aid "indigent young men of said town of Mansfield in fitting themselves for the evangelical ministry." These supplied, and a surplus existing, that is to go "in aid of other indigent young men in this state" fitting for the same ministry. Neither of the words "indigent" nor "evangelical" is of rare use or hidden meaning. They are quite within ordinary intelligence, and point with a sufficient degree of certainty to the individual to enable the statute of charitable uses to distinguish him from all others. It is a sufficiently accurate statement, in this connection, to say that they describe a man who is without sufficient means of his own, and whom no person is bound and able to supply, to enable him to prepare himself for preaching the Gospel. The trustees are the persons who for the time being hold office as selectmen of a town, an office of continuous duration. To them the donor has given power, and upon them imposed the duty, of determining the persons

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who meet the specified requirements and who are to become beneficiaries. There are persons to determine and a rule for their guidance. These constitute a valid foundation for a charitable use.

The Superior Court is advised that the State of Connecticut took the title to the land mentioned in the complaint subject to a prior incumbrance in favor of the persons who for the time being hold office as selectmen of the town of Mansfield, as trustees of Mr. Whitney's gift to a charitable use in aid of indigent young men of said town who are fitting themselves for the evangelical ministry; said incumbrance being the value of the property deeded by said Whitney to the Orphans' Home corporation at the time when the last named corporation abandoned the charitable use for which it was given, independently of the value of the improvements by the corporation.

Also that, by an appropriate amendment to the complaint, the State of Connecticut can obtain a judicial determination as to the value of the property donated by Mr. Whitney to the Orphans' Home, computed as of the date of the abandonment, leaving out of view the improvements made thereon by the corporation; interest to be computed from the date of the abandonment.

In this opinion PARK, C. J. and LOOMIS, J., concurred.

CARPENTER, J., (dissenting). I cannot assent to the conclusion at which a majority of the court have arrived. My reasons for dissenting however do not require me to controvert any legal propositions discussed in the majority opinion. My starting point is different; I travel a different road, and I have come to a different result.

My first inquiry is—what estate was conveyed to the Connecticut Soldiers' Orphan Home by the deed of Mr. Whitney?

The granting clause of the deed and the habendum are as follows:—"do by these presents give, grant, bargain, sell, and confirm unto the said corporation and to their succes-

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sors two certain tracts or parcels of land" * * * . "To have and to hold the above granted and bargained premises, with the appurtenances thereof, unto them the said grantees and their successors, to be by them used for the purpose intended and specified in said act of incorporation."

The office of the habendum is to state what estate or interest is granted by the deed; although this is sometimes done in the premises. Bouvier's Law Dict. *in verbum.* Judge SWIFT says:—"The deed must also ascertain the quantity of interest or kind of estate that is granted. This may be done in the premises, or where the parties are first described, but is usually reserved for the province of the words "to have and to hold." But if the kind of estate be determined in the premises, it may be qualified in the habendum, but not wholly contradictory or repugnant to the estate granted in the premises. For instance, if lands are granted to one and his heirs and assigns forever in the premises, to have and to hold to him for life, and then to another in fee, he shall take an estate in fee by the first expression, which cannot be altered by any subsequent words in the deed; for the first words create the estate, and the rule in construing deeds is that the first words shall operate. But where the grant is to one and his heirs, to have to him and the heirs of his body, this being in one connected sentence, would create an estate in fee tail. But the usual method is not to limit and define the estate till we come to the words "to have and to hold," and then it is done by limiting it to a certain person and his heirs forever, or to a certain person during life or for years, with remainder over according to the nature of the estate to be conveyed." 1 Revised Swift's Dig. top page 129.

In the light of these elementary principles what is a fair construction of this deed? If the granting clause had been to the corporation in fee simple, or to the corporation, its successors and assigns forever, it would have conveyed a fee; and the qualifying words in the habendum would have been repugnant and consequently inoperative. The granting clause as it is, or with the word "successors" omitted, with

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the usual habendum—"to have and to hold the above granted and bargained premises to the said corporation, its successors and assigns, to its and their own proper use and behoof forever," without restrictive words, would have conveyed a fee. If the habendum should be omitted it is questionable whether a simple grant to the corporation would carry a fee. Mr. Chamberlin, in his work on American Common Law, 699, says:—"In some of the states however this clause is omitted, in which case it is of course necessary to express in the granting clause the extent and duration of the estate." In 1 Rev. Swift's Dig., top page 81, it is said:—"In grants of lands to corporations the word 'heirs' is not proper, for they have no heirs; and even the word 'successors' is not necessary, for as a corporation never dies, a grant to it constitutes a perpetual estate equivalent to a fee simple." If this is to be taken literally, and as broadly as stated, essential requisites in deeds to individuals are dispensed with in deeds to corporations. I cannot believe that the author so intended. I think he assumed that the deed would contain the usual habendum clause, and that that, by the use of the word "forever," or in some other way, would determine whether the estate granted was a fee or a less estate.

The reason given for the proposition, that "a corporation never dies," is not now true in fact; for corporations, whatever they may have been in the days of Judge SWIFT, are now mortal. That is apparent from the record of this case; and we know as a matter of fact that they are constantly passing out of existence. In theory they may be regarded as perpetual; but a theory, so manifestly contrary to the facts, is a poor foundation for a rule of law.

It seems to me that words of inheritance or their equivalent are necessary in grants to corporations as well as to individuals. There should be no distinction. This case affords a good illustration. The grant is to a corporation and its successors. Had it been to a natural person by name it would have carried but a life estate. It being to a corporation the grant is for the life of the corporation. The

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word "successors" in this case seems to have no particular meaning. The corporation has practically ceased to exist, and it has no successors in its charitable work. Its grantees are not successors but assigns, and assigns are not mentioned. The estate granted does not survive the grantee, as it has no successor to continue its beneficent work.

The operative words in the granting clause are apt and appropriate to describe any estate which may be determined by the habendum. Whether that indicates a fee, a life estate, an estate for years, or an estate otherwise qualified and limited, the granting words are equally applicable. There is hardly room for repugnancy or inconsistency even. The habendum not only limits the duration of the estate, but confines it strictly to a particular use. There are not only no words of inheritance, but the use to which the estate is limited is in some respects inconsistent with a fee. A fee imports absolute dominion, subject only to the right of eminent domain. The corporation had no such dominion, for it could use it only for one purpose, and it was inalienable except possibly to a successor.

The proviso that in case the corporation should abandon the use of the premises for the purpose specified it should pay their market value to the selectmen of Mansfield, does not and cannot operate to enlarge the estate granted. It may tend to show that the grantor intended to convey a fee and that he supposed he had done so. But his intention to convey a fee, in the absence of adequate and proper words for that purpose, is of no avail. This is not a will, in which great latitude of construction is allowed in order to give effect to the intention, but a deed, in which the question is not merely—what did the parties intend? but what have they done? Deeds must be construed as they are. If there are defects and omissions by which they fail to express the intention of the parties, the instruments must be reformed before courts can give effect to the intention. Not so with wills. Any mistakes or omissions in them cannot be rectified by the courts. So that the question before us is not—what did the grantor intend to do, or suppose that he had

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done, but what did he actually do? His supposition that he had conveyed a fee did not make it so.

Nor is this an estate upon condition. It is not the conveyance of a fee defeasible on the grantor ceasing to use it for an orphan home, but it is simply the grant of a right to use the property for that purpose. The interest granted is unconditional. Of course there can be no forfeiture and no right of reversion.

My conclusion therefore is that the title to the property never passed from Mr. Whitney. He simply conveyed to the corporation a right to use the property, subject to which the title remained in him. That title descended to his heirs. When the specified use was abandoned the right so to use it was extinguished and the heirs had an unincumbered title. That title, by the conveyances from the widow and daughter, is now vested in the state. Thus I think the state has a good title.

In this opinion GRANGER, J., concurred.

THE CREDIT COMPANY, LIMITED, *vs.* THE HOWE MACHINE COMPANY.

Fairfield County, March T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

The defendant was a manufacturing corporation of this state, having its principal office in the city of New York, and limited by its charter to such use of mercantile paper as should be necessary to the convenient prosecution of its business, which paper its treasurer, by vote of its directors, was authorized to execute for the company. *S*, who had been its president and was still a large stockholder, drew drafts upon the company in London, England, where he was engaged in stock speculations, which were accepted by the treasurer of the company, but were subsequently protested for non-payment. *S* had previously had large funds in the hands of the company, against which he had previously drawn, and the drafts had been accepted and paid, but at the time the protested drafts were made his account was largely over-

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drawn and the acceptance of them was for his accommodation. These drafts, at the time they were drawn, and before acceptance, were discounted by the plaintiff company, through *W*, who was a member and its managing director, and the proceeds were delivered to *S*, and by him at once placed to his credit with *W & Co.*, a firm to which he was largely indebted and of which *W* was a member. The plaintiff company had previously discounted for *S* like drafts, which had been accepted and paid; and the treasurer of the defendant company had previously accepted drafts of *S* for his accommodation, with the knowledge of the directors. In a suit upon the drafts it was held—

1. That though the defendant company had power by its charter to deal only in mercantile paper necessary to its business, yet as it had that power it would be holden by the acceptances in question except against a party who took the paper knowing that they were accommodation acceptances.
2. That the plaintiff company established a *primâ facie* case when it presented the drafts duly drawn and accepted, there being no circumstances to indicate fraud or illegality, and that the burden of proving that the plaintiff company had knowledge of the accommodation character of the acceptances was on the defendant company.
3. That the whole question became therefore—whether the plaintiff company took the paper in good faith for value.
4. That it did not follow that it took it in bad faith because of the object for which *S* procured the money, since he might have drawn upon funds of his own in the defendant's hands, and if so the intended use of the money was of no consequence.
5. That it did not affect the position of the plaintiff company that it discounted the paper before acceptance, and that no new consideration passed from it to the defendant company upon the acceptance.
6. That the plaintiff company was not to be regarded as not a holder for value by reason of the fact that the money obtained was placed to the credit of *S* with *W & Co.*, to whom he was indebted; since the fact that *W* was a member and managing director of the plaintiff company and also a member of *W & Co.* did not create a community of relation to the transaction on the part of the two companies.

While it is a general rule that persons dealing in commercial paper of a corporation are bound to take notice of the extent of its power, yet a distinction is to be observed between the terms of a power and the circumstances under which it is exercised. Parties may well be required to take notice of the former, but to require them to take notice of the latter would frequently result in gross injustice.

Especially is this so where the officer of the corporation which exercises the power at the same time represents the corporation and speaks for it in giving information as to the circumstances under which it is exercised.

In the present case the treasurer of the defendant company, who, by virtue of his office, was the proper person to accept drafts on the company, was also the person held out by the corporation as the proper one to inform holders of drafts whether they were drawn on funds of

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the drawers; and by accepting the drafts in question he practically declared that they were so drawn.

[Argued May 6th—decided December 17th, 1886.]

ACTION upon four acceptances; brought to the Superior Court in Fairfield County. The case was referred to a committee by whom the following facts were found:—

On the 16th day of March, 1877, A. B. Stockwell drew upon the Howe Machine Company, the defendant, four drafts, viz.: One for $10,000 gold; one other for $10,000 gold; one other for $10,000 gold; and one other for $15,000 gold. All the drafts were made payable at ninety days' sight. All of them were addressed to the Howe Machine Company, 28 Union Square, New York, and all were, on April 21st, 1877, accepted as of April 7th, 1877, by Levi S. Stockwell, as treasurer of the Howe Machine Company.

On the 26th day of March, 1877, the Credit Company (Limited), the plaintiff, at the request of A. B. Stockwell indorsed these four drafts and sold them through a broker, James E. Barker, who also endorsed them, to Samuel Montague & Co. of London, foreign bankers, for £8,928 10s. 3d.

These four drafts were presented for acceptance to the Howe Machine Company, 28 Union Square, New York, on the 7th day of April, 1877, and acceptance was at first refused, and the drafts were protested. Subsequently, and within a few days thereafter, on April 21st, 1877, all of the drafts were accepted as of the date of April 7th, 1877, the day when they were first presented for acceptance, in the manner above specified.

When the drafts became due and payable they were not paid; they were duly protested for non-payment, and upon notice of their non-payment the plaintiff, being an indorser thereon and payee therein named, paid Samuel Montague & Co. the amount of the drafts and charges, and now holds the same. The drafts have never been paid to the plaintiff by the Howe Machine Company, nor by any person.

One of the drafts was as follows:—

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"LONDON, 16th March, 1877.

"No. 7024. Exchange for $10,000 gold.

"At ninety days' sight pay this first of exchange, second unpaid, to the order of the Credit Company, Limited, ten thousand dollars gold, value received, which place to account.

"A. B. STOCKWELL.

"To the Howe Machine Company,
28 Union Square, New York."

Across the face of the draft was written the following:

"Accepted, April 7th, '77, payable 28 Union Square.

"THE HOWE MACHINE CO.
LEVI S. STOCKWELL, Treas."

And it was indorsed as follows:—

"Pay H. J. Barker, or order, for value received, for the Credit Company, Limited. J. HUME WEBSTER, *Director*.

"Pay Messrs. Samuel Montague or order, value received.

"HENRY J. BARKER."

The others were like the above in their tenor, indorsements and manner of acceptance, varying only in their amounts.

The Howe Machine Company was organized as a joint stock corporation under the laws of this state in January, 1865, for the same purposes as the present specially chartered corporation. On its organization it adopted by-laws which have ever since been the by-laws of the present corporation. Among them are the following:—

"Art. 4. The officers of said corporation shall consist of six directors, who shall be stockholders and be chosen by the stockholders by ballot; a president, who shall be chosen by the directors from their own number by ballot; and a secretary and treasurer, who shall be appointed by the board of directors.

"Art. 7. It shall be the duty of the treasurer to have the charge and oversight of the receipts and disbursements of this corporation and board of directors, and keep, or cause to be kept, an accurate account of the same.

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"Art. 9. All papers relating to the business of the corporation shall be signed by the president, or by such other person as the directors shall appoint for that purpose at any legal meeting, and by no other person, and such appointment shall be duly entered on record.

"Art. 13. No officer or agent of this corporation shall be allowed or have any right or power to sign, indorse or pledge the name or credit of the corporation, or to use, pledge or dispose of the property or funds of the corporation except for the sole use and benefit of the corporation."

At the May session of the General Assembly of this state, 1871, the Howe Machine Company applied for a special charter, which was granted. The charter contained the following provisions:—

"Sec. 2. Said corporation shall be and remain a body politic and corporate by said name of the Howe Machine Company, located at said Bridgeport, and shall have and enjoy their said corporate franchise, and all the rights and privileges herein granted, for the purpose of manufacturing sewing machines, machinery, and tools of all kinds, metallic castings, forgings, lumber, cases, and any and all other articles and things composed in whole or in part of metal or wood, which they shall deem expedient; and may conduct such mercantile business as may be convenient in connection with such manufacture.

"Sec. 3. * * * The capital stock of said corporation shall be deemed personal property, and shall be transferable only on the books of said corporation, in such manner as its by-laws shall prescribe. And said corporation shall at all times have a lien upon the stock and property of its members, invested therein, for all debts due from them to said corporation."

At the annual meeting of the company held on the 1st day of January, 1872, the charter was accepted by the company. Upon its acceptance no change was made by the corporation in its manner of conducting its business. The same books of account which were in use under the joint stock organization continued to be used after the charter was ac-

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cepted. The same by-laws adopted under its joint stock organization continued to be the by-laws under the charter. The stockholders and officers of the company were the same before the charter and after it was accepted.

The Howe Machine Company was located in Bridgeport, but had its principal business office in New York city, and in the year 1877 its office there was at 28 Union Square.

A. B. Stockwell for many years previous to January 1st, 1877, was president of the Howe Machine Company, and Levi S. Stockwell, his brother, was during that time treasurer of the company. About the 1st of January, 1877, Levi S. Stockwell was elected both president and treasurer of the company, and continued such until August 15th, 1877.

The Credit Company (Limited) is, and was at the time of the transactions herein named, a financial institution located in London, England, and engaged in discounting and buying bills, making loans, &c.

J. Hume Webster is, and was during the transactions in question, the managing director of the Credit Company, and is and was also a member of the firm of Hume Webster & Company, of London, bankers.

The Howe Machine Company was and is engaged in the manufacture and sale of sewing machines.

The Credit Company, on making sale of the four drafts, paid over the proceeds of the same, less commissions, to A. B. Stockwell, and he placed them to his account with Hume Webster & Co.

In the spring of 1874 A. B. Stockwell went to London, England. He presented letters of introduction to J. Hume Webster, the managing director of the Credit Company, and at the same time represented that he was president of the Howe Machine Company; that he was the principal stockholder; that he had the right to pledge the credit of the company, and was their representative in Europe; and that the business was very profitable. He was, in fact, at that time president of the company, and was the principal stockholder, having more than three fourths of the stock of

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the company; the whole stock being forty thousand shares of $25 each; Levi S. Stockwell, the treasurer, having nearly all of the remainder of the stock, there being less than one hundred shares owned by other parties.

The Credit Company, relying upon these representations made to its managing director, had the following business transactions with A. B. Stockwell and the Howe Machine Company, to wit:—May 29th, 1874, the Credit Company, at the request of A. B. Stockwell, discounted two drafts of the Howe Machine Company, per N. P. Stockwell, agent, on the agent of the Howe Machine Company in Belgium. The proceeds of these drafts were paid to A. B. Stockwell, and the drafts at maturity were paid. On the 19th of October, 1874, the Credit Company made a loan of £9,500, upon the obligations of A. B. Stockwell, the Howe Machine Company, and the Howe Machine Company (Limited) of London, secured by mortgage on the property of the last named company at Glasgow, which loan was paid at maturity. During the years 1875 and 1876 the Credit Company discounted or negotiated other bills indorsed or drawn by the Howe Machine Company, per A. B. Stockwell as president, the amounts and dates of which were not stated in the evidence. In December, 1876, A. B. Stockwell drew drafts on the Howe Machine Company to the amount of $45,000, which drafts were similar to the drafts in suit, were accepted by the Howe Machine Company in the same manner as the drafts in suit, and were paid by the company at maturity. On February 6th, 1877, A. B. Stockwell drew on the Howe Machine Company drafts to the amount of $30,000, which were in similar manner accepted by the company and paid at maturity. On March 28th, 1877, A. B. Stockwell drew drafts on the Howe Machine Company to the amount of $30,000, which drafts were similar to the drafts in suit, and were accepted and paid by the company. All of these drafts were negotiated by the Credit Company for A. B. Stockwell in a similar manner to the drafts in suit.

At the time A. B. Stockwell presented his letters of intro-

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duction to the managing director of the Credit Company, he also presented an instrument under the seal of the Howe Machine Company, describing him as president of the company and purporting to give him power to deal with and pledge the credit of the company, but by whom this instrument was executed the committee was unable to determine from the evidence offered. There was no evidence to show that the company authorized such an instrument to be executed.

At a directors' meeting of the Howe Machine Company, held on the 29th of May, 1865, the following vote was passed:—

"*Resolved*, That the treasurer be, and he hereby is, authorized and empowered to make, sign, indorse and accept notes, checks and bills of exchange in the name and for and on account of this company, and generally to execute any and all papers relating to the business of the company."

At a meeting of the directors of the company, held November 2d, 1874, the following votes were passed:—

"*Resolved*, That Levi S. Stockwell, the treasurer of this corporation, be and is hereby designated and appointed to sign, execute and deliver all instruments and papers pertaining to the business of the corporation.

"*Resolved*, That the corporation hereby ratifies and confirms all and singular, the papers, bonds, undertakings, deeds and other instruments of whatever kind or nature heretofore signed, executed or delivered in the name of this corporation by Levi S. Stockwell, treasurer."

During the years 1876 and 1877 Levi S. Stockwell, as treasurer, exclusively accepted drafts drawn on the Howe Machine Company.

On the 6th day of February, 1877, A. B. Stockwell sold to Cornelius K. Garrison, of New York, twenty-two thousand shares of the Howe Machine Company stock standing in his name, for the sum of $200,000. On the transfer books of the company the shares were transferred as of date of January 31st, 1877. The agreement of sale was in writing, and there was attached to it another agreement signed by Gar-

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rison by which the latter bound himself to re-transfer the stock to Stockwell within six months on Stockwell's paying him $200,000 in cash. These shares were transferred to Garrison in good faith on the terms above stated. Stockwell did not re-purchase them, and Garrison now owns the shares.

A large proportion of the money paid by Garrison for these shares was paid to the Howe Machine Company, and credited to the account of A. B. Stockwell on the books of the company.

A. B. Stockwell, for many years previous to the acceptance of the bills in suit, and subsequent thereto, had an open account with the Howe Machine Company on its books. He deposited large sums with it, and drew on it in large amounts, frequently overdrawing his account, and at the time of the acceptance of these drafts his account was largely overdrawn. The account shows that the company frequently paid his private bills. The directors and stockholders of the company had knowledge of these accounts between the company and A. B. Stockwell, and that Levi S. Stockwell, the treasurer, was accepting drafts drawn on the company by A. B. Stockwell, and there was no evidence that they ever objected to these transactions.

Sometime in the years 1876 and 1877 A. B. Stockwell was engaged in speculating in stocks in London, and kept an account with said Hume Webster & Co. J. Hume Webster, the senior partner of the firm, and the managing director of the Credit Company, had knowledge of these speculations, and that the money obtained by A. B. Stockwell, on the drafts drawn by him on the Howe Machine Company, was used by him in his stock speculations. It did not appear from the evidence that the other members of the firm of Hume Webster & Co. or of the Credit Company had such knowledge.

Samuel Montague & Co., who purchased the drafts in suit, had no knowledge that the money obtained thereon by A. B. Stockwell was used by him in his private transac-

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tions, and not in the business of the Howe Machine Company.

Neither the Credit Company nor Hume Webster & Co. had any knowledge of the charter or by-laws of the Howe Machine Company.

Upon the trial of the cause the plaintiff offered evidence of the custom of bankers in London as to negotiating foreign bills before acceptance. The defendant objected to the evidence as irrelevant and immaterial. The committee received it subject to objection, and from such evidence found that it is the usual custom there to negotiate foreign bills before acceptance. The plaintiff also offered evidence to show the reason for negotiating foreign bills before acceptance, which evidence was objected to by the defendant as irrelevant and immaterial, and was not received by the committee.

The plaintiff offered evidence to prove the course of business of the Howe Machine Co., and the power of its treasurer to accept drafts, and its acceptance of drafts previous to its charter granted in 1871. The defendant objected to the evidence as irrelevant and immaterial. The committee received it subject to objection.

If, upon the foregoing facts, the law is so that the defendant is liable to the plaintiff for the four drafts in question, by reason of the acceptance of the same by the treasurer of the defendant in the manner hereinbefore described, then the committee found that there was due the plaintiff from the defendant, on the 29th day of December, 1883, the sum of $62,475. If, upon the facts, the law is so that the defendant is not liable to pay to the plaintiff the drafts in question by reason of such acceptance by the treasurer of the defendant, then the committee found that there was nothing due the plaintiff from the defendant.

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

R. S. Ransom of New York and *E. W. Seymour*, for the plaintiff.

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1. The fact that drafts drawn on the defendant had been negotiated several times previously by the plaintiff and were accepted and paid at maturity, is alone sufficient to estop the defendant from claiming that Stockwell was not authorized to draw or negotiate the bills. Story on Agency, § 54; *Van Wyck* v. *McIntosh*, 14 N. York, 442; *Farmers' & Mechanics' Bank* v. *Butchers' & Drovers' Bank*, 16 id., 145; *Olcott* v. *Tioga R. R. Co.*, 27 id., 546; *Fulton Bank* v. *N. York & Sharon Canal Co.*, 4 Paige, 127; *Lester* v. *Webb*, 1 Allen, 56; *Lyndeborough Glass Co.* v. *Mass. Glass Co.*, 111 Mass., 315; *Glidden* v. *Unity*, 33 N. Hamp., 571; *Peterborough R. R. Co.* v. *Nashua & Lowell R. R. Co.*, 59 id., 585; *McLaughlin* v. *Detroit & Milwaukee R. R. Co.*, 8 Mich., 100. An instrument being attested and being sealed with the seal of the corporation, is valid even if there was no evidence to show that the company authorized such an instrument to be executed. The authority to affix the seal will be presumed. The fact that the drafts were drawn on the defendant is proof of express authority to pledge the credit of the company. *Canandaigua Academy* v. *McKechnie*, 26 N. Y. Supreme Ct. R., 62, 67; *Lovett* v. *Steam Sawmill Association*, 6 Paige, 54; Potter on Corporations, § 39 and note 14, and cases therein cited.

2. It would be a sufficient answer to what is alleged by the defendant—that these bills were not drawn or accepted, or used in the business of the corporation, and that the acts of the officers were in excess of their powers—to say that the corporation had power to make contracts to raise and expend money, and in doing so to make notes and draw, indorse and accept bills of exchange. 1 Parsons on Notes & Bills, 164. And having such rights and powers, negotiable papers, made, drawn and indorsed or accepted by the company, by its proper officers, would in the open market, or in commercial transactions, be governed by the law applicable to such papers, and the rights of *bonâ fide* holders of such paper would be unaffected by the object or purpose for which such notes or bills were made or accepted. Potter on Corporations, § 547; *Safford* v. *Wyckoff*, 4 Hill, 442; 1

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Parsons on Notes & Bills, 164, 165; *Stoney* v. *American Life Ins. Co.*, 11 Paige, 635; *Farmers' & Mechanics' Bank* v. *Butchers' & Drovers' Bank*, 14 N. York, 631 to 633; *Mechanics' Banking Association* v. *White Lead Co.*, 35 id., 505. Where an act is absolutely prohibited by statute, or illegality appears on the face of the contract, the corporation is not bound; but where, as in this case, the contract is a bill of exchange which the corporation can draw or accept for some purposes, the acceptance is not void in the hands of a *bonâ fide* holder, no matter what the bill was drawn or accepted for, even if drawn and accepted "for a purpose and at a place not authorized by the charter, and in violation of the laws of the state where it was actually issued." The distinction is clearly drawn in the following cases: *Stoney* v. *Am. Life Ins. Co.*, 11 Paige, 635; *Safford* v. *Wyckoff*, 4 Hill, 442; *Vallett* v. *Parker*, 6 Wend., 615; *Farmers' & Mechanics' Bank* v. *Butchers' & Drovers' Bank*, 14 N. York, 631. See also Potter on Corporations, § 547. All corporations of a nature similar to the defendant have power to draw or accept bills of exchange. 1 Parsons on Notes & Bills, 164; *Barker* v. *Mechanic Ins. Co.*, 3 Wend., 94; *Mott* v. *Hicks*, 1 Cowen, 513. If the officers were not authorized to draw or accept these particular bills, that is a matter between themselves and the company, but cannot prejudice innocent third parties. *Booth* v. *Farmers' & Mechanics' Bank*, 50 N. York, 400; *Stoney* v. *Am. Life Ins. Co.*, 11 Paige, 635. In this case the president was the principal owner of the corporation, and not only did, but was allowed by the company to do as he pleased, so that what he did the company did. A similar case is described in *N. York & N. Haven R. R. Co.* v. *Schuyler*, 34 N. York, 30, where the result was that the corporation was held liable, and estopped from disputing the authority of its transfer agent Schuyler. At page 50 the judge quotes the following: "If the directors of a company, no matter whether through inattention or otherwise, suffer its subordinate officers to pursue a particular line of conduct for a considerable period without objection, they are as much bound to those who are

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not aware of any want of authority as if the requisite power had been directly conferred." That is just this case, if the acts of the president and treasurer were in excess of their powers. They had been given the control of the books, papers and seal of the corporation, and allowed to manage and control matters as they pleased. The treasurer had, for years, accepted for the company bills drawn by the president on the company for his own private purposes, and the company had regularly paid the bills as they matured, so that within the cases above cited the corporation became bound, whether they had expressly conferred such power or not, or whether the act of accepting was or was not an excess of power. See also *Beers* v. *Phœnix Glass Co.*, 14 Barb., 358; *Lester* v. *Webb*, 1 Allen, 36. It should be remembered that the president and the treasurer owned over 39,900 of the 40,000 shares of the company's stock.

3. The plaintiff is a *bonâ fide* holder of the drafts or bills, and the fact that the plaintiff indorsed and negotiated or sold the drafts before acceptance does not deprive it of the character of a *bonâ fide* holder as against the acceptor. *Heuertematte* v. *Morris*, 101 N. York, 63; *Arpin* v. *Owens*, 140 Mass., 144; *Winne* v. *Raikes*, 5 East, 514; *Powell* v. *Monnier*, 1 Atk., 611; *Robinson* v. *Reynolds*, 2 Queen's Bench, 211; *Hoffman* v. *Bank of Milwaukee*, 12 Wallace, 181; *Mechanics' Bank* v. *Livingston*, 33 Barb., 458; *First Nat. Bank of Portland* v. *Schuyler*, 39 N. York Superior Ct. R., (7 Jones & Spencer,) 440; Byles on Bills, (6 Am. ed.,) 206; 1 Parsons on Notes & Bills, 179, 180. Of the case of *Farmers' & Mechanics' Bank* v. *Empire Stone Dressing Co.*, 5 Bosworth, 275, so much relied upon by the defendant's counsel, it is sufficient to say that that case is contrary to the decisions of every other court on that question, is disregarded now in the very court in which it was rendered, and is expressly overruled by the Court of Appeals in the above case of *Heuertematte* v. *Morris*, 101 N. York, 63.

4. The plaintiff did not purchase the drafts nor advance money on them, but as agent or broker sold them for Stockwell. Having indorsed them the plaintiff afterwards, on

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being charged as indorser, was obliged to pay and take them up from Montague & Co., the indorsees and owners, and thus acquiring their title and rights became indisputably *bonâ fide* holders. 1 Parsons on Notes & Bills, 261. The defendant's counsel rely on the case of *Devlin* v. *Brady*, 32 Barb., 518, and 36 N. York, 531, and similar cases. But those are cases where the owner of a note pledges or indorses it to a bank to secure a loan, and afterwards repays the loan and takes back the note. In this case the plaintiff only borrowed the money for the drawer; the drafts were indorsed and sold, and the buyers became the absolute owners. Consequently, when the plaintiff, being charged as indorser, paid the amount of the drafts and took them up, it became a *bonâ fide* holder of the same.

5. It is said that the plaintiff had notice that these drafts were not drawn in the business of the company. Within the foregoing decisions, and in view of the fact that the corporation authorized and allowed its president to draw upon the company and to pledge its credit, and also authorized its treasurer to accept such drafts, and knew of their acceptance, and paid them without objection, it is insisted that it would not make any difference, or relieve the company from liability, if it was, or had been, known to the plaintiff what the drafts were drawn for. What the committee finds is that J. Hume Webster knew that Stockwell was speculating in stocks, and knew what use he put this money to after he got it. Even if J. Hume Webster did have notice, he is not the plaintiff, but at the most an agent, whose knowledge is not the knowledge of the company unless obtained while engaged officially in the business of the company, or rather while engaged in this particular business. *Bank of United States* v. *Davis*, 2 Hill, 451; *N. York Central Ins. Co.* v. *National Protection Ins. Co.*, 20 Barb., 468; *Westfield Bank* v. *Cornen*, 37 N. York, 320; *Atlantic State Bank* v. *Savery*, 82 id., 291; *Washington Bank* v. *Lewis*, 22 Pick., 24; *Commercial Bank* v. *Cunningham*, 24 id., 270. Therefore, while it is not material, and would not be a defense to the defendant, if it had been known what use or purpose the drafts

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or their proceeds were to be put to, yet in fact it was not known, or at least it was not proved to have been known, what use they were to be put to, and the burden of proof in such case is on the defendant. 1 Parsons on Notes & Bills, 165, 225; *Safford* v. *Wyckoff*, 4 Hill, 442; *Belmont* v. *Coleman*, 1 Bosw., 188; *Caryl* v. *McElrath*, 3 Sandf., S. C., 176. Besides, if the position taken in the preceding fourth point is correct, that the plaintiff got the rights of Montague & Co., it would make no difference whether it knew that the acceptance was an accommodation acceptance or an excess of power, or not. The plaintiff, deriving title from a *bonâ fide* holder, would also be a *bonâ fide* holder. Story on Prom. Notes, § 191.

6. Supposing the plaintiff and all the parties knew at the time of the indorsement and negotiation of the bills that the drawer intended to use the money for his own purposes, could such knowledge prejudice the plaintiff and deprive it of the rights of a *bonâ fide* holder? How could the plaintiff know that the drawer did not have funds in the hands of the drawee, or that the drawee did not owe him? The law would presume that he was drawing against funds, or that the drawee was indebted to him, and the defendant admitted it by the acceptance. Chitty on Bills, 580, 647; *Alvord* v. *Baker*, 9 Wend., 323; *People's Bank* v. *Bogart*, 81 N. York, 106; *Raborg* v. *Peyton*, 2 Wheaton, 385. The case stands precisely as if it had been known to the plaintiff at the time of the indorsement and negotiation or sale of the drafts that the acceptor was indebted to the drawer and that the drafts were drawn against funds. In fact it was so proven, the presumptions standing alone being equivalent to proof.

7. It may be said that there were circumstances sufficient to put the plaintiff upon inquiry as to whether the drawing and acceptance of the bills were authorized. Apart from this fact it is well settled law that a party, before taking commercial paper, is never bound to make inquiry, and that no amount of negligence will prejudice his rights or deprive him of the character of a *bonâ fide* holder. *Welch* v. *Sage*,

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47 N. York, 143; *Seybel* v. *National Currency Bank*, 54 id., 288; *Chapman* v. *Rose*, 56 id., 137, 140; *S. C.*, 47 How. Pr. R., 15. The plaintiff however was not negligent in this case. It not only had no reason to question or suspect a want of authority, but there was in fact none.

W. D. Shipman and *M. H. Cardozo*, both of New York, with whom were *S. G. Wheeler, Jr.*, of New York, and *G. Stoddard*, for the defendant.

1. The law of the state of New York must govern as to the liability of the defendant upon the acceptances of the drafts in suit, for they were both accepted and payable in the city of New York. Daniel on Negotiable Inst., §§ 895, 896, 879; *Everett* v. *Vendryes*, 19 N. York, 436; *Hibernia Nat. Bank* v. *Lacombe*, 84 id., 367, 381; *Dickinson* v. *Edwards*, 77 N. York, 573, 576, 587; *Musson* v. *Lake*, 4 How., 262; *Rouquette* v. *Overman*, L. R., 10 Q. B., 525.

2. The powers of a corporation created by a legislative act are such only as the statute creating it confers, and the enumeration of such powers implies the exclusion of all others. The defendant was incorporated in 1871 by an act of the General Assembly of the state of Connecticut. By the second section of the act it is provided that the defendant is to have power to "manufacture sewing machines, machinery and tools of all kinds, metallic castings, forgings, lumber, cases, and any and all other articles and things composed in whole or in part of metal or wood which they shall deem expedient, and conduct such mercantile business as may be convenient in connection with such manufacture." When the defendant accepted this charter, there was created a contract between the state of Connecticut on the one part and the defendant on the other, binding alike upon both, and by its terms the defendant could do no other business than that which under this contract the state gave it power to do. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. MARSHALL, Ch. J., *Dartmouth College* v. *Wood-*

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ward, 4 Wheaton, 536. Being a manufacturing corporation of course it impliedly had authority to do such acts as were proper or usual in carrying on such a business; thus it had no express power to sell what it manufactured, but such power would be necessarily implied; again, it had no express power to make negotiable paper, but impliedly for the purposes of carrying on its legitimate business such power clearly existed. But no where in its charter is any express power conferred upon it to engage in speculations in stocks. It had no such express power, and there are no words in the charter from which such a power can be implied. A learned writer well states the argument against a recognition of *ultra vires* acts as valid, for, says he, it "would be against public policy, for the reason that the assets and income of the corporation might be expended in unauthorized undertakings and speculations, and the corporation thereby prevented from performing its part of the contract with the state; and because the non-assenting stockholders and creditors of the corporation might thereby suffer loss, against which they should be protected." George W. Field on "*Ultra Vires*," 13 Am. Law Review, 632. The English Courts maintain the doctrine that charters not expressly or by necessary implication authorizing an act, prohibit it and render such act void. *Ashbury Railway Carriage & Iron Co.* v. *Riche*, L. R., 7 H. L., 653; *S. C.*, L. R., 9 Exch., 224; *East Anglean Railways Co.* v. *Eastern Counties Railway Co.*, 11 Com. Bench, 775; *Coleman* v. *Eastern Counties Railway Co.*, 10 Beav., 11; *Bagshaw* v. *Eastern Union Railway Co.*, 2 McN. & Gordon, 389; *Great Northern Railway Co.* v. *Eastern Counties Railway Co.*, 9 Hare, 306; *McGregor* v. *Dover & Deal Railway Co.*, 18 Queen's Bench, 618; *Eastern Counties Railway Co.* v. *Hawkes*, 5 H. L. Cas., 331; *Attorney Gen.* v. *Great Northern Railway Co.*, 26 Jurist, 1006; *Mayor &c. of Norwich* v. *Norfolk Railway Co.*, 4 El. & Blackb., 397. The same doctrine is laid down in the New York cases. *Safford* v. *Wyckoff*, 1 Hill, 11; *Leavitt* v. *Palmer*, 3 Const., 19; *Talmage* v. *Pell*, 3 Seld., 328; *Tracy* v. *Talmage*, 14 N.

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York, 162, 179; *Bissell* v. *Michigan Southern R. R. Co.*, 22 id., 258, 289; *Whitney Arms Co.* v. *Barlow*, 63 id., 62, 68; *Alexander* v. *Cauldwell*, 83 id., 480, 485; *Nassau Bank* v. *Jones*, 95 id., 115, 122. The Connecticut cases are also to the same effect. *N. York Fireman Ins. Co.* v. *Ely*, 5 Conn., 560, 572; *Hood* v. *N. York & N. Haven R. R. Co.*, 22 id., 502; *Elmore* v. *Naugatuck R. R. Co.*, 23 id., 457; *Mutual Savings Bank* v. *Meriden Agency Co.*, 24 id., 159; *Naugatuck R. R. Co.* v. *Waterbury Button Co.*, id., 468. The same doctrine is held in Massachusetts. *Davis* v. *Old Colony R. R. Co.*, 131 Mass., 258. And by the Supreme Court of the United States. *Thomas* v. *Railroad Co.*, 101 U. S. Reps., 71, 82.

3. No stockholder, however large, in a corporation has a right to use the corporate funds or credit for his own purposes. Neither has the board of directors, as a body, the right to use the corporate funds or credit, except for legitimate corporate purposes. But the charter of the Howe Machine Company is imperative on this point, that the capital stock shall not be used by individual stockholders. Morawetz on Corp. §§ 52, 403; *Morgan* v. *Railroad Co.*, 1 Wood's C. C. R., 18; *Kean* v. *Johnson*, 9 N. Jer. Eq., 407; *Black* v. *Del. & Raritan Canal Co.*, 24 id., 455; *Sawyer* v. *Hoag*, 17 Wall., 610; *Upton* v. *Tribilcock*, 91 U. S. Reps., 45, *Patterson* v. *Lynde*, 106 id., 519, 521; *Miner* v. *Mechanic's Bank*, 1 Peters, 71; *Market St. Bank* v. *Stumpe*, 2 Misso. App., 545; *Salem Bank* v. *Gloucester Bank*, 17 Mass., 30; *St. James's Church* v. *Church of Redeemer*, 45 Barb., 356; *Crandall* v. *Lincoln*, 52 Conn., 73, 94; *Pickering* v. *Stephenson*, L. R., 14 Eq. Cas., 340; Thompson on Liability of Officers of Corporations, 398, and notes 1 and 2.

4. When the drafts in suit were given to the plaintiff and accepted by the defendant's treasurer, whatever the defendant might theretofore have been, it was then no "pocket corporation" or quasi partnership. 1 Lindley on Part., 253, 281, 329, 330, 334; *Shirreff* v. *Wilkes*, 1 East, 48; *Farmers' & Mechanics' Bank* v. *Butchers' & Drovers' Bank*,

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16 N. York, 135; *Monument Nat. Bank* v. *Globe Works*, 101 Mass., 58.

5. The acceptances in question were, as between the plaintiff and defendant, all accommodation acceptances. The defendant's treasurer accepted them solely for the personal accommodation of A. B. Stockwell. There is no finding that the corporation defendant ever had any legitimate business dealings with the defendant. Indeed, no one ever claimed that it had. It is true that the plaintiff introduced evidence to show that there is a custom in the city of London to discount such bills before acceptance, but such evidence was wholly inadmissible and must be disregarded. It is settled law that if a bill of exchange is discounted before acceptance it is upon the credit of the drawer, and if after acceptance it is upon the credit of the acceptor. The object of the evidence introduced was to vary the law merchant, and to import into the contract or engagement of the acceptor a new, different and additional liability from that which the law imposed upon him; and that is, that although the plaintiffs discounted the drafts before acceptance, and hence, as the law says, upon the credit of the drawer, they in fact, by virtue of the custom of the city of London, relied upon the acceptors. This custom cannot bind the defendant. *Woodruff* v. *Merchants' Bank*, 25 Wend., 673; *S. C.*, 6 Hill, 174; *Bowen* v. *Newell*, 4 Seld., 190; *Thompson* v. *Riggs*, 5 Wall., 663, 679; *Barnard* v. *Kellogg*, 10 id., 383; *Stagg* v. *Insurance Co.*, id., 589; *Tilley* v. *County of Cook*, 103 U. S. Reps., 155; *Wheeler* v. *Newbould*, 16 N. York, 392; *Markham* v. *Jaudon*, 41 id., 235, 245; 6 Southern Law Review, 845; 7 id., 1.

6. The knowledge which J. Hume Webster acquired as a member of the firm of Hume Webster & Co., as to the object for and the agreement upon which A. B. Stockwell gave the drafts in suit, was the knowledge of the Credit Company. Webster was one of the partners in the firm of Hume Webster & Co., and at the same time he was managing director of the Credit Company. What he knew as partner he was not ignorant of as manager of the Credit Com-

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pany. In *Nat. Security Bank* v. *Cushman*, 121 Mass., 490, MORTON, J., says:—"If the note is discounted by a bank, the mere fact that one of the directors knew the fraud or illegality will not prevent the bank from recovering. But if the director who has such knowledge acts for the bank in discounting the note, his act is the act of the bank, and the bank is affected with his knowledge. A bank or other corporation can act only through its officers or other agents. And in other cases of agency, notice to the agent in the course of the transaction in which he is acting for his principal, of facts affecting the nature and character of the transaction, is constructive notice to the principal. If, therefore, Coleman acted for the bank in discounting the note in suit, the bank is affected with his knowledge of fraud in the inception of the note." See also *Bank of U. States* v. *Davis*, 2 Hill, 451, 463; *Innerarity* v. *Merchants' Bank*, 139 Mass., 332. In brief, the clear, simple rule is, that a corporation is bound by the knowledge of the agency through which it acts, be it board of directors, president, managing director, or by whatever name its agent may be known. In this case the plaintiff knew that the drafts in suit were accommodation drafts drawn by A. B. Stockwell for his own benefit and that the entire proceeds were to be, and as in fact they were, paid to Hume Webster & Co. on account of existing balances due them from Stockwell on previous stock losses. The plaintiff also knew that the defendant received no use or benefit, and was not to, and could not, receive any use or benefit from the drafts in suit, or of any money pretended to be paid for the drafts. The articles of association of the plaintiff expressly confer upon its directors all the powers that the corporation may exercise, and, among others, the power to appoint "a manager or managing director."

7. The plaintiff as payee and prior indorser to Montague & Co. did not, by paying to them the amount of the drafts in suit, become subrogated to their rights. The plaintiff did not purchase the drafts of Montague & Co. It merely took them up as indorsers. This gave them no rights as purchasers. *Devlin* v. *Brady*, 36 N. York, 531, affirming the

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same case in 32 Barb., 518; *Burr* v. *Smith*, 21 id., 262; *Chester* v. *Dorr*, 41 N. York, 279; *Lancey* v. *Clark*, 64 id., 209, 211.

8. There has been no ratification by the Howe Machine Company of any of the irregular acts of A. B. Stockwell or of Levi S. Stockwell. But even if there had been a ratification by the directors of previous irregular acts, such ratification cannot legalize these acts. "Even a subsequent ratification by the directors of similar transactions will not render other contracts valid." *McCullough* v. *Moss*, 5 Denio, 567.

9. The provision contained in the third section of the defendant's charter, that "said corporation shall, at all times, have a lien upon the stock and property of its members invested therein, for all debts due from them to said corporation," is the same as that contained in the general act relating to the incorporation of joint stock companies in Connecticut, and does not authorize the loaning of its credit by the corporation to its stockholders upon the security of their stock. If it did it would be making the capital stock simply a fund for the payment of such debts as stockholders might impose upon it for their own benefit. *Wood* v. *Dummer*, 3 Mason, 308; *Crandall* v. *Lincoln*, 52 Conn., 73.

10. The plaintiff is not a *bonâ fide* holder of the drafts in suit. The defendant is therefore not estopped from setting up its defense, that there has been no valid acceptance of these drafts by the Howe Machine Company. The sole power of the treasurer to accept is given by the directors' resolution, "that the treasurer be, and he hereby is, authorized and empowered to make, sign, indorse and accept notes, checks and bills of exchange in the name and for and on account of this company, and generally to execute any and all papers relating to the business of the company." But not only had the treasurer no authority conferred on him by the directors to accept accommodation drafts, the directors themselves had no power to confer any such authority. Article thirteen of the by-laws in express terms restrains them from conferring any such power. It is as

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follows:—"No officer or agent of this corporation shall be allowed or have any right or power to sign, indorse or pledge the name or credit of the corporation, or to use, pledge or dispose of the property or funds of the corporation, except for its sole use and benefit." One who deals with the officers or agents of a corporation is bound to know their powers and the extent of their authority. Daniel on Neg. Inst., §§ 386, 889; Green's Brice's Ultra Vires (2d ed.) 252, note *a*; *Stainer* v. *Tysen*, 3 Hill, 279; *Farmers' & Mechanics' Bank* v. *Butchers' & Drovers' Bank*, 16 N. York, 135; *Alexander* v. *Cauldwell*, 83 id., 480. It is clear here that this acceptance was in no manner for the benefit of the company, as it was accommodation paper. But even of this paper the plaintiff is not a *bonâ fide* holder because it was taken for a pre-existing debt. The drafts were drawn by A. B. Stockwell, and, for a commission paid by him, indorsed by the Credit Company, J. Hume Webster director; their discount procured by the Credit Company, J. Hume Webster director; and the proceeds paid to J. Hume Webster, stock broker, on account of a pre-existing debt of over £30,000 due from Stockwell to Hume Webster, for losses in stock speculations. In these circumstances the plaintiff stands in the same position with Hume Webster himself. Where paper is thus applied to a pre-existing debt of the party taking it he cannot be regarded as a *bonâ fide* holder for value. *Philbrick* v. *Dallett*, 34 N. Y. Superior Court R., 370; *Clark* v. *Ely*, 2 Sandf. Ch., 166; *Chrysler* v. *Renois*, 43 N. York, 212; *Comstock* v. *Hier*, 73 id., 269; *Heuertematte* v. *Morris*, 101 id., 63. The drafts were taken with full knowledge that they were accommodation drafts. The finding of the committee is clear and conclusive upon this point. And no consideration was advanced on the faith of the acceptance. "To entitle one to enforce an indorsement or an acceptance, which is otherwise invalid, on the ground that he is a *bonâ fide* holder for value, it must appear that he parted with value upon the faith of the acceptance. He may be a *bonâ fide* holder of the bill for value paid therefor, and be entitled to enforce it against every other party

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thereto, and yet have no right to recover on such indorsement or acceptance." *Farmers' & Mechanics' Bank* v. *Empire Stone Dressing Co.*, 5 Bosw., 275. See also Daniel Neg. Inst., § 449; *Philbrick* v. *Dallett*, *supra*; *Chrysler* v. *Renois*, *supra*; *Monument Nat. Bank* v. *Globe Works*, 101 Mass., 59; *Fawcett* v. *New Haven Organ Co.*, 47 Conn., 224. As to the defendant not being estopped from setting up the invalidity of the acceptance—Bigelow on Estoppel, 345, 437.

11. The defendant was a manufacturing corporation and had no power, express or implied, to engage in stock speculations. The second section of its charter shows clearly that it was a manufacturing corporation with power only to conduct such mercantile business as might be convenient, in connection with the manufacture of sewing machines, etc. It is well settled that so far as the authority of an agent of a corporation is defined by the constitution or charter, the scope of the agent's powers must always be considered as disclosed. Hence, when the charter discloses that the corporation had not the power, *ex necessitate*, it must be held to have disclosed that the agent of the corporation had not and could not have the power. *Silliman* v. *Fredericksburg, &c. R. R. Co.*, 27 Gratt., 119, 130; *Pearce* v. *Madison, &c. R. R. Co.*, 21 How., 443; *Merritt* v. *Lambert*, 1 Hoff. Ch., 166, 168; *Hoyt* v. *Thompson's Exr.*, 19 N. York, 207; *Salem Bank* v. *Gloucester Bank*, 17 Mass., 1, 29; *Root* v. *Wallace*, 4 McLean, 8; *Bank of Chillicothe* v. *Dodge*, 8 Barb., 233; *City Fire Ins. Co.* v. *Carrugi*, 41 Geo., 660, 673; *Underwood* v. *Newport Lyceum*, 5 B. Monr., 129; *Balfour* v. *Ernest*, 5 C. B., N. S., 601.

12. It cannot be seriously contended that a fraudulent or irregular use of the funds or credit of a corporation becomes sanctioned and legalized by repetition, or that one who has been a party to the earlier frauds or irregularities with full knowledge, becomes thereby an innocent party in later and similar transactions. A collusive holder can not be an innocent holder.

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CARPENTER, J. (After stating the facts.) As this case was commenced before the practice act went into operation the pleadings are under the old practice. The defendant denies the matters alleged in the declaration, and gives notice, in substance, that it will prove that the treasurer of the defendant corporation was not authorized to accept these drafts, that the drafts being solely for the accommodation of the drawer the company itself under its charter and by-laws had no power to accept them, and that the plaintiff is not a *bonâ fide* holder for value.

The defendant's notice alleges that these bills were not accepted by the defendant, or by or with its authority or consent, but were accepted by one of its officers without authority and contrary to the provisions of its by-laws, of which the plaintiff had notice.

It is not contended that the treasurer had no power under any circumstances to accept any draft; for the votes of the directors and the course of dealing by the defendant clearly show that he had such power; but it is claimed that under the circumstances he had no power to accept these particular drafts. Obviously the authority or want of authority in the treasurer to accept these drafts depended not upon the nature of the act but upon the attending facts and circumstances. That he had power to accept drafts under some circumstances is not denied. Hence, if they were drawn on account of the defendant's business, or to draw out of its treasury money which belonged to A. B. Stockwell, the power of the treasurer to accept them would be conceded. But the strength of the defendant's position in this part of the case lies in the fact that the defendant was not owing Stockwell, and the money was not wanted for any purpose connected with the defendant's business. As between the Stockwells, or either of them, and the defendant, the acceptances were unauthorized and void; but, as between the plaintiff and the defendant, the answer to the question we are considering hinges upon the answer to another question,—is the plaintiff a *bonâ fide* holder for value?

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The proper answer to that question we shall consider later; but assuming for the present that the answer may be an affirmative one, we pass to the next question, which is,—was the defendant authorized to accept accommodation drafts? Clearly not as to all parties with notice. But as corporations may accept drafts for some purposes, and as the purpose for which a draft is drawn does not ordinarily appear on its face, the question as to all parties with notice is—was it drawn for a legitimate purpose? As to all others the important inquiry is,—is the plaintiff a *bonâ fide* holder for value? And that brings us to the main question in the case.

A preliminary question of some importance which bears directly on this question is—on whom was the burden of proof? In the pleadings the defendant assumes that burden; and properly so upon principle. The drafts apparently may be for a legitimate purpose. As there is some presumption that all parties act properly and within the scope of their powers, the plaintiff establishes a *primâ facie* case when it presents the drafts duly drawn and accepted, there being no circumstances indicating fraud or illegality. And so are the authorities. Edwards on Bills, 686, 689; Daniel on Negotiable Instruments, 626, 662; 1 Parsons on Notes & Bills, 255.

It is insisted that the plaintiff does not sustain to this defendant the relation of a *bonâ fide* holder for value, for the reason that the drafts were indorsed and negotiated by the plaintiff before they were accepted; and that therefore the plaintiff parted with nothing of value upon the credit of the acceptances. In support of this position the case of *Farmers' & Mechanics' Bank* v. *Empire Stone Dressing Co.*, 5 Bosworth, 275, is cited. We are unable to accept that decision as a correct exposition of the law. The Court of Appeals says of that case, in the case of *Heuertematte* v. *Morris*, 101 N. York, 63:—"It is true that some expressions of the learned judge writing in that case may justify the citation, yet it should be considered that those remarks were unnecessary to the decision of the case, and the same court

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have twice since then refused to follow it. We conceive the rule there laid down finds no support in the doctrines of the text writers or the reported cases. * * * If a party becomes a *bonâ fide* holder for value of a bill before its acceptance, it is not essential to his right to enforce it against a subsequent acceptor, that an additional consideration should proceed from him to the drawee. The bill itself implies a representation by the drawer that the drawee is already in receipt of funds to pay, and his contract is that the drawee shall accept and pay according to the terms of the draft. The drawee can of course upon presentment refuse to accept a bill, and in that event the only recourse of the holder is against the prior parties thereto; but in case the drawee does accept a bill, he becomes primarily liable for its payment, not only to its indorsees but also to the drawer himself."

It is not therefore true that the purchaser of a bill before acceptance trusts wholly to the credit of the drawer. He believes and expects that the drawee will accept; and upon such belief and expectation he acts. When Stockwell presented these bills to the plaintiff, he contracted that the drawee would accept and pay them. Upon that promise the plaintiff relied.

The reply to *Heuertematte* v. *Morris* is, that in that case the acceptor was an individual and not a corporation; so that no question arose as to the validity of the acceptance. But the validity of the acceptance is not the question we are now considering. We have already endeavored to show that the acceptance in the case at bar bound the corporation as to a *bonâ fide* holder for value. The precise question now is—whether a person who receives an accommodation bill before acceptance, no new consideration moving from him to the drawee, can avail himself of a subsequent acceptance. In *Farmers' & Mechanics' Bank* v. *Empire Stone Dressing Co.*, 5 Bosworth, 275, it was held that he could not. In *Heuertematte* v. *Morris*, 101 N. York, 63, it was held that he could. The latter case was put upon the broad ground that the former was not law; and not upon any supposed dis-

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tinction between corporations and individuals. The good faith of the holder must not be confounded with the validity of the acceptance. Although the latter may and often does depend upon the former, yet they are distinct questions for most purposes. An accommodation acceptance being valid, and the plaintiff otherwise a holder in good faith, the mere fact that he received the bill before acceptance does not make him a *malâ fide* holder.

In *Arpin* v. *Owen*, 140 Mass., 144, the court say:—"It is immaterial when an acceptance is made; it may be made at any time, and the rights of the payee and of the indorsee are the same after it is made, whether they were acquired in anticipation of it or subsequent to it."

These drafts were indorsed and sold by the plaintiff, and the avails were paid over to A. B. Stockwell. Stockwell paid the money so received to Hume Webster & Co. So far the transaction on its face is free from suspicion. It is not claimed that any fraud or illegality is found in terms. The most that can be claimed is, that there are certain circumstances in the case from which fraud may be inferred. Those circumstances are that Stockwell had been previously speculating in stocks with the knowledge of Webster; that in doing so he had become largely indebted to Hume Webster & Co., a firm in which J. Hume Webster was a partner; that J. Hume Webster was the agent by whom the plaintiff indorsed and sold these drafts; and that the money received therefor was in a short time paid over to Hume Webster & Co. in part liquidation of Stockwell's indebtedness to that firm.

But these circumstances are not, in law, equivalent to fraud. At one time in England the question was held to be whether the plaintiff had taken the bill under circumstances which ought to have excited the suspicion of a prudent and careful man. *Gill* v. *Cubitt*, 3 Barn. & Cress., 466. Afterwards the rule was so far modified as to require gross negligence. *Crook* v. *Jadis*, 5 Barn. & Adol., 909. Later still gross negligence was held to be evidence of *mala fides* merely, and not the thing itself. In *Goodman* v. *Harvey*, 4 Adol. &

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El., 870, Lord DENMAN says:—"I believe we are all of opinion that gross negligence only would not be a sufficient answer where the party has given consideration for the bill. Gross negligence may be evidence of *mala fides*, but is not the same thing. We have shaken off the last remnant of a contrary doctrine."

In *Swift* v. *Tyson*, 16 Peters, 1, STORY, J., says:—"There is no doubt that a *bonâ fide* holder of a negotiable instrument for a valuable consideration, without any notice of facts which impeach its validity as between the antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by those facts, and may recover thereon, although as between the antecedent parties the transaction may be without any legal validity." "Notice of facts which impeach its validity" means knowledge of those facts. *Goodman* v. *Simonds*, 20 Howard, 343; and by "facts" is intended facts which of themselves impeach the transaction,—in this case fraud, and not other facts which tend to prove fraud or which excite suspicion. *Goodman* v. *Simonds*, *supra*. And such is the law of this state. *Brush* v. *Scribner*, 11 Conn., 388. We think that is the law of this country; at least we are aware of no contrary decision.

"But it must still be true," as is said in 1 Parsons on Notes & Bills, 259, "that while gross or even the grossest negligence is a different thing from fraud, the negligence may be such, and so accompanied, as to afford reasonable and sufficient grounds for believing that it was intentional and fraudulent." By this we apprehend that no more is meant than that the evidence may be so strong as to justify the court in finding fraud; and applies only to courts that pass upon both questions of fact and law, and has no application to this court, which must take the facts as they are found by the court below.

It may be further claimed that the fraud here contended for is not the fraud of antecedent parties to the bills, but fraud, if it exists, to which the plaintiff itself is a party; and that if the facts and circumstances establish fraud with

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reasonable certainty, the court ought so to regard it, notwithstanding the fact that fraud is not expressly found. We apprehend that the proposition does not relieve the case of the objection that the question is still one of fact and not of law. Nevertheless, assuming that the principle involved in the proposition is a correct one, we will briefly examine the facts to see if it has any application to this case. To make the principle applicable we think the facts should be of a conclusive character. If they are ambiguous, or consistent with the absence of fraud, they are not sufficient.

There are certain facts essential to the conclusive character of this evidence, which are wanting; and their absence is significant. It is not found that Webster knew that Stockwell had no funds in the defendant's treasury against which these drafts were drawn. If Stockwell had in fact had funds there, that would have effectually repelled any imputation of fraud. Webster's knowledge of the purpose of the drafts, a previous agreement even with Stockwell that the avails should be paid to Hume Webster & Co., would have been of no consequence. So also if he really believed that the bills were drawn against funds. That he did so believe is probable, as certain undisputed facts afford a reasonably good foundation for such a belief. For about three years Webster had known and had business dealings with Stockwell. Within a period of four months immediately preceding this transaction the plaintiff indorsed and negotiated drafts by Stockwell on the defendant for $75,000. Two days after the drafts in suit were negotiated, it indorsed and negotiated drafts by and on the same parties, for $30,000 more. All these drafts were in fact accepted by the defendant and paid at maturity.

In December, 1876, when Stockwell presented to the plaintiff drafts to the amount of $45,000, he in legal effect represented that he had funds in the defendant's hands; he virtually pledged his honor and reputation as a business man that it was true. When the defendant accepted those drafts it admitted that those representations were true. The same representations were repeated by the parties in Febru-

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ary, 1877, and on March 28th. All those representations were, for all the purpose of this case, true; for those drafts were all paid at maturity. Is it strange that the same representations made on the 26th day of March should be believed?

It is not found that Webster knew that the drafts were drawn for the purpose of raising money to pay to Hume Webster & Co. If he had not such knowledge how could he be justly chargeable with a fraudulent intent?

Again. There is no finding that Stockwell was then in poor credit, or that Webster or Hume Webster & Co. supposed that they were in danger of losing by him. Hume Webster & Co. had, in the space of about one month, paid his checks to an amount exceeding $100,000. The plaintiff, during the same month, indorsed his drafts to the amount of $75,000. These facts afford some ground for believing that both parties regarded him as trustworthy. If they did, pray what reason had they for colluding with Stockwell for the purpose of drawing money illegally and unjustly from the defendant?

Moreover, the circumstances relied on as showing fraud are in themselves weak and will hardly justify, much less require, the inference claimed for them.

We may add that if bills of exchange, which are supposed to be the highest type of negotiable instruments, can be successfully impeached by such circumstances as exist in this case, the integrity of all such instruments must be seriously impaired, and their usefulness as a circulating medium well nigh destroyed.

In the next place, it is claimed that the plaintiff is not a *bonâ fide* holder because the defendant's treasurer had no power to accept accommodation drafts, that the corporation itself had no such power, and that the plaintiff was bound to take notice of the powers of a corporation and its officers, and of the extent of their authority.

On account of the complex character of this proposition it can only be properly considered by treating each branch of it separately. We may admit generally that the treas-

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urer had no authority to accept accommodation paper, and that the directors had no power to confer upon him such an authority. But in order to prevent injustice and maintain the integrity of mercantile paper it is necessary to limit the application of the principle to parties with notice. This limitation necessarily results from the fact that every business corporation has power to deal in negotiable paper in the line of its business. As such paper does not ordinarily show on its face the circumstances of its origin or the purpose for which it is made, it becomes important to distinguish those who have notice of its character and purpose from those who have not. To say indiscriminately that the holder of accommodation paper made by a corporation cannot be a *bonâ fide* holder simply because it is accommodation paper, ignores this important distinction and amounts practically to begging the question.

We pass now to the second branch of the proposition—that persons dealing in commercial paper of a corporation are bound to take notice of the extent of its power. Here too we may properly admit that the proposition is a correct one; but care should be exercised in its application not to extend it beyond its appropriate limits. To clearly understand those limits a distinction is to be observed between the terms of a power and the circumstances under which it is exercised. Parties may well be required to take notice of the former; but to require them to have knowledge of the latter would in many cases result in gross injustice. Especially is this so where the agent or officer of the corporation which exercises the power, at the same time represents the corporation, and speaks for it in giving information as to the circumstances under which it is exercised. No better illustration is needed than the case at bar. The treasurer of the defendant was the officer specially authorized by vote of the directors to accept bills of exchange; at the same time by virtue of his office, he was the person held out by the corporation as the proper one to inform holders whether the drawer draws against funds. The corporation virtually says—"you may safely trust the word of our

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treasurer on that subject." When he speaks, the corporation speaks. By accepting the draft he declares that the drawer has funds, and that is the declaration of the corporation. Mercantile paper does not require those who would become its holders to go to the acceptor and insult him by the question—did you tell the truth when you accepted that paper? They have a right to assume that he tells the truth and to act accordingly. If the treasurer in fact misrepresents the corporation, the corporation and not the person who trusts him should bear the loss.

An instructive and very interesting case on this subject is *The Farmers' & Mechanics' Bank* v. *The Butchers' & Drovers' Bank*, 16 N. York, 125. The defendant's counsel cite that case and quote from it this sentence—"One who deals with an agent has no right to confide in the representation of the agent as to the extent of his powers." The court however clearly recognise the distinction to which we have adverted,—namely, between the terms of a power, and extrinsic facts, which may or may not, according to the circumstances, affect the rights of third persons when the power is exercised. That was an action on a certified check. The defense was that the bank had no funds of the drawer. Immediately following the sentence quoted the court uses this language:—"If therefore a person, knowing that the bank has no funds of the drawer, should take a certified check, upon the representation of the cashier or other officer by whom the certificate was made that he was authorized to certify without funds, the bank would not be liable. But in regard to the extrinsic fact, whether the bank has funds or not, the case is different. That is a fact of which a stranger, who takes a check certified by the teller, cannot be supposed to have any means of knowledge. Were he held bound to ascertain it, the teller would be the most direct and reliable source of knowledge, and he already has his written representation upon the face of the check. If, therefore, one who deals with an agent can be permitted to rely upon the representation of the agent as to the existence of a fact, and to hold the principal respon-

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sible in case the representation is false, this would seem to be such a case. It is, I think, a sound rule, that where the party dealing with an agent has ascertained that the act of the agent corresponds in every particular, in regard to which such party has or is presumed to have any knowledge, with the terms of the power, he may take the representation of the agent as to any extrinsic fact which rests peculiarly within the knowledge of the agent, and which cannot be ascertained by a comparison of the power with the act done under it."

This case also holds that a certified check is substantially an accepted bill of exchange. The principle involved therefore applies to this case and is an authority against the defendant. It is true that, in the case at bar the bills of exchange were not accepted when the plaintiff indorsed them; but we apprehend that that will not prevent the application of the principle. It is no uncommon thing for the payee to indorse a bill and put it in circulation before acceptance. The fact that he does so is in itself no evidence of bad faith.

The principle seems to be, that a person dealing with a corporation is bound to know whether or not the officer or agent who represents it and acts in its name is authorized so to do. If he is, and the act is within the apparent scope of his authority, he is not bound to have knowledge of extrinsic facts making it improper for him to act in that case.

We must conclude therefore that the fact that the drawer had no funds in the hands of the drawee at the time these bills were drawn and negotiated, that fact being unknown to the plaintiff, is not a sufficient reason for holding that the plaintiff is not a *bonâ fide* holder.

It is further claimed that the plaintiff is not a *bonâ fide* holder for value on account of the use which was made of the proceeds of these bills, they having been paid to Hume Webster & Co. to apply on a debt due that firm from Stockwell. This argument assumes, what we cannot admit, that the payment was equivalent to a payment to the plaintiff on a debt due it. The firm of Hume Webster & Co. and the

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plaintiff are in fact and in law two distinct persons; and we must so regard them until fraud or collusion is established which will make one responsible for the acts of the other. If the plaintiff was guilty of no fraud, and for reasons already suggested we must assume that it was not, then the plaintiff in good faith paid full value for these bills. If we were at liberty to regard this as a scheme devised by Webster (acting in the name of the plaintiff but really for Hume Webster & Co.) and Stockwell, to defraud the defendant for the benefit of Hume Webster & Co., we might be justified in holding that the plaintiff is not a *bonâ fide* holder. But we cannot reach that result as a legal conclusion from the facts as they appear. The main fact, the one thing essential to that conclusion, an arrangement to that effect then or previously made, is not found.

For these reasons a majority of the court are of the opinion that the plaintiff is entitled to recover, and the Superior Court is so advised.

In this opinion PARDEE, LOOMIS and GRANGER, JS., concurred.

PARK, C. J., (dissenting.) I think the plaintiff corporation is not a *bonâ fide* holder of the drafts in question, for the following reasons:—

The defendant corporation was limited by its charter to such use of mercantile paper as might be necessary in the prosecution of its business. The plaintiff was bound to take notice of this limitation and to conduct itself accordingly. The plaintiff knew, through Hume Webster, its managing director, that the proceeds of these drafts were not to be used by the defendant in the prosecution of its business, but were to be used by the drawer, A. B. Stockwell, for his own individual purposes in London, while engaged in speculating in stocks.

But it is said that corporations as well as individuals are bound to pay their debts; that if the defendant was owing A. B. Stockwell to an amount equal to the face of these

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drafts, the defendant had the right to pay the indebtedness by the acceptance and payment of the drafts, no matter to what purpose the proceeds might be applied.

It is further said that the plaintiff, when it discounted these drafts for A. B. Stockwell at his request, did not know that Stockwell had no funds in the hands of the defendant, and had therefore the right to assume from the act of Stockwell in presenting the drafts for discount, that he had funds in the hands of the defendant sufficient for the payment of the drafts, which presumption was enough to constitute the plaintiff a *bonâ fide* holder of the drafts for value, although Stockwell at the time was owing the defendant a large amount.

I concede that the claims of the plaintiff would be sound if the facts of the case admitted of them.

It will be observed that A. B. Stockwell, when he presented the drafts to the plaintiff for discount, made no declaration, in fact, that he had funds in the hands of the defendant on which they were drawn. I fully concede that if the drawer of a draft presents it to a party for discount, an implication arises that the draft is drawn on funds of the drawer in the hands of the drawee, if nothing whatever is said by the drawer on the subject, and the party to whom the draft is so presented knows nothing to the contrary. And I further concede that such presumption, in such circumstances, would be sufficient to make such party a *bonâ fide* holder of the draft for value, should he discount the paper. But this is only a presumption of law, which must give way to express declarations to the contrary, made by the drawer at the time he presents the draft for discount. The majority of the court treat this presumption of law, in the present case, as equivalent to a positive declaration of Stockwell that he had funds in the hands of the defendant sufficient to pay the drafts, to the truth of which he pledged his honor and credit as a business man. I cannot so regard the matter in the case we have here on paper to determine. Let the finding of the committee decide the matter.

The committee finds on this point as follows:—"In the

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spring of 1874 A. B. Stockwell went to London, England. He presented letters of introduction to J. Hume Webster, the managing director of the Credit Company (Limited), and at the same time represented that he was president of the Howe Machine Company; that he was the principal stockholder; that he had the right to pledge the credit of the company, and was their representative in Europe, and that the business was very profitable. The Credit Company, relying on these representations made to its managing director, had the following business transactions with said Stockwell and said Howe Machine Company, the defendant."

Then follows a description of the drafts that were afterwards drawn by A. B. Stockwell on the defendant and discounted by the plaintiff, and among them are the drafts under consideration.

Here it appears that Stockwell, on his arrival in London in 1874, applied to the plaintiff's managing director for a line of discounts by the plaintiff, of drafts to be drawn by him on the defendant, from time to time. In order to induce Mr. Webster, acting for the plaintiff, to make the discounts, he represents that he himself is a person of large property, being the principal stockholder of the defendant company; that the defendant was a rich corporation, doing a very prosperous business; that he had the authority to pledge its credit, and was its representative in Europe. And it is to be presumed that he stated all that could be said to induce Mr. Webster, acting for the plaintiff, to make the discounts, and Mr. Webster must so have understood it. If the drafts were to be drawn on funds of Stockwell, would he not have so stated, when he was making a statement of his case?

It seems that the representations which were made had the desired effect, for the committee finds that the drafts under consideration, as well as all the others, were discounted by the plaintiff relying upon these representations; that is, were made upon the faith of them and in consequence of them. The plaintiff relied upon the ability of Stockwell to render the defendant liable to pay these drafts,

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the proceeds of which, the plaintiff knew, were to be used by Stockwell in stock speculations; which could not be the case without the drafts being accommodation drafts, as they were in fact. How then can it be said that the plaintiff, in discounting the drafts, was induced to do so by the presumption of law that they were drawn by Stockwell upon funds of his in the hands of the defendant? The acts and declarations of Stockwell were equivalent to an express declaration that he pledged the credit of the defendant to accept and pay the drafts at maturity as accommodation paper of his, the plaintiff knowing that the proceeds were to be used by him in stock speculations. Suppose that the drafts in question were the first that were discounted by the plaintiff for Stockwell, and that when Stockwell asked Mr. Webster for the plaintiff's discount, the following conversation on the subject had occurred. Mr. Webster inquires: "What do you propose to do with the proceeds of the drafts?" To which Mr. Stockwell replies: "I intend to use them in my stock speculations here in London." To this Mr. Webster rejoins: "I see by the charter of the drawee that it is limited to such use of mercantile paper as may be necessary in the prosecution of its business. What security have we that the drafts will be paid?" To this Mr. Stockwell replies: "I am president of the company; I am its principal stockholder; I am its representative in Europe; I have authority to pledge the credit of the company to the payment of the drafts." Mr. Webster, not satisfied with this, says: "I see by the by-laws of the company that none of its officers have authority to pledge the company's credit. How is this?" Mr. Stockwell answers: "But I have authority notwithstanding." Mr. Webster then says: "Relying upon your declarations, that you are the president of the company on whom the drafts are drawn, that you are its principal stockholder, that you are its representative in Europe, that you have authority to pledge the credit of the company to pay these drafts, we will discount them."

If such dialogue had occurred, and the case finds that it

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did so substantially, could it be said that a presumption of law existed in the case in favor of the plaintiff, that the drafts were drawn on funds of Stockwell in the hands of the defendant, and could Webster have supposed that the drafts were drawn on the funds of Stockwell? I think not. I think the declarations of Stockwell gave Webster clearly to understand that the drafts were accommodation paper, and that consequently the plaintiff was not a *bonâ fide* holder of them.

I think judgment should be rendered for the defendant.

HUME WEBSTER AND COMPANY *vs.* THE HOWE MACHINE COMPANY.

Fairfield County, March T., 1886. PARK, C. J., CARPENTER, PARDEE LOOMIS and GRANGER, Js.

The defendant was a manufacturing corporation of this state, having its principal office in the city of New York. *S*, in London, England, made a draft on the company, which was accepted for the company by the treasurer, payable at its office in New York. The draft was discounted by the plaintiffs, and the proceeds applied to an existing indebtedness of the drawer to them, they not discharging the debt, or relinquishing anything of value. *S* had at the time no funds in the drawer's hands and the acceptance was wholly for his accommodation, but this fact was not known to the plaintiffs. By its charter the company was limited in the use of mercantile paper to that necessary for the convenient prosecution of its business. In a suit on the acceptance it was held—

1. That the contract was governed by the law of the state of New York.
2. That by that law the plaintiffs were not *bonâ fide* holders for value.
3. That the burden of proof, after the accommodation character of the acceptance was shown, rested on the plaintiffs to show that they were *bonâ fide* holders for value.
4. That not being such, the defendant could interpose any defense that it could have availed itself of if the drawer had been the plaintiff.
5. That a provision in the charter that the company should have a lien upon the stock of its members for any indebtedness to the company could not be regarded as a permission to the stockholders to borrow and to the company to lend to them its capital.
6. That the corporation could not acquire the right to accept drafts for ac-

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commodation by assuming and repeatedly exercising the right. Neither the directors nor stockholders, by permission or ratification, could confer the power on any of the officers.

7. That the taking up and paying of the draft by the plaintiffs as indorsers, did not change their position, which was fixed by their first relation to it.

Where a party takes such an acceptance without notice that it is for the accommodation of the drawer, and the acceptance is by an officer of the company authorized to accept if the drawer has funds in the company's hands, the holder is not affected by the extrinsic fact of want of funds, and can recover upon the acceptance if he is a *bonâ fide* holder for value.

[Argued May 6th—decided December 17th, 1886.]

ACTION upon an acceptance; brought to the Superior Court in Fairfield County. The case, with the next preceding one of *The Credit Company* v. *The Howe Machine Company*, was referred to a committee, and heard with that case, and the facts common to both were embodied in a single finding, which is given in full in the report of that case. The finding of the additional facts peculiar to the present case was as follows:—

On the 28th day of March, 1877, A. B. Stockwell drew upon the Howe Machine Company two drafts for $10,000 gold each, payable at sixty days' sight, and addressed to the Howe Machine Company, 28 Union Square, New York. The drafts were both accepted by Levi S. Stockwell, as treasurer of the Howe Machine Company. When they were first presented for acceptance on the 11th of April, 1877, acceptance was refused, and the drafts were protested, but afterwards on May 19th, 1877 they were accepted as of April 11th, 1877, the day when they were first presented.

Soon afterwards Hume Webster & Co., having indorsed the drafts, sold them for A. B. Stockwell and placed the proceeds to his credit in his account with them. A. B. Stockwell was at that time indebted to Hume Webster & Co. for a much larger amount than these drafts.

When these two drafts became due and payable, one of them was paid, and the other one, on which the present suit is brought, was not paid and was duly protested, and

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Hume Webster & Co., as payees and indorsers, took up and now hold the same. The draft has not since been paid by the Howe Machine Company, nor by any person.

This draft, with the indorsements thereon, is in the following words and figures:—

"Exchange for $10,000 gold.

London, 28th March, 1877.

"At sixty days' sight pay this first of exchange, second unpaid, to the order of Hume Webster & Co., ten thousand dollars gold, value received, which place to account against accompanying certificate for one thousand shares of the Indiana Manufacturing Company. A. B. STOCKWELL.

"To the Howe Machine Company,
28 Union Square, New York."

Across its face is the following:

"Accepted, April 11th, 1877. Payable at 28 Union Square, New York. "THE HOWE MACHINE COMPANY,
LEVI S. STOCKWELL, Treas."

And it is indorsed as follows:

"Pay Messrs. Donnell, Lawson & Co., or order, value in account. "HUME WEBSTER & CO.

"Pay J. Earle Hodges, without recourse.
"DONNELL, LAWSON & CO."

If upon these facts and those found in the case of *The Credit Company* v. *The Howe Machine Company*, the law is so that the defendant is liable to the plaintiffs for the draft in question by reason of the acceptance of the same by the treasurer of the defendant, in the manner hereinbefore described, then it is found that there was due the plaintiffs from the defendant, on the 29th day of December, 1883, the sum of $13,925. But if upon the facts the law is so that the defendant is not liable to pay the plaintiffs the amount due on said draft, by reason of such acceptance by its treasurer, then it is found that there is nothing due the plaintiffs from the defendant.

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

R. S. Ransom, of New York, and *E. W. Seymour*, for the plaintiffs.

1. The fact that the drawer was indebted to the plaintiffs and that the proceeds of the drafts which were sold by the plaintiffs were applied towards the payment of what the drawer then owed them, does not affect the rights of the plaintiffs or make them any the less *bonâ fide* holders. They did not take the bill on account, or even give credit for the bill, but they indorsed the draft and sold it for Stockwell, and with the proceeds Stockwell paid them so much of what he owed them. The proceeds of the draft when obtained belonged to Stockwell, and were, and could only have been, applied to the payment of what Stockwell owed them by his consent. The draft never was the plaintiffs' until after they were charged as indorsers and paid and took it up. The draft was not taken as security or even in payment of a precedent debt, and none of the cases cited by the defendant's counsel have any application. Even if the draft had been taken as a payment of a debt which the drawer owed and so discharged that debt, the plaintiffs would have been *bonâ fide* holders. *Day* v. *Saunders*, 37 How. Pr., 543; *Youngs* v. *Lee*, 12 N. York, 551, 555; *Brown* v. *Leavitt*, 31 id., 113; *Pratt* v. *Coman*, 37 id., 441; *Farrington* v. *Frankfort Bank*, 31 Barb., 183. But, in this case the plaintiffs did not even take, or credit the drawer with, the draft, but the drawer paid to the plaintiffs the money obtained on a sale of the draft. There is, therefore, no such question as the defendant's counsel raise in the case. The plaintiffs were simply paid a portion of the debt that A. B. Stockwell owed them in money. The purchasers of the draft certainly owned it. They did not hold it as a pledge, or as security for money lent; it was sold to them, and they paid for it, and the plaintiffs, who, as indorsers, were sureties upon it, when they were charged as indorsers, and paid the indorsee for it, and took it up, became

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the owners, deriving title from such owners, with all their rights, and consequently were *bonâ fide* holders. Parsons on Notes & Bills, 261; *Flint* v. *Schomberg*, 1 Hilton, 532. The case of *Devlin* v. *Brady*, 32 Barb. and 36 N. York, and other kindred cases on which the defendant's counsel rely and lay great stress, are cases where a party, not a *bonâ fide* holder, pledges or procures it to be discounted to secure a loan, and have no application to such a case as this.

2. The finding that J. Hume Webster knew that the drawer was dealing in stocks cannot prejudice the rights of the plaintiffs, and if it is assumed that the firm or all the members of the firm knew it, that would not affect their rights, or make them any the less *bonâ fide* holders, for these reasons:—1st. There is no finding or proof that the drawer was intending to use this money for that purpose, or that they knew what the drawer was intending to do or would do with it when they indorsed the bill, or before it was sold and the money obtained.—2d. There is no law against dealing in stocks, and the use the drawer intended to or did put the money to was in no way material nor any business of the defendant.—3d. The proceeds of the draft were not in fact used to purchase or to deal in stocks, but to pay a debt the drawer owed.—4th. The presumption was and is that the Howe Machine Co. was indebted to the drawer and that the draft was drawn against funds, and that fact was afterwards admitted by the acceptance. What difference, then, could it make what the drawer intended to do with the money which the company admitted it had in its hands belonging to him? There is no question of *bonâ fides* properly in the case.—5th. Besides, as before shown, the plaintiffs have the rights of the indorsee to whom they paid and from whom they took up the draft, and that the indorsee was a *bonâ fide* holder even the defendants would not dispute.

W. D. Shipman and *M. H. Cardozo*, both of New York, with whom were *S. G. Wheeler, Jr.*, of New York, and *G. Stoddard*, for the defendant.

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All of the argument submitted on behalf of the defendant in the case of *The Credit Company* v. *The Howe Machine Company* applies with equal if not greater force to the case of Hume Webster & Co. This action is brought by that firm upon a draft for ten thousand dollars drawn by A. B. Stockwell upon the Howe Machine Company. On March 28th, 1877, A. B. Stockwell drew upon the defendant two drafts for ten thousand dollars each, payable at sixty days sight, and addressed to the Howe Machine Company, 28 Union Square, New York, which were afterwards accepted by Levi S. Stockwell, as treasurer of the defendant company. On March 28th, 1877, A. B. Stockwell was indebted to the plaintiffs, in a much larger amount than these drafts. The plaintiffs took these drafts from Stockwell, indorsed and sold them, and placed the proceeds thereof to his credit in his account with them. When the two drafts became payable, one of them was paid, the other was not, and was duly protested, and Hume Webster & Co. as payees and indorsers took them up and now hold them.

It is clear that this draft was taken by the plaintiffs on account of a past-due debt owing to them by A. B. Stockwell for losses incurred by him in his stock speculations. This being so the plaintiffs cannot be considered *bonâ fide* holders for value of the draft.

The act of the treasurer of the defendant in accepting this draft was, as we have demonstrated in our argument in the other case, unauthorized, and the plaintiffs not being *bonâ fide* holders, having taken it for a past-due debt with knowledge of the fact that the proceeds thereof were to be used by Stockwell for his own private purposes, cannot recover.

PARDEE, J. For the facts which are common to this and the cognate case of *The Credit Company (Limited)* v. *The Howe Machine Company*, reference is made to the latter. The additional facts solely applicable to this are, that the plaintiffs were in March, 1877, doing business as bankers in London, England; that on March 28th, 1877, A. B. Stock-

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well drew a draft upon the defendant company, at its office in the city of New York, in favor of the plaintiffs at sixty days sight, for the sum of $10,000 in gold. Soon after the date of the draft it was delivered by A. B. Stockwell to the plaintiffs, who indorsed and sold it for him and placed the proceeds thereof to his credit in his account with them, he being then indebted to them in a much larger sum. The draft was subsequently accepted by Levi Stockwell as treasurer of the defendant corporation, but was dishonored at maturity. The plaintiffs as payees and indorsers took it up and now hold it unpaid, and this suit is based thereon.

The defendant is a private manufacturing corporation. At the time of acceptance by its treasurer the drawer was largely indebted to it. The acceptance was solely a loan of its credit to him for his accommodation. This loan of credit, this act of accommodation, was an abuse of the power conferred upon the treasurer, and a fraud upon the corporation for which he accepted. Of this the plaintiffs were without notice or knowledge. But there is neither claim nor proof, nor ground for the assumption, that they agreed to or did discharge or release A. B. Stockwell from any portion of his liability to them upon their book account against him by the mere reception of the draft and the credit upon that account of the proceeds resulting from the indorsement and sale thereof. There is no proof of any express, and there can be no assumption of any implied agreement, that it was received in absolute payment and satisfaction, or in discharge of any portion of the drawer's liability to them; no proof nor presumption that upon dishonor of the bill they could not have enforced to the fullest extent their original account against him; no proof that upon the reception of the draft they parted with any right or property; no proof that they are not now in every respect in as good condition as if they had not received it.

The defendant had its office and place of business in New York; there the acceptance was made; there the bill was made payable. In an action at law for the enforcement of a contract, the law of the jurisdiction in which it is made

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and to be executed determines the extent of the obligation of the contractor and the character of the defenses which he may interpose for his protection. We think the law of the state of New York is, that when the acceptance of a bill by the treasurer of a private manufacturing corporation is an act of fraud upon the corporation, or when the same has been unduly obtained, or the procurement and negotiation thereof is a wrong and a loss inflicted upon the corporation by the drawer and the treasurer jointly, the burden is upon the person suing upon it to prove that he is a *bonâ fide* holder; and that he cannot be such if he received it upon a pre-existing debt, without parting with any right or property of value, and can lose nothing if he does not recover. For this reason:—he has neither paid anything for, nor lost anything in consequence of being the holder of the bill; there was possibility of gain, no possibility of loss. It is the pleasure of the law if possible to make every fraud harmless to innocent parties; therefore in such cases it will not permit the holder to be the instrumentality by which a needless injury should be inflicted upon the acceptor. Under this rule there remains to the defendant the right to interpose in this action all defenses of which it could avail itself if A. B. Stockwell were plaintiff.

In *Coddington* v. *Bay*, 20 Johnson, 637, (1822), the marginal note is—"Where *R* as agent had received notes to be remitted to his principal and passed them to the defendant as security against responsibilities assumed by him as indorser of the notes of *R*, and the maker of notes lent *R* for his accommodation, but not then payable, and the defendant had no notice or knowledge that the notes belonged to the plaintiff, but believed that they belonged to *R*, who had become insolvent at the time he received them: *Held*—that the notes, not being received in the usual course of trade, nor for a present consideration, the defendant was not entitled to hold them against the true owner." The court says:—"The general rule laid down seems to be this, that when negotiable paper is transferred for a valuable consideration and without notice of any fraud, the right of the

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holder shall prevail against the true owner. All the cases substantially agree in this. In the application of the rule this question arises—what is that *valuable consideration* intended, which shall protect the holder as against the drawer of the note? Is the rule satisfied if enough is shown to make out a consideration as between the holder and the agent who assigned or transferred the paper? If nothing more is required the appellants must prevail; for the notes were passed for the indemnity of the appellants, and so far as Randolph and Savage are concerned that formed a valid consideration. The right to hold against the owner in any case is an exception to the general rule of law; it is founded on principles of commercial policy. The reason for such rule would seem to be, that the innocent holder having incurred loss by giving credit to the paper, and having paid a fair equivalent, is entitled to protection. But what superior equity has the holder who made no advances, nor incurred any responsibility on the credit of the paper he received, whose situation will be improved if he is allowed to retain, but, if not, is in the condition he was before the paper was passed? To allow such a state of facts as sufficient to resist the title of the real owner would be productive of manifest injustice and is not required by any rule of policy; it is enough if the holder be secure when he advances his funds, or makes himself liable on the credit of the paper he receives. In coincidence with this principle it appears to me all the cases have been decided; for although the rule is laid down generally, that the holder will be protected where the bill or note is taken in the usual course of trade and for a fair and valuable consideration without notice, in every case I have met with where the owner failed to recover, it appeared that the holder gave credit to the paper, received it in the way of business, and gave money or property in exchange." In *Philbrick* v. *Dallett*, 34 N. Y. Superior Ct. R., 370, the marginal note is:—"The doctrine that when a note has been taken for a *pre-existing debt*, it is held *bonâ fide*, &c., as held in *Swift* v. *Tyson*, 16 Pet., 1, has not been followed in this state. A contrary rule has been

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firmly maintained, both at law and equity, by a long and uninterrupted series of adjudications, and is beyond question the law of the state." The court says:—"But when the acceptance is not only without consideration in fact, but in addition has been procured by means of a fraud practiced upon the acceptor, an entirely different rule prevails. Here the mere taking of a draft on account of an antecedent debt, without giving up or surrendering something of value on the faith of its acceptance, is not enough to constitute the holder a *bonâ fide* holder for value as against the acceptor. The doctrine of *Swift* v. *Tyson*, 16 Peters, has not been followed in this state. On the contrary our courts held at quite an early day that the receipt of commercial paper fraudulently put in circulation, or diverted from the purpose for which it was originally issued, merely as payment or security for a precedent debt, no new credit or other thing of legal value being given on the faith thereof, and no security being relinquished or discharged, nor any new responsibility being incurred on the credit thereof, is not parting with value, such as to enable the holder to enforce such commercial paper against an accommodation party, or to hold it against the true owner, or to hold it free of equities existing upon it against the transferrer at the time of the transfer. It is only when a creditor receives negotiable paper fraudulently put in circulation or diverted from its purpose, in good faith, *and* in actual satisfaction and discharge of a prior indebtedness, so that, unless such paper is available in his hands he loses the demand, that this is considered as parting with value. In such case the actual discharge of the personal responsibility of the debtor is equivalent to the parting with securities or to the paying of money. The extinction of a legal demand in its original form is however to be proved affirmatively, and the question whether a party is a holder for value, so as to displace in his favor any right or equity of prior parties, depends upon the fact being established of an intended and actual extinguishment. *N. York Exchange Co.* v. *De Wolf*, 3 Bosworth, 86, and authorities there cited." In *Comstock* v. *Hier et al.*, 73

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N. York, 269, (1878,) the plaintiff indorsed a promissory note for the accommodation of the makers, under their agreement that the same should be used only for the purpose of taking up and retiring a former note so indorsed; but they transferred it to the defendants as collateral security for the payment of an antecedent loan, they parting with no value and relinquishing no rights upon the receipt thereof. The defendants transferred the note before maturity to a *bonâ fide* holder for value, who compelled the plaintiff to pay it. He sued the defendants for the amount so paid by him. It was held that the defendants were liable; that having no title or right to the note the transfer by them was a conversion; and that it was immaterial that they acted in good faith. The court said:—"Upon the undisputed facts proved upon the trial and found by the referee, there could have been no recovery by the defendants as indorsees of the note of Jaycox and Green against the present plaintiff upon his indorsement. His defense would have been perfect upon proof of the facts clearly established in the present action, that he indorsed the note for the accommodation of the makers, for a special purpose, to wit, to enable the latter to take up the other notes to which the plaintiff was a party, and that the note with the indorsement was fraudulently diverted from the purpose for which it was made and delivered to the defendants as collateral security for an antecedent debt, they parting with no value therefor. When a bill or note is void in its creation, or has been unduly obtained, or has been wrongfully diverted from its purpose and fraudulently negotiated, the party suing on it is bound to show himself a *bonâ fide* possessor. The affirmative is with the plaintiff in an action upon such a note, to prove a clear legal title valid as against the parties to the instrument. *Woodhull* v. *Holmes*, 10 Johns. R., 231. One who receives it after due, or with notice of the circumstances under and purposes for which it was made, although he pays a valuable consideration, is not a *bonâ fide* holder entitled to recover thereon. One who receives it before due, and without notice or knowledge of any fraud in its

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inception or transfer, but for a precedent debt, and without parting with value or any valuable consideration, does not acquire a valid title to the note or bill, but takes it subject to all its infirmities, precisely as if he had taken it after dishonor, or with knowledge of all the circumstances affecting its validity. This is the well-established rule in this state, as well as the recognized rule in England." Citing *Coddington* v. *Bay*, 20 Johns. R., 687, and several other cases. The court also cites *Stalker* v. *McDonald*, 6 Hill, 93, as a case where an innocent holder of negotiable paper received for a valuable consideration in the usual course of trade, though from a person having no title and no authority to transfer it, will be protected against the claim of the true owner; and *Seneca Co. Bank* v. *Neass*, 5 Denio, 329, is cited as a case where the holder may acquire a good title to a note which will be protected, although it was used for a different purpose from that intended, if there is no restriction as to its use, or the use made is a matter of indifference to the parties. In *Lawrence* v. *Clark*, 56 N. York, 128, it was decided that a party receiving a note on a precedent debt, without surrendering or relinquishing any security or right respecting it, is not a *bonâ fide* holder of the same. The note before it fell due had been transferred by the payees to the plaintiffs, who received and accepted upon it, and in part payment of, a prior existing indebtedness of the payees to them. In *McBride* v. *Farmers' Bank of Salem*, 26 N. York, 450, the marginal note is, that "a bank receiving from another notes for collection, obtains no better title to them, or the proceeds, than the remitting bank had, unless it becomes a purchaser for value without notice of any defect of title. It is not a purchaser for value by reason of its having a balance against the remitting bank for which it had refrained from drawing, and from having discounted notes for the latter upon its indorsement, in reliance upon a course of dealing between the banks to collect notes for each other, each keeping an open account of such collections, treating all the paper sent for collection as the property of the other, and drawing for balances at pleasure."

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The court says:—"The decisions of our courts have been uniform, from the time *Coddington* v. *Bay*, 20 Johns., 637, was determined, that before the holder of a note can acquire a better title to it than the person had from whom he received it, he must pay a present valuable consideration therefor; and that receiving it in payment of or as security for an antecedent debt is not such a consideration. *Rosa* v. *Brotherson*, 10 Wend., 86; *Stalker* v. *McDonald*, 6 Hill, 93; *Youngs* v. *Lee*, 2 Kern., 551. * * * These views are not inconsistent with the opinions in the following cases:—*Clark* v. *Merchants Bank*, 2 Comst., 380; *Commercial Bank* v. *Union Bank*, 1 Kern., 203; *Warner* v. *Lee*, 2 Selden, 144; *Scott* v. *Ocean Bank*, 23 N. York, 289." In *Cardwell* v. *Hicks*, 37 Barb., 458, the marginal note is, that "a holder can claim protection from the defense of a party whose note or other mercantile obligation has been obtained by fraud, only in case he has parted with some value or suffered some injury upon the faith of it. Where the holder will lose no right of which he was possessed when he obtained the note, and will be fully reinstated if he fails to recover, he is not a holder for value, and the equities of the party whose note has been obtained by fraud will be preferred. One who purchases a promissory note made by another party and pays for it partly in cash and partly by discharging a precedent debt due to him from the person of whom he buys it, is a *bonâ fide* holder to the extent of the money paid by him, and may recover that sum of the maker. But if the jury finds that the note was fraudulently obtained, this will constitute a valid defense to the action, to the amount of the debt discharged." The court said:—"Twenty years of judicial construction and decision have not fully terminated the controversy in this state so ably discussed in the conflicting cases of *Swift* v. *Tyson*, 16 Peters, 1, and *Stalker* v. *McDonald*, 6 Hill, 93. The case last mentioned was determined in the late Court of Errors and is entirely adverse to the ruling of the judge in the case at bar. That case expressly indorses *Coddington* v. *Bay*, and *Rosa* v. *Brotherson*. as the law of this state and condemns the case of

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Swift v. *Tyson*. * * * The case of *Youngs v. Lee*, 2 Kernan, 551, does not purport to overrule these cases."

In *Farrington* v. *Frankfort Bank*, 31 Barb., 183, the court says that the case of "*Seneca Co. Bank* v. *Neass*, 5 Denio, 829, simply recognizes the principle that the satisfaction of a precedent debt may form a valuable consideration for the transfer of negotiable paper. But the case was decided upon another ground and the questions now presented were not considered. * * * The *Bank of Salina* v. *Babcock*, 21 Wend., 499, was decided upon grounds which were supposed to make the case an exception to the general rule, and was not considered by the court pronouncing the decision as overruling any of the antecedent cases in our own courts." The cases of *Cole* v. *Saulpaugh*, 48 Barb., 104, and *Schepp* v. *Carpenter*, 49 Barb., 542, were cases of accommodation paper, obtained without fraud and given without restriction as to use. Therefore the payee might lawfully transfer, and the holder lawfully receive them, in payment of a precedent debt. In *Philbrick* v. *Dallett*, 34 N. York Superior Ct. R., 370, the court says of these cases that they "are based upon the fact that the payee, not being limited or restricted as to the manner of its use, had a right to apply the note to the payment or security of an antecedent debt, or to sustain his credit with it in any other way. In *Turner* v. *Treadway*, 53 N. York, 650, (1873,) the defendant gave to *T* his promissory note, and the latter transferred it to the plaintiff's intestate in payment of a precedent debt, which debt was not evidenced by any writing or written acknowledgment, and the transferrer parted with no security. The court below held that the payment of a precedent debt made the plaintiff's intestate a *bonâ fide* holder. It was held that this ruling was error; that he was not a *bonâ fide* holder within uniform decisions from *Coddington* v. *Bay*, 20 Johns., 637, to *Weaver* v. *Barden*, 49 N. York, 286, and that the note was subject in his hands to any legal or equitable defense which existed against it in the hands of the payee.

The plaintiffs cite, as establishing the proposition that if

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they had taken the draft in question as a payment of a debt which the drawer owed and so discharged that debt, they would have been *bonâ fide* holders under the law of New York, *Youngs* v. *Lee*, 12 N. York, 551, *Brown* v. *Leavitt*, 31 N. York, 113, and *Farrington* v. *Frankfort Bank*, 31 Barb., 183. Of these cases it is enough now to say that in *Weaver* v. *Barden*, 49 N. York, 286, the marginal note is, that, "to entitle a purchaser to the protection of a court of equity as against the legal title or a prior equity, he must not only be a purchaser without notice, but he must be a purchaser for a valuable consideration actually paid; he must have paid the purchase money or some part thereof, or have parted with something of value on the faith of such purchase, before he had notice of the prior right or equity. Mere security given for the purchase money, or a credit upon a pre-existing debt, is not sufficient." The court says: "A mere receipt of a bill or note in payment of or as security for a precedent debt, has never in this state been held sufficient to protect the title of the holders as against the equities of third persons, and some new credit must be given, new advance made, or some prior security parted with, or a debt absolutely satisfied and extinguished, in order to complete the title of the holder. See cases cited in *Farrington* v. *Frankfort Bank*, 24 Barb., 554. In this court the rule has not been departed from; on the contrary it has been recognized and followed in *Youngs* v. *Lee*, 2 Kernan, 551, and *Brown* v. *Leavitt*, 31 N. York, 113." The court also cites *Coddington* v. *Bay*, 20 Johns., 637, and *Chrysler* v. *Renois*, 43 N. York, 209, approvingly.

In *Day* v. *Saunders*, 3 Keyes, 347, the defendant indorsed the note of *W* for his accommodation, upon his agreement to use it in the purchase of a farm and for no other purpose; *W* transferred it to the plaintiff in payment of two notes, one not due, and one over-due, made by *W* and held by the plaintiff. It was held that the giving up of the notes by the plaintiff constituted a good consideration and made him a *bonâ fide* holder. In *Pratt* v. *Coman*, 37 N. York, 440, the marginal note is, that the "surrender to a

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party of his own negotiable note, past due, and taking in lieu thereof a negotiable note before its maturity, is a sufficient parting with value to constitute a party a *bonâ fide* holder of the latter note." *A* procured the defendant's note by fraud and indorsed it to the plaintiff before maturity; for this note, and other notes by *A* the plaintiff surrendered to *A* his overdue notes, without notice. The court said: "The giving up to Agnew of his note, and taking the note in suit for it, according to every rule of presumption known to the law, is evidence of the intention of the parties to cancel the note. If, however, it did not discharge the pre-existing debt, it certainly operated to cancel the negotiable paper of the plaintiff; and this, as I understand the law, is a parting with value sufficient to constitute the plaintiff a *bonâ fide* holder of this note;" citing *Youngs* v. *Lee*, 2 Kernan, 551, and *Bank of Salina* v. *Babcock*, 21 Wend., 499, as supporting this doctrine. In *Boyd* v. *Cummings*, 17 N. York, 101, there was no restriction placed upon the use to be made of the indorsement, and upon the reception of it the holder discontinued proceedings supplemental to execution. In *Essex Co. Bank* v. *Russell*, 29 N. York, 673, in exchange for the indorsement the holder had given part cash and surrendered a note upon which third parties were holden. In *Farmers' & Mechanics' Bank* v. *Butchers' & Drovers' Bank*, 16 N. York, 125, the question was, whether the defendant bank was holden by its cashier's certificate that a check was good, when the drawer had no funds. The check was passed to the plaintiff in payment of an installment "then due" from the drawer and others upon shares in the plaintiff corporation. That the plaintiff was a *bonâ fide* holder was assumed, not argued. Probably the installment was due at the time when payment was made.

The payment of an installment upon shares of capital stock is the present purchase and reception of a new and additional interest in the corporation and may differ from a payment upon a pre-existing debt in the sense in which that expression is ordinarily used.

As has been stated, when A. B. Stockwell drew the draft

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in suit and when it was accepted by Levi S. Stockwell as treasurer of the defendant corporation, the latter was not indebted to the drawer, nor was the draft drawn in or about its business, nor in any sense for its use or benefit, but solely for the use and benefit of the drawer—for his accommodation. It is the argument of the plaintiff that the charter provision giving the corporation a lien upon its shares belonging to the drawer, a stockholder, by way of security for any indebtedness from him to it, is a special legislative permission to the stockholders to borrow and to the corporation to lend to them the entire capital. We cannot accede to this. No act of stockholder, director, treasurer or other agent, which in the absence of this provision would be beyond the power given by the charter and therefore unlawful, is made lawful by its presence. If the defendant corporation should be compelled to make good a negotiable acceptance by its treasurer in excess of his power for the accommodation of a stockholder, it could have regained the amount paid from shares of its stock or from any other property belonging to him; the unlawfulness of the acceptance would be no bar in his behalf against such recovery. But the existence of the right to recover the money from the shares or from any other property does not make the acceptance lawful; does not put an indorsee thereof in the position of a *bonâ fide* holder of a negotiable paper issued by a corporation within the power given by its charter. His rights are in no wise strengthened thereby.

This privilege of lien created no form of indebtedness from the corporation to A. B. Stockwell, its stockholder; no fund in its possession for which he had any right to draw or sue. Notwithstanding the existence of the lien, and the possibility of thereby recovering money paid, the corporation remained an accommodation indorser in the fullest meaning of that expression. As between it and the drawer it was under no obligation to honor the draft at maturity. He could not have compelled it to pay and reimburse itself from his shares or from any other property. He could not force it against its will to occupy any other position than

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that of accommodation acceptor. And, under the law of the state of New York, the plaintiffs, because of the application made of the draft, have no other or greater rights than had the drawer.

In December, 1876, and in February, 1877, A. B. Stockwell drew drafts upon the defendant similar to those in suit, to the amount of about $80,000, which were negotiated by the Credit Company, and were accepted and paid. The managing director of that company was also senior partner in the plaintiff firm. As we have said, a private manufacturing corporation has no power to accept drafts having no connection with its business, being merely loans by way of accommodation. It cannot acquire this power simply by exercising it repeatedly. The directors and stockholders cannot, either by permission or ratification, confer it upon any of its officers or agents. If the holder of such acceptance takes it with knowledge of its character he cannot enforce it. He has notice of its invalidity. The corporation may interpose that defense. If it is paid at maturity he gains no point of advantage over the corporation in respect to any other like acceptance taken with like knowledge, in the future; he must hold the last of a long series of such with as little power to enforce it as he held the first. If he holds such acceptance without notice that it is for the accommodation of the drawer, and it is by an officer authorized to accept if the drawer has funds, he is not to be affected by the extrinsic fact of want of funds, and can enforce it if he holds *bonâ fide;* for, as between such holders of negotiable paper without notice, and stockholders of a corporation, the law gives preference to the former. If after holding and enforcing many such acceptances he becomes the holder of another with notice of the infirmity, the previous repeated payments do not constitute an usage or course of business which will estop the corporation from interposing a defense against the last; it is to stand as if it were the first and only acceptance made or held. The acceptance for accommodation of the drawers by the treasurer of a private manufacturing corporation is a legal fraud

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upon the corporation, even if it be done with the assent of stockholders and directors. It is not within the legal power of all the stockholders of a corporation to divest it of its assets and possess themselves of the same by combination and by giving consent each to all others to draw for and receive such sums as they may mutually agree upon, even if the act takes the form of a loan for the use, benefit and accommodation of each. This rule of law is suspended in behalf of *bonâ fide* holders of negotiable paper. And by the law of the state of New York the holder of an acceptance thus fraudulently made cannot enforce it if he merely received and applied it upon a pre-existing debt and did not part with any right or property on the faith thereof. Therefore such application is the legal equivalent of notice of the vice in the acceptance, puts the holder beyond the pale of *bonâ fides*, and previous payments to him as a *bonâ fide* holder do not harden into an usage binding upon the corporation after he ceases to occupy that position. The holder of an acceptance may prove the repetition of acts of acceptance, the mode of transacting and the character of the corporate business, all for the purpose of establishing himself in the position of a *bonâ fide* holder for value without notice. But proof of all these facts will not effect such enlargement of charter powers as to make an accommodation acceptance lawful in his hands with notice, as would be the acceptance of an individual, who in this regard may do what he will with his own. The vote of the directors of the defendant corporation passed in 1874, that the treasurer "be and is hereby designated and appointed to sign, execute and deliver all instruments and papers pertaining to the business of the corporation," can have no other effect than to designate the officer who shall execute and deliver the legal and proper obligations of the corporation; such as concern its business and are within its corporate powers. And any corporate permission to A. B. Stockwell to represent the defendant and pledge its credit must be interpreted as referring to the transaction of business strictly within corporate design and power. The assets of a corporation

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constitute a fund in its keeping, in trust, first, for creditors, lastly for stockholders. The statutory lien upon shares for indebtedness was given in aid of the proper application of this fund; not for the purpose of adding to the burden of obligation which previously rested upon a corporation in consequence of an unauthorized negotiable acceptance by its treasurer on behalf and for the accommodation of a stockholder. The plaintiffs, having received and applied the proceeds of such an acceptance upon a pre-existing account against the drawer, parting with no right or property on the faith thereof, cannot convert for their sole benefit this privilege of a lien into an absolute obligation; cannot make it the instrumentality of diversion of corporate assets from creditors to stockholders; since the act of the treasurer left the defendant in the position and with all the immunities of an accommodation acceptor.

Soon after the reception of the draft in suit from the drawer the plaintiffs indorsed and sold the same through the indorsee for the drawer and placed the proceeds to his credit. It was dishonored at maturity. They then, as payees and indorsers, took it up. If we should concede to the indorsee the right to enforce the draft against the defendant, that concession would not avail the plaintiff. The indorsee did not sell the draft to them. The plaintiffs neither purchased it, nor any new or additional right connected therewith. By their indorsement they came under an obligation to the indorsee in the event of dishonor to take back the draft and return the money received upon it; to place both parties in their original position. And this is the legal effect of the transaction. *Devlin* v. *Brady*, 36 N. York, 531; *Lancey* v. *Clark*, 64 N. York, 209.

The plaintiffs cite several cases in support of a contrary doctrine. But with one exception, if we are not mistaken, in no one of these was the plaintiff a party to, or in any form interested in, the note prior to a purchase after maturity; in the excepted case he had indorsed it for pay.

The Superior Court is advised to render judgment for the defendant.

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In this opinion PARK, C. J., and LOOMIS, J., concurred.

CARPENTER, J., (dissenting.) In this case I think the majority has misapprehended the law of the state of New York. When it is said by the courts of that state that if the holder of an accommodation acceptance received it in payment of an antecedent debt, without discharging the debt or parting with anything of value at the time he received it, he is not a holder in good faith for value if the acceptance was unduly or fraudulently obtained, they mean, I apprehend, some fraud, artifice or deception practised upon the acceptor, by which he was induced to accept, and by which he may be subjected to some loss or damage in addition to the liability which he assumed by the acceptance. To illustrate: if the acceptance was obtained for the purpose of discharging a prior obligation, and is used for another purpose, the acceptor may be liable not only on the acceptance but also on the prior obligation; a double liability which he did not contemplate. In such a case the law of New York exempting him from liability on his acceptance, although differing from the law of the United States and of this state, is not perhaps unreasonable. But I have been unable to find any case in which the principle has been applied to an acceptance by an agent who had no authority to accept as between himself and his principal, but who nevertheless has accepted under such circumstances as would otherwise bind the principal.

As the decision does not affect the law of this state, reaching no further probably than the present case, I deem it sufficient merely to state the ground of my dissent, without an extended examination of the numerous cases in New York.

In this opinion GRANGER, J., concurred.

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NELSON MILLARD AND ANOTHER *vs.* DANIEL F. WEBSTER AND OTHERS.

New Haven County, June T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS AND GRANGER, JS.

K, at *W* in this state, ordered goods of the plaintiffs in the city of New York, and they were there shipped, and reached *W*, and were deposited in the freight house of the railroad subject to *K's* order. Later on the day of their arrival, *K* made an assignment for the benefit of his creditors under the insolvent law. Two days later, not having removed the goods from the freight house, he re-marked them and ordered them sent back to the plaintiffs. After this but before they were sent back the probate court, upon *K's* assignment, ordered an officer to take possession of his property, pending the appointment of a trustee in insolvency. The officer took possession of these goods while they were being transferred to the cars to be returned to New York. Held that there was no stoppage *in transitu* on the part of the plaintiffs.

The fact that a purchaser of goods was not able at the time to pay all his debts if his creditors had pressed for immediate payment, is not enough to show that he was at the time insolvent, and much less that he was guilty of fraud in the purchase.

[Argued June 2d—decided July 27th, 1886.]

REPLEVIN for goods wrongfully detained; brought to the Court of Common Pleas in New Haven County and tried to the court before *Studley, J.* Facts found and judgment rendered for the defendants. Appeal by the plaintiffs. The case is sufficiently stated in the opinion.

H. C. Baldwin and *J. M. Sweeney*, for the appellants.

D. F. Webster, for the appellees.

PARK, C. J. The principal question in this case is, whether the law regarding the stoppage of goods *in transitu* applies to the case.

The facts are as follows:—On the fifth day of December, 1884, one Knapp, of the city of Waterbury, was carrying on the business of a grocer in that city, and on that day he

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ordered a quantity of goods of the plaintiffs, in good faith, believing himself solvent. The goods were sent the same day, and all responsibility for their delivery by the plaintiffs ceased when they were placed on a truck in front of the plaintiffs' warehouse in the city of New York.

The goods arrived at Waterbury during the morning of the eighth day of the same month and were stored in the freight house of the railroad company subject to the order of Knapp. In the afternoon of the same day Knapp for the first time became aware that he was unable to pay certain claims against him that were then due, and thereupon made an assignment for the benefit of all his creditors. On the tenth day of December, Knapp, without authority from the plaintiffs, re-marked the goods in the warehouse, where they had remained, to the plaintiffs' address in the city of New York, and directed the agent of the railroad company to forward them to the plaintiffs.

Immediately after these transactions had occurred the probate court for the district of Waterbury ordered a deputy sheriff of the county of New Haven to take into his possession the goods of Knapp and hold them pending the appointment of a trustee on his estate. The deputy sheriff took possession of these goods, in accordance with the order, while they were being transferred from the freight house to the cars to be carried to New York as directed by Knapp. On the fifteenth day of the same month a trustee on Knapp's estate was duly appointed, and on the same day the trustee took possession of the goods, and retained it till they were taken out of his possession by the proceedings in this case.

On the thirteenth day of the month Knapp informed the plaintiffs by letter that he was insolvent, and that the goods he purchased of them were in the freight house at Waterbury subject to their order, but the plaintiffs took no action in the premises farther than to write a letter for the return of the goods, which was never received.

At the time the goods were ordered Knapp had not prop-

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erty enough to pay all the claims against him if he had then been pressed for payment.

These are the facts, and the principal question is—do they show that the plaintiffs stopped the goods *in transitu*, that is, took possession of them before they were taken possession of by Knapp, or by his representative, the deputy sheriff or the trustee in insolvency for the benefit of Knapp's creditors?

Knapp himself carefully avoided taking possession of the goods, and sought to return them to the plaintiffs; and had the plaintiffs ratified his acts before the goods were taken possession of by the deputy sheriff after the assignment, by the order of the court of probate, for the benefit of Knapp's creditors, perhaps there might have been some ground for the claim that the plaintiffs stopped the goods *in transitu* by the action of their agent; but this they neglected to do. There appears to have been no effective action whatever on the part of the plaintiffs to stop the goods *in transitu* before the happening of that event, and we see no tenable ground for the claim.

Again, it is said that Knapp was guilty of fraud in making the purchase of the goods, inasmuch as he had not property enough at the time to pay all his debts, if he had then been pressed for payment. But the case finds that the purchase was made in good faith, and that he did not then know that he could not make payment of all demands against him if his creditors should press for immediate payment. This knowledge he obtained afterwards, and then he sought to return the goods to the plaintiffs.

But the fact that he had not property enough to make immediate payment of all claims against him falls short of showing that he was then insolvent, and much less that he was guilty of fraud in the purchase. It often happens that men of large property, much more than sufficient to pay all demands against them in the ordinary course of business, have not property enough for the purpose if all their creditors should at once press for payment. We think there is nothing in this claim.

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There is no error.

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

THE TOWN OF HAMDEN *vs.* NATHAN P. MERWIN.

New Haven Co., June T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

J being pregnant with an illegitmate child, the defendant executed a bond to the plaintiff town by which, on condition that neither the town nor the parents of *J* would institute any legal proceedings against him on account of her condition or for the support of the child or of the mother, he covenanted that the child should not become a charge to the town during such time as the father would by law be liable for its support, the amount not to exceed that to which such father would by law be liable and the town to give him one week's notice before taking any legal steps for the support of the child or its mother. Upon a demurrer to a complaint setting out the bond, in a suit brought by the town upon it, it was held—

1. That the bond was not void for uncertainty as to the amount for which the defendant was liable, nor as to the time the liability should continue.
2. That it was not void as an agreement that no criminal prosecution should be brought against the defendant. The "legal proceedings" referred to being civil proceedings, which alone the town, or the parents of *J*, or she herself could have instituted.
3. That the provision for one week's notice before taking legal steps for the support of the child, had no reference to a suit on the bond.

The plaintiff alleged that, in addition to the support of the child, it had been compelled to pay for its burial, and stated a certain sum as the total expense. Held not to be a ground of demurrer that the defendant was not liable for the expenses of the burial and that it could not be seen from the complaint how much of the total expense was for the child's support. In the trial of the case on its merits any items that the plaintiff was not entitled to recover, would be rejected by the court.

Where a contract will bear two constructions, one of which would make it legal and the other illegal, that which will make it legal will be given to it.

[Argued June 1st—decided June 28th, 1886.]

ACTION on a bond; brought to the Court of Common

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Pleas in New Haven County. Complaint demurred to, and case reserved on the demurrer for the advice of this court. The case is fully stated in the opinion.

W. H. Ely, in support of the demurrer.

J. W. Alling and *J. H. Webb*, contra.

PARK, C. J. The case stands on a demurrer to the complaint, the declaratory part of which is as follows:—

1. On December 7th, 1883, the defendant, in consideration of the agreements on the part of the plaintiff therein contained, executed and delivered under seal a contract with the plaintiff, of which the following is a copy: "Know all men by these presents that I, Nathan P. Merwin, of the town of Woodbridge, in the county of New Haven, in consideration that neither the town of Hamden in said county, nor the parents of Jennie L. Downs of said Hamden, do institute any legal proceedings against me of any kind or nature on account of the said Jennie L. Downs being pregnant with an illegitimate child, or for the support of said illegitimate child, or for the support or nursing of the said Jennie L. Downs during her confinement, do hereby covenant and agree to and with the said town of Hamden and with the selectmen thereof, that said child of said Jennie L. Downs shall not be or become a charge or expense to said town of Hamden nor to the selectmen thereof during such time as, under the statute laws of this state, the person accused of begetting such child would be liable for the support of such child, and only to an amount not exceeding the amount to which, under said statute laws, the person accused of begetting such child would be liable; and provided that neither said town nor the selectmen thereof shall furnish any money or supplies to said Jennie L. Downs nor to said illegitimate child when born, nor take any legal proceedings for the support of said child or the mother thereof, without giving me notice in writing one week prior thereto of the intention to do so, and provided that neither said

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town of Hamden nor the said Jennie L. Downs nor the parents of said Jennie shall institute any legal proceedings for either the support of said child, or for causing the pregnancy of said Jennie L. Downs, with the consent of said town. In witness whereof I have hereunto set my hand and seal this 7th day of December, A. D. 1883.

"NATHAN P. MERWIN, [L. S.]"

2. On December 6th, 1883, the illegitimate child referred to in said contract was born to the said Jennie L. Downs.

3. Said Jennie at the time of the birth of said child had a legal settlement in said town of Hamden.

4. On or about January 1st, 1885, said illegitimate child became in need of care and support, and the mother thereof (the said Jennie) applied to said selectmen for assistance in the care and support of said child.

5. On January 14th, 1885, said selectmen gave notice in writing to the defendant that said illegitimate child was in need of care and support and about to become a charge and expense to said town of Hamden, and that, unless sooner relieved and cared for by the defendant, said selectmen would on January 21st, 1885, begin to incur charges and expense in the necessary care and maintenance of said child, for which said town of Hamden would hold the defendant responsible pursuant to said contract.

6. The defendant neglected and refused to do anything for the care and support of said child.

7. On January 21st, 1885, the plaintiff began to incur expense in the necessary care and support of said child, and continued to incur such expense until the death of said child on or about July 19th, 1885, when the plaintiff was further obliged to pay and did pay the necessary expenses of its proper burial.

8. The total expense thus incurred by the plaintiff was $103.21.

9. The defendant has neglected and refused to pay the same or any part thereof.

10. The plaintiff has duly kept and performed all the conditions of said contract on its part.

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The plaintiff claims $125 damages.

The plaintiff afterwards amended the complaint as follows:—

The plaintiff amends the complaint by substituting for paragraph seven the following:—

7. On January 21st, 1885, said illegitimate child was, and for more than one month prior thereto had been, and continued thereafter until its death to be, a poor inhabitant, having a legal settlement in said town of Hamden, and not having estate sufficient for its support, and having no relations of sufficient ability who were obliged by law to support it, and the mother of said child being unable to contribute anything for its support, the plaintiff on said last mentioned day began to incur expense in the necessary maintenance and support of said child, and continued to incur such necessary expense and furnish such necessary support until the death of such child on or about July 19th, 1885, when, because of the inability of the mother of said child or any of its relatives who were obliged by law to support it, to defray the expense of the burial, the plaintiff was further obliged to pay, and did pay, the necessary expenses of its proper burial.

7½. That the period during which said support and maintenance were so furnished by the plaintiff to said pauper child, was within the time during which, under the statute laws of this state, the person accused and found guilty of begetting an illegitimate child would, at the suit of a town, be liable for the support of such illegitimate child, and did not exceed the amount to which under said statute laws such person so found guilty would be liable to said town.

The plaintiff further amended the complaint by adding thereto the following paragraph:—

11. Neither the plaintiff nor the parents of said Jennie L. Downs, nor the said Jennie, either with or without the consent of the plaintiff, have ever instituted any legal proceedings against the defendant of any kind or nature on account of said Jennie being pregnant with an illegitimate child, or for causing said pregnancy, or for the support of

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said illegitimate child, or for the support or nursing of the said Jennie during her confinement.

The defendant demurred to the entire complaint as amended, stating the following grounds of demurrer:—

1. The matters and allegations therein contained are insufficient in the law to entitle the plaintiff to the relief sought.

2. The said pretended agreement in writing set forth in the complaint is void for uncertainty, and because it is impossible to ascertain from the terms of said pretended agreement what amount the defendant should pay the plaintiff under the same and during what time the claimed liability of the defendant should continue thereunder to exist; and because said pretended agreement does not fix any definite standard by which either the amount to be paid thereunder or the time during which the same should be paid can be ascertained with any degree of certainty, and said pretended agreement is in all respects of too vague and indefinite a character to be capable of being enforced.

3. It is an express condition precedent of said pretended agreement that the plaintiff town and the selectmen thereof shall not take any legal proceedings for the support of said child or the mother thereof without giving the defendant notice in writing one week prior thereto of the intention to do so; and it nowhere appears or is alleged in said complaint that the plaintiff did give the defendant such notice as is required by the aforesaid terms of said pretended agreement.

4. It is not alleged and does not appear from said complaint that the amount now sought to be recovered does not exceed in any one week during which the plaintiff claims to have furnished support to said child, the amount which the defendant is claimed to have contracted to pay under the terms of said pretended agreement.

5. It is not alleged and does not appear from said complaint that the defendant has not already paid all he ever contracted to pay by the terms of said pretended agreement for the support of said child while living.

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6. It is not alleged and does not appear from said complaint that the defendant has ever refused to pay all expenses for the support of said illegitimate child while living, that he ever agreed to pay by the terms of said pretended agreement.

7. It does not appear that the amount expended by the town, and which it now seeks to recover, did not exceed the amount the defendant agreed to pay.

8. It does not appear from the copy of said pretended agreement contained in the complaint, that the defendant did ever agree to pay anything for the funeral expenses of said child of said Jennie L. Downs; yet in said complaint he is charged with the same along with, and inseparably mixed with, what is claimed by the plaintiff to have been expended for the support of said child while living, and the defendant has no means of ascertaining from said complaint how much of said expense was for funeral expenses and how much was for support.

9. It is not alleged and nowhere appears in said complaint that the plaintiff ever gave the defendant any notice in writing one week prior thereto of the plaintiff's intention to furnish any money for the funeral expenses of said child.

10. It is not alleged and does not appear from said complaint that the amount claimed to have been expended by the plaintiff for expenses for the support of said child while living, is equal to the sum of one hundred dollars, so that this court has any jurisdiction of this case.

The defendant insists that under his first ground of demurrer he has the right to claim that the agreement, entered into between the plaintiff and himself, which is the foundation of this suit, is void, because the plaintiff therein agreed that it would not institute any criminal proceeding against him on account of the pregnancy with an illegitimate child of the female therein named.

The statement of this ground of demurrer is as general as language could make it, and is clearly in conflict with the second section of the Practice Act, which declares that "all

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demurrers shall distinctly specify the reasons why the pleadings demurred to are insufficient."

But there is no foundation for the claim, even if it could be considered. The proceedings described in the contract are civil proceedings. The town could not possibly institute any other proceeding; neither could the parents of Jennie L. Downs, nor she herself.

Again, if the contract was ambiguous in this respect, if it was susceptible of a construction that would make it illegal, as well as one that would make it legal, it should have the legal construction, for illegality is never to be presumed.

The defendant's second ground of demurrer sets forth, substantially, that the contract is void for uncertainty, because, it is said, it is impossible to ascertain by it how much the defendant was to pay the plaintiff, and during what time his liability was to continue.

The duration of the defendant's liability under the contract is thus stated in it:—"During such time as, under the statute laws of this state, the person accused of begetting an illegitimate child would be liable for the support of such child." And the amount of the defendant's liability is thus described:—"And to an amount not exceeding the amount to which, under said statute laws, the person accused of begetting an illegitimate child would be liable."

If a person should be brought before a proper court and found guilty of begetting an illegitimate child, the court would not find it difficult to determine what sum he should pay per week for the support of such child, nor during what time the payment should be made. And why should there be any difficulty here? The defendant leaves the matter in his contract to be determined in the same way in a suit on the contract, if the parties cannot agree between themselves. The contract refers to the statute for the amount of the defendant's liability and the duration of it. The statute provides a mode to determine the matter. The reference then is to the statutory mode for the determina-

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tion of these questions. We think this ground of demurrer is untenable.

The third ground of demurrer is based upon the clause in the contract which requires that one week's notice to the defendant shall be given before legal proceedings shall be taken, and the claim is that the complaint does not state that such notice was given before the institution of this proceeding.

The notice required by the contract had no reference to a suit brought for a breach of the contract the defendant was then entering into, but, if it applies to the bringing of suits at all, to proceedings brought directly to compel the defendant to support the illegitimate child. This suit was not brought for such support. That had been rendered by the plaintiff when it was instituted. It was brought to compel the defendant to make restitution to the plaintiff under his contract, for expenses incurred in such support, and the contract required no notice to be given before it was brought.

Paragraph seven of the complaint sets forth that the child in question was a pauper; that it had a legal settlement in the plaintiff town; that the plaintiff was compelled to provide, and did provide, necessary care and support for the child from the twenty-first day of January 1885, till the time of its death in the month of July of the same year, when the plaintiff was compelled to pay, and did pay, the necessary expenses of its burial; and that all such expenses amounted to the sum sought to be recovered in this suit. Paragraph seven and a half sets forth that the period during which the support and maintenance were so furnished by the plaintiff was within the time during which, by the statute laws of this state, a person found guilty of begetting an illegitimate child would at the suit of a town be liable for the support of such child, and that it did not exceed the amount to which under the same statute such person would be liable to the town. Paragraph nine sets forth that the defendant neglected and refused to pay any part of such necessary expense so incurred by the plaintiff for the

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support and burial of the pauper child. Paragraph six sets forth that the defendant neglected and refused to do anything for the care and support of the child. These paragraphs fully answer the fourth, fifth, sixth and seventh grounds of demurrer.

Under the eighth ground of demurrer it is alleged that the defendant never agreed to pay for the funeral expenses of the child, but that the plaintiff has included such expenses in the amount it seeks to recover in damages, and the defendant cannot tell how much was expended in the support of the child, and how much in its burial.

We do not see how this can make the complaint insufficient if the facts be as alleged. The *ad damnum* clause governs the jurisdiction of the court, and not what the plaintiff recovers on the trial.

If the funeral expenses cannot be taken into consideration in the trial of the cause upon its merits, the court will reject them.

The ninth and tenth grounds of demurrer need not be considered further than they have already been in the consideration of the other questions in the case.

We advise the Court of Common Pleas that the complaint is sufficient.

In this opinion the other judges concurred.

GEORGE PAGE *vs.* NATHAN P. MERWIN.

New Haven Co., June T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

Words are actionable *per se* which impute the commission of crimes involving moral turpitude, although they are not denominated infamous.

To charge another with fornication is slanderous *per se*.

Where, in an action for slander, the court struck out certain allegations of the defendant's second defense, but the same matters could have been proved under his first defense, which was a general denial, and no evi-

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dence was rendered inadmissible in his favor nor admissible against him that would not have been under the first defense, it was held to be no error.

Where the court refused to strike out certain allegations of the complaint, the truth of which the defendant, by his answer previously filed, had either fully or substantially admitted, it was held to be no error.

Where the defendant was charged with having slanderously imputed to the plaintiff the paternity of a certain illegitimate child, it was held that a written agreement entered into secretly by the defendant with the selectmen of the town, for the payment of the expense of supporting the child, and which the court regarded as not of the nature of a compromise, was admissible as tending to prove that the defendant himself was the father of the child.

The question whether damages are excessive can be considered only when the whole evidence is brought up on the appeal.

[Argued June 4th—decided July 8th, 1886.]

ACTION for slander; brought to the Superior Court in New Haven County. The complaint contained several counts, the first of which sufficiently presents the matter charged.

1. From on or about December 21st, 1882, to May 1st, 1883, the plaintiff was in the employ of the defendant at work upon his farm, and the plaintiff during the time of the employment aforesaid lived in the family of the defendant at his house in said Woodbridge.

2. On September 8th, 1879, the defendant was duly appointed by the probate court for the district of New Haven, the guardian over the person and estate of one Jenny L. Downs, then of Hamden in said county, a minor female, and from the time of such appointment up to the date of this writ and complaint, has been her lawful guardian as aforesaid. And during all of the said time up to or about the 6th day of December, 1883, the said Jenny L. Downs has resided with the defendant at his said house in Woodbridge.

3. On December 6th, 1883, the said Jenny L. Downs was delivered of an illegitimate child in the town of Hamden in said county.

4. On or about December 10th, 1883, the defendant spoke in the hearing of Frederick Goodwin, of said Woodbridge, and of other persons, the following words: "The child"

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(meaning the illegitimate child aforesaid delivered of said Jenny L. Downs), "is Page's" (meaning the plaintiff.) "Page" (meaning the plaintiff), "is the father of the child" (meaning the illegitimate child aforesaid). "The young one" (meaning the illegitimate child aforesaid), "is Page's" (meaning the plaintiff), and meaning to impute thereby that the plaintiff had committed the crime of fornication with the said Jenny L. Downs.

5. Said words were false and malicious.

The defendant demurred to the complaint on the ground that it was not alleged that the plaintiff had sustained any loss or damage by reason of the utterance of the words by the defendant. The court (*Andrews, J.*,) overruled the demurrer.

The defendant then filed a general denial as an answer to all the counts, with a second defense setting forth in detail the circumstances under which the words were uttered, so far as the speaking of them was admitted, and making sundry statements with regard to the character and conduct of the girl, and his belief at the time that the defendant was the father of the child, and the absence of all malicious intention on his part. The plaintiff moved that these allegations of the second defense be stricken out, and the court (*Sanford, J.*,) struck them out. The defendant then moved that paragraphs one, two and three of the complaint be stricken out, but the judge denied the motion. The defendant excepted to both rulings. The defendant by his answer filed at a term previous to that of the two motions last stated, had in direct terms admitted the truth of paragraph one of the complaint, that of paragraph two, except that the said Jenny had lived in his family only till about August 1st, 1883, instead of December 6th, 1883, and that of paragraph three according to his belief.

The case was afterwards tried to the jury before *Phelps, J.*

On the trial it was claimed and not denied that at the commencement of the pregnancy of the said Jenny L. Downs, the plaintiff was in the employment of the defendant as an ordinary laborer on his farm, that the defendant was a wid-

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ower, that the said Jennie was rendering service in his family, and that both the plaintiff and said Jennie boarded and lodged there, and that the defendant was worth about $10,000.

After having offered proof of and claiming to have proved the speaking and the causing to be written and published the alleged slanderous and libelous words, the plaintiff offered in evidence a certain written agreement of the defendant with the selectmen of the town of Hamden, as tending to prove an admission by the defendant that he had wrongfully and falsely accused the plaintiff, and that he was himself the father of the child, and also as showing his motive for protecting himself against the consequences of his own misconduct, which, as the plaintiff claimed, had led the defendant to so speak and cause to be written and published the alleged slanderous words.

The agreement was as follows:—

"Know all men by these presents, that I, Nathan P. Merwin, of Woodbridge, county of New Haven, in consideration that neither the town of Hamden in said county, nor the parents of Jennie L. Downs of said Hamden, do institute any legal proceedings against me of any kind or nature on account of the said Jennie L. Downs being pregnant with an illegitimate child, or for the support of said alleged illegitimate child, or for the support or nursing of the said Jennie L. Downs during her confinement, do hereby covenant and agree to and with said town of Hamden and with the selectmen thereof, that said child of said Jennie L. Downs shall not be or become a charge or expense to said town of Hamden nor to the selectmen thereof during such time as under the statute laws of this state the person accused of begetting such child would be liable for the support of such child, and only to an amount not exceeding the amount to which under said statute laws the person accused of begetting such child would be liable, and provided that neither said town nor the selectmen thereof shall furnish any money or supplies to said Jennie L. Downs nor to said illegitimate child when born, nor take any legal proceedings for the support

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of said child or the mother thereof, without giving me notice in writing one week prior thereto of the intention to do so; and provided that neither said town of Hamden nor the said Jennie L. Downs nor the parents of said Jennie shall institute any legal proceedings for either the support of said child, or for causing the pregnancy of said Jennie L. Downs, with the consent of said town. In witness whereof, I have hereunto set my hand and seal this seventh day of December, 1883. "NATHAN P. MERWIN. [L. S.]"

The defendant objected to the admission of this paper and claimed to have signed it under a promise by the selectmen of Hamden that it should be kept secret; and also because if the plaintiff was sued by the town of Hamden for the maintenance of the child, which was threatened, he would charge the defendant with having instigated the suit and be revenged on him by burning his buildings. The court overruled the objection, and admitted the paper, and the defendant duly excepted.

The plaintiff claimed to have proved the speaking by the defendant of the alleged slander, and that the words were spoken falsely and maliciously, and that the defendant got the said Jennie with child, and to shield himself from the consequences of his conduct uttered said words to her mother, and to one Northrop, and one Goodwin, and fraudulently persuaded the said Jennie to say to Dr. Wright, the attending physician at the time of the birth of the child, that the plaintiff was its father, and thereby caused the physician in his return to the registrar of births of the town to make the same statement, and the registrar to publish it in the public records of the town.

The defendant denied that he had improperly influenced the said Jennie in any way, or had had sexual intercourse with her, or had uttered the alleged slanderous words, and claimed that he had said nothing except what he was authorized by the said Jennie to say, and what he believed to be true, that reports that the plaintiff was the father of the child were current in the community before he had said anything on the subject, and that if he had said to Goodwin

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and Northrop what was claimed, he was simply repeating what had been previously said by others and currently reported, and that what he had said to Mrs. Downs was in a private conversation with her about the condition of her daughter, and therefore privileged and proper.

The plaintiff claimed to have proved that the current reports, if they existed, were wholly due to the acts and statements of the defendant.

These and all other claims of the parties were fully submitted to the jury, and the court instructed them that if the defendant said nothing to Mrs. Downs of an intentionally slanderous character, and only conversed with her with respect to her daughter's condition, such conversation was privileged and not actionable.

The jury were likewise fully instructed on the question of general and punitive damages, and returned a verdict of $2,000 for the plaintiff, which was accepted by the court.

The defendant claimed the damages found by the jury to be excessive. The court, assuming that the jury found the claims of the plaintiff to be true, and those of the defendant untrue, finds the amount of the verdict not excessive.

The defendant appealed.

W. C. Case and *W. H. Ely*, for the appellant.

1. The words charged to have been spoken are not actionable *per se*, and only upon proof of special damage. "Spoken words which impute that the plaintiff has been guilty of an indictable offense, are actionable without proof of special damage. If the offense imputed be not indictable, but only punishable summarily before a magistrate by penalty or fine, the words will not be actionable *per se*. Odger on Libel & Slander, 54. The same doctrine has been held by many of the courts of last resort of the several states, where this question has come up recently for adjudication; and it makes no difference whether the offense be punished by fine, by imprisonment, or by both, so long as it is not indictable, and not punishable by an infamous punishment. *Pollard* v. *Lyon*, 91 U. S. R., 225, 229; *Brooker* v. *Coffin*, 5

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Johns., 188, 191; *Bassell* v. *Elmore*, 48 N. York, 561, 563; *Davis* v. *Brown*, 27 Ohio St., 326, 328; *Farnsworth* v. *Storrs*, 5 Cush., 412, 415; *Wagaman* v. *Byers*, 17 Maryl., 183, 187; *Griffin* v. *Moore*, 43 id., 246, 251; *Shafer* v. *Ahalt*, 48 id., 171, 173. It is claimed, however, that the rule in Connecticut is otherwise. The only authority on which such claim can rest is the case of *Frisbie* v. *Fowler*, 2 Conn., 707. But in this case the language was used in reference to a married woman, and *necessarily* thereby imputed to her, if it imputed anything, the crime of adultery, which then was, and now still is, an indictable crime, and then was, and now still is, punishable with an infamous punishment—in the state prison; and whatever was said in that case in respect to language imputing merely fornication with an unmarried female was a mere *obiter dictum*. But conceding it to have the force of a decision, it cannot affect the case at bar, for at that time, November, 1818, fornication was an indictable crime. It was punishable, till as late as 1821, by whipping at the post, the same as adultery, and hence, down to that time (1821), was an infamous crime, because indictable in the county court, which had sole jurisdiction, and had power to summon a grand jury; and the offense of fornication was not then cognizable by a justice of the peace in a summary manner without indictment, as it now is. As the complaint is now made to a justice of the peace, who has jurisdiction to hear and determine the case, and sentence the accused, but has no power to summon a grand jury, the offense is not and cannot be indictable, nor is the punishment an infamous one. And being only a misdemeanor, not indictable, not punishable with an infamous punishment, not necessarily even for thirty days in the county jail, even words which impute this offense are not actionable *per se*. *Gosling* v. *Morgan*, 32 Penn. St., 273; *Stitzell* v. *Reynolds*, 67 id., 54; *McKee* v. *Wilson*, 87 N. Car., 300.

2. The court erred in erasing a portion of the defendant's answer. Those allegations showed that the speaking of the words was done with no malicious intent, in the honest belief that they were true, and in circumstances which

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made the speaking privileged. *Halstead* v. *Nelson*, 24 Hun, 395; *Moore* v. *Mauk*, 3 Bradw. (Ill.,) 114. The court also erred in refusing to strike out those parts of the complaint which were impertinent, and especially in allowing them to stand while expunging the part of the defense which was direct answer to that part of the complaint.

3. It being claimed by the defendant that the words were not uttered in any defamatory sense, and they being susceptible of a meaning that was not defamatory, it was the duty of the court to submit to the jury the question whether they were used in a defamatory sense. Odger on Libel & Slander, 94; *Shattuck* v. *Allen*, 4 Gray, 540, 546; *Downs* v. *Hawley*, 112 Mass., 237, 241; *Sanderson* v. *Caldwell*, 45 N. York, 398, 401; *Robinson* v. *Drummond*, 24 Ala., 174, 179; *Rodgers* v. *Kline*, 56 Miss., 808, 816; *Van Vactor* v. *Walkup*, 46 Cal., 124, 134. The words, if they are alleged to charge a crime, must legally charge it, beyond all question. *Ward* v. *Clark*, 2 Johns., 10; *Dexter* v. *Taber*, 12 id., 239; *Abrams* v. *Smith*, 8 Blackf., 95; *Carmichael* v. *Shiel*, 21 Ind., 66.

4. The court erred in admitting the bond given by the defendant to the selectmen of the town. This bond admitted nothing. By it the defendant merely agreed to support the child. He may have done so, and we claim he did, to save himself from the revenge of the plaintiff. It may have been done to save some other person from exposure. If it was to save himself, then it was a compromise of the matter with the selectmen. It is clearly an arrangement to prevent legal proceedings by the selectmen. It is therefore a compromise. A compromise is always protected from any use of it against a party who joined in it. *Hartford Bridge Co.* v. *Granger*, 4 Conn., 148; *Stranahan* v. *East Haddam*, 11 id., 507; *Strong* v. *Stewart*, 9 Heisk., 143. And it makes no difference that the present plaintiff was not a party to the compromise. *Gilhooley* v. *Sanborn*, 128 Mass., 485.

J. W. Alling and *J. H. Webb*, for the appellee.

PARK, C. J. The demurrer to the complaint in this case

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is based upon the claim that it is not slanderous *per se* to impute to a person the commission of the crime of fornication.

So long ago as the case of *Frisbie* v. *Fowler*, 2 Conn., 707, Chief Justice SWIFT said:—"By the laws of this state the breach of chastity in every form, from adultery to mere lascivious carriage, is punished by statute. The consequence has been that these charges have become words actionable in themselves. This point has been repeatedly decided, and may be considered to be the settled law of this state." In the same case Judge HOSMER said:—"By the common law of this state (to her honor be it spoken,) words imputing to a woman, whether she is married or single, a violation of chastity, are themselves actionable."

The defendant claims that when this case was decided the crime of fornication exposed offenders to infamous punishment, which is not the case at the present time, and that therefore the case is no longer authority on the subject. But the character of the punishment annexed to the crime is not alluded to in the opinions. The reason given is, that the crime involves moral turpitude.

In the case of *Pollard* v. *Lyon*, 91 U. S. R., 225, may be found a thorough examination of the law on this subject. It is there held that words are actionable *per se* which impute the commission of crimes involving moral turpitude, although such crimes are not technically denominated infamous.

We think the court committed no error in holding the complaint to be sufficient.

And we likewise think the court committed no error in expunging from the record certain parts of the defendant's second defense to the several counts. An examination of them will show that they contain nothing but a detailed statement of the circumstances attending the transactions, in the course of which the plaintiff claims that the slanderous words were uttered which are set forth in the several counts of his complaint, which circumstances, if proved, the

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defendant claims would conclusively show that no slanderous words were uttered on any of those occasions.

It is clear that the defendant could have proved all those circumstances as well under his first defense of a general denial of the facts alleged in the complaint, as he could have done under the paragraphs in question if they had not been stricken out. The action of the court did not deprive the defendant of any legitimate evidence, neither did it make evidence admissible against him that otherwise could not have been received. We think there was no error in this regard.

The defendant moved the court to strike out of the complaint paragraphs one, two and three, and that too after the defendant by his answer had expressly admitted paragraph one to be true, paragraph two to be true with the exception of an allegation as to the length of time that Jennie Downs resided at the defendant's house, and paragraph three to be true according to his best knowledge and belief. The court refused to comply with the request, and we think committed no error in so doing.

On the trial of the cause the plaintiff offered the following contract in evidence "as tending to prove an admission by the defendant that he had wrongfully and falsely accused the plaintiff, and that he was himself the father of said child; and also as showing the reason and motive of protecting himself against the consequences of his own misconduct which, as the plaintiff claimed, had led the defendant to so speak and cause to be written and published the alleged slanderous and libelous words."

[This contract is fully set out in the statement of the case.]

The defendant objected to the admission of this evidence, and claimed to have signed the document under a promise by the selectmen of Hamden that it should be kept secret, and also because if the plaintiff was sued by the town for the maintenance of the child, which was threatened, he would charge the defendant with having instigated the suit, and be revenged on him by burning his buildings. The

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court admitted the evidence, and this is made the ground of a claim of error.

The defendant insists that the contract was executed and delivered by the defendant as a compromise between himself and the town of Hamden. We see nothing in the writing that looks like a compromise. The defendant did all that the town of Hamden could have demanded of the father of a bastard child, and did it voluntarily and without objection so far as it appears. The act shows conduct of the defendant inconsistent with his claims on the trial, and we think it was admissible to be considered by the jury.

Several technical objections are made by the defendant to the charge of the court to the jury, which we do not deem it necessary or important to consider in detail. It is sufficient to say, that we do not see how the defendant could have been prejudiced by any of them.

We cannot consider the question whether the damages are excessive. It is not properly before us. A consideration of that question would require that all the evidence upon the trial should come before us.

There is no error.

In this opinion the other judges concurred.

THE TOWN OF HARTFORD *vs.* JULIA CHAMPION.

Hartford District, Oct. T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

The statute (Gen. Statutes, p. 153, sec. 4,) provides that where any resident tax-payer fails to give in a sworn list of his taxable property the assessors "shall fill out a list for him, putting therein all property which they have reason to believe is owned by him liable to taxation, at the actual value thereof, from the best information they can obtain, and add thereto ten per cent. of such valuation." Held not necessary that the assessors should get knowledge of specific property kept back from taxation, but that it is enough if they ascertain the fact that

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property is thus kept back, and use their best judgment as to the amount and value of it.

It is sufficient if, from information obtained by inquiry, and from their own judgment upon the general facts of the case, they come to the honest belief that property is thus kept back.

Assessors inserted the following item in a list thus filled out by them, after specifying other property:—"All taxable property not specifically mentioned, $25,000." Held to be legal.

[Argued October 6th,—decided November 26th, 1886.]

ACTION to recover taxes; brought to the Superior Court in Hartford County, and tried to the court before *Andrews, J.* Facts found and judgment rendered for the plaintiff. The defendant appealed. The case is fully stated in the opinion.

T. M. Maltbie and *P. C. Bryant*, for the appellant.

S. O. Prentice and *J. H. Brocklesby*, for the appellee.

GRANGER, J. This action is brought for the recovery of taxes as a debt due from the defendant to the plaintiff town, under the statute of 1881, (Session Laws of that year, ch. 101, sec. 2,) which provides that "all taxes properly assessed may be recovered by any proper complaint or proceeding at law for the recovery of money as in other cases." The only question in the case is whether the taxes were "properly assessed."

The complaint alleges that the defendant on the first day of October, 1881, was a resident of the town of Hartford and liable to pay taxes in said town; that on that day she was the owner of a large number of shares of the capital stock of several insurance companies named; that she neglected to give in to the assessors a sworn list on or before the first day of November, 1881, of the taxable property owned by her on said first day of October; that the assessors thereupon filled out a list for her, putting the insurance stocks above named at $86,665, and other property owned by her and liable to taxation at the sum of $25,000, and added

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ten per cent. of said valuations thereto. The complaint then proceeds to allege that the assessment list was never appealed from or changed, that a certain tax was duly laid by the town on the assessment list of that year, which was payable July 15th, 1882, and that the amount of the defendant's tax was $1,044.07, that the collector had since that date demanded the tax of her, but that she had never paid it, and that the tax was now due, with the interest and additions provided by law.

The case was tried to the court. On the trial it appeared that the item of $25,000 was entered upon the defendant's assessment list as follows: "All taxable property not specifically mentioned, $25,000."

Upon the argument of the case the counsel for the defendant asked the court to decide that the assessment so made against her was not legal, for the reason that it did not appear from the evidence that the assessors had any knowledge whatever of any property belonging to her for which she is set in the list at the sum of $25,000, under the head of "all other taxable property not specifically mentioned," nor that they had any reasonable ground to believe that she had such property. And they asked the court to hold that there must be such facts shown to have been brought to the knowledge of the assessors, and upon which they acted, as would enable the court to see that the assessors either knew that the defendant actually had such property, or that they could reasonably believe that she had it; and that unless such facts had been shown the court ought to hold the assessment illegal and void. The court found that in filling out and making the assessment list for the defendant, the assessors, acting from the best information they were able to obtain, had reason to believe and did verily believe that she owned all the property set therein, and that the same was of the value at which it was assessed, and that it was liable to taxation. The court also found that the defendant on the first day of October, 1881, was a resident of the town of Hartford, and that all the paragraphs of the complaint were proved and true, and found

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the issue for the plaintiff and rendered judgment in its favor for the whole amount of the tax claimed, with the ten per cent addition, and interest at the rate provided by law.

The defendant appeals from this judgment and assigns the following reasons of appeal:

"The assessment and tax is illegal and void, because,

"1st. The list of property of the defendant for taxation was not made as required by law.

"2d. Said list contained a large amount of property which did not exist, and which the assessors did not have reason to believe was owned by the defendant and liable to taxation.

"3d. Said list was not a list of the property of the defendant, or intended as such, but was fraudulently made with intent to injure and punish the defendant.

"4th. Said judgment is erroneous because it includes a tax upon a large sum improperly and illegally placed by the assessors in the list of property for taxation of the defendant."

The substance of the defendant's reasons of appeal and of the claim made by her counsel in the argument before us, is, that the assessors had no right under the statute to put any property in the defendant's list unless they had definite knowledge of specific property which she owned and had failed to put into her list, and that such property must have been actually valued by them.

The statute (Gen. Statutes, p. 153, sec. 4) provides that where any resident tax-payer fails to give in a sworn list of his taxable property "the assessors shall fill out a list for him, putting therein all property which they have reason to believe is owned by him liable to taxation, at the actual value thereof, from the best information they can obtain, and add thereto ten per cent. of such valuation."

Under this statute the assessors are not limited to any particular source or means of information, or evidence of ownership or value; they are only required to act upon "the best information they can obtain." This information they may obtain by inquiring of those who would be likely

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to know, and from their own judgment upon the general facts of the case. It is sufficient if they ascertain enough to found upon it an honest belief that the tax-payer has taxable property which he keeps back from taxation. It is not necessary that they learn of and specify particular property. The object of the tax-payer is to keep his property out of sight and from the knowledge of the assessors. By frankly stating what he owns he avoids all danger of an unjust impression on the part of the assessors. If they get at the fact that property is thus concealed by using their best judgment in the matter, and by inquiries that bring them to an honest belief on the subject, the tax-payer is in the circumstances in no position to make a reasonable complaint if they misjudge in the matter.

It is expressly found that the assessors, in making the list, "acted from the best information they were able to obtain, and had reason to believe, and did believe, that the defendant owned all the property set therein, and that it was of the value at which it was assessed." This finding we must regard as decisive of the proper action of the assessors in the matter.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

JOHN B. GARVIE *vs.* THE CITY OF HARTFORD & OTHERS.

Hartford Dist., Jan. T., 1887. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

The state constitution forbids the increase of the compensation of any public officer, to take effect during his continuance in office. Held to render illegal a vote of the common council of a city to pay a joint-standing committee of the council for services rendered by the committee, the office of councilman being one without compensation and the services being those ordinarily rendered by such a committee.

[Argued January 5th,—decided February 3d, 1887.]

SUIT for an injunction against the payment by the defen-

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dant city of a sum of money, under a vote of the common council of the city, as compensation to one of its standing committees; brought to the Court of Common Pleas of the county of Hartford. The defendant filed an answer, to which the plaintiff demurred, and the case was reserved upon the pleadings for the advice of this court. The case is fully stated in the opinion.

C. J. Cole, in support of the demurrer.

S. O. Prentice, contra.

PARDEE, J. On March 22d, 1886, the court of common council of the city of Hartford passed the following resolution: "*Resolved*—that the city auditor be and he is hereby instructed to draw his order on the city treasurer in favor of the joint standing committee on bathing house for two hundred and fifty dollars, for services rendered the past year." The plaintiff, a tax-payer, asks that the city and its treasurer may be restrained from honoring the order. In its answer the city says:—

"Said committee on bathing-house was composed of Asa S. Cook, George H. Brown and Henry P. Hitchcock, who were members of the court of common council of said city of Hartford for the municipal year beginning in April, 1885, and ending in April, 1886, and as such members were, in accordance with the rules of said court, duly chosen and appointed as members of said joint standing committee on bathing-house of said court, and during said term acted in said capacity, performing all the duties devolving upon said committee, and rendering to the city all the services customarily rendered by such joint standing committee. Among the services which said committee were called upon to perform, and which they did in fact perform, for and on behalf of said city, were the care and custody of the bathing-house owned by the city, and of other property of the city connected therewith, and the charge and management of the same for the uses of the people of the city,

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and for the purposes for which it was intended. The duties performed and the services rendered for and on behalf of said city by the members of said committee as aforesaid, were of value to said city, and were reasonably worth the sum of $250. The resolution first set out in paragraph four of the complaint, was adopted and passed for the purpose of making a reasonable compensation to the said members of said committee for said services rendered to said city as aforesaid. For a long period of years it has been the practice of said city through its court of common council to pay said committee for the services rendered by them, and for said court to pass a joint resolution authorizing and directing such payment. Said resolution was passed in conformity with said practice, in good faith, and under the belief that the same was lawful and proper."

To this the plaintiff demurs, stating the grounds of demurrer as follows:

"Because it appears from the complaint and answer that the resolution of the court of common council of the city of Hartford set forth in the complaint, and granting the sum of two hundred and fifty dollars to the joint standing committee on bathing-house, was in violation of that clause of the state constitution which provides that 'neither the General Assembly, nor any county, city, borough, town, or school district, shall have power to pay or grant any extra compensation to any public officer, employee, agent or servant, or increase the compensation of any public officer or employee, to take effect during the continuance in office of any person whose salary might be increased thereby, or increase the pay or compensation of any public contractor above the amount specified in the contract.' Because there was no legal obligation on the part of the city of Hartford to pay said joint standing committee on bathing-house any compensation or salary, and so said grant operated as a mere gratuity. Because the members of said joint standing committee on bathing-house were members of said court of common council of the city of Hartford, and as such occupied a fiduciary relation to the plaintiff and to the city of

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Hartford, and therefore had no legal right to grant compensation to themselves as members of said committee."

Upon the answer and demurrer we are to assume that the duties performed by the defendants were such as have been customarily performed by the joint standing committee of the council upon the bathing-house.

From the date of the grant of a charter to the city of Hartford to this present the office of a member of its court of common council has remained without salary. The honor inseparable from the office has stood in the place of pecuniary compensation. Therefore the members in whose favor the resolution was passed accepted the office with knowledge of the fact that they then had neither legal nor equitable claim to compensation. Simultaneously with their acceptance there came into operation a binding agreement that they had entered upon an office to which no compensation then attached. Upon them then the constitutional provision bore as upon any contractor, employee, or servant. They had undertaken an office upon an explicit agreement as to compensation then affixed; the contractor undertakes to furnish materials and perform labor for a stipulated price; the servant to labor upon fixed terms. The purpose of the provision, applicable alike to all, is to make it legally impossible for any one of them to receive a greater sum, either by payment or gift, for performing the duties pertaining to his office, or for fulfilling the terms of his contract for furnishing materials or for personal service, than it would have been legally possible for him to obtain by the judgment of a court upon the terms of his contract as originally made. Although, as is claimed by the defendants, it is mathematically impossible to add to nothing, nevertheless it is constitutionally possible to prohibit a gift to one who has no legal right to demand anything. The defendants are bound by their acceptance of an office without compensation. The action of the members of the court of common council in affixing a salary to the office must be for the benefit of their successors and will be unselfish. If the city shall allow any person to furnish materials or per-

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form service or labor for it without having previously fixed the price, the law makes a contract as binding as any which the parties could have made for themselves; that is, the city is to pay the market value of the materials or service or labor, to be determined by the judgment of a court, if the parties disagree. And to the price thus judicially fixed there can be no addition by payment, gift, or otherwise.

The Court of Common Pleas is advised that the answer is insufficient.

In this opinion the other judges concurred.

ALONZO R. ABORN *vs.* DAVID J. RATHBONE.

New London Co., Oct. T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

A receipt in full, given upon the part payment of a debt, in the absence of any impeachment of it for fraud or mistake, is valid and a discharge of the entire debt.

Where, upon part payment of a debt, a receipt in full is given for the purpose of aiding the debtor to settle more favorably with his other creditors and on his promise to pay the balance, the creditor cannot avail himself of these facts to set aside the receipt.

[Argued October 20th,—decided December 17th, 1886.]

ACTION for goods sold; brought by appeal from the judgment of a justice of the peace, to the Court of Common Pleas of New London County, and tried to the jury, before *Mather, J.* Verdict for the defendant, and appeal by the plaintiff for error in the charge of the court. The case is fully stated in the opinion.

D. G. Perkins, for the appellant.

F. T. Brown, for the appellee.

GRANGER, J. The defendant was indebted to the plaintiff to the amount of $222, on the 1st of March, 1881. On that day he gave the defendant the following receipt:

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"Norwich, Conn., March 1st, 1881. Received of Mr. Jewett Rathbone one hundred and fourteen $\frac{50}{100}$ dollars account in full to date. A. R. Aborn."

The plaintiff claimed, and offered evidence to prove, that at the time the receipt was given he offered to pay the plaintiff one hundred dollars in cash and receipt two small bills against him, coming to $14.50, if he would accept it in full, and that the plaintiff accepted it in full and gave the receipt in question.

The plaintiff claimed, and offered evidence to prove, that the payment was made on account only, and a receipt on account given, and that after it was made a person in the defendant's employ came to him and represented that the defendant wanted a receipt in full to show to his other creditors as a means of obtaining a more favorable settlement with them, and that it would not affect the plaintiff's claim, but that the defendant would pay the balance, and the plaintiff claimed that this was a fraud upon him on the part of the defendant, as the defendant had no other creditors except his father, with whom he did not attempt to compromise.

The plaintiff claimed that the receipt was void, as it had no other consideration than a part payment of the debt, which was insufficient; and that if otherwise valid, it was rendered void by the fraud of the defendant in obtaining it, and he requested the court to charge the jury in accordance with the claim, if they found the facts claimed by him to have been proved.

The court instructed the jury as follows:—

"If you find, as claimed by the plaintiff, that this receipt was given solely as a receipt for the money paid on account, and that the plaintiff did not intend and did not execute said receipt to discharge the balance of his account, (unless it was so given to aid the defendant in defrauding his creditors), then the receipt is no defense to this action, and your verdict should be for the plaintiff. Or if you find that the defendant, intending to defraud the plaintiff, obtained this receipt in the manner claimed by the plaintiff, and without

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any intention on part of the plaintiff by giving such receipt to aid the defendant in defrauding his creditors, then the receipt is void, and the plaintiff can recover the unpaid balance of his account. Giving a receipt in full for a debt operates to defeat any further claim for the debt, unless the receipt is obtained under such circumstances of mistake, accident, surprise or fraud as would authorize a court of equity to set it aside. If the receipt was given by Aborn to enable Rathbone to defraud his other creditors, then Aborn was participating in the attempt to defraud, and has no right to set up fraud in his own behalf to make the receipt inoperative against himself."

We think the plaintiff has no ground for complaint against this charge. The general principle laid down with regard to receipts in full, has long been the settled law of this state, whatever it may be elsewhere. The receipt in this case, unless impeached for fraud or mistake, was valid, and discharged the whole debt, though given for a payment that was in itself but a part of the entire debt.

And while the receipt, if obtained of the plaintiff by fraud, would be of no validity against him, yet where it was given, as the jury must have found it to have been, as a part of a scheme for enabling the defendant to defraud his other creditors, it is equally well settled law that the plaintiff can not avail himself of that very fraud to set the receipt aside. No principle is better settled than that a man can never set up his own fraud for his own benefit.

The judge told the jury that if the plaintiff had this fraudulent intent in giving the receipt, yet if the defendant had no such fraudulent purpose and it was wholly a false representation to the plaintiff and a fraud upon him, the receipt was invalidated by the defendant's fraud, and the plaintiff could recover. This part of the charge being in the plaintiff's favor, of course he does not complain of it and we need not consider it.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

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JACOB GRISSELL *vs.* THE HOUSATONIC RAILROAD COMPANY.

Hartford District, Oct. T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS AND GRANGER, JS.

The act of 1881 (Session Laws, ch. 92,) provides that where any injury is done to "a building or other property" by a fire communicated by the locomotive of a railroad, without contributory negligence on the part of the owner of the property, the railroad company shall be responsible in damages; and that every railroad company shall have an insurable interest in the property for which it may be so held responsible and may procure insurance thereon. Held—

1. That the act was not unconstitutional and invalid, either (1) as denying to railroad corporations the equal protection of the laws, in making them liable for the consequences of a lawful act without negligence on their part, or (2) as taking away their property without due process of law in depriving them of a legal defense, or (3) as impairing the rights given them by their charters, which authorize the use of fire in operating their locomotives and require them to run their trains, for the unavoidable consequences of which they are made liable.
2. That the statute, under the expression "buildings or other property," includes fences and forest trees.

It is not necessary that the property should be such as is ordinarily regarded as insurable. The statute creates an insurable interest, which is independent of the question whether an insurer could be found to take the risk.

The statute is valid in its application to railroad companies which had taken the land for their road and paid the assessed damages before the act was passed.

This is especially so where the charter of such a railroad company contains a provision that it may be altered at the pleasure of the General Assembly and that it shall be subject to all general laws that may be enacted.

[Argued October 7th—decided December 23d, 1886.]

ACTION for the destruction of fences and trees upon the land of the plaintiff near the railroad of the defendant company by fire communicated by the locomotive of the defendants; brought before a justice of the peace, and, by appeal, to the Court of Common Pleas of Litchfield County, 'd tried to the jury before *Warner, J.*

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The action was founded upon the following statute, enacted in 1881:—

"Where any injury is done to a building or other property of any person or corporation, by fire communicated by a locomotive engine of any railroad corporation, without contributory negligence on the part of the person or corporation entitled to the care and possession of the property injured, the said railroad corporation shall be held responsible in damages to the extent of such injury, to the person or corporation so injured; and any railroad corporation shall have an insurable interest in the property for which it may be so held responsible in damages, along its route, and may procure insurance thereon in its own behalf."

On the trial the plaintiff offered evidence to prove that on the 16th day of April, 1885, between the hours of eleven and twelve in the forenoon, the defendant was running a locomotive engine with a train of cars attached thereto in a northerly direction, along the side of the plaintiff's land, which lies on the easterly side of the defendant's layout; that very soon after the train had passed a smoke and fire were seen by witnesses, on the easterly side of the defendant's track, and that traces of the fire were visible from the track to and upon the land of the plaintiff and land of one Gaylord; that no smoke or fire were seen in that vicinity prior to the passage of the train, although the witnesses were in a position to have seen the same if any existed; that at that time there was a high wind blowing from a northwesterly direction; and that the fire progressed with great rapidity and burned the plaintiff's fences, growing trees and herbage. No witness testified that he saw the spark of fire come from the locomotive which set the fire.

The plaintiff also offered evidence to prove that he did not contribute to the injury, and that he was not negligent in the care of his property, and did not expose it to fire from locomotive engines. He also offered evidence to prove the damage done to his fences, growing timber and herbage by the fire.

To this last evidence the defendant objected, on the

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ground, 1st, that there had been no proof of negligence on the part of the defendant; and 2d, that the plaintiff could not recover under the provisions of the act of 1881, until he should prove that the defendant had, or could have, an insurable interest in the property injured by the fire, and that the burden of such proof was on the plaintiff. The court overruled the objection and admitted the evidence, and the defendant excepted.

The defendant called one Todd as a witness, who testified that he was a fire insurance agent, and had been for the last eighteen years, and that he did not know of any insurance company that insured growing trees and herbage or fences against fire. This evidence was objected to by the plaintiff, but was heard by the agreement of the parties, subject to the ruling of the court in its charge to the jury.

The defendant requested the court to charge the jury that there was no evidence to prove that the defendant was guilty of any negligence, and as there was no other evidence that the fire was communicated from the defendant's locomotive, the plaintiff could not recover; also that the act of 1881 was unconstitutional and void, as it interfered with the charter rights, contracts and duties of the defendant.

The court did not charge the jury as requested, but instructed them as follows:—

"It is your duty to determine from all the evidence adduced and the circumstances connected with the occurrence of the fire, whether the fire which injured the plaintiff's property proceeded from the defendant's locomotive, or from some other cause. The defendant is not correct in his claim that the statute of 1881 is unconstitutional and void. I instruct you that if you find that the locomotive of the defendant communicated the fire to the land of the plaintiff, either directly or to the land of Mr. Gaylord and from thence it ran on to the land of the plaintiff, and did him the injury of which he complains, and you also find that the plaintiff in no wise contributed to that injury, then your verdict should be for the plaintiff. But this must be proved affirmatively by the plaintiff and by a fair preponderance of evidence on

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his part. You must be satisfied from the evidence that the defendant's locomotive communicated the fire that did the injury to the plaintiff, and that he did not contribute to it. It was not incumbent upon the plaintiff to prove that the property which was injured by the fire could have been insured by the defendant. The testimony of Mr. Todd, which was offered to prove that there was no insurance company that could or would insure such property against fire, was not admissible, and is to have no influence on your minds. You will reject it. If you find that the fire that injured the property of the plaintiff did not come from the locomotive of the defendant, then your verdict must be for the defendant. Or if you find that the fire came from the locomotive and you also find that the plaintiff contributed to its spread and extension, then your verdict should be for the defendant."

The jury returned a verdict for the plaintiff, and the defendant appealed to this court, on the ground of error in the charge of the court and in its ruling upon the evidence offered.

M. W. Seymour, with whom was *H. H. Knapp*, for the appellant.

First. The first question to be considered arises upon the construction of the statute itself. Are "fences," "growing trees" and "herbage" (the only property proved to have been injured) "other property," within the meaning of the statute of 1881? The word "property," HINMAN, C. J., in *Stanton* v. *Lewis*, 26 Conn., 449, says, "of course must include everything that is the subject of ownership." Literally, therefore, "other property" includes franchises, easements, incorporeal hereditaments, and other things incapable of being either insured or destroyed by fire. Clearly, it seems to us, the legislature intended no such sweeping change in our law. Again, that principle of interpretation denominated *noscitur a sociis*, requires the meaning of the words "other property" to be limited to the property of the same general character as "buildings." 2 Parsons on Con-

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tracts, 501, note *u*; Potter's Dwarris on Statutes, 272, 292; *Wheeler* v. *McCormick*, 8 Blatch., 267; *Chidsey* v. *Town of Canton*, 17 Conn., 476; *Bailey* v. *Close*, 37 id., 411; *Boon* v. *Ætna Ins. Co.*, 40 id., 575; *Allen's Appeal*, 81* Penn. St., 302; *Renick* v. *Boyd*, 99 id., 555; *Reed* v. *Belfast*, 20 Maine, 246; *Rex* v. *Wallis*, 5 T. R., 375, 379; *Rex* v. *Hall*, 1 Barn. & C., 237. The words themselves being of doubtful interpretation, the intention of the legislature in passing such a statute is a legitimate source from which to seek light. In this view, the provision that the railroad corporation "shall have an insurable interest in the property for which it may be so held responsible in damages and may procure insurance thereon in its own behalf," certainly shows that the legislature intended to limit the meaning of the words "other property," to such other property as is capable of being insured; to such other property as it is possible for the railroad corporation to have "*insured in its own behalf.*" *Chapman* v. *Atlantic & St. Lawrence R. R. Co.*, 37 Maine, 92. If we are right in supposing this to be the proper interpretation of the statute, there can be no doubt that the court erred in not permitting us to prove the impossibility of insuring the property injured?

Second. We deny the constitutional power of the legislature to enact any such statute. There are certain propositions which cannot be denied by either side, which are here stated for the purpose of narrowing this discussion to its controverted points:—1st. That the defendant is a corporation chartered in 1836 for the purpose of maintaining and operating a railroad; that under that charter it has acquired property and rights of various kinds; that some of those rights and property are peculiar in their nature, owing to the quasi-public character of its business, and that others are to be controlled by the same rules of law that govern the private property of individuals.—2d. Its charter is a contract between the state and the company, which is within the protection of Art. I., Sec. 10, of the constitution of the United States. *Enfield Bridge Co.* v. *Conn. River Co.*, 7 Conn., 48; *Derby Turnpike Co.* v. *Parks*, 10 id., 522; *Wash-*

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ington Bridge Co. v. *The State*, 18 id., 64; *Dartmouth College* v. *Woodward*, 4 Wheat., 518; *Planters' Bank* v. *Sharp*, 6 How., 301; *Fletcher* v. *Peck*, 6 Cranch, 132; 3 Parsons on Contracts, 532.—3d. The company is a citizen of this state and like any other citizen is entitled to the equal protection of the laws of the state and of the United States, and especially that protection thrown around a citizen of the United States by the 14th amendment of the constitution of the United States. *Louisville &c. R. R. Co.* v. *Letson*, 2 How.. 497; *R. R. Tax Cases*, 13 Fed. Rep. 722; *Southern Pacific R. R. Co.* v. *California*, 118 U. S. R., 109; *Santa Clara County* v. *Southern Pacific R. R. Co.*, id., 394.—4th. The statute of 1881 does not pretend to take the property of the company for a public use. The fact that it does not provide for compensation would be fatal to any such claim if made.—5th. Though the charter is subject to alteration, amendment and repeal by the General Assembly, the act of 1881 is not such an alteration or amemdment. See argument and opinion in *State* v. *N. Haven & Northampton Co.*, 43 Conn., 351.—6th. If the statute be properly a police regulation, the legislature would have full power to enact it, whether the charter were a close one, or subject to alteration or amendment. Pierce on Railroads, 460; *People* v. *Boston & Albany R. R. Co.*, 70 N. York, 569.—7th. Down to the enactment of this statute no railroad corporation in this state could have been held responsible in damages for a fire communicated by one of its locomotive engines, without showing either malice, negligence, or such a wanton disregard of the rights of others as to amount to malice. 1 Black. Com., 431; Pierce on Railroads, 431; *Morris* v. *Platt*, 32 Conn., 86; Cooley on Torts, 591; *Clark* v. *Foot*, 8 Johns., 421; *Losee* v. *Buchanan*, 51 N. York, 487.—8th. The enactment of this statute can in no sense be considered the establishment of a rule of law, changing the common law, as to where thereafter the loss occasioned by accidental fires should fall. The fact that it was confined in its operation to railroads, would be fatal to any such claim. 1 Black. Com., 45; Webster in *Dartmouth College Case*, 4 Wheat.,

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518; Cooley on Const. Limit., 353, 390; *Chicago &c. R. R. Co.* v. *Moss*, 60 Miss., 641.—9th. Within proper limitations and due regard for the rights of all, fire is a subject matter within the police regulation of the state. For example—the establishment of fire limits; the destruction of property to prevent spreading of fire, etc.

We submit that these propositions and concessions bring us face to face with the only question that can be successfully raised in this branch of the case. Can the legislature, under a legal exercise of the police power, say that a railroad company shall be responsible in damages for fires communicated by its locomotives, irrespective of the question whether it has been guilty of a neglect of duty or not?

In what do the police powers of the state consist? Blackstone (4 Comm., 162,) defines the public police as "the due regulation and domestic order of the kingdom, whereby the inhabitants of a state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners, and to be decent, industrious and inoffensive in their respective stations." To the same effect see Bentham's General View of Public Offences, (Works, part 9, p. 157;) Cooley's Principles of Const. Law, 209; Cooley's Const. Limitations, 577; *State* v. *N. Haven & Northampton Co.*, 43 Conn., 378; *Commonwealth* v. *Alger*, 7 Cush., 84; *Thorp* v. *Rutland & Burlington R. R. Co.*, 27 Verm., 149; *Munn* v. *Illinois*, 94 U. S. R., 145; *Beer Co.* v. *Massachusetts*, 97 id., 33. But SHAW, C. J., in *Commonwealth* v. *Alger*, says that the police power must not be "repugnant to the constitution." And EARL, J., in *Matter of Jacobs*, 98 N. York, 110, says: "These citations are sufficient to show that the police power is not without limitations, and that in its exercise the legislature must respect the great fundamental rights guaranteed by the constitution." And Cooley, in his Principles of Const. Law, 388, says:—"All property and rights within the jurisdiction of the state, are subject to the regulations and restraints of its police power, except so far as they are removed therefrom by the express provisions

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or implications of the federal constitution." And Potter, in his Dwarris on Statutes, 458, says:—"The limit to the exercise of the police power can only be this: the legislation must have reference to the comfort, the safety, or the welfare of society; it must not be in conflict with the provisions of the constitution." See also *Austin* v. *Murray*, 16 Pick., 121, 126; *Coe* v. *Schultz*, 47 Barb., 64; *People* v. *Marx*, 99 N. York, 377, 386; *State* v. *Noyes*, 47 Maine, 189; *Slaughter House Cases*, 16 Wall., 36, 87.

Strictly speaking, the words of this statute do not bring it within the legitimate objects regarding which the police power of the state may be exercised. It does not require of railroads the use of spark arresters, or any other device to prevent the escape of fire, and as a penalty impose an obligation to pay for all damage occasioned thereafter by fire. It is not a statute for the better protection of property. It simply imposes on the railroads an absolute liability. It requires nothing; it suggests nothing for the better protection of property; it simply shifts the burden of the loss from where for all time it has rested, on to others.

The real object of the statute is simply an incitement to carefulness on the part of people engaged in the railroad business, by holding over their heads pecuniary loss; and yet it does not grant an immunity in cases where care has been exercised, for it declares they must suffer the same pecuniary loss in either case. And it holds them to the same responsibility for the malicious act of an employee or of a stranger. Even the act of God, provided the proximate cause of injury was "a fire communicated by a locomotive engine," would not relieve the defendant corporation from responsibility.

But if, under its police powers, the state has a right to vary the common law rule, and hold people responsible in damages for fires accidently originating on their premises, as a legal police regulation it must apply to all alike. A statute which discriminates between classes of individuals is for that reason void. *Chicago &c, R. R. Co.* v. *Moss*, 60

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Miss., 641; *Alabama R. R. Co.* v. *Morris*, 65 Ala., 193; *Durkee* v. *Janesville*, 28 Wis., 464.

But, notwithstanding the statute is not a legal police regulation, it would still be a law binding on the defendant corporation, unless it in some way interferes with the rights secured by the constitution of the United States and of this state. What then are the rights secured by the constitution to all citizens and corporations? The legislature cannot—(*a.*) Interfere with the obligations of contracts. U. S. Const., Art. 1. § 10.—(*b.*) Nor deprive any person of life, liberty or property without due process of law. Vth Am. to U. S. Constitution.—(*c.*) Nor take private property for public use without just compensation. XIVth Amendment to U. S. Const. Also Art. 1, Sec. 2, State Constitution.—(*d.*) Nor deny to any person within its jurisdiction the equal protection of the laws. XIVth Amendment to U. S. Const.—(*e.*) Nor deprive one of life, liberty or property but by due course of law. State Constitution, Art. 1, § 9. And (*f.*) all courts shall be open and every person for an injury done to him in his person, property or reputation, shall have remedy by due course of law and right, and justice administered without sale, denial or delay. State Const., Art. 1, § 12.

Railroads are quasi-public corporations. They take the place of and perform for the government certain governmental functions. In respect to matters strictly and properly *publici juris* the power of the legislature is very great; but there are certain matters which by reason of the fact that they are *public*, cannot be taken away from or interfered with, except upon just compensation. The right to run by the use of fire and steam is one of these. The defendant railroad not only *may* run, but it *must* run. The state compels it to run. *State* v. *Hartford & N. Haven R. R. Co.*, 29 Conn., 538. As it may and can only run by the use of fire and steam, it may use fire and steam, for it could not run without them. The manner of its using fire and steam may, under proper circumstances and for proper objects, be regulated, but a regulation which amounted to a

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prohibition would be void. A regulation which partially permitted their use, would impair their full power to use, and hence would be equally void. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. R., 650. But again. Railroads, inasmuch as they are built by private capital, in their relation to their stockholders, the property owned by them, and their income, are *privati juris*, and subject to the same limitations, and invested with the same security as the private property of an individual. *Benson* v. *Mayor &c. of New York*, 10 Barb., 245; *Commonwealth* v. *Penn. Canal Co.*, 66 Penn. St., 41; *Chicago, Bur. & Q. R. R. Co.* v. *Att'y Gen.*, 9 Western Jurist, 347. What we have said about the defendant's right to run, and to use fire and steam as the only possible means of running, applies with still greater force to those private rights. The state has contracted with the defendant that it may run; may use fire and steam; may receive an income from running. Mr. Justice STORY, in the *Dartmouth College case*, 4 Wheat., 518, says:—"In my judgment it is perfectly clear that any act of a legislature which takes away any powers or functions vested by its charter in a private corporation or its officers, or which restrains or controls the legitimate exercise of these, or transfers them to other persons without its assent, is a violation of the obligation of that charter." Mr. Justice WASHINGTON, in *Green* v. *Biddle*, 8 Wheat., 84, says:—"The objection to a law on the ground of its impairing the obligation of a contract, can never depend on the extent of the change which the law effects in it. Any deviation from its terms by postponing or accelerating the period of performance, imposing conditions not expressed in the contract, or disposing of those which are, however minute or apparently immaterial in their effect upon the contract or the parties, impairs its obligation." Even the essential right of taxation may be taken away from the state by the charter granted to a railroad, and any subsequent attempt to tax it would be a violation of the contract between the state and the company. *New Jersey* v. *Yard*, 95 U. S. R., 104; *Farrington* v. *Tennessee*, id., 679; *Humphrey* v. *Peques*, 16 Wall.,

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244; *Pacific R. R. Co.* v. *Maguire*, 20 id., 36. A charter granting the exclusive right to a company to do a certain thing, even though it be a matter of public concern, is violated by giving another company the same privilege. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. R., 650; *Boston & Lowell R. R. Co.* v. *Salem & Lowell R. R. Co.*, 2 Gray, 1.

But again, the constitution provides that no citizen shall have his property taken away from him without *due process of law*, or due course of law. Mr. Webster's definition in the Dartmouth college case is, "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society." Cooley, in his Const. Limitations, 357, says:—"There is no rule or principle known to our system under which private property can be taken from one person and transferred to another, for the private use and benefit of such other person, whether by general law or by special enactment." Can the money of the stockholders of the defendant corporation be given by law to one who shall suffer from a fire, the kindling of which they were guilty of no carelessness or malice in causing, and in regard to which, though they may have conclusive evidence that it was caused by an inevitable accident, the statute says in effect that they shall not be permitted to introduce it, and that money said to be taken *by due process of law?* Is there no such thing in law as "*damnum absque injuria?*" Cooley's Const. Lim., 319. To the same effect are the following cases: *Wright* v. *Cradlebaugh*, 3 Nevada, 341; *Taylor* v. *Porter*, 4 Hill, 140, 145; *Ohio & Miss. R. R. Co.* v. *Lackey*, 78 Ill., 55; *McCready* v. *Sexton*, 29 Iowa, 366, 391; *People* v. *Haws*, 37 Barb., 440; *Zeigler* v. *Alabama R. R. Co.*, 58 Ala., 594; *Mayor &c.*, v. *Thorne*, 7 Paige, 261.

These cases cited to show that the statute under consideration is void, because it takes the property of the railroad

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without due process of law, apply with still greater force, we claim, to the last clause of the first section of the fourteenth amendment to the constitution of the United States, which forbids any state to deny to any person within its jurisdiction the "equal protection of the laws." If a private individual cannot be held responsible for accidental fires, all citizens within this state have a right to demand the same protection. *Slaughter House Cases*, 16 Wall., 36; *R. R. Tax Cases*, 13 Fed. Rep., 722; *Southern Pacific R. R. Co.* v. *California*, 118 U. S. R., 109; *Santa Clara County* v. *Southern Pacific R. R. Co.*, id., 394; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 id., 650; *Davis* v. *Minge*, 56 Ala., 121; *Zeigler* v. *Alabama R. R. Co.*, 58 id., 594; *Wantlan* v. *White*, 19 Ind., 470; *White* v. *Flynn*, 23 id., 46; *Groesbeck* v. *Seeley*, 13 Mich., 330, 342; *In re Jacobs*, 98 N. York, 98; *People* v. *Marx*, 99 id., 377; Blackwell on Tax Titles, 100; Cooley's Const. Lim., 368.

J. S. Turrill, for the appellee.

LOOMIS, J. This action is founded on the statute of 1881, (Session Laws of that year, ch. 92,) the first section of which is as follows:—"Where an injury is done to a building or other property of any person or corporation by a fire communicated by a locomotive engine of any railroad corporation, without contributory negligence on the part of the person or corporation entitled to the care and possession of the property injured, the said railroad corporation shall be held responsible in damages to the extent of such injury, to the person or corporation so injured; and any railroad corporation shall have an insurable interest in the property for which it may be so held responsible in damages along its route, and may procure insurance thereon in its own behalf."

The plaintiff was the owner and possessor of land adjoining the defendant's railroad track in the town of New Milford, and certain of his fences, growing trees and herbage thereon were destroyed by fire communicated by the defendant's locomotive engine. There was no contributory negligence

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on the part of the plaintiff, and he brought this suit to recover damages for the injury received and obtained a verdict in his favor in the court below.

The defendant gives six distinct reasons for his appeal to this court, but none of them can avail to set aside the plaintiff's verdict if the statute is valid, and can be construed to cover the property injured. Our discussion therefore will be confined essentially to these two points:—

1. Is the statute a valid one?

The defendant's counsel in his argument presented a powerful arraignment of the statute as denying to railroad corporations the equal protection of the laws, in that it makes them liable for the consequences of a lawful act without any fault or negligence, and as taking away their property without due process of law, in that it deprives them of a legal defense, and as impairing the rights given them by their charters, which authorize the use of fire, steam and locomotive engines, while requiring trains to be run for the benefit of the public, for the unavoidable consequences of which acts the statute makes them liable. The several counts in this indictment seem to be based principally upon this one principle of the common law, that for a lawful, reasonable and careful use of property the owner cannot be made liable.

But this principle is not so wrought into the constitution or into the very idea of property that it cannot be departed from by the legislature where protection to persons or property may require it.

But the defendant also invokes another principle, which it is claimed the statute violates; namely, the equal protection of the law. But to give force to this objection it should appear that a burden is cast on railroad corporations from which all others are exempt under similar circumstances. There can of course be no such inequality if the circumstances are radically different. This consideration seems to have been ignored in the argument for the defendant, or else it was erroneously assumed that the circumstances were

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similar. Some of the cases cited in behalf of the defendant will illustrate the distinction to which we refer.

In *Durkee* v. *City of Janesville*, 28 Wis., 464, an act had been passed providing that the city of Janesville should be holden to pay no costs in any action brought against it to set aside any tax assessment or tax deed or to prevent the collection of any tax. The act was held void, because it exempted one corporation by name from a burden from which no other was exempt under like circumstances, and it enabled the city to recover its own costs if it recovered judgment, but denied it to the other party to the same litigation in case judgment was recovered against the city. So in *Ohio & Miss. R. R. Co.* v. *Lackey*, 78 Ill., 55, an Illinois statute was held unconstitutional and void which made the railroad company liable for all the burial expenses and coroner's fees incurred, where anyone happened to die or be killed in any way in the cars of such railroad. This act attempted to make the company liable though a person might die from a mortal sickness which was upon him when he entered the car, or by his own hand, or in other ways in regard to which the company would have no agency whatever. The distinction between such a case and the one at bar is too manifest to require further comment.

The only case cited which supports the defendant's position in the least, is the case of *Zeigler* v. *South Alabama R. R. Co.*, 58 Ala., 594, where a statute of that state was held unconstitutional which declared that railroad corporations should be liable and make compensation to the owner for all damage to live stock caused by their locomotives or trains, without any reference to the skill or diligence with which the train was operated, unless there was some contributory negligence on the part of the owner other than permitting the stock to run at large. There might be a difference of opinion in different jurisdictions as to the validity of such legislation. But assuming, for the sake of argument, that the decision was right, there is an important distinction between the two cases. There the animals injured were where they ought not to have been—trespassers

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obstructing the defendant's railroad track, directly exposing the defendant's property to hazard and loss; here, the property injured was where it ought to have been, on the plaintiff's own premises, occasioning no hazard to the railroad company. There, too, it was possible for the owner to have kept his stock on his own premises where they would have been safe; but here it was not possible for the plaintiff to avoid the loss that he suffered by any act of his own.

It is a mistake to suppose that it necessarily transcends the limits of valid legislation, or violates the principle of a just equality before the law, if the one using extra-hazardous materials or instrumentalities, which put in jeopardy a neighbor's property, is made to bear the risk and pay the loss thereby occasioned, if there is no fault on the part of the owner of the property, even though negligence in the other party cannot be proved. If the statute should make the owner of a vicious domestic animal liable for the damage it might occasion, without proof of *scienter*, or knowledge of its vicious propensity, as required by the common law, we do not think the act would be void. Such a statute would only be a new application of an ancient common law principle, that where one of two innocent persons must suffer loss from an act done, it is just that it should fall on the one who caused the loss rather than upon the other who had no agency in producing it and could not by any means have avoided it.

An ancient statute of this state, which has been very often enforced, makes the owner of dogs, or if the owner is a minor or an apprentice, the parent, guardian or master, liable for all the damage done by them, irrespective of any fault or negligence on the part of the owner. Gen. Statutes, p. 267, sec. 5. Another statute (Gen. Statutes, p. 489, sec. 6,) makes one who kindles a fire on his own or any land, liable for all damage it may do if it runs upon the land of another, and proof of negligence is not required. We are not aware that the validity of any of these statutes has been called in question. The dangerous character of the thing used is always to be considered in determining the

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validity of statutory regulations fixing the liability of parties so using it. Fire has always been subject to arbitrary regulations, and the common law of England was more severe and arbitrary on the subject than any statute. In Rolle's Abridgement (Action on the Case, *B*, title *Fire*,) it is said: "If my fire by misfortune burns the goods of another man he shall have his action on the case against me. If a fire breaks out suddenly in my house, I not knowing it, and it burns my goods and also my neighbor's house, he shall have his action on the case against me. So if the fire is caused by a servant, or a guest, or any person who entered the house with my consent. But otherwise if it is caused by a stranger who enters the house against my will."

It ought perhaps to be stated that this has not been adopted as the common law rule in the United States. In most states, we presume, there are arbitrary police regulations concerning the transportation or deposit of gun powder. Would the constitutionality of a statute be questioned that should make one who deposits large quantities of gunpowder or dynamite on his own premises, in dangerous proximity to the property of another, liable for any loss thereby occasioned to the latter without proof of negligence?

There is no force in the objection that the statute under consideration unjustly selects only railroad corporations to bear the burden of an extraordinary risk. It is confined to them because they alone have the privilege of taking a narrow strip of land from each owner, without his consent, along the route selected for the track, and of traversing the same at all hours of the day and night, and at all seasons whether wet or dry, with locomotive engines that scatter fire along the margin of the land not taken, thereby subjecting all combustible property to extraordinary hazard of loss, and that too for the sole profit of the corporation. The argument for the defendant is fallacious in erroneously assuming that the statute denies to the defendant a good defense which at common law all others would have under similar circumstances.

In *Jones* v. *Festiniog Railway Co.*, Law Rep., 3 Queen's

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Bench, 733, in a suit against an unchartered railway company, it was proved by the defendants that all reasonable precautions had been taken to prevent the emission of sparks from a locomotive engine used by them. But it was held, nevertheless, that they were liable on the ground that the locomotive was a dangerous engine to be brought and used by the defendants even upon their own premises, and that they must bear the consequences in case of damage to others. Wharton, in his treatise on Negligence, § 868, lays down the same doctrine as to the liability of unchartered companies at common law.

How then can it transcend the limits of just and valid legislation to attach to chartered railroad companies, for doing the same act, under the same circumstances, the same liability, where the charter, as in this case, is an open one, expressly made subject to all general laws?

In *Hooksett* v. *Concord R. R. Co.*, 38 N. Hamp., 242, where the construction of a similar statute was under consideration, EASTMAN, J., in giving the opinion of the court, used this suggestive language: "The extraordinary use of the element of fire by which the property of individuals situated along the lines of railroads becomes endangered beyond the usual and ordinary hazard to which it is exposed, no doubt caused the legislature to interfere. * * * By this exposure an increased risk of loss of property is caused. The risk must be borne by some one; and if the property is insured, a larger premium must be paid. Upon whom shall this risk fall and this burden rest? Upon the owners of the property, or upon the corporations who make this extraordinary use of the fire?"

The only answer, it seems to us, which a due sense of justice can dictate, is the one given in that case—that the responsibility and burden should rest on the corporations. No other mode of adjusting this risk can be suggested so just towards all parties as this. Before the statute, upon taking land for railroad purposes, it was possible upon the appraisal to include something for the increased risk to buildings on the land not taken, confining it however to

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the diminished value of the remaining property caused by the risk. Pierce on Railroads, 215; *In re Utica &c. R. R. Co.*, 56 Barb., 456; *Wilm. & Reading R. R. Co.* v. *Stauffer*, 60 Penn. St., 374. But it would seem extremely difficult to make any just appraisal even on this limited basis; and it could have no application to buildings afterwards placed on the land, nor to buildings which might be destroyed by fire from this source on land more remote from the railroad, no part of which was taken or appraised, nor to any personal property whatever. And it would of course be utterly impracticable to assess beforehand damages for property that might be destroyed in the future.

And here we may suggest that the statute under consideration, though often characterized as arbitrary, is really based on a principle quite similar to that which allows an assessment in favor of the land-owner founded on the risk of fire from the same source. In both cases it is assumed that there is a risk and that it is justly placed on the corporation. The statute carefully guards the interests of the corporations by giving them an insurable interest in all the property for which they may be made liable, and section fourth provides that no appraisal of damages for land taken or injured by the location or construction of a railroad shall hereafter include any compensation for the increased risk to any building outside of such location, on account of sparks from the locomotive engines on such railroad.

This last provision suggests that the statute is not quite so equitable in its application to the defendant company, which established its railroad before the statute was enacted, as to corporations afterwards formed. It can of course derive no benefit from this provision except as to land it may have taken since the enactment of the statute. The record is silent as to when the land in question was taken or whether or not anything was at the time included or claimed as damages on account of the risk from fire to the property now owned by the plaintiff. No question founded on these facts was made in the court below, and of course is not to be entertained in this court for the purposes of decision.

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We may however remark as to the general provisions of the statute, that if they are valid as to railroads to be established, they may be equally so as to railroads already in existence. The defendant's charter not only contains an explicit reservation for the legislature to alter, amend or repeal it, but makes it also in terms subject to all general laws the legislature may thereafter pass. And as to any defense suggested by the assumption that an appraisal of the general risk from fire may have been made to the plaintiff originally or his grantor, while we reserve a final decision of the question for the case in which it properly arises, we may here suggest that where the original appraisal only gave damages to the extent that the property was diminished in value in consequence of the risk, and the same property is afterwards destroyed, the damages to be recovered under the statute would of course only represent the remaining or diminished value, so that the statute cannot properly be charged with allowing double damages for the same thing.

In other jurisdictions the original appraisal and the indemnity provided by the statute have not been considered so inconsistent as that both might not exist together. *Pierce* v. *Worcester & Nashua R. R. Co.*, 105 Mass., 199; *Bangor &c. R. R. Co.* v. *McCombe*, 60 Maine, 290; *Adden* v. *White Mt. R. R. Co.*, 55 N. Hamp., 413; *Lyman* v. *Boston & Wor. R. R. Co.*, 4 Cush., 288.

In further confirmation of our reasoning as to the validity of the statute we make the following citations:—

Redfield, in his treatise on the Law of Railways in the first edition, page 360, published in 1857, alluding to the statutes similar to the one under consideration, said:—"We cannot forbear to add that the interference of the legislatures upon this subject in many of the American states, seems to us an indication of the public sense in favor of placing the risk in such cases upon the party in whose power it lies most to prevent such injuries occurring." In Pierce on Railroads, p. 444, it is said:—"Statutes have been enacted making the company liable even in the absence

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of negligence, for injuries to private property caused by fire communicated by its engines, which in effect make it an insurer in case of such injury. These statutes are constitutional, even when applied to pre-existing corporations." In 2 Wood's Railway Law, sec. 331, it is said:—"In some states railway companies are made liable, irrespective of the question of negligence, for fires set by their engines, and as a compensation for this extraordinary liability are given an insurable interest in such property; and these statutes have been held constitutional, even in their application to corporations established before the statute was passed, and although damages for the risk of fire were considered when the land was taken." In the well-considered case of *Rodemacher* v. *Milwaukee & St. Paul R. R. Co.*, 41 Iowa, 297, the court discussed at length the constitutionality of a provision of the code of that state, that "any corporation operating a railway shall be liable for all damages by fire that is set out or caused by the operating of any such railway," and fully sustained the act, even as applicable to pre-existing railways.

The counsel for the defendant in the case at bar sought to impair the force of the decision by reason of the fact that in Iowa the code had entirely supplanted the common law. The distinction seems to us not well taken. The legislature surely could acquire no additional power by exercising its sovereign will twice, first in abolishing the common law, and then in enacting the statute. And the objection as to inequality before the law so persistently urged against our statute applies with equal force to the provision of the Iowa code, for that applies exclusively to railway corporations, the same as our statute.

In *Lyman* v. *Boston & Worcester R. R. Co.*, 4 Cush., 290, it was held that a similar statute in Massachusetts was applicable to railroads established before as well as since its passage, and that it extended as well to estates a part of which is conveyed by the owner as to those of which a part is taken by authority of law. The constitutionality of the statute was not discussed, but the principles stated as constituting its

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foundation directly apply. DEWEY, J., in delivering the opinion on p. 291, said:—"We consider this one of those remedial acts passed for the more effectual protection of property against the hazards to which it has become subject by the introduction of the locomotive engine. The right to use the parcel of land appropriated to a railroad does not deprive the legislature of the power to enact such regulations, and impose such liabilities for injuries suffered from the mode of using the road, as the occasion and circumstances may reasonably justify." This reasoning clearly makes the legislation in question a legitimate exercise of the police power of the state. See also the comments of SHAW, C. J., in delivering the opinion in *Hart* v. *Western R. R. Corp.*, 13 Met., 105, and of BIGELOW, C. J., in *Ross* v. *Boston & Wor. R. R. Co.*, 6 Allen, 90.

2. The remaining question relates to the construction of the statute. Do the words "other property" embrace fences, growing trees and herbage, the property injured in this case?

The entire description in the statute is "building or other property," and the defendant invokes the benefit of the principle of interpretation known as "*noscitur a sociis*," that is, that the particular word "building," being followed by the general words "or other property," the latter only includes subjects "*ejusdem generis*."

This rule has been often recognized and applied, but we think its application to this case would work injustice and tend to defeat in part the object of the statute. The statute is clearly remedial, and ought to be construed liberally to effectuate the intention of the legislature, which was to give the owners of property along the route of the railroad indemnity for the loss of all property that might reasonably be said to be exposed to danger from the source referred to. And besides, the above maxim would be exceedingly difficult of application unless the words "other property" should be entirely rejected. The hay, grain, farming tools and live stock in a barn, the goods in a store, the personal property in a house or factory, would hardly be *ejusdem*

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generis with a "building;" and can it be possible that the legislature intended only a partial indemnity for the building alone, overlooking the greater value of property within and without?

Then as to growing trees, the legislature would have in view the fact that railroads traverse the forests as well as the open fields, and that, by reason of the annual deposit of dry leaves, the former were peculiarly exposed to danger from fire; and again we ask—can it be supposed that in framing a general act of indemnity the owners of this species of property were not to be included?

There is some disagreement as to the construction of this language as used in similar statutes in other jurisdictions, but in no instance has such property as was injured in this case been excluded. In the state of Maine it is extended to all property having a permanent location along the route, such as buildings and their contents, fences, trees and shrubbery, but it is held not to extend to a pile of cedar posts temporarily deposited near the railroad. *Chapman* v. *Atlantic & St. Lawrence R. R. Co.*, 37 Maine, 92; *Pratt* v. *Same*, 42 id., 579.

But it is said that a proper interpretation of the language we have been considering cannot be reached without first determining whether the railroad company could have procured insurance on the property injured. The argument in brief is, that, as the statute gives a railroad company an insurable interest in all the property for which it may be made liable, it cannot be made liable where no insurance could have been obtained. Hence in this case a witness was offered to testify that he knew of no insurance company that would insure fences, growing trees and herbage. This testimony was rejected, and this is made a distinct ground of error; but, as we stated at the outset, it depends upon the construction of the statute and requires no separate consideration.

The statute would be extremely uncertain if its enforcement depended on the ability of the railroad company to obtain insurance. The withdrawal of insurance companies

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from issuing policies in a particular state, owing to unfriendly legislation or an alteration of their charters, might in effect nullify the law as to railroads in that state.

Undoubtedly the statute confers an insurable interest coextensive with the property for which the railroad company may be responsible, and gives liberty to obtain such insurance in its own name with any other party who is able and willing to contract relative to the subject matter. If there was an inherent impossibility of obtaining insurance upon any particular species of property, the argument would have more force, but there is no such impossibility. It is a matter of common information that the scope and subject matters of insurance are being extended constantly in all directions, so that now there are insurance companies that issue policies of insurance against a great variety of hazards, both physical and moral. The reason for conferring this insurable interest upon the railroad companies will further illustrate its meaning and effect. Before the statute the risk from fire was upon the owner of the property, and he alone had an insurable interest, but as the statute shifted the risk from the owner to the railroad company, it also, as a matter of justice and equity, conferred upon the latter the insurable interest, with the right to obtain in its own name such insurance. The corporation now has the same capacity to contract for insurance that the owner had before. All that is needed to make a valid contract is a corresponding capacity on the part of some other corporation or individual. The statute however does not concern itself with the last named party.

In Massachusetts a statute containing the same language as to the description of the property and insurance, has been construed to include all kinds of combustible property, real and personal, even where the corporation had no knowledge or reasonable cause to believe that there was property situated where it was exposed to injury. *Ross* v. *Boston & Worcester R. R. Co.*, 6 Allen, 87. In *Trask* v. *Hartford & New Haven R. R. Co.*, 16 Gray, 71, a part of the property injured consisted of a fence, and HOAR, J., in delivering

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the opinion of the court, said:—"A fence is not so commonly insured probably because its value and risk do not make insurance desirable; but it certainly can be insured. Whether a just construction of the statute of 1840 would require any limitation of the extremely comprehensive language used to define the liability of railroad corporations created by it, this case gives us no occasion to consider. We certainly do not intend to intimate, by putting our decision upon the ground above stated, that the property must be insurable, in the ordinary or commercial sense of that word, to make the corporation liable." In the state of Maine the clause in their statute relative to insurance has been applied in the construction of the statute so as to restrict its operation to such property, real or personal, as has some permanent location along the route of the railroad, because, as they say, it would not otherwise be practicable to obtain insurance, but as we have seen the courts of that state find no difficulty at all in extending the statute to fences and growing trees. *Chapman* v. *R. R. Co.*, and *Pratt* v. *R. R. Co.*, before referred to.

For the foregoing reasons we conclude that there was no error in the judgment complained of.

In this opinion the other judges concurred.

FREDERICK W. WARNER *vs.* WILLIAM L. WILLARD.

Hartford District, Oct. T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

A testator by the first clause of his will gave his wife a life use of all his real estate, and after giving sundry pecuniary legacies to his children, made the following residuary bequest:—"All the residue of my estate of whatever kind I give to my wife." No other disposition was made of the fee of the real estate. Held that under this clause the widow took the fee of the real estate of which by the first clause she took only a life use.

There is a presumption against the intention of a testator to leave any part of his estate intestate.

[Argued November 11th—decided November 30th, 1886.]

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AMICABLE SUBMISSION to the Superior Court in Hartford County of a question as to the construction of a will; reserved for the advice of this court. The case is fully stated in the opinion.

E. D. Robbins, for the plaintiff.

C. M. Joslyn, for the defendant.

GRANGER, J. This is an amicable suit to obtain a construction of the will of William Willard. The first clause of the will is as follows:—

"I give and bequeath to my beloved and faithful wife, Jane G. Willard, the use and improvement of the real estate of which I may die possessed, during her natural life. I also give to her, the said Jane G., all my household furniture of every name and kind."

The testator then gives to one daughter $2,500; to another $2,000; to his son $2,000 and his gold watch, gold headed cane and wardrobe; and to an adopted son $1,000. Then follows the sixth clause of the will, which is as follows:—

"All the residue of my estate of whatever name or kind, after payment of my debts and funeral charges, I give and bequeath to my wife, Jane G. Willard."

The residue of the estate of course includes the fee of the real estate, of which only the life use had been given by the first clause and which had not been disposed of by any other clause of the will, unless from the whole will we can gather the intent of the testator not to include it.

The defendant contends that, taking this clause in connection with the first, it is evident that the testator intended to give his wife only a life use of the real estate and that this gift of the residue must therefore be regarded as intended to embrace only the personal estate. The facts are found with regard to the amount of the testator's personal and real estate, but they throw no light upon this question.

It is difficult to discover any reason why the testator

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should have given his wife a life estate, only, in the first clause of the will, and the fee of the same real estate by the residuary clause. But the question for us to consider is not why he did what he did, but simply what has he in fact done. We must look for his intention only in the will itself, and in that he has expressed himself in language free from all ambiguity. He not only speaks of "all the residue," but of "all the residue of my estate *of whatever name or kind.*" It would hardly be possible for language to be more comprehensive.

Were the matter left in any doubt, there is a further consideration that would be decisive. If the fee of the real estate does not pass by the residuary clause, then it is not disposed of, and becomes intestate estate. But there is always a presumption that when a party makes a will he intends to dispose of all his property, and not to die intestate as to any part of it. "Every intendment is to be made against holding a man to be intestate, who sits down to dispose of the residue of his property." *Booth* v. *Booth*, 4 Ves., 407. To the same effect are *Higgins* v. *Dwen*, 100 Ill., 554, 556; *Smith* v. *Smith*, 17 Gratt., 268; *Irwin* v. *Zane*, 15 W. Virg., 646.

Our conclusion is that the widow took the fee of the real estate, and the Superior Court is so advised.

In this opinion the other judges concurred.

VALENTINE B. CHAMBERLAIN, TREASURER OF THE STATE, *vs.* THE CONNECTICUT CENTRAL RAILROAD COMPANY.

Hartford District, Oct. T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

The Connecticut Central Railroad Company, in 1875, under authority of its charter, made a mortgage to the state treasurer of all its estate present and to be acquired, to secure an issue of coupon bonds payable

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in 1895, but to become due at the election of the holder six months after default in the payment of the interest coupons. The New York & New England Railroad Company, which owned a connecting road, in 1880 took a lease of the road and all its property, the lease to run until 1895, and in place of paying rent the lessee was to apply the net income from the use of the road to the payment of the interest coupons. Soon after taking the lease the lessee became the owner of all the bonds. Upon a suit brought by the state treasurer, as trustee for the bondholders, for a foreclosure of the mortgage, upon an alleged default in the payment of the interest coupons, it was held—1. That there had been no default if the net receipts from the road had been sufficient to pay the interest coupons—2. That in accounting for these receipts the New York & New England Railroad Company was bound to account for and apply the net receipts from this road by itself, and had no right to pro-rate them with its receipts upon its own road upon the entire mileage.

And held that the matter was not affected by the lease, since by it the lessee had agreed to do only what as a mortgagee in possession it would have been bound to do.

Also that it did not affect the matter that the lease conveyed all right that the lessor had or might acquire in certain terminal advantages and connecting roads, since the mortgage itself covered future acquired rights, and the lease itself provided for the deducting of the expenses incurred on account of those connections and advantages from the gross earnings of the leased road.

The foreclosure suit was brought by the state treasurer as trustee for the bondholders at the request and for the benefit of the New York & New England Railroad Company, and that company was brought in as a co-defendant. Held that, as that company held all the bonds, it was to be regarded as really the plaintiff, and that the whole question of accounting was to be treated as if it was so.

And the suit having been brought at its request and for its benefit, the company did not stand in a position to take advantage of a provision of the lease for an arbitration in case of any disagreement between the parties.

But it is well settled that such an agreement to submit to arbitration will not be held valid where its effect is to oust the court of jurisdiction.

A mortgagee in possession, whether the possession has been acquired by actual entry or by attornment of tenants, is bound to apply the rents and profits in discharge of the debt and can be compelled to account for them.

And an equitable mortgagee stands in the same position, as does also an assignee of the mortgagee.

[Argued October 8th—decided December 17th, 1886.]

SUIT brought by the plaintiff, as treasurer of the state, and *ex officio* trustee for the holders of certain coupon bonds

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of the Connecticut Central Railroad Company, to foreclose a mortgage of the property of the railroad company made to a former treasurer of the state as such trustee. The suit was brought to the Superior Court in Hartford County. After the suit came into court the New York & New England Railroad Company, which owned all the mortgage bonds, was brought in as a party respondent. The case was heard, on a demurrer to the defendant's answer, before *Andrews, J.* Demurrer sustained and a decree of foreclosure passed. Appeal by the defendant. The case will be sufficiently understood from the opinion.

L. Sperry, for the appellant.

1. On July 29th, 1875, the Connecticut Central Railroad Company made a mortgage to the treasurer of the state as trustee for the benefit of its bondholders, and issued under it $325,000 of bonds. This mortgage conveyed to the treasurer as trustee all the estate and franchises of the company present and prospective. This suit is brought for a foreclosure of the mortgage, by the state treasurer. He is a nominal party merely, holding the legal title for the benefit of the bondholders. As a question of equity pleading both the trustee and the *cestuis que trust* are necessary parties. *Goddard* v. *Prentice*, 17 Conn., 555; Daniels' Chancery Pl. & Prac., (4th ed.,) 220, and note, 221, 259. It is undoubtedly true, under the terms of the mortgage, and under the Practice Act, that the trustee could maintain an action in his own name. It is also undoubtedly true that if the trustee refuses to act, a single bondholder may maintain an action in his own name for his own benefit and the benefit of others who may wish to join with him. *Alexander* v. *Central Railroad Co.*, 3 Dill., 487; *Sage* v. *The Same*, 93 U. S. R., 412. If it be true that the *cestui que trust* has all his common law rights of action preserved to him, the terms of the mortgage or a code practice to the contrary notwithstanding, it ought to be equally true that the *cestui que trust* will be liable to all equitable common law defenses.

2. In a mortgage obligation the security is incidental to

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the debt. An assignment of the debt conveys the security with it. If a mortgagee assign the debt without transferring the security he retains a naked legal title only. He becomes a trustee for the benefit of the holder of the debt. He cannot release the security without rendering himself personally liable to the holder of the debt. The holder of the debt is the only actual party in interest. *Ely* v. *Stannard*, 46 Conn., 124. The New York & New England Railroad Co. have held all the mortgage bonds since about the first of June, 1880, and now hold them all. It appears therefore that this suit of foreclosure is instituted solely for the benefit of that company. That company is a party to the record, and it is the only party having any actual interest as a plaintiff. And the Connecticut Central is the only party having any interest as a defendant. *Merwin* v. *Richardson*, 52 Conn., 223. A suit in the name of a plaintiff having a legal title only is ordinarily open to all of the defenses which could be urged against the actual party in interest.

3. The New York & New England Railroad Company have been in possession of all the mortgaged property since about the first of June, 1880. During all that time they have also been the owners and holders of all the mortgaged bonds. It follows therefore that during all that time they have been mortgagees in possession. It is well-established law in this state that a mortgagee in possession is bound to account in a court of equity for rents and profits. *Kellogg* v. *Rockwell*, 19 Conn., 446; *Harrison* v. *Wyse*, 24 id., 1. They went into possession under a lease. They were therefore lessees in possession. The leasehold property and the mortgage property are identical. They have held the mortgage as long as they have held the lease. In other words, the company present a dual character—lessees and mortgagees. The lessee character was created by agreement of parties. The acquirement of the mortgage bonds by them was a matter over which the Connecticut Central had no control. They come into a court of equity and assert their rights as mortgagees. Upon such a declaration they ought

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to be governed in that court by the law applicable to mortgagees. Although both equitable and legal title may be acquired by the same person, a court of equity will not allow the two titles to merge as long as the ends of justice require that they should be kept separate. *Bassett* v. *Mason*, 18 Conn., 137; *Goodwin* v. *Keney*, 47 id., 486. This court has already decided that a mortgagee in possession is still bound to account to any person having an interest in the property, notwithstanding he may also hold possession under the mortgagor by an assignment of the equity. *Harrison* v. *Wyse*, 24 Conn., 1. And he is bound to account even though he enter into possession under an agreement not to account. *Anderson* v. *Lauterman*, 27 Ohio St., 104; *Moore* v. *Degraw*, 1 Halst. Ch., 346. This is the case of a lessee acquiring the mortgage debt while in possession under a lease which reserves no stated rent, but provides in terms that the lessee shall apply the entire income to certain uses, and among the rest the payment of interest. The New York & New England Railroad Company, as lessees and mortgagees in possession, have received the entire income of the mortgaged property. The income so received is more than sufficient to pay the alleged over-due interest, over and above all other charges. They have received more than $500,000. In round numbers, the interest amounts to one fourth of the income. No application of income to the payment of interest has ever been made. No account has ever been rendered by them either as lessees or mortgagees. They come into a court of equity and assert their rights as mortgagees. The defendant asks for an account. Will the court grant it?

4. The plaintiff states by way of demurrer several reasons why an account should not be given. Let us consider those reasons in their order.

(1.) That they are in possession under a lease which covers rights not covered by the mortgage, and that the lease is a separate contract. These statements are true only in part. The leasehold estate and the mortgage estate are identical. The mortgage conveyed all lands, franchises,

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"materials, privileges, appurtenances, and property, real and personal, which now belongs or hereafter may be acquired by said company." It is difficult to see how a subsequent lease could convey any more than that. As lessor and lessee the interest of the two parties was the same—to preserve the equity. When the lessee became a mortgagee, which was not contemplated by the lease, the interest of the parties was adverse. It then became of interest to the New York & New England Company to conceal the earnings, or in some other way to depreciate the value of the property, so as to acquire the equity on the mortgage. And the lease is not a separate contract in any such sense as the plaintiff claims. The lease is subsequent to the mortgage, but it relates to the same subject matter. The mortgage relates to certain property, upon which are predicated certain bonds with interest coupons; the lease relates to the same property, contemplates a large income, which has in fact been realized, and provides for the application of the income to the payment of interest.

(2.) That the lease provides for arbitration and that no arbitration has been had. It is true that the lease provides for arbitration as a final settlement of all differences which may arise. The effect of that provision of the lease, if it has any binding effect, is to oust the court of jurisdiction, and it is therefore void as against public policy. It is hardly worth while to multiply authorities on that point. *Pearl* v. *Harris*, 121 Mass., 390; *Tobey* v. *County of Bristol*, 3 Story, 800; *Home Ins. Co.* v. *Morse*, 87 U. S. R., 445.

(3.) That the cross-complaint is in the nature of a bill of discovery, but does not contain averments to justify its maintenance. The cross-complaint alleges that the New York & New England Railroad Company are in possession of more than sufficient money, derived from the Connecticut Central, to pay the interest; that the money accrued under the exclusive management of the New York & New England; that when received it ought to be applied to certain uses; that it is mingled with their own money, and is received in a fiduciary capacity; that all books, vouchers

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and accounts are in their exclusive possession and control; and that the Connecticut Central is unable to establish its claim except by an accounting. It is clearly within the rule in equity. It asks for an account so far forth as the same may be necessary to show that the alleged over-due interest has in fact been paid, and it counts upon "matter already in litigation" between the same parties. Story Eq. Pl., (9th ed.,) §§ 398, 399. A suit to foreclose a mortgage given to secure a bond, wherein judgment is asked against the obligor for any deficiency, is subject to a counterclaim of any other cause of action on contract which the obligor had against the plaintiff at the time of the commencement of the suit. *Hunt* v. *Chapman*, 51 N. York, 555; *Allen* v. *Maddox*, 40 Iowa, 124; *Goodwin* v. *Keney*, 49 Conn., 563.

(4.) That the cross-complaint attempts to shift the burden of proof. But in a court of equity both parties are reciprocally required to furnish and use such evidence as the court may need. The plaintiff must carry the burden of establishing his bill; but that being done, the defendant must carry the burden of furnishing to the court such evidence, pertinent to the issue, as lies peculiarly within his knowledge.

(5.) That the bonds and coupons being negotiable are liable to be transferred. It is sufficient for the purpose of this case to know that they have not been transferred. The judgment appealed from shows that. The cross-complaint claims that they have been paid. If that be true the subsequent transfer of the over-due coupons would not affect the defense. And this suit has to do with over-due coupons only.

(6.) That the lease contemplates the operation of an entire road between Hartford and Springfield, and that collateral issues are thereby brought into the case. The lease does not in terms pretend to convey anything in addition to what had been previously conveyed by the mortgage, as before stated. The operated road has been more extended than the leased road. But, as alleged in the cross-complaint, it has all been operated on account of the Connecticut Cen-

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tral, producing a gross income. And it is conceded in it that the sums paid for track rentals and terminal facilities are proper charges against that gross income in determining the net income applicable to interest and dividends. It is no defense to a bill in equity praying for an account of a particular stage line, to say that the line in question has been operated as part of a more extended line, and that the accounts are in the hands of agents and have never been adjusted. *Newton* v. *Thayer*, 17 Pick., 129. It is no defense that the accounts are intermingled with those of third parties. *Butler* v. *Cromwell Iron Co.*, 22 Conn., 359.

S. E. Baldwin, for the appellee.

1. This suit is not the place for an accounting under the lease. This is a simple action for a foreclosure of certain real estate in Connecticut, brought by the mortgagee, who holds in trust for those who may, from time to time, be owners of certain negotiable bonds and coupons. They may belong to *A* to-day and to *B* to-morrow, and the plaintiff's accountability to the owners will change as often. The present ownership of these bonds is in a railroad company, which is also in possession of the mortgaged property, and of certain other property in Massachusetts, under a lease made five years after the mortgage. The lease contains full provisions for the determination of all rights under it. It contemplates the operation of the Connecticut part of the road, which was all that was mortgaged, and the Massachusetts part of the road, as an entirety. The rent payable to the Springfield and New London road for the Massachusetts end of the line, is to be taken out of the earnings of the entire line from Springfield to Hartford, and the same is true of the rent for the use of the Hartford depot and the tracks from East Hartford to Hartford, and of the Rockville depot. The plaintiff has nothing to do with the lease. His title is paramount to it. The equitable rights of the bond-holders are paramount to it, and are expressly reserved in the covenants of the lease. The lease requires no accounting except to the state. In lieu of any

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rendition of accounts to the lessor, it provides that the lessor may itself have free access at all times to the lessee's books, papers and accounts relating in any manner to the operation of the leased property, and fully examine the same. Should the lessee fail to state or apply the net earnings as required by the lease, the lessor may, after sixty days' notice, re-enter, and if the parties "differ as to whether any act or payment ought to be done or made under the provisions of this lease, then such matter of difference shall be submitted to and fairly decided by such person as arbitrator as the parties may agree upon," or a judge of this court appoint. The Connecticut Central Railroad Company has exercised its right under the lease of inspecting the books of account of the New York & New England Railroad Company. It did this through a committee, in 1884, and does not claim that it has ever given notice that it claimed any default under the lease, or asked to have any matter of difference submitted to arbitration. The answer and cross-complaint are attempts to substitute for an investigation as to the execution of one contract between *A* and *B*, an investigation into the execution of another contract between *B* and *C*. Suppose that a testamentary trustee for a married woman invests in a mortgage on one of a block of two houses; that the owner afterwards turns the houses into one, and leases them as such to the married woman; and that she fails to pay the rent reserved. If her trustee forecloses the mortgage, can the mortgagor call for an accounting under the lease? And still less is an account demandable here, where the mortgage security is a negotiable one, which is designed to pass from hand to hand in the market like money. It is certainly no answer to the plaintiff's complaint that his *cestuis que trust* owe an independent and unliquidated claim and ought to render an account of it. And so far as the cross-complaint is concerned, it can have no wider scope than a cross-bill in equity, but must be confined to "matter in question in the original complaint," even if it makes new parties. Practice Book, p. 15, sec. 8; id. p. 18, sec. 1; Public Acts of 1877,

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p. 170, chap. 45; Story Eq. Pleadings, 401; *Harrall* v. *Leverty*, 50 Conn., 46, 63. An accounting for an unliquidated demand for breach of covenant under a collateral contract, embracing different property, executed subsequently to the mortgage, and to which the plaintiff is no party, is not a matter brought in question by the complaint. An accounting would be useless unless it can be made the basis of a set-off. But there can be no set-off save of mutual debts. Gen. Statutes, 424, sec. 13; Practice Book, p. 2, sec. 5; *Gaylord* v. *Couch*, 5 Day, 223; *Fitch* v. *Gates*, 39 Conn., 369; *Meeker* v. *Thompson*, 43 id., 80. And no set-off of unliquidated claims. Waterman on Set-off, §§ 297, 298; *Jennings* v. *Webster*, 8 Paige, 503; *Knox* v. *Protection Ins. Co.*, 9 Conn., 433; *New Haven Pipe Co.* v. *Work*, 44 id., 230, 237; *Drew* v. *Towle*, 27 N. Hamp., 412; *Duncan* v. *Lyon*, 3 Johns. Ch., 357. In *Goodwin* v. *Keny*, 49 Conn., 563, there was an admitted and definite claim of the sole owner of the equity against the sole plaintiff, who was insolvent.

2. Even if an account could be demanded in this action, the account in fact demanded was plainly unreasonable. It asks for every item, explained in minute detail, of the business of four years, over a railroad in two states. The lease does not require any such account to be kept. No railroad's books contain such entries. In order to avoid the necessity of any such explanations, the lease guarantees free access to the lessee's original books, papers, way-bills, contracts, &c. The lessee accepted the lease, knowing that it was under this liability and no other. It cannot be supposed that under these circumstances it has the means to state such an interminable account as is called for, even if it were bound to render any statement at all. And the account asked for is of the whole line from Springfield to Hartford, as an entirety, though the mortgage covers only a separate part of it. The lessee has had ample opportunity since 1880 to re-enter, or ask an arbitration, or bring a bill to redeem, setting up the receipt of net earnings under the lease as payment. Either one of these methods would be

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the proper way to test the claim that, although the entire road from Hartford to Springfield is to be run as one line, and the operating expenses and rentals for each end charged in gross against the earnings from the whole, still a high "local" rate should be charged on all freight transported to or from any station on the Connecticut Central road from or to any station on the New York & New England road, instead of a *pro rata* freight, which the lessee claims the right under the lease to charge. This is a device to delay a foreclosure, which was not brought until nearly six years after a default. When the New York & New England road bought their bonds, they bore three defaulted coupons, of April 1st, 1879, October 1st, 1879, and April 1st, 1880. It is not surprising that the Connecticut Central continued in default under the lease, as it was before the lease; and an account for the time from 1880 to 1885 would have no more relevancy to this case, than an account for the time from 1878 to 1880.

LOOMIS, J. This is a complaint in the name of the state treasurer against the Connecticut Central Railroad Company for the foreclosure of a mortgage executed by the latter upon all their estate, present and prospective, to secure an intended issue of bonds, which were afterwards in fact issued to the amount of $325,000, payable in 1895, or at the election of the holder at any earlier time after six months default on the interest coupons annexed to the bonds. The interest was paid to October 1st, 1878, and coupons to the amount of $136,500 have since matured, and are in default, unless the defence set up is true and sufficient.

Ordinarily the contention in such an action is reduced to narrow limits and can easily be determined, but here the proceedings are much more complicated.

The New York & New England Railroad Company, which, during the pendency of the action, was upon application of the plaintiff made a co-defendant, are the owners and holders of all the bonds and coupons constituting the mortgage debt, and this suit was instituted by the plaintiff

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as treasurer of the state, by request of the New York & New England Railroad Company for their sole benefit; and the latter, since June 1st, 1880, have had exclusive possession of all the property mortgaged, under an agreement contained in a lease, reserving no rent but stipulating that the net income derived from the use of the property should be applied to the payment of the identical coupons which in this suit are alleged to be due and unpaid.

Upon these facts the Connecticut Central Railroad Company insist that the real plaintiff in the suit is the New York & New England Railroad Company, and upon this assumption the answer and cross-complaint, as contained in the record, were filed, which in substance contain the single defense, that the New York & New England Railroad Company is bound to render an account in this action of its receipts and expenses while in possession since June 1st, 1880, and that on a fair and just accounting it would appear that the net earnings of the property have been enough to pay, and in equity have paid, all the defaulted coupons upon which the complaint for foreclosure is based. On demurrer to the answer and cross-complaint the trial court rendered judgment for the plaintiff and passed an absolute decree of foreclosure.

The main question presented by the appeal for review in this court, is, whether the defense referred to was sufficient. We think it was, and that the technical objections upon which the demurrer was based ought not to prevail.

The objections seem to assume that the proposed defense could not be entertained without improperly shifting both the parties and the issues in the suit. But reference to the well-settled principles of equity, applicable to the subject matter, will show that these objections have no foundation. It is true that the mortgage sought to be foreclosed was to the treasurer of the state, (as a mere trustee,) yet in effect it was a contract between the Connecticut Central Railroad Company and the holders of the bonds, and in equity the case stands precisely as it would had the present bond-

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holders been named in the deed as mortgagees. Jones on Railroad Securities, § 68; *Butler* v. *Rahm*, 46 Md., 541.

It is difficult to conceive how the New York & New England Railroad Company could have been regarded as a stranger to the suit, in view especially of the distinct admission contained in the pleadings, that it owns, and has owned since June 1, 1880, all the bonds and coupons secured by the mortgage, and that the suit was brought by its request and for its benefit.

But it is said that these bonds and coupons were negotiable and that the state treasurer as trustee must account to one bond-holder to-day, and to another to-morrow, in case of a transfer. This is true, and it is easy to suppose a very complicated case, but such is not this case, because the bonds have not been negotiated and there is no divided interest or ownership.

The fundamental doctrine of equity is, that the owner of the debt is the real mortgagee; the debt is the principal thing; the conveyance is a mere incident; it therefore follows that an assignment of the debt carries the security along with it and that an extinguishment of the debt is an equitable determination of the estate conveyed. These principles are equally applicable whether the debt is represented by negotiable or non-negotiable securities. We conclude, therefore, that in the case at bar there was no objection to the defense on account of the parties; the defense was aimed at the real and only party in interest, and so far was legitimate.

But it is said that an issue was presented foreign to the matter of the complaint. The matter in question was, whether a foreclosure ought or ought not to take place. It ought not to take place if there was no debt due. This the defendant attempted to show by offering to prove that all the matured coupons had been paid. The mode of payment was immaterial, whether in cash, or in rents and profits received by the owners of the mortgage debt and agreed to be applied in payment of it.

The accounting prayed for was in aid of the defense, and

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was based on a duty incumbent upon the New York & New England Railroad Company under the circumstances to render it. The doctrine is elementary that a mortgagee in possession, whether acquired by actual entry or by attornment of the tenants, will be subject, not only to the equity of redemption, but to the duty of applying the rents and profits in discharge of the debt, and rendering an account of their receipt and application. *Saunders* v. *Frost*, 5 Pick., 260; *Moore* v. *Cable*, 1 Johns. Ch., 385. And an equitable mortgagee is as liable to account as a legal mortgagee. *Brayton* v. *Jones*, 5 Wis., 117. An assignee of the mortgagee in possession stands in the place of his assignor in respect to the account. 2 Jones on Mortgages, § 1118.

But it is further said, that in this case the New York and New England Railroad Company were in possession under a lease from the defendant, and upon this fact a threefold objection is based, namely—that the lease is a separate and independent contract; that it covers property not included in the mortgage; and that it provides for an arbitration in case of difference, and no arbitration has been had or asked for.

If we may adopt somewhat the manner of a pleader, our general reply would be that the first two parts of the objection are not true in any such sense as the argument for the plaintiff assumes, and that the last is insufficient.

The contract of lease, instead of being entirely independent, has an intimate connection with the subject matter of the suit, in that it provides for the application of the net income of the leased property first of all to pay the coupons claimed to be in default.

The lease, too, took effect June 1st, 1880, and that is also the alleged date of the purchase of the bonds in question. The latter by their terms all become due in 1895—the same year the lease is to terminate. This is quite suggestive that the purchase of the bonds and the taking of the lease were parts of one and the same scheme. But we do not rely upon this last suggestion to show that the lease is not a separate contract in such a sense as the demurrer assumes.

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The case may well stand on this proposition, that if the possession and use of mortgaged premises by the owner of the mortgage debt without any agreement at all respecting the matter, imperatively demands an accounting and the application of rents and profits to the payment of the debt, the duty surely can be no less on the party who has agreed to do that very thing.

Then, as to the point that the lease covers more property than the mortgage, it has much less truth than the first. The leasehold estate and the mortgage estate are substantially identical. The mortgage conveyed all lands, franchises, "materials, privileges, appurtenances and property, real and personal, which now belongs to or hereafter may be acquired by said company." The difficulty of conveying anything more than this by any subsequent lease is quite apparent without further argument.

The color of a foundation which this point has to rest upon is the paragraph in the lease which reads "together with any right it" (the defendant) "has or may hereafter acquire to use in any manner" certain terminal facilities and connecting roads which are named. The language is that of a mere quit-claim; no rights are described as existing, and if they did exist the sweeping language of the mortgage would seem broad enough to include them. There may have been some remnant of a lease or license for the defendant to use the connecting roads referred to, but whatever may be the right referred to, it furnishes no obstacle at all to accounting, for the lease expressly provides for deducting from the gross earnings of the entire line operated solely on account of the Connecticut Central, whatever is paid on account of those connections and advantages, and there can be no uncertainty, on that account, in ascertaining the net income to be applied on the mortgage debt. It may be well here to add that the directions contained in the lease respecting the mode of ascertaining the amount, if any, to be applied on the mortgage, should be followed.

Another objection attempted to be drawn from the lease is, that as it provides for arbitration in case of a difference

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between the parties, the defendant is restricted to that remedy alone. But the New York & New England Railroad Company, having caused this suit to be instituted for their sole benefit, is in no position to make such an objection if it was otherwise good, for having invoked the jurisdiction of a court of equity to pass upon their allegations, they cannot limit that jurisdiction till it has determined all the equities between the parties relative to the subject matter.

Moreover, it seems to be well settled that an agreement to submit to arbitration will not be held valid, either in law or equity, when its effect is to oust the court of jurisdiction. *Wood* v. *Humphrey*, 114 Mass., 185; *Tobey* v. *County of Bristol*, 3 Story, 300; *Thompson* v. *Chamock*, 8 T. R., 139; *Jones* v. *St. John's College*, L. R., 6 Q. B., 115; Russell on Arbitration, 61–63, and cases there cited.

Our reasoning has brought us to the conclusion that it is the duty of the New York & New England Railroad Company to account in this action, and that the defense founded upon the anticipated results of such accounting is one the defendant mortgagor should be allowed to make.

The further objection, that the account demanded is in some of its details unreasonable, and that no railroad company's books contain such items, we do not deem it necessary to pass upon. There is nothing on record to show whether this point is well founded or not, and in the brief of counsel it is stated in the most general terms without argument. We think therefore it is better to leave the details to the trial court, that can act upon fuller information and argument. It is quite obvious that the details will depend much upon what the plaintiffs are willing to disclose. If they refuse or neglect to give, as the answer and cross-complaint allege, an account of the actual freight, tolls and income of the Connecticut Central Railroad Company, and insist on pro-rating all such items with what they receive for the same things upon the entire mileage of their own road, then many of the details asked for would become both reasonable and necessary. We observe near the conclusion of the cross-complaint and in one place in the answer

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that the demand for special details referred to is subject to a qualification in these words—"So far forth as the same may be necessary to show that the New York & New England Railroad Company * * * have received, previous to the commencement of this suit, sufficient moneys belonging to the Connecticut Central Railroad Company to pay said alleged over-due interest, over and above all other lawful charges against the same." Applying this qualification to all the details asked for, there is surely nothing unreasonable in the account demanded.

There was error in the judgment complained of, and a new trial is ordered.

In this opinion the other judges concurred.

FRANK L. PALMER & OTHERS *vs.* THE HARTFORD FIRE INSURANCE COMPANY.

New London Co., Oct. T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

The plaintiffs had held a policy of insurance of the defendants upon a quantity of merchandise, and on the policy expiring applied to the defendants for a renewal policy to be on the same terms with the expiring one, which the defendants promised to give. The defendants wrote and delivered to them a new policy and received the premium. The plaintiffs, supposing it to be on the same terms with the first, did not examine it until after the loss of the property by fire three months later, when, on reading it, they discovered an important variance from the former policy, materially affecting their right of recovery. If they had known of the change they would not have accepted the policy. In a suit for the reformation of the policy and a recovery of what would become due under it, it was held that the plaintiffs could not be regarded as guilty of laches in not examining the policy and applying earlier for its correction, since they had a right to believe it to be in all essential respects like the former one.

The defendants, having promised that the new policy should be on the same terms with the first one, were not in a position to charge the plaintiffs with neglect in not discovering that it was not so.

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No written contract is beyond the reach of a court of equity for the purpose of reforming it, if the prayer for relief is presented in due season.

There is of course a strong presumption in favor of the written agreement over a mere oral one by which it is sought to be corrected, and the prayer for relief in such a case must be supported by overwhelming evidence or be denied.

[Argued January 13th—decided February 11th, 1887.]

SUIT for the reformation of a policy of fire insurance and for the recovery of the amount due on the policy when reformed; brought to the Superior Court in New London County.

The complaint alleged that prior to the 15th of May, 1884, the plaintiffs had insured certain goods in the office of the defendant, a fire insurance company in the city of Hartford, to the amount of $5,000, for one year, for a premium of $50, and that the policy was to expire on the 15th of May above mentioned; that the defendant proposed to the plaintiffs to renew the insurance on the same terms and conditions stated in the expiring policy, and issued a policy therefor for one year for the same premium, which proposition was accepted by the plaintiffs and the premium paid; that the new policy differed from the old one in containing the following clause which was not in the other:—"*Co-insurance Clause.* If the value of the property at the time of any fire shall be greater than the amount of the insurance thereon, the insurer shall be considered as co-insurer for such excess, and all losses shall be adjusted accordingly;" that the plaintiffs, relying on a faithful performance of the agreement on the part of the defendant to reinsure the property, and supposing the new policy to be of the same tenor as the one that the plaintiffs then held, omitted to examine or read the same, and did not know of the change till after the fire; that the new clause entirely changed the character of the insurance, and that the plaintiffs would not have paid the premium, nor received the new policy, had they known that the new clause was inserted therein; and had the defendant refused to perform its agreement the plaintiffs would have secured other insurance

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elsewhere of the same character as that which they had by the first policy, which they could have easily done for the same price; that the goods on the 17th of August, 1884, were partly destroyed and greatly damaged by fire; that at the time of the insurance and of the fire they were of the value of $37,354; that the plaintiffs' loss was $5,218; that there was other insurance to the amount of $5,000, by reason of which the defendant was liable to pay only half the loss, namely, $2,609; and that the defendant refused to correct the policy, or issue one in conformity to the agreement, and insisted that the co-insurance clause should stand, and that it was not bound to pay more than it would be under the policy as it stands; praying for a correction of the policy in accordance with the agreement, and for a recovery of the money which they would be entitled to recover under the amended policy.

The defendant demurred to the complaint, assigning the following grounds of demurrer:—

1. Upon the facts stated in the complaint, the plaintiffs are not entitled to the relief sought.

2. The complaint does not aver that there was a mutual mistake between the parties as to the terms of the policy of insurance, or any agreement between them as to the specific terms of the new policy.

3. The plaintiffs were guilty of gross laches in not examining their policy, and thereupon notifying the defendant of their claim, so that the defendant might, before any loss have exercised its right of rescission.

The court (*Torrance, J.*,) sustained the demurrer and rendered judgment for the defendant. The plaintiffs appealed.

S. Lucas, for the appellants.

1. It is alleged in the complaint that there was an agreement between the parties as to the specific terms of the policy to be issued, for it is alleged that the defendant proposed to the plaintiffs to renew the insurance of $5,000, for the same premium and on the same terms and conditions con-

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tained in the first policy. That policy being made a part of the complaint, the specific terms of the policy to be issued were definitely determined, and the proposition made by the defendant having been accepted, became the original contract of the parties. 1 Parsons on Cont., 483; May on Ins., § 45.

2. It was not necessary to aver that there was a mutual mistake between the parties as to the terms of the policy to be issued. There was no mistake on the part of either. It stands uncontradicted that the insurance sought by the plaintiffs is the one the defendant by its contract had agreed to give, and hence there could be no mistake in regard to that on the part of either party. The cause of complaint is that the defendant has not performed the contract admitted by the demurrer. It had agreed to deliver to the plaintiffs a policy of a certain character. It has not done it, but has delivered a policy of an entirely different character. Does it make any difference whether the defendant failed to do it by mistake or by design? If it delivered the policy by design, in violation of its contract, without disclosing its true character, then it was guilty of a fraud; and if guilty of a fraud, it is without excuse, and the contract should be enforced. *Story* v. *Norwich & Wor. R. R. Co.*, 24 Conn., 113; *Town of Essex* v. *Day*, 52 id., 496; 1 Story Eq. Jur. § 187. The rule that a mistake must be mutual or a court will not reform a contract, is, in its proper application, founded in reason; and the reason is this: If a contract is corrected by a court of chancery, to make it conform to the intention of one of the parties, it is of course forcing a contract upon the other party which he never intended to make, unless his own intent concurred with that of the other party. *Town of Essex* v. *Day*, supra. But that is not this case. The plaintiffs are not seeking to force a contract on the defendant which it never made, but to enforce a contract it did make, and which became obligatory before a policy was delivered. May on Ins., § 14; *Sheldon* v. *Conn. Mut. Life Ins. Co.*, 25 Conn., 207. If upon an agreement for insurance a policy be drawn by the insurance office, in

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a form which differs from the terms of the agreement, and varies the rights of the parties insured, equity will interfere, and deal with the case on the footing of the agreement, and not on that of the policy. Kerr on Fraud & Mistake, 422.

3. The plaintiffs were not guilty of such laches as should deprive them of equitable relief. It comes with a poor grace from the defendant who committed the error or fraud, to blame the plaintiffs for trusting to it to do as it agreed and not detecting the error. This was not an instrument signed by the plaintiffs or given by them; it was simply received by them under the misapprehension that it was right, which misapprehension was induced by the confidence they put in the defendant. And then it should be kept in mind that they had made a contract with the defendant whereby it was legally, as well as morally, bound to issue the proper policy. Courts have granted relief in cases very much stronger for defendants than this; and that, too, when there was no prior agreement on which to base the claim for relief. *Wooden* v. *Haviland*, 18 Conn., 101; *Town of Essex* v. *Day*, 52 id., 492.

4. If the defendant was deprived of any right of rescission it was caused by its own neglect or wrong. If it delivered the policy by mistake, it was its mistake. If by design, it was its own fraud. What claim on the plaintiffs has the defendant, simply because they omitted to detect its own mistake or fraud, by reason of the confidence they reposed in it?

H. C. Robinson and *C. E. Perkins*, for the appellees.

1. The general rule is well settled that where parties have once reduced their agreement to writing, and it has been delivered and received, no evidence of previous negotiations or arrangements, whether verbal or in writing, can be received to add to, alter or contradict the terms of the written instrument. This is the well-settled rule both at law and in equity. The rule is uniform at law, but there are certain exceptions to it in equity. These are that if one party to the contract has been guilty of fraud, by which the

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contract is made different from what it was agreed to be, or if it is so made by the *mutual mistake of the parties*, equity will interfere, and make the contract what it should have been; but these are the only grounds. The subject is fully treated in 1 Story's Eq. Jurisprudence, §§ 154, 155. In *Hearne* v. *Marine Ins. Co.*, 20 Wall., 488, Judge SWAYNE says, on page 490: "The reformation of written contracts, for fraud or mistake, is an ordinary head of equity jurisdiction." It is evident that no claim can be made under the head of fraud, for no fraud is alleged, and, as is said in *Crocker* v. *Higgins*, 7 Conn., 346, "unless fraud is alleged in the bill, it cannot be presumed or proved in aid of the plaintiff's case." And as to mistake, in the first place, it is not alleged that there was any mistake of any kind by either party in making the policy, nor that there was an accidental mistake of the scrivener or clerk in drawing it, nor that there was a mutual mistake. But the real ground of the claim appears from the latter part of the complaint, where the plaintiffs allege that there was a mistake on *their part alone*. They allege that they received the policy as it is, but did not look at or read it, and, if they had done so, they would not have received it, but would have refused to take it, and applied elsewhere for other insurance; that thereby they were mistaken as to what the policy really was, received it under such mistake, and now, after the fire, want the policy reformed to make it what they supposed it was going to be. This was the claim made by the plaintiffs below, and the real question in the case is, whether if these allegations are true this court will interfere. Nothing can be better settled than that in such a case no relief will be granted. The mistake must be a mutual one; both parties must have done what neither intended to do. *German Ins. Co.* v. *Davis*, 131 Mass., 316; *Hearne* v. *Marine Ins. Co.*, 20 Wall., 488; *Spare* v. *Ins. Co.*, 13 Ins. Law Journal, 286; *Brugger* v. *State Investment Ins. Co.*, 5 Sawyer, 310; *Paine* v. *Jones*, 75 N. York, 593; *Malleable Iron Works* v. *Phœnix Ins. Co.*, 25 Conn., 465; *Brainard* v. *Arnold*, 27 id., 624;

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Woodbury Savings Bank v. *Charter Oak Ins. Co.*, 31 id., 517; *Bishop* v. *Clay Ins. Co.*, 49 id., 167.

2. An additional reason for not granting the relief asked for, is the gross negligence of the plaintiffs in not examining the policy when given them, and not until after the fire. It is a well settled principle that equity will not relieve where the applicant has been guilty of negligence, and this principle has often been applied to this question of the necessity of reading contracts received from another. It has many times been set up as a defense that the party did not read the contract delivered to him in performance of an agreement, but not successfully. In *Bishop* v. *Clay Ins. Co.*, 49 Conn., 167, the court say, (p. 172:) "Now, if they exercised ordinary diligence and caution in caring for their own interests, we may assume that they examined the policy when received, and were satisfied that it was right." In *Ryan* v. *World Life Ins. Co.*, 41 Conn., 172, the court says: "She says that she and her husband signed the application without reading it, and without its being read to them. That of itself was inexcusable negligence." In *Grace* v. *Adams*, 100 Mass., 507, the court says: "It was his duty to read it. The law presumes, in the absence of fraud or imposition, that he did read it, or was otherwise informed of its contents, and was willing to assent to its terms without reading. Any other rule would fail to conform to the experience of men. Written contracts are intended to preserve the exact terms of the obligations assumed, so that they may not be subject to the chances of a want of recollection or an intentional misstatement. The defendants have a right to this protection, and cannot be deprived of it by a willful or negligent omission to read the paper." In *Monitor Ins. Co.* v. *Buffum*, 115 Mass., 345, the court says: "In the absence of fraud he is conclusively presumed to assent to those terms. He cannot be permitted to qualify his contract, or his relations to the subject matter, by asserting and proving that he never read the writing and was ignorant of its contents." The Supreme Court of Pennsylvania in the very late case of *Susquehanna Ins. Co.* v. *Swank*, 102 Penn. St.,

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17, where the insured, when he signed his application, was assured by the agent that his policy should be written on the "annual interest" plan which required no assessment, but whose policy, in fact, was written on the assessment plan, and who retained the policy from June 9th, 1877, until September or October of the same year, when he sent it to the agent with protests, and in October of the following year returned it to the company, held that it was his duty to read the policy, and that after retaining it as he did, without examination, a court of equity would not interfere, and say: "During all this time he had the benefit of the insurance. In case of loss the company would have been liable. An instrument may be reformed in case of fraud, accident or mistake, but where the mistake was the result of the supine negligence of a party who sleeps upon his rights until other duties and responsibilities have grown up, the law will not help him." The Supreme Court of the United States in the recent case of *N. York Life Ins. Co.* v. *Fletcher*, 117 U. S. R., 519, remarks upon the duty of examining insurance policies, and the effect of receiving them without reading. The opinion says, p. 534: "He would have discovered by inspection that a fraud had been perpetrated. The retention of the policy was an approval of the application and its contents. The consequence of that approval cannot after his death be avoided." The opinion then cites approvingly the case of *Am. Ins. Co.* v. *Neiberger*, 74 Misso., 167, where the assured agreed with the agent that the policy to be issued should contain a clause giving him the right to cancel at the end of a year. The policy contained no such clause, but he retained it from January 25th till May 10th, 1875. The court in that case said: "It will be the duty of the insured when he receives the policy, promptly to examine it. After such delay he will be deemed to have accepted the policy as issued." The same case approves of *Richardson* v. *Maine Ins. Co.*, 46 Maine, 394, where, without the applicant's knowledge, the agent of the insurance company had falsely stated that there was no mortgage upon the property insured. The policy did not set out the

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application, except by reference, but the court held "that the assured by accepting the policy was bound by its covenants and ratified the application." These authorities are sufficient to show the views of courts on this subject. We do not claim that the mere fact that the plaintiffs did not look at the policy is, in all cases, conclusive evidence of laches as a matter of law. It may be explained; sickness, false statements by the other party, and other circumstances may excuse it; but here the plaintiffs allege no such facts, as it was their duty to do if there were any. Again, the plaintiffs were bound to know from the fact that a new policy was given to them, that it was not a mere renewal of the old one. It is not alleged, nor is there any pretence, that, in fact, the old policy was renewed with all its specific terms and conditions. The allegations relative to the preliminary negotiations, which are only formally admitted to be true by the demurrer, for purposes of pleading, without reference to their actual truth, do not claim that. The substitution of a new policy for the existing one, as asked by the plaintiffs, forms of course a new contract. The very fact that the policy is a new one is proof conclusive that it is not the old one, and the fact that an additional clause was inserted shows that it was not done by mistake, but was intentional on the part of the defendants. It is not like the case of a clause omitted, which might be done by accident. The court is therefore asked to change a contract which is just what the defendants intended that it should be. It has always been held that this cannot be done. This is not a bill for a specific performance of the parol agreement which it alleges. That agreement has been executed and the policy delivered and accepted, so that that parol agreement has done its office and is now out of the case. No such claim was made in the court below, nor is the bill or prayer framed for such relief. The counsel for the plaintiffs will probably rest their case principally upon the late case of *Essex* v. *Day*, 52 Conn., 483, and will claim that that decision changed the law not only as to laches, but also as to the necessity of mistakes being mutual, but we submit

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that it was not the intention of the majority of the court to do either, but merely to say that in the peculiar circumstances of that case they did not find ground for the application of either of those principles, or found other facts which took the case out of such application. Laches begins to be imputed especially soon in contracts of a speculative or precarious nature, and most of all in cases where a party has an arbitrary right of cancellation. The retention of a policy of insurance was held by the Supreme Court of the United States in a very early case, *Graves* v. *Boston Marine Ins. Co.*, 2 Cranch, 419, in which MARSHALL, C. J., gives the opinion, to be a very significant act, and one which, after the loss occurred, should be quite binding upon the assured. This case, and the principles for which we contend, were affirmed in the case of *Snell* v. *Atlantic Ins. Co.*, 98 U. S. R., 90, and the latest utterance of that high authority is in harmony with all its earlier ones and with the decisions cited from our own courts. We submit that it would be a very dangerous precedent to establish, that an intelligent manufacturer should be allowed to disclaim the provisions of a written contract of fire insurance, accepted by him without reserve, months after the transaction, and when the property has been consumed and the right of cancellation by the company in case of misunderstanding has been forever lost. It is putting a reward upon gross inattention which will in the end sharply re-act upon the general interests of community. The plaintiffs must have known from the physical form of the contract itself that it was a new policy and not a renewal of the old one. There is no suggestion of concealment by the company, nor of intellectual inferiority of the plaintiffs. Their laches was too palpable to be relieved by the sound discretion of a court of equity.

PARDEE, J. The complaint in this case is in effect as follows: Prior to May 15th, 1884, the defendant had issued to the plaintiffs a policy of insurance against loss by fire upon merchandise; on that day it expired; on that day the

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defendant proposed to them to renew the insurance upon the terms and conditions of the expiring policy, the plaintiffs accepted the proposition; the defendant wrote a policy, delivered it to, and received the premium from the plaintiffs; they, relying upon the fidelity of the defendant to its promise, and supposing the last written policy to contain the same stipulations and conditions as were in the first, omitted to read it. The merchandise was damaged by fire on August 17th, 1884; subsequently the plaintiffs for the first time discovered that the last policy contained this condition, which was not in the first: "Co-insurance clause. If the value of the property at the time of any fire shall be greater than the amount of the insurance thereon, the insurer shall be considered as co-insurer for such excess, and all losses shall be adjusted accordingly." In this respect the last policy materially differs from the first. The plaintiffs would not have accepted the policy and paid the premium if they had known that it contained this clause; and if the defendant had notified them of its refusal to perform its agreement, they could and would have obtained elsewhere, at the same price, the desired insurance upon the stipulated terms. The defendant refuses either to correct the policy or perform the agreement. The plaintiffs ask that the policy may be reformed so as to express the agreement, and that the defendant be compelled to perform the agreement and pay the indemnity promised by it. The defendant answers by demurrer, assigning therefor the following reasons:—"that upon the facts stated the plaintiffs are not entitled to the relief sought; that the complaint does not aver that there was a mutual mistake between the parties as to the terms of the policy or as to the agreement for one; and that the plaintiffs were guilty of gross laches in not reading the policy, and in not notifying the defendant of their claim, so that it might have exercised its right of rescission before loss.

The Superior Court held the complaint to be insufficient. The plaintiffs appeal, assigning the following reasons:—

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1. The court erred and mistook the law in rendering judgment in favor of the defendant to recover costs.

2. In not holding that the plaintiffs were entitled to recover at least the amount of loss covered by the policy, as delivered to the plaintiffs by the defendant.

3. In holding that upon the facts stated in the complaint the plaintiffs were not entitled to the relief sought.

4. In holding that the plaintiffs should have averred in their complaint that there was a mutual mistake between the plaintiffs and defendant as to the terms of said policy.

5. In holding that there was no allegation in the plaintiffs' complaint of an agreement between the parties as to the specific terms of the new policy that was to be issued.

6. In not holding that, as the defendant had agreed to renew said insurance on the same terms and conditions as stated in the old policy, for the same premium, and issue a policy therefor, it was immaterial under the circumstances in this case whether the failure to perform said agreement on the part of the defendant was by mistake or design.

7. In holding that the plaintiffs were guilty of such gross laches in not examining the new policy that they are not entitled to relief, and in holding that the defendant was excused in the performance of its contract because the plaintiffs did not detect its omission to deliver such a policy to the plaintiffs as it agreed to, till after the fire.

8. In holding that it was the duty of the plaintiffs to detect, and notify the defendant of, an alteration which the defendant made, and in the very nature of the case must have had knowledge of, to wit, the changes in the terms and conditions of the new policy from those in the old.

9. In not holding that the plaintiffs were entitled to a correction of said last named policy in the manner sought, and to specific performance of the agreement stated in paragraph ten, and to judgment for the amount that would be due by said policy, when corrected, by reason of said loss by said fire.

For the purpose of testing the sufficiency of the pleadings

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we are to assume that the defendant admits that an agreement between it and the plaintiffs for indemnity against loss by fire, containing every stipulation and condition which should enter into or affect it, was reduced to writing, and that the defendant agreed to make and sign a copy thereof, except as to the dates of commencement and termination of risk, and deliver the same to the plaintiffs; that it wrote and signed a policy of insurance, and delivered it to the plaintiffs as and for a performance of its promise, and received the stipulated premium, without notice to them that an important and variant condition had been added to those contained in the first written agreement; and that the plaintiffs, trusting to the defendant's fidelity to its undertaking, omitted to examine the policy for the purpose of discovering variances from the written draft, and did not in fact discover the variance until after damage to the property for which indemnity had been sought.

The presence of the variant clause in the delivered instrument is of necessity due either to intention or mistake upon the part of the defendant. To attribute it to the former is to charge constructive fraud at least; and inasmuch as the plaintiffs have not charged this specifically, if we accede to the rule of law invoked by the defendant, that unless fraud is so charged it is excluded from the case, there remains the other and only possibility, namely, mistake; and upon a fair interpretation of the allegation, this, the only possible legal meaning, is to be attributed to it, namely, that the writing, which by the agreement of the parties should have been a copy of a previously written draft, did in fact contain a variant and material clause, which neither of them desired or intended that it should contain, and which neither party would knowingly have permitted to be in it. This meaning the defendant should have found therein, and to it made answer.

That it is a most frequent and useful office of a court of equity to reform written contracts, and make them conform to the verbal agreement or written draft which of necessity precedes them, is in the knowledge of all, and it is suffi-

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ciently accurate to say that no writing is beyond its reach if the prayer for relief is presented in due season and supported by convincing evidence. Of course the presumption in favor of the written over the spoken agreement is almost resistless; and the court has wearied itself in declaring that such prayers must be supported by overwhelming evidence or be denied. But in the case at bar the defendant volunteers to lift this burden from the plaintiffs, and upon the pleadings admits that the delivered policy is materially variant from the precedent written draft agreed upon.

There are many precedents for the reformation of policies of insurance in cases where the insured has held the policy until after a loss in silence and in ignorance of the necessity for such reformation,—ignorance because of the omission to read the policy or of a careless reading. A few are cited.

In *Andrews* v. *Essex Ins. Co.*, 3 Mason, 10, STORY, J., said:—"There cannot at the present day be any serious doubt that a court of equity has authority to reform a contract where there has been an omission of a material stipulation by mistake. And a policy of insurance is just as much within the reach of the principle as any other written contract. But a court of equity ought to be extremely cautious in the exercise of such an authority, seeing that it trenches upon one of the most salutary rules of evidence, that parol evidence ought not to be admitted to vary a written instrument. It ought therefore in all cases to withhold its aid where the mistake is not made out by the clearest evidence according to the understanding of both parties, and upon testimony entirely exact and satisfactory. There is less danger where the instrument is to be reformed by reference to a preliminary written contract which it was designed to execute. But even here there is abundant room for caution, since the parties may have varied their intentions, or the clause may not have been originally understood by either party to go to the extent now required. And these considerations acquire additional force where circumstances have occurred in the intermediate time which give an increased importance to

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the asserted mistake. Under these limitations the doctrine of courts of equity on this subject does not seem at variance with general convenience or justice."

In 1 Story's Equity Jurisprudence, § 159, it is said as follows:—"The relief granted by courts of equity in cases of this character is not confined to mere executory contracts, by altering and conforming them to the real intent of the parties; but it is extended to solemn instruments which are made by the parties in pursuance of such executory or preliminary contracts, and indeed, if the court acted otherwise, there would be a great defect of justice, and the main evils of the mistake would remain irremediable. Hence, in preliminary contracts for conveyances, settlements, and other solemn instruments, the court acts efficiently by reforming the preliminary contract itself, and decreeing a due execution of it as reformed, if no conveyance or other solemn instrument in pursuance of it has been executed. And if such conveyance or instrument has been executed, it reforms the latter also by making it such as the parties originally intended."

In *Oliver* v. *Mut. Commercial Ins. Co.*, 2 Curtis, 277, the marginal note is as follows:—"If a policy when drawn and received does not correctly express a previously concluded agreement for insurance which it was designed by both parties to execute, equity will reform it. If underwriters conclude an agreement for insurance with one known to them to be merely an agent and nothing is said as to whose account the insurance is to be made upon, the agent has a right to a policy insuring him as agent, or for whom it concerns. If the agent makes a mistake in declaring the interest, equity requires it to be corrected and the policy reformed. There is a distinction between the correction of a mistake in a written contract and in the execution of a power. In the latter case courts interpose more willingly. But if the agent did not declare the interest in the wrong person by mistake, but through a fraudulent design, equity will not relieve the principal. If a party fails through mistake to obtain such a policy as he is entitled to by an

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existing valid contract, equity will relieve, though the mistake arose from ignorance of law."

In *N. Amer. Ins. Co.* v. *Whipple*, 2 Bissell, 419, the court says:—"It is easy to see how, in the filling up of printed blanks, a mistake like that alleged by the complainant might happen; and the policy clerk says that it occurred from the fact that he was accustomed in the majority of instances to fill up yearly policies. All the other policies were made out for two months; that is, they expired on the 22d of December, 1864, instead of the 22d of December, 1865. This is not contradicted by the defendant. The defendant himself, who personally procured this insurance, has no recollection, or does not testify to any, in regard to what transpired at the time he applied for the insurance. He admits that he obtained the insurance at the time mentioned, but does not profess to remember the time the policies were to run, from anything he can now recall of the transaction. It is shown in the proofs, and I presume it would be taken notice of without proof, that fourteen months is an unusual time for the life of an insurance policy. The usual time is two, three, four, six and twelve months, and if for any reason the defendant had had occasion to apply for a policy so much out of the usual course of business, it would have made some impression upon his memory and that of the clerks and agents of the insurance company who participated in the transaction. So also the fact that only so small an amount was paid for a policy having so long a time to run, would seem to be a circumstance calculated to excite attention and impress itself upon the memory. It is true that the defendant testifies that he afterwards sent his policies to the insurance agents to have them looked over and mistakes corrected; but both the agents deny that they ever saw this policy and assert positively that they supposed the same had expired on the 22d of December, 1864, and had so entered the same on their books, and so informed the complainant, and had no knowledge that the policy in question was claimed to be in force until after the fire. Under the evidence in this case I can but conclude that the substantial allegations

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in the bill are made out by the proofs, and that the complainant is entitled to the relief prayed for."

In *Phœnix Fire Ins. Co.* v. *Gurnee*, 1 Paige, 278, the marginal note is as follows:—"A court of chancery has jurisdiction to correct mistakes in policies of insurance as well as in all other written instruments. The evidence of the mistakes in all cases should be clear and satisfactory." Chancellor WALWORTH said in this case:—"It is well settled that a court of equity has jurisdiction to correct mistakes in policies of insurance as well as in all other written instruments. Phill. on Ins., 14. But the evidence of such mistake, and that both parties understood the contract in the manner in which it is sought to be reformed, should be clear and satisfactory. In policies of insurance the label or written memorandum from which the policy was filled up is always considered of great importance in determining the nature of the risk and the intention of the parties. Thus, in *Motteaux* v. *London Insurance Company*, (1 Atk., 347), Lord HARDWICKE held that a policy ought to be rectified agreeably to the label; and in the issues which he directed in that case the label was treated as the real contract between the parties. In this case there is a substantial difference between the policy and the written memorandum on which it is founded."

In Wood on Fire Insurance, § 484, it is said as follows:—"When an application for insurance is made and accepted, and a policy is issued which, either by mistake or fraud on the part of the insurer, essentially varies from the contract made, and the policy is not seen or examined by the assured until after the loss thereunder occurs, he is not estopped from seeking a reformation of the contract upon the ground that he accepted the policy. Thus, where the plaintiffs entered into a contract for insurance with the defendant's agent and paid him the premium and took from him a receipt stating that the insurance was for $10,000 upon "merchandise, generally contained in their three story brick building, metal roof, and occupied by them as a commission house," and a policy was issued containing all the

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provisions of the contract except the words "*as a commission house*," and the policy was received by a clerk of the plaintiffs, and its terms were not known to the assured until the loss, it was held that, "inasmuch as the insured refused to pay the loss upon goods held by commission, the assured were entitled to have the policy made to conform to the agreement, and could not be said to have accepted the change in the contract as indicated by the policy. The fact that proceedings are not instituted for its reformation until after a loss does not of itself bar the remedy. It is a circumstance to be taken into consideration in connection with other circumstances in determining whether the plaintiffs waived the variance, but, if the delay is excused, the remedy remains."

In Van Tuyl v. *Westchester Fire Ins. Co.*, 55 N. York, 657, the plaintiffs procured insurance upon their stock and materials in their manufactory. One of the printed conditions declared it void in the case of the establishment running, in whole or in part, over or extra time, or running at night, without special agreement. The plaintiffs gave evidence to show that they previously insured with the defendant, but had the policy canceled because of the condition above mentioned being in it; that the plaintiffs' agent informed the defendant that the United States Insurance Company of Baltimore was writing on the property, and that their policy did not contain that clause; that the defendant thereupon agreed to write as the other companies did and to follow the form of the United States policy, which the plaintiffs were to and did furnish for the defendant to copy. The plaintiffs thereupon produced a blank form, which the witness testified was a blank policy of the latter company. This was offered in evidence and was objected to upon the ground that the copy shown the defendant should be produced, and that a blank form not filled up was not proper evidence. The objection was overruled, and the defendant excepted. The plaintiffs also gave evidence tending to show that they did not discover that the permission required was not in the policy until after the fire. The

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evidence as to the agreement was denied by the defendant's agent who effected the insurance. It was held that the plaintiffs were entitled to have the policy reformed. See also *N. Y. Ice Co.* v. *N. Western Ins. Co.*, 23 N. York, 357; *National Fire Ins. Co.* v. *Crane*, 16 Md., 260; *Harris* v. *Columbia Ins. Co.*, 18 Ohio, 116; *Weed* v. *Schenectady Ins. Co.*, 7 Lans., 452; *Bidwell* v. *Astor Ins. Co.*, 16 N. York, 263; *Brioso* v. *Pacific Mut. Ins. Co.*, 4 Daly, 246; *Bunten* v. *Orient Ins. Co.*, 2 Keys, 667; *Malleable Iron Works* v. *Phœnix Ins. Co.*, 25 Conn., 465; *Bennett* v. *City Ins. Co.*, 115 Mass., 241; *Moliere* v. *Penn. Fire Ins. Co.*, 5 Rawle, 342; *National Traders' Bank* v. *Ocean Ins. Co.*, 62 Maine, 519; *Lippincott* v. *Ins. Co.*, 3 La., 546; *Franklin Ins. Co.* v. *Hewitt*, 3 B. Monr., 202; *Law* v. *Warren*, 6 Irish. Eq., 299.

In *Nat. Traders' Bank* v. *Ocean Ins. Co.*, 62 Maine, 519, it is said as follows:—"This is a bill in equity asking the court to reform an insurance policy. The authority of the court to grant the relief prayed for is conceded. The only question is whether the evidence of mistake is such as to justify the court in exercising its authority. . . . As there can be no recovery upon the policy as it is now written, for the reason that between the voyage insured and the one actually made by the vessel there would be apparently a fatal deviation, the plaintiffs ask to have the policy reformed so that it will describe the voyage correctly. We think the relief prayed for should be granted. Where, as in this case, an insurance company undertakes to insure the charter of a vessel after being informed that no copy of the charter has been received, and it is not known how many ports she will be required to use, and through mistake the policy is so written as to limit the vessel to the use of one port when in fact her charter requires her to use two, we think a court of equity should order the policy reformed so as to make it describe the voyage correctly. The mistake in this case seems to be established beyond the possibility of doubt. The policy and the charter are both written instruments. A comparison of the two demonstrates that the voyage described in the charter is misdescribed in the policy.

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Can there be any doubt that the misdescription was the result of mistake? We think not. It is impossible to believe that the applicant for insurance knowingly paid the premium for a void policy. Nor would it be just to the officers of the insurance company to suppose that they took a premium for a policy known to them to be of no value. The conclusion is therefore inevitable, that the misdescription was the result of a mistake—a mutual mistake—a mistake in which both parties participated; and we think equity and good conscience require that it should be corrected."

In *Buckland* v. *Adams Express Co.*, 97 Mass., 132, the court said:—"On a consideration of the facts stated, it does not appear to us that the plaintiffs ever did agree that the merchandise in question should be transported on the terms set forth in the receipt which was delivered to the workman at the manufactory when the package was delivered to the defendants' agent. It is not stated that the plaintiffs or either of them ever read the paper containing the alleged regulations or one similar to it. It is agreed that the defendants received and carried like packages of merchandise for the plaintiffs at or about the time the one in controversy was delivered for carriage without giving the plaintiffs any receipt whatever therefor, and that this was the course of dealing between the parties in a large majority of the instances in which the defendants had been employed by the plaintiffs. From this it would appear that the ordinary course of business was for the defendants to receive merchandise from the plaintiffs without attempting to limit their liability as carriers in any manner whatever. Under these circumstances we cannot fairly infer that the plaintiffs understood that by the delivery of a receipt for the merchandise the defendants intended to limit the liability which they ordinarily assumed in their dealings with the plaintiffs, or that the latter understood and assented to the contents of such receipt as fixing the terms on which the defendants were to transport the merchandise."

In *National Fire Ins. Co.* v. *Crane*, 16 Maryland, 295, the court said: "Whatever effect the want of such an indorse-

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ment may have at law in an action on the policy, we think it cannot be urged in a court of equity, in a cause otherwise free from objection. The judge below has correctly stated the law on the subject. The indorsement could have been made only by the company. If it be omitted, who is to blame? Certainly not the assured. These policies contain many stipulations, some of them operating as conditions precedent for the benefit of the company, and few for that of the assured. It is too common for applications to be met and adjustment refused on frivolous and unjust pretences, in order to defeat fair claims on contracts of which good faith is the very essence, and we think it would promote the interest of insurance companies, and tend to a higher state of morals in business transactions, if they would exhibit more readiness to settle demands upon them, than, as we discover from the numerous reported cases on the subject, appears to be usual with them. In this case the president of the company dictated the application himself; the prior insurance was made known to him; the parties relied upon him; they never went to the office of the company, he came to the counting-house of the complainant, seeking the risk, and after hearing all they had to say on the subject he departed, and soon after sent the policy and received the premium, his clerk saying that it was all right, the only defect, however, being that the company had omitted part of its own duty in not indorsing the former insurance. In such a case we are called upon to say that the party is without remedy. On the contrary, we think it would be a reproach to the jurisprudence of the state if this company were discharged from their contract on any such grounds. There is a distinction in cases where the preparation of an instrument belongs to the party to become liable under it; he ought in that case to be dealt with more strictly. 19 Ves., 257. Insurance contracts are within this principle, and equity will interpose not only in cases of fraud, but also of mistake, where a policy is drawn up in a form different from the application, or anything is omitted which it is the duty

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of the company to insert or indorse on the instrument. *Collett* v. *Morrison*, 32 Eng. Law & Eq. R., 171."

In *Bidwell* v. *Astor Ins. Co.*, 16 N. York, 266, it is said: "That the contract of insurance agreed to be made by the defendants was such in its character as the plaintiffs have alleged in their complaint, has been found by the judge and is conclusive upon us. The fact on which the appellants rely, that the policy actually made out was in the plaintiff's hands for a considerable time and until the loss had occurred, was a circumstance to be weighed by the judge as bearing upon the truth of the plaintiff's allegation that the policy did not pursue the contract. It has undoubtedly been considered by the judge, and his judgment has been given, notwithstanding that circumstance, in favor of the plaintiff. There is no rule of law which fixes the period within which a man may discover that a writing does not express the contract which he supposed it to contain, and which bars him of relief for delay in asserting his rights, short of the period fixed by the statute of limitations. *Phœnix Fire Ins. Co.* v. *Gurnee*, 1 Paige, 278."

It is a matter of common knowledge that a policy of insurance against fire, at the present day, is a lengthy contract, which, after specifying the main things, namely, the subject, its location, the owner, the amount, the time and the price, embodies very many stipulations and conditions for the protection of the underwriter. If a person desiring indemnity against loss applies to the underwriter and states the main things above enumerated, and says no more, he has knowledge that he has asked for and will receive a contract which, in addition to those, will contain many limiting conditions in behalf of the party executing it; and when he receives the policy he cannot avoid seeing and knowing that there are many more stipulations in it than were covered by his verbal request. It may well be that a due regard for the rights of others requires him to examine those stipulations, and express a timely dissent, or be held to an acceptance thereof. Nothing which has previously transpired between him and the underwriter furnishes jus-

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tification for omission to read them. The underwriter has not invited his confidence by any promise as to what the writing shall contain or omit.

But if the underwriter solicits a person to purchase of him indemnity against loss by fire, and if they unite in making a written draft of all the terms, conditions and stipulations which are to become a part of or in any way affect the contract, and if the underwriter promises to make and sign a copy thereof, and deliver it as the evidence of the terms of his undertaking, and if a material and variant condition is by mistake inserted, and the variant contract is delivered, and the stipulated premium is received and retained, the court will not hear the claim that he is entitled to the benefit of the variant condition, where the other party had neither actual nor imputed knowledge of the change. In his promise to make and deliver an accurate copy, there is justification before the law for the omission of the other party to examine the paper delivered, and for his assumption that there is no designed variance. A man is not for his pecuniary advantage to impute it to another as gross negligence, that the other trusted to his fidelity to a promise of that character.

The rule of law that no person shall be permitted to deliver himself from contract obligations by saying that he did not read what he signed or accepted, is subject to this limitation, namely, that it is not to be applied in behalf of any person who by word or act has induced the omission to read. The defendant has brought to our notice a few of the many cases in which the rule has been plainly declared; but we think that in few or none of these did the party seeking to enforce it subject himself to this limitation.

There was in the first written draft agreed upon by the plaintiffs and defendant the contract between them; in all its terms and conditions it became, and has hitherto continued to be operative. The draft of another and variant one has not annulled or affected it, because the last has not in the eye of the law been accepted by or become obligatory upon the plaintiffs. That contract the defendant had the

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right to rescind,—a right which it has possessed in its fullest measure because it was not affected by the delivery of the variant one, not accepted by the plaintiffs; and if, because of its own negligence in omitting to execute and deliver a true copy of the original agreement, it resulted that it was induced to refrain from exercising its right of rescission, it must accept the consequences rather than cast the burden upon the plaintiffs.

There is error in the judgment complained of, and it is reversed.

In this opinion the other judges concurred.

ANDREW J. COE AND ANOTHER, EXECUTORS, *vs.* CHARLES P. JAMES AND OTHERS.

New Haven Co., Dec. J., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

A testator gave his property to a son, a grandson, and two granddaughters, with a provision that if any of the legatees should die without issue the share of such decedent should go to certain others. Held to mean a dying without issue in the lifetime of the testator, and that the legatees surviving the testator took an absolute estate in the property given.

[Argued Dec. 7th, 1886—decided January 26th, 1887.]

SUIT for the construction of a will, brought to the Superior Court in New Haven County, and reserved for the advice of this court. The case is fully stated in the opinion.

A. J. Coe, for the plaintiffs.

S. E. Baldwin, for the defendants.

GRANGER, J. This is a suit brought by the executors of a will to obtain a construction of the will.

By the will the testator gives to his granddaughters,

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Harriet T. James and Edith James, each five thousand dollars. Of the residue he gives one third to his son Charles U. Shepard, Jr., and of the residue after the payment of these three legacies, he gives two thirds to his daughter, Fanny B. James, for life, with the remainder to his two granddaughters before named; and the remaining one third to his grandson, Louis S. De Forest, and in case of his death without issue, then to the father of said Louis, John W. De Forest, for life, with the remainder to the granddaughters named.

Then follow the provisions of the will as to which the present question arises, which are as follows :—" In the event of the death of my said son without issue, his portion to go to my other legatees herein named, to be shared in the same manner as the residue of my estate hereinbefore last named. In case my said son, grandson or granddaughters shall leave descendants, their respective shares under this will shall go to said descendants severally. In the event of the death of either of my said granddaughters without issue, everything given her hereby shall go to her mother for life, remainder to her father for life, remainder to my surviving granddaughters and my grandson, share and share alike; and in the event of the death of both without issue, then the shares of both shall go in like manner to said parents and to my said grandson."

The question made in the case is—whether the provision with regard to the death of the son, grandson and granddaughters without issue, was intended to limit the estates given them to life estates, or only to provide for the contingency of their dying before the death of the testator.

This question is to be determined, not by the application of any technical rule to the construction of the will, but by ascertaining from the will if possible the real intent of the testator.

There is nothing in the will beyond the expression quoted to indicate an intention to limit the estates given to estates for the lives of the persons to whom they are given, while the frequent designation of an estate as one for life when it

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was clearly intended to be such, shows that the testator was perfectly familiar with the language ordinarily used in describing an estate for life. It is also to be considered that the legatees and devisees in question were the natural objects of the testator's bounty, being his son, grandson and granddaughters, and no reason is apparent why he should limit their estates when evidently desirous to keep the property in the family. By construing the term "dying without issue" as meaning dying before the death of the testator without issue, every apparent intent of the testator, and every intent that we can regard as probable upon the facts of the case, seems to be satisfied.

We conclude therefore that the only contingency affecting the bequest to the son, grandson and granddaughters, was their dying in the lifetime of the testator, and as they all survived the testator, we think each took an absolute estate in the property given.

The construction which we thus give to the will is sustained not only by a rule of very general application (1 Jarman on Wills, 782,) but by recent decisions of this court. *Phelps* v. *Robbins*, 40 Conn., 250; *White* v. *White*, 52 Conn., 518.

The Superior Court is advised to give a construction to the will in accordance with these views.

In this opinion the other judges concurred.

ANNIE E. BRONSON *vs.* THE BOROUGH OF WALLINGFORD.

New Haven Co., Dec. T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

The statute (General Statutes, p. 233, sec. 16,) provides that persons authorized to repair highways may make water courses, where necessary, to draw off the water from the highway upon the adjoining land; a later statute (Acts of 1881, ch. 65,) providing that it shall be so done as to cause the least damage and that the water shall not be discharged

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into any door-yard or enclosure for storage or sale of merchandise. Held that municipal corporations, so long as their acts are kept within the authority of the statute, are not liable for the damage done to such adjoining land by the water turned upon it.

And independently of the statute, since such corporations are required by law to construct and repair their highways, they would not be liable for the damage done by such acts, so long as no wanton or unnecessary damage was done, and they were not guilty of negligence in causing the damage.

In an action for damage done by such acts the special facts which show that the acts were not justifiable must appear in the complaint.

[Argued December 8th, 1886—decided February 18th, 1887].

ACTION for an injury to the land of the plaintiff by the turning of water and sewage from the street upon it; brought to the Superior Court in New Haven County, and reserved, upon a demurrer to the complaint, for the advice of this court. The case is fully stated in the opinion.

J. W. Alling, in support of the demurrer.

1. Municipal corporations in the discharge of a governmental duty are exempt from responsibility for the acts of their agents, unless such liability is imposed by statute, and to the extent only of such statutory liability. *Jones* v. *City of New Haven*, 34 Conn., 13; *Judge* v. *Meriden*, 38 id., 90; *Hewison* v. *City of New Haven*, id., 136, 139; *S. C.*, 37 id., 482; *Torbush* v. *City of Norwich*, 38 id., 228; *Jewett* v. *City of New Haven*, id., 372; *Mead* v. *City of New Haven*, 40 id., 74; *Fellowes* v. *City of New Haven*, 44 id., 240; *Cooney* v. *Hartland*, 95 Ill., 516.

2. The repair of highways is everywhere regarded as a governmental duty. *Chidsey* v. *Town of Canton*, 17 Conn., 478; *Weed* v. *Borough of Greenwich*, 45 id., 170, 182. "In all civilized countries the duty of providing safe and convenient highways to facilitate trade and communication between different parts of the state or community, is considered a governmental duty." *Chicago &c., R. R. Co.*, v. *Att'y Gen.*, 9 West. Jour., 347; 2 Morawetz on Corp., 1073.

3. The repair of highways is cast upon the boroughs not as a privilege—not because it is sought for, but because it is the general law of the state that boroughs should be respon-

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sible for the repair of highways within their limits. *Hill* v. *City of Boston*, 122 Mass., 379. The case of *Weed* v. *Borough of Greenwich*, supra, turned upon the point, that the act done in that case was done under the special powers and privileges conferred by the borough charter, and that the governmental duty of repairing highways was, whether correctly or not, supposed to be upon the town. But the duty of repairing highways is no less of a governmental character, though imposed upon the borough by its charter as well as by general law. The burden of this duty was upon this borough before these provisions in its charter, which have not, in this regard, made that duty more onerous. *Hill* v. *City of Boston*, supra; *Mead* v. *City of New Haven*, supra.

4. The acts of the borough complained of were authorized by statute. An ancient statute provided that "persons authorized to repair highways may make or clear any water course, or place for draining off the water therefrom, into or through any person's land, so far as necessary to drain off such water." Gen. Statutes, p. 233, sec. 16. This statute was amended in 1881 so as to read as follows: "Persons authorized to construct or repair highways, may make or clear any water course, or place for draining off the water therefrom, into or through any person's land, so far as necessary to drain off such water and when it shall be necessary to make any drain upon or through any person's land, for the purpose named in this act, it shall be done in such way as to do the least damage to such land; provided nothing in this act shall be so construed as to allow the drainage of water, from such highways, into or upon any door-yard, in front of any dwelling house, or into or upon yards and inclosures used exclusively for the storage and sale of goods and merchandise." This statute justifies the acts of the borough, it not being charged or claimed that the borough was guilty of any negligence in the matter, or that the exceptions of the statute apply to the case.

W. L. Bennett, contra.

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1. "A person has no right, by grading the surface of his land, to turn the surface water which ordinarily falls upon or flows over it, upon the adjoining land of another." *Adams* v. *Walker*, 34 Conn., 466. "A municipal corporation has no greater right than an individual to collect the surface water from its lands and streets into an artificial channel, and to discharge them upon the lands of another." *Byrnes* v. *Cohoes*, 67 N. York, 204; *Noonan* v. *Albany*, 79 id., 470; *Field* v. *West Orange*, 36 N. Jer. Eq., 118; *West Orange* v. *Field*, 37 id., 600; *Manning* v. *Lowell*, 130 Mass., 21; *Brayton* v. *Fall River*, 113 id., 226; *North Vernon* v. *Voegler*, 89 Ind., 77; *Crawfordsville* v. *Rand*, 96 Ind., 236; *Arn* v. *Kansas*, 14 Fed. Rep., 236; *Inman* v. *Tripp*, 11 R. Isl., 520; *Ashley* v. *Port Huron*, 35 Mich., 296. This proposition of law is well established in other states. It was, however, urged in the court below that the injuries complained of must have been caused by servants of the borough in the performance of a public duty, and that for the consequences of such acts the law is so in this state that the defendant is not liable. But it has been directly decided upon a state of facts almost identical with that set up in the complaint, that a municipality is not exempt from those liabilities for malfeasance for which individuals and private corporations would be liable in a civil action by the party injured. *Danbury & Norwalk R. R. Co.* v. *Norwalk*, 37 Conn., 119; *Weed* v. *Greenwich*, 45 id., 170; *Mootry* v. *Danbury*, id., 550. In the last case the court lay down this proposition, (p. 556:) "A principle of universal application, that every man shall transact his lawful business in such a manner as to do no unnecessary injury to another, compels towns to do what they are required to do in a proper manner. In other words, towns will not be justified in doing an act, lawful in itself, in such a manner as to create a nuisance, any more than individuals; and if a nuisance is thus created, whereby another suffers damage, towns, like individuals, are responsible." The court also hold (p. 557) that there is nothing in the opinion in the case of *Judge* v. *Meriden*, 38 Conn., 90, inconsistent with

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this view. See also *Healey* v. *New Haven*, 47 Conn., 314; *Morse* v. *Fair Haven East*, 48 id., 222.

2. This case, however, need not be governed by the rule of liability applicable to towns. By an act revising and amending its charter, passed in 1881, the borough of Wallingford is given special powers to lay out drains and sewers in the borough. Special Acts of 1881, p. 116, §§ 30, 32, 33. Its charter is its only authority. The duty to lay out such drains is not, strictly speaking, a public one; it is a special power or privilege conferred on the borough at its request. *Jones* v. *New Haven*, 34 Conn., 12; *Danbury & Norwalk R. R. Co.* v. *Norwalk*, 37 id., 119; *Weed* v. *Greenwich*, 45 id., 170. If acts of the character now in question are performed under this charter, no exemption from liability by the borough can be interposed when from negligence or wilfulness they are so performed as to produce unnecessary damage to other parties. *Danbury & Norwalk R. R. Co.* v. *Norwalk*, and *Weed* v. *Greenwich*, last cited.

3. But it is said that the defendant has power to do the act complained of under Gen. Statutes, p. 233, sec. 16. This statute has no application to this case. As has been said, the borough acts under the powers conferred upon it by its charter. The charter authorizes its court of burgesses to "provide for the outflow and disposal of any waste water, drainage or sewerage from any public or private sewer or drain, in such manner and upon such places as it shall determine; provided that suitable compensation shall be made for any damage to private property;" and provides how the amount shall be determined by appraisers. It was the duty of the borough to have the compensation determined. *Healey* v. *New Haven*, 49 Conn., 401. However it may be with other persons authorized to repair highways, the officers of the borough may not dispose of waste water and drainage upon the lands of individuals without first paying compensation for damages. Moreover, it nowhere appears that the acts complained of were in any sense occasioned in the repair of highways, or by persons authorized to repair highways. The duty of providing sew-

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erage and drainage is distinct from the duty to keep highways in repair, as has already been shown. *Jones* v. *New Haven*, 34 Conn., 12.

CARPENTER J. The complaint in this case, after alleging that the plaintiff was the owner of certain real estate, alleges that "on the first day of July, 1884, all that part of the territory of said borough of Wallingford which is situate on Main street, Center street, and Hall avenue in said borough and adjacent to said highway, was drained, and for a period of time whereof the memory of man runneth not to the contrary had been drained, of surface waters and sewerage, through open gutters and drains along said Center street and said Hall avenue and past and away from the said land of the plaintiff. On the day and year last aforesaid the defendant, by grading and the construction of covered drains, sewers and culverts, changed the course and direction of the flow of said waters and sewerage, with the intent so to do, in such manner that the same ran, and have ever since flowed and run, and still do flow and run, along a certain other highway known as Cherry street, and under said Cherry street by a culvert, over and upon the said premises of the plaintiff, and in such manner as to constitute a nuisance. Whereby the premises of the plaintiff are at times of rain flooded with filthy waters and with sewerage, and are kept damp, unhealthy and malarious, at all times are worn into gullies and carried away by the force of said floods, and the plaintiff has been and is deprived of the enjoyment of said property, and the value of the same has been greatly diminished."

The second count refers to another portion of the territory of the borough, and alleges a diversion of the surface water thereon, omitting the word "sewerage," so as to cause it to flow on and across the land of the plaintiff; alleging the damage in the same way as in the first count.

To this complaint the defendant demurred, alleging that on the facts stated the plaintiff is not entitled to the relief therein sought.

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The complaint is not entirely free from ambiguity. It speaks of surface water and sewerage. The defendant by the 32d section of its charter (Special Laws of 1881, p. 117), is authorized to construct sewers and drains, and to "provide for the outflow or disposal of any waste water, drainage or sewage from any public or private sewer or drain, &c; provided that suitable compensation shall be made for any damage to private property, the amount, if the parties cannot agree, to be determined in the manner specified in sections thirty-three and thirty-six of this act."

This refers to ordinary sewerage from dwelling houses and other buildings supplied with running water, and to such surface waters as may be drained into sewers, but has no reference to surface water passing off upon the surface of the ground. The general supervision of its system of sewers is given to the borough, so far at least as to enable it to provide for the outflow and disposition of waste water and sewerage from drains and sewers; a power conferred on it at its own request, not for the benefit of the public at large, but for the special benefit of the inhabitants of the borough. In exercising this power damage to individuals must be paid for, and the mode of payment is provided for.

A general statute imposes upon the borough the duty of maintaining highways within its limits. That makes it necessary for the borough to dispose of all surface water falling or coming upon the highways.

Were the acts of the defendant, of which the plaintiff complains, done in the exercise of powers conferred upon it by its charter, or in the discharge of duties imposed upon it by the general statute? We think the defendant was caring for the highways under the general statute. If the suit is for acts done under the charter, it is questionable whether the plaintiff has any remedy except that which the charter provides. But passing that, the complaint is not adapted to a cause of action, the gist of which is an omission of the borough to provide for the appraisal of damages. On the other hand, it is apparent that surface water is the principal thing of which the plaintiff complains, and that the sewerage

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mentioned in the complaint is such sewerage as may have been lischarged upon the surface and mingled with water passing thereon.

We interpret the complaint therefore as alleging a cause of action resulting from the disposition by the defendant of surface water on the highways in the discharge of its duty in caring for the highways.

We come then to the main question—does the complaint disclose a good cause of action?

The defendant is accused of no negligence resulting in an injury to the plaintiff; it is not accused of a faulty construction or repair of the highway by reason of which the plaintiff has been injured, as in *Mootry* v. *Town of Danbury*, 45 Conn., 550; it is not accused of improperly discharging the surface water on the plaintiff's premises in such a manner as to expose her property unnecessarily to special damage, as in *Danbury & Norwalk Railroad Co.* v. *Town of Norwalk*, 37 Conn., 109; nor is it accused of a direct trespass upon the plaintiff's land, as in *Weed* v. *Borough of Greenwich*, 45 Conn., 170. But in its general features this case is very much like that of *Judge* v. *City of Meriden*, 38 Conn., 90, in which the superintendent of streets, with a view to protecting them from damage, changed the course of the water so that it flowed on the plaintiff's premises to his injury, and this court held that the city was not liable. The defendant so graded the streets and constructed its drains, sewers and culverts (presumptively in the best manner), as to cause the water to flow on the plaintiff's land. The intent charged we consider as an intent simply to change the grade, and not a malicious intent to injure the plaintiff. Surface water must be turned from the road-bed into drains and gutters, and at times will flow in considerable quantity. It would be practically impossible for towns, cities and boroughs in most cases to prevent such water from flowing on to the lands of the adjoining proprietors. To hold them responsible for not doing so in all cases, would be unreasonable. It is only in special cases, where wanton or unnecessary damage is done, or where damage results from negligence, that they

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can be held responsible. It logically follows that the special facts which show that the act was wanton or unnecessary must appear in the complaint. Nothing of the kind appears in this complaint.

We have a statute which recognizes this distinction. Gen. Statutes, p. 233, sec. 16. It provides that "persons authorized to repair highways may make or clear any water-course, or place for draining off the water therefrom, into or through any person's land, so far as necessary to drain off such water." In 1881 this statute was re-enacted, with the further provision that the work should be "done in such way as to do the least damage to such land," and with a proviso that such water should not be drained into any door-yard, in front of any dwelling-house, or into any inclosure used exclusively for the storage and sale of merchandise." Session Laws of 1881, page 34, sec. 65. Clearly this statute exempts the defendant from liability unless it appears that the work was done in such a way as to do unnecessary damage, or that the water was drained into some place prohibited by the statute. Nothing of the kind appears.

The complaint is insufficient.

In this opinion the other judges concurred.

EDWIN TOLLES'S APPEAL FROM COMMISSIONERS.

Hartford Dist., Oct. T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

Upon the presentation of claims to commissioners on insolvent estates, it is only necessary that the claim should be so stated that it can be understood, and no pleadings are necessary. The whole question is whether the claim should be allowed against the estate.

And where an appeal is taken from the doings of the commissioners in allowing or disallowing a claim, the same rule applies. The whole question is still whether the claim should be allowed against the estate.

This being so, either party desiring to have the case set in the jury docket and allowed by statute to have cases so placed upon an issue of fact being closed, is bound to have it so set in the jury docket at the first

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term of the court, unless the parties shall afterwards agree or the court order that it shall be so placed.

An assignment of property under seal by a debtor to a creditor to be disposed of by the latter and the proceeds to be applied in payment of a certain debt owed the assignee, and the balance to be paid to the debtor, does not constitute an obligation on the part of the debtor on which a suit can be sustained for the recovery of the debt stated.

The admission of the indebtedness stated in the assignment may operate to save the claim from the running of the statute of limitations against it, but as such admission it can have no greater effect of any kind by reason of its being under seal.

[Argued October 7th,—decided November 30th, 1886.]

APPEAL from the doings of commissioners upon the insolvent estate of Edwin M. House, deceased, in disallowing a claim presented against the estate by the appellant as assignee of Milo W. Pember; brought to the Superior Court in Hartford County, and heard before *Andrews, J.* Facts found and judgment rendered for the appellee, and appeal by the original appellant. The case is sufficiently stated in the opinion.

W. F. Henney, for the appellant.

G. G. Sill, for the appellee.

GRANGER, J. This is an appeal from the doings of commissioners on the insolvent estate of Edwin M. House, deceased, in disallowing a claim presented against the estate by the appellant.

The appeal came into the Superior Court for Hartford County at its October term, 1885, and at that term the appellant filed, as his reason of appeal, the statement that the commissioners had disallowed his claim and that it should have been allowed. At the January term, 1886, an order was made that the appellant file a bill of particulars on or before the first Tuesday of April. The bill of particulars was filed within the time limited, and consisted of a claim of $680, upon an instrument under seal, executed by the deceased in his lifetime to one Pember, and by Pember assigned during the lifetime of the deceased to the appellant;

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with a further statement of the same amount due on an account stated.

The appellee during the same term filed a defense, first, denying that the claim ought to be allowed against the estate, and, secondly, stating that it did not accrue within six years before the death of the deceased. The appellant at the same term filed a reply to the appellee's second defense, alleging, first, that the instrument in question, which contained the account stated, was under seal; and, secondly, that the deceased, within six years before his death, paid the sum of six dollars to be applied on the claim. The appellee in his rejoinder, filed at the same term, denied the truth of both the above replies.

On the same day that the appellee filed his denial of the appellant's reply, the appellant moved that the cause be entered on the jury docket; which motion the court denied. And this ruling of the court is made the first ground of error.

The appellant claims that he was entitled to an entry of the case in the jury docket at the time his motion was made, under the following provision of the Practice Act:—"The following named classes of cases shall be entered on the jury docket, at the request of either party, made to the clerk during the first term, to wit: * * * appeals from the doings of commissioners on insolvent estates. * * * Where, in any of the above named classes of cases, an issue of fact is joined after the first term, the case may, within three weeks from such joinder, be entered in the jury docket for the trial of such issue upon request of either party made to the clerk; and any of such cases may at any time be entered in the jury docket by consent of both parties or by order of the court." Practice Act, sec. 22.

We have never adopted the practice, which prevails in some of the other states, of requiring the appellant from the rejection of a claim presented by him against an insolvent estate to file a statement, like a declaration at common law, setting out his claim in the same manner as in an ordinary declaration in a suit at law. Where such a declaration is

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filed it opens the way for all the pleadings in an ordinary suit. It presents the claim in such a form that the declaration could be demurred to. Under our practice a claim is presented to the commissioners on an insolvent estate in such form that it can be understood what it is, but not in such form as to call for and hardly to admit of any pleadings before the commissioners. The single issue before them is, whether the claim ought to be allowed against the estate. *Mills* v. *Wildman*, 18 Conn., 124, *American Board of Commissioners' Appeal from Probate*, 27 id., 344; *Mead's Appeal from Probate*, 46 id., 417.

An appeal from the allowance or the disallowance of a claim by the commissioners carries the case into the appellate court precisely as it stood before the commissioners. The question there is, as before, whether the claim is one that should be allowed against the estate. The object is not to get a judgment upon the claim, but to get a dividend from the estate. The party appearing and making defense against the claim is generally not the original debtor, who, even if living, may be taking no further interest in the matter, but the administrator or trustee in insolvency. And it will be readily seen that many questions may arise with regard to the liability of the estate to pay the claim which could not arise in an action at law upon such a claim. For instance, the claim may not have been presented in due season against the estate, or it may not have been presented in such a form as to cover the claim made on the appeal. The relation of the claim to the estate is as essential an element of the case as its intrinsic character and merits.

An appeal from commissioners is a different thing from an appeal from a decree of a court of probate. In the latter case the decree stands until reversed, and the appellate court, in acting upon the matter, is exercising probate powers. Commissioners are a common law tribunal, exercising no probate powers, but the law and equity powers of ordinary tribunals. An appeal from their doings carries up the whole subject of the appeal, and the appellate court in acting upon the matter is exercising only its ordinary law

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and equity powers. On such an appeal there is no propriety in the appellant filing any reason of appeal. If the claim as presented to the commissioners does not show with sufficient definiteness what it is, the other party can move for a bill of particulars; but this bill of particulars does not become itself the ground of any new or different pleadings. The appellee in the present case filed as one of his defenses merely the averment that the claim ought not to be allowed against the estate. This is the natural general issue in such appeals, and the law pre-supposes and implies it in every case.

The case thus standing upon a presumed issue of fact, either party desiring that it be placed in the jury docket should make his application for that purpose at the first term of the court. After that term the matter rests, as in other cases, upon the agreement of the parties or the order of the court.

We do not intend to say that any formal pleadings that the parties may file will be regarded as irregular and inadmissible, but that no such pleadings are necessary, and that an issue of fact raised upon them is not to be regarded as such a new issue as to revive the right of either party to put the case on the jury docket. Nor do we intend to say that if a claim should be so presented as to be open at once to a demurrer and a demurrer should be filed, the case must on such an issue be put at once on the jury docket before the issue of law is decided. We only decide that in a case which, like the present, is so presented as to necessitate an issue only of fact, the party who desires a jury trial is bound at the first term to have the case put on the jury docket.

The appellant offered in evidence the following document, executed by Edwin M. House, the deceased,. under seal, and delivered to Pember, the assignor of the appellant:—

"Know all men by these presents, that whereas I, Edwin M. House, am justly indebted to Milo W. Pember, in the sum of six hundred and eighty dollars, and am desirous to secure the payment thereof with lawful interest:—Now therefore I, the said Edwin M. House, in consideration of

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the premises and for the purposes aforesaid, and in further consideration of one dollar to me in hand paid by said Pember, receipt whereof is hereby acknowledged, and in further consideration of the uses and trusts hereinafter conferred upon and assumed by said Pember, do hereby give, grant, sell, convey, transfer and assign to said Pember all my real and personal estate, debts, demands, claims and choses in action of every kind whatsoever and wheresoever the same may be situated. To have and to hold the same to him the said Pember, in trust for the purposes following, viz.:—To be held, managed and disposed of in such ways as without unnecessary sacrifice and with reasonable dispatch to raise the sum of $680 aforesaid with lawful interest, to be retained by said Pember in satisfaction of my indebtedness to him, and to reimburse himself for any sums he may at any time have paid at my request, and to render his account of his doings under this trust, and to assign back to me all the rest and residue of said estate, real and personal, debts, demands, claims and choses in action hereby conveyed to said Pember, which shall remain in his hands after he has been paid said sum of $680 with the interest thereon, and after said indebtedness to said Pember has been satisfied. In witness whereof I have hereunto set my hand and seal, this 16th day of July, 1878. EDWIN M. HOUSE, [L. S.]"

The appellant claimed that this document constituted a covenant on the part of House to pay to Pember the $680 named in it, or at least might be treated as an account stated between them of an indebtedness of that amount.

It is found that Pember never took possession of, or in any way appropriated any of the property mentioned in the document.

It is very clear that this document was intended to be only a bill of sale of the property mentioned in it, and not an obligation on the part of House to pay the $680. It clearly creates no such obligation.

The appellant also claimed that this document, being under seal, was to be regarded not only as an acknowledgment of the indebtedness of House for $680, but that, by

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reason of being under seal, it stood as such acknowledgment for the term of seventeen years instead of only six, as in the case of an ordinary acknowledgment. But it is very clear that no such effect can be given to the document. If it is to be regarded as an acknowledgment of a pre-existing indebtedness it could have no more effect than any other form of acknowledgment by reason of its being under seal. If it were an obligation under seal it could of course be enforced as such for the ordinary term of such obligations, but as a mere acknowledgment of a debt for the purpose of saving it from the operation of the statute of limitations, it can have no additional effect from the fact that it is under seal.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

THE WILLIAM ROGERS MANUFACTURING COMPANY *vs.* SIMPSON, HALL, MILLER AND COMPANY.

Hartford District, Oct. T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

William Rogers, for twenty-five years before his death in 1873, had a valuable reputation in the market as a manufacturer of silver-plated ware. A son of the same name acquired skill under him in the same manufacture, and since 1864 had had a valuable independent reputation in the market as a manufacturer of the same goods. In 1878 the second William Rogers made a contract with the defendant corporation by which it was agreed that he should exercise his skill in superintending their manufacture of silver-plated ware, and direct as to its quality and style, and allow his name to be stamped thereon and defend its use; in consideration of which he was to receive a commission upon sales. The plaintiff corporation had since 1872 been engaged in the manufacture of silver-plated ware, and used sundry trade-marks, of which the name "William Rogers" was the principal part, claiming to own the exclusive right to such stamps by the agreement of the first William Rogers and by long-continued use. In a suit brought by the last-mentioned company against the other for an injunction against the use of the name "William Rogers" as a trade-mark, it was held;—

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1. That the second William Rogers had the right to use his name as the important part of his trade-mark so long as it was accompanied with devices to distinguish it from the trade-marks of the plaintiffs, and was not used for the purpose of misleading purchasers, although purchasers who took note only of the words "William Rogers," or were not familiar with the stamps of the plaintiffs, were liable to be misled.
2. That under the arrangement by which the goods were manufactured by the defendant corporation under the superintendence of the second William Rogers, and with an interest on his part in the manufacture and sale, they had a right to use the name of William Rogers in their trade-mark in the same manner that he could have done if he had been the direct manufacturer.

When the second bearer of a name which has become the distinguishing part of a trade-mark used by another manufacturer, uses the same name as a part of his own trade-mark, with proper distinguishing devices, it is not a sufficient reason for enjoining the latter against the use of the name, that the goods of both manufacturers become known in the market by the same name. He is not to be injuriously affected by any use the public may make of a mark which the law allows him to use.

If purchasers who will take note of nothing but the name upon the trade-mark are misled, and there is consequent loss to either of the parties entitled to use the name, it must be borne as a consequence of the act of taking the name as a trade-mark.

[Argued November 10th, 1886,—decided February 25th, 1887.]

SUIT for an injunction against the use of a certain name in a trade-mark, and for an account and damages; brought to the Superior Court in Hartford County. The following facts were found by a committee:—

The plaintiff is a corporation organized in 1872, under the joint-stock laws of this state, located in Hartford, and engaged in the manufacture and sale of spoons, forks and knives. It succeeded to the business of a partnership of the same name which had been formed in 1865.

For one or two years after its organization as a corporation its sales were considerable, amounting to nearly $140,000 in 1873, which was its best year. After that its sales gradually decreased, until, in 1877, they amounted to less than $40,000. From that time forward until the spring of 1879 the business was still smaller, and the goods which purported to be of its manufacture were made, plated, and

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stamped for it at Waterbury, by Rogers & Brother, a corporation by that name, engaged in the same business and located in the latter city.

The plaintiff at all times had goods in the market bearing its stamp, and had a travelling salesman out, and its goods were, to a limited extent, on sale in the markets of the country, and were sold to and by dealers in Hartford.

In the year 1879 the management of the William Rogers Manufacturing Company was consolidated with that of the Rogers Cutlery Company, another corporation located in Hartford, and was officered by the managers of the latter company, and from that time the business of the plaintiff has considerably increased.

The goods manufactured by the plaintiff have had a good reputation.

About the year 1847 three brothers, all now deceased, William, Asa H., and Simeon S. Rogers, engaged in the manufacture of electro-silver-plated spoons, forks and knives at Hartford, under the partnership name of Rogers Brothers. Prior to that time William and Simeon had been engaged in the general jewelry and plated-ware business in State street at Hartford, under the firm name of William Rogers & Co. Asa had learned the art of electro-silver-plating, and was the only practical plater of the three.

The spoons, forks and knives manufactured by the copartnership were stamped "[Star] Rogers Brothers A 1," or "[Star] Rogers Bros. A 1," and such stamps became well known in the trade as indicating goods manufactured by the firm. In the copartnership thus formed William traveled, selling goods, and when at home exercised a general superintendence over the whole business. Simeon managed the store. Asa did the plating. William Rogers, Jr., was employed as a general assistant.

Electro-silver-plating was then a novel manufacture, and because principally of their integrity in the manufacture, the goods of the Rogers Brothers being found to answer their recommendation as honest goods, the goods of their

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manufacture acquired a valuable reputation in the market, and as early as 1853 became known as "Rogers goods."

[Facts are then found in much detail with regard to various partnerships or corporations with which some or all the Rogers brothers were connected, and which were authorized to use the name of "Rogers" as a part of their trade-marks, and especially the name of William Rogers, for the purpose of showing how far the plaintiff corporation was entitled to the trade-marks which it was seeking to protect; but as the court does not consider this question in deciding the case, the facts that relate to it are omitted.]

Before the bringing of this suit the following stamps had at various times been put upon goods sent into the market by the copartnership of William Rogers Manufacturing Company, the plaintiff corporation of the same name, and the Rogers Cutlery Company:—"1847, Wm. Rogers & Son A 1."—"Wm. Rogers & Son."—"1776 Wm. Rogers & Son."—"(Anchor) Wm. Rogers & Son AA."—"(Anchor) W. R. & Son AA."—"1865 Wm. Rogers Mfg Co. AA."—"Rogers Nickel Silver."—"Rogers Cutlery Company."—"Rogers Silver Plate Company." The stamp first adopted by the copartnership was "1847, Wm. Rogers & Son A 1." Having been enjoined against the use of the prefix "1847," and the suffix "A 1," upon the petition of the Meriden Britannia Company in September, 1872, they for a short time used "Wm. Rogers & Son," and "1776 Wm. Rogers & Son," and then adopted "(Anchor) Wm. Rogers & Son AA," and "1865 Wm. Rogers Mfg Co.," which has been sometimes used with and sometimes without the prefix "1865." "(Anchor) W. R. & Son AA." was used only on small articles from lack of room. "Rogers Cutlery Co." was used by that company and not by the plaintiff, and "Rogers Silver Plate Co." was used only on some job lots.

Wm. Rogers died in 1873; Simeon S. Rogers in 1874; and Asa H. Rogers in 1876.

During the respective lives of these brothers they uniformly claimed that the original stamp of "Rogers Broth-

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ers" and the other so-called Rogers stamps used by them, or either of them, or by the companies with which they or either of them were connected, were their personal trade-marks, and denoted that the goods to which they were applied were mannfactured under their personal superintendence and guaranty of quality.

While the brothers, together or separately, were engaged in such manufacture, either for themselves or for the companies with which they were connected, the stamps so used by them or either of them did represent, and were understood by the public to represent, such superintendence and guaranty; but the stamps continued to be used by the companies after such connection had ceased, under a claim of right so to do, and have come to represent not the personal superintendence and guaranty of the brothers or either of them, but that the goods bearing such stamps are of the same good quality as the goods which were manufactured under the personal superintendence of the brothers, and that the companies using them are the legitimate successors to the brothers in the use of the marks.

The marks are valuable to the parties using them. There was nothing peculiar or mysterious in the art of electro-silver-plating, known to the Rogerses and not known to any skillful silver-plater, and it was their diligence, integrity and skill, and their persistent and undeviating requirement that their trade-marks or names should be placed only upon goods of their standard by the various companies with which they were connected in business, that marks used by them, of which the name "Rogers" formed a part, gave to such goods a valuable reputation.

By reason of the numerous stamps on spoons, forks and knives, containing the word "Rogers," as before stated, and of the efforts of the various concerns who had used such stamps since 1847 to promote the sales of their goods as "Rogers goods," the word "Rogers" had, before the bringing of this suit, become the conspicuous and familiar part of such stamps to a large class of the retail buyers; but jobbers and those retail buyers who are informed in rela-

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tion to the trade-marks, and the several manufacturers represented by them, readily distinguish between the stamps of the different manufacturers by the words or symbols which such stamps do not possess in common. Many of those retail buyers who buy only by the stamp, look only to the word "Rogers," and are for this reason liable to confound the various stamps, but generally the retail buyers who desire any information on the subject of the maker of the goods rely upon the dealer for such information.

A large proportion of the ultimate purchasers are not familiar with the various marks and their signification, as indicating a particular make, but look merely to see if they are Rogers goods, and usually rely upon the statements of the seller, and are satisfied if they are stamped with the name "Rogers" in some form.

A limited portion of such purchasers are familiar with the various stamps, and such have no difficulty in distinguishing one stamp from another, and are not liable to be deceived if they desire a particular stamp.

In the year 1864 William Rogers, Jr., and William J. Pierce formed a business connection, under which silver-plated spoons and forks were furnished to the trade, bearing the stamp of William Rogers, Jr., the arrangement being that Rogers should receive a commission for the right to stamp such goods with his name; Rogers to sell the goods as the manufacturer, and Pierce not to be personally known in the business.

William Rogers, Jr., is the son of William Rogers, Sr. He had been brought up by his father in the jewelry and plated-ware business of William Rogers & Co., at State street in Hartford, and became associated with his father in 1856, under the firm name of Wm. Rogers & Son, which firm continued until the year 1861. He had also assisted his father generally in the original business of Rogers Brothers, and had always been in familiar association with his father in the latter's business affairs. His name originally was William H. Rogers, but, somewhere about 1856, he changed his name to William Rogers, Jr., for the purpose

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of being more closely identified with his father, and had become known by that name.

The goods sold under this arrangement with Pierce were plated by him according to the Rogers standard, as agreed by the parties, and were advertised and sold as "Genuine Rogers goods," and equal to the goods of the original Rogers Brothers.

This arrangement continued about a year, and until the formation of the copartnership of the Wm. Rogers Manufacturing Company in 1865.

The Wm. Rogers Manufacturing Company co-partnership continued the use of the trade-marks after William Rogers and William Rogers Jr., who had been members of it, left the firm in March, 1868, and within a short time after obtained a temporary injunction against the Rogerses, father and son, restraining them from using the trade-marks or either of them; from representing that any person other than the Wm. Rogers Manufacturing Company had the right to use them; from interfering with the free use of the trade-marks by the Wm. Rogers Manufacturing Company, and from stating that that company had no right to use them. Wm. Rogers, Jr., was afterwards found in contempt for a violation of this injunction, and fined by the court therefor. The injunction continued in force until after the organization of the plaintiff corporation, when it was withdrawn by consent, without costs.

The Wm. Rogers Manufacturing Company continued its business as a copartnership and the use of the trade-marks until a transfer was made in January, 1872, to the plaintiff corporation. This corporation continued the business at Hartford, at the same place and in the same building, making goods of a good quality, and stamping them with the trade-marks ("Anchor) Wm. Rogers & Son, AA.," and "1865, Wm. Rogers Mfg. Co., AA.," and other stamps to a limited extent, and has claimed the right to use these stamps.

The goods manufactured by them or for them bearing these stamps have been up to the standard of quality known

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as the Rogers standard. The standard has in fact been raised by the plaintiff and by the other companies making the so-called "Rogers goods."

The goods made and sold by the copartnership and the plaintiff corporation became familiarly known in the market as "William Rogers goods" and "Hartford goods."

The plaintiff has on signs, circulars, blotters and in advertisements used the name "Wm. Rogers & Son" as a business name, from which it might be naturally inferred by the public that William Rogers or his son William Rogers, Jr., was connected with the manufacture or business, or was the firm conducting the business. The managers of the plaintiff corporation have also stamped job lots of goods with the stamp "Rogers Silver Plate Co.," and registered this stamp as a trade-mark, there being no such company in existence. Such use and register was for the purpose of attempting to control the name and prevent other parties from using it. The managers of the corporation have also sent into the market since its consolidation with the Rogers Cutlery Company, spoons and forks stamped "Rogers Cutlery Co.," as one of its stamps, the stamp being used on goods on hand at the time of the consolidation of the two companies, which had been manufactured by the Rogers Cutlery Co. It has maintained to the public that its stamps are those of the original, genuine Rogers Brothers.

The defendant is a joint-stock corporation located at Wallingford, in this state, and for some years prior to 1878 had been engaged in the business of making and selling plated ware, both flat and hollow, stamping its flat-ware "Simpson, H. M. & Co.," or with the initials "S. H. M. & Co.," accompanied with devices denoting the quality.

The hollow-ware, stamped with the name of the corporation, sold well and had a high reputation in the market, but its flat-ware, although of good quality and finish, did not find a ready market, and its sales were quite limited.

Prior to 1878 the defendant, through its officers and agents, had made several attempts to connect with itself in some way some man by the name of Rogers, with a view to

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stamping such name upon its goods. It had a contract in 1867 with William Rogers and William Rogers, Jr., with reference to the use of the stamp "Wm. Rogers & Son" upon its hollow-ware, and such was so used to some extent. The persons who composed its management had negotiations in 1876 with F. Willson Rogers, a younger son of William Rogers, at that time without practical experience in the business, looking to the formation of a company to be called the Rogers Silver Plate Company, under which name an organization was made and published, and that name was stamped upon a small lot of goods, but the negotiations fell through and nothing came of it. In 1872 some negotiations were had with one William W. Rogers, a machinist, with no practical knowledge of the plated ware business, and who was not connected in any way with the William Rogers before referred to.

In 1878 a contract between William Rogers and William Rogers, Jr., and the Meriden Britannia Company having expired, William Rogers having died, and William Rogers, Jr., being then out of business, the latter applied to the defendant for the purpose of making an arrangement with the corporation for the manufacture by it of silver-plated forks, spoons and knives, under his supervision and control, and with his stamp as a trade-mark. Some of the officers of the defendant had endeavored, in 1868, to make some arrangement of the kind with him and his father, but they then entered into the contract with the Meriden Britannia Company before referred to.

The officers of the defendant were at first suspicious that his application was made for the purpose of obtaining better terms in a new contract with the Meriden Britannia Company, but on becoming convinced that his proposition was in good faith, and that his relations with the latter company were fully terminated, they requested him to make a definite proposition, which was done, and the result was the making of a contract between himself and the defendant, of which the following are the parts important to the present case. The defendants are designated in the contract as the

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party of the first part and William Rogers as the party of the second part. The contract is dated May 6th, 1878.

"1. The party of the second part agrees, upon the execution of this contract, to enter into the service of the party of the first part, with the general duty of superintending the electroplating, burnishing, buffing and finishing for the market of silver-plated flat-ware goods, manufactured by the party of the first part, of designing and determining the patterns to be used for such ware, of superintending the preparation and printing of all circulars, labels and boxes required for the sale of such ware, and of promoting, by all means in his power, the profitable sale of all goods, the preparation of which for market is placed under his superintendence by this contract.

"2. It is understood that the grade for plating of all silver-plated goods finished under this contract shall be according to the standard adopted by William Rogers, Sr., and also practiced by him and the party of the second part in their business copartnership of William Rogers & Son, and for spoons and forks shall be according to the following schedule:— * * * And the party of the second part agrees faithfully to inspect, oversee and superintend the plating of all goods which are the subject of this contract, and to see that such plating is in all respects so done as to make said goods in that respect equal to the standard aforesaid; and for further security thereof, it is mutually agreed that the said party of the first part shall provide a suitable person, who shall, under oath, weigh such goods before and after plating, and keep a true record of such weight in a book to be kept for that purpose. * * * And said party of the second part shall have free access to all parts of the factory where such goods are being made, plated, finished, or stored.

"3. Said party of the second part further agrees faithfully to give his attention and supervision to the burnishing, buffing and assorting for the market, of all goods plated in accordance with the foregoing article, * * * and no commission, as is hereinafter provided, shall be paid by the party of the first part on the sales of any goods so prepared for

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the market not of the first quality, or such as are known as imperfects or seconds. And from all such imperfect goods the name of Rogers shall be erased."

"5. The said party of the second part further agrees to furnish such patterns as may be needed for the goods which are the subject of the foregoing articles. * * * The styles and patterns used for goods so made shall not be used during this contract for any goods not made under his supervision, as aforesaid, and are to bear his name exclusively.

"6. Said party of the second part further agrees to give his time, abilities and influence, so far as may be necessary, to establishing and increasing the sale of the goods made under this contract, and that he will not, either for himself or others, directly or indirectly, while this contract is in force, engage in making or selling any article of what is commonly known as flat-ware, or to aid others in the same in any way whatever. * * * The party of the first part agrees not to use, directly or indirectly, any other name of Rogers during the continuance of this contract.

"7. All goods made under the superintendence of the party of the second part as provided by this contract shall be authenticated by the stamp of his name thereon, with such accompanying device as he may desire, and shall be so stamped at the factory of the party of the first part in Wallingford, and nowhere else, and the stamps used for that purpose shall be accessible to either party at all business hours. No other stamp shall be used on such goods without the consent of the party of the second part. Nor shall such stamp or device be used on any goods which are not the subject of this contract. Upon the termination of this contract the right to use said stamp shall remain with the party of the second part."

"9. The party of the first part, on its part, agrees to use all reasonable efforts to effect sales of the goods which are the subject of this contract, and to make the same efforts for that purpose that they do for the sale of hollow ware or other goods manufactured by them. The agents for the

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sale of the last-mentioned goods shall solicit orders for the sale of the former, and the party of the first part agrees not to imitate, by label or otherwise, the goods which have been stamped by the party of the second part."

"11. The party of the first part agrees to pay the party of the second part, as compensation for the services hereinbefore mentioned, a commission on all sales of what is commonly known as flat-ware, bearing his stamp as aforesaid, as follows, to wit:— * * *

12. "All lawsuits against either party, involving the right to use the stamp hereinbefore mentioned, shall be defended at the expense of the party of the second part, and any judgment therein satisfied by him."

14. "This contract is to continue for the term of fifteen years from its date, unless sooner dissolved by mutual consent, with the privilege to the party of the first part of renewing the same for the same or any less period."

William Rogers at once entered into business with the defendant under this contract, and the business has been conducted by the parties in compliance with its terms.

The officers and managers of the defendant corporation were well aware of the value of the name "Rogers" as a stamp on silver-plated ware, if the person whom it represented belonged to the family of either of the Rogers brothers, and had been connected with them, or either of them, in the production of silver-plated goods, and who had a reputation in relation thereto, and was known to the trade; and they entered into the contract for the purpose of availing themselves of the use of the name of William Rogers as a trade-mark upon their flat-ware which should be made under his personal supervision and control, and also of availing themselves of his taste, skill and judgment in relation to the design, style and finish of such goods, and of his knowledge of the trade, and from the belief that the goods so manufactured, stamped and advertised would be well received as genuine Rogers goods.

When the contract was made the business of the plaintiff was at a low ebb, as hereinbefore stated; it was

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not in the market as a formidable competitor and the defendant had no knowledge that it was in the market, and its conduct in making the contract was not actuated by any motive towards the plaintiff, but its motive was to enable it to compete more successfully in the market with the manufacturers of such goods. The effect of the use of the Rogers name was soon manifest in the increased and increasing sale of their goods so manufactured and stamped.

The defendant was well equipped for the manufacture of such goods of good style, quality and finish, before the contract with William Rogers was entered into, and no change has been made merely on account of his employment.

The goods made under the contract have been stamped "(Eagle) Wm. Rogers (Star)" in accordance with its provisions and for the purpose therein disclosed, and under the claim that by reason of his superintendence and control of the manufacture it was entitled to have the benefit in the market of the knowledge of the public that its goods were so manufactured, and the advantage in trade of whatever reputation William Rogers had acquired by reason of his connection theretofore with such manufacture and sale of electro-silver-plated goods in his association with the various parties with whom he has been engaged in the manufacture and sale of such goods, and by his long association with his father in his business operations relating to such manufacture.

From his boyhood William Rogers, Jr., has had some connection with the manufacture and selling of electro-plated silver-ware, principally spoons, forks and knives, by the various concerns with which his father was associated. Since 1864 down to the time of his connection with the defendant, his name had, by reason of his relation to the business as hereinbefore stated, and the efforts to that end of those with whom he had been associated, been known to the trade as that of the son of William Rogers, Sr., with whom he had been associated in the manufacture of electro-silver-plated goods, and had in consequence thereof obtained

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a valuable reputation, so that goods stamped with his name, as indicating his supervision and guaranty of their manufacture, had by reason thereof a better selling value in the market.

From 1865 to 1878 he had been almost constantly employed in connection with such manufacture with the Wm. Rogers Manufacturing Company at Hartford, and the Meriden Britannia Company at Meriden, as before stated.

The portrait of William Rogers, Jr., in connection with that of his father, was extensively circulated by both of those companies, by which William Rogers, Jr., was prominently brought to the notice of the trade in connection with his father.

William Rogers, Jr., was not a manufacturer in the sense of making the blanks, or plating or finishing the goods. The value of his name consisted in his knowledge of the business, his skill and judgment in relation to the style and finish of the goods and the requirements of the trade, acquired by his long association with his father in the business, and in the fact that he as well as his father had always insisted that his name should only be used on goods of a certain high standard of quality. It was these characteristics which caused the great reputation of his father.

The blanks of the defendant's goods are made by the Simpson Nickel Silver Company of Wallingford, under contract with the defendant, as the blanks of the Meriden Britannia Company were prepared by Wallace & Sons during the period of William Rogers's connection with that company under the contract of 1868.

This manufacture includes the making, finishing and trimming the blanks. It is supervised and controlled in all its departments by William Rogers, and the work is required to be done to his acceptance, and his requirements have been close and exacting. This supervision also extends to the patterns and dies. The plating and completing of the manufacture, and its preparation for the market, are done at the factory of the defendant, and are under the same charge, supervision and control.

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In plating, every piece is counted and weighed, and then plated, and afterwards weighed again to ascertain that the proper amount of silver is on each piece. This weighing is done by a sworn weigher, and the amount is recorded daily in a book for the purpose. Every portion of the work in the plating department, in flat-ware, is under the supervision and charge of William Rogers. In exercising this superintendence and charge he has been faithful, and, in particular, scrupulous to have his goods conform to his own standard of high quality ware, and the reputation of his family name.

The goods thus made and stamped "(Eagle) Wm. Rogers (Star)" are equal in quality to any goods in the market bearing a Rogers stamp.

His services are valuable to the defendant, and the stamp, by reason of its indication of his personal supervision and guaranty, is of special value to it. The arrangement existing between him and the defendant is valuable to him, and it is only through the medium of some such arrangement that he is able to make his special training in the business available to himself.

The stamp "(Eagle) Wm. Rogers (Star)" was not adopted for the purpose of imitating the trade-mark of the plaintiff, but as a new and distinctive trade-mark, indicating his personal supervision and control.

The stamp is put upon the goods in the usual and customary place and manner.

There is no difficulty in distinguishing between the stamp "(Eagle) Wm. Rogers (Star)" and the stamp "1865, Wm. Rogers Mfg. Co., AA.", and "(Anchor) Wm. Rogers & Son AA.", by those dealers or others who will examine the whole stamp and are familiar with the stamps which are used by the plaintiff; but those who regard the word "Rogers" or "Wm. Rogers" only, or who are not familiar with the stamps of the plaintiff, might readily confound them. As before stated, a large class of dealers is familiar with the various stamps used by the different makers of the so-called "Rogers goods," and would readily distinguish the

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stamp of the defendant from all others, while many small dealers, and a large portion of the ultimate purchasers, are not familiar with the different stamps and their signification, and such dealers and purchasers usually rely upon the representations of the seller, and are satisfied with any stamp bearing the name Rogers, if they are represented to be genuine.

But a dealer or ultimate purchaser who desired goods made by the plaintiff, and was not familiar with its stamp, would readily take goods with the defendant's stamp, from the word "Wm. Rogers" being on the goods.

Purchasers who have a preference for a particular manufacture are as a rule familiar with its stamp, and persons so familiar would not be liable to confound the defendant's stamp with such, if they were observed.

The goods made by the plaintiff and by the copartnership of the same name became known in the market by the general appellation of "Wm. Rogers goods," and no other goods known by that name had ever been in the market except those made and sold by that copartnership and the plaintiff corporation, until the time that goods made by the defendant were put upon the market, since which time these goods have generally become known in the trade as "Wm. Rogers goods."

A purchaser ordering from a dealer simply "Wm. Rogers goods" would be as likely to get goods made by the defendant as those made by the plaintiff, unless he should designate them as Hartford or Wallingford goods, by which they are usually distinguished in the trade. And if the order were thus specific, it might be filled by the goods of either if he was not familiar with the respective stamps, or being familiar neglected to observe them.

The defendant has extensively advertised its goods as "the celebrated William Rogers goods," and as made under the personal supervision and guaranty of William Rogers, and explaining who he is and his former business connections. The plaintiff has followed this by advertisements describing its goods as "the genuine William Rogers

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goods." Prior to these advertisements by the defendant no goods had been advertised as "William Rogers goods." Numerous circulars and advertisements issued by the defendant were annexed to the finding, which cannot be inserted here. The following is one of the briefer ones:—

"Sectional Plated Spoons and Forks.
"[Eagle] William Rogers x. 12.
"Triple Plated upon all points exposed to wear.
"Plated by the method invented by
"William Rogers in 1855,
"Who was the original inventor of
"Sectional Plate.
"Wm. Rogers,
"(Since 1878) Wallingford, Conn., formerly of Hartford and
"West Meriden."

The defendant knew that the use of their trade mark and their circulars and advertisements would cause their goods to become known in the market as "William Rogers goods." They were not however intended or calculated to induce the public to believe that the goods designated as "the celebrated William Rogers goods" were manufactured by the plaintiff. The purpose of the circulars and advertisements was to direct public attention to the fact that the manufacture of its goods was controlled by the William Rogers whose name they bear, and to the celebrity of its goods as it is claimed by reason of such control and association with his name.

The defendant knew that the goods which had been made and sold by the plaintiff had become known as "William Rogers goods," and when its advertisements were published it knew that the plaintiff's goods were in the market, and that it was continuing business.

The circular referred to is not misleading to a person familiar with the facts stated therein, and with the fact that William Rogers, Sr., died in 1873; but persons not so familiar might be led by it to suppose that the William Rogers who was the inventor of sectional plate in 1855, was in the

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employ of the defendant at the time the circular was published.

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

F. Chamberlin and *O. H. Platt*, with whom were *J. P. Platt* and *H. R. Mills*, for the plaintiff.

First. The stamps "(Anchor) Wm. Rogers & Son AA" and "1865 Wm. Rogers Mfg. Co. AA" are the plaintiff's trade-marks. (1) They were adopted, with the assent of the Rogerses, by the partnership which preceded the plaintiff. (2) They were conveyed by the copartnership, together with its property, business and good will, to the plaintiff corporation. (3) The transfer to the plaintiff corporation was made with the assent of William Rogers, Jr., Wm. Rogers, Sr., being then imbecile and incompetent. (4) And the trade-marks have been in actual use by the plaintiff upon its goods continuously since its organization in 1872 and prior thereto by the partnership from their adoption in 1865. The record is explicit on all these points. Thus it appears that these stamps, adopted in 1866, have been continuously used by the partnership and corporation to the present time—openly, adversely, and under claim of right as their trade-marks. "The trade-mark recognized by the common law is generally the growth of a considerable period of use rather than a sudden invention. * * * At common law the exclusive right to it grows out of its use, not its mere adoption." *Trade-Mark Cases*, 100 U. S. R., 94. "It is the actual use of the trade-mark, affixed to the merchandise of the manufacturer, and this alone, which can impart to it the element of property. The mere declaration of a person, however long and however extensively published, that he claims property in a word as his trade-mark, cannot even tend to make it his property." *Candee* v. *Deere*, 54 Ill., 439. "The right to use a trade-mark is above all other rights one which depends upon use." LOWELL, J., in *William Rogers Mfg. Co.* v. *Rogers & Spurr Mfg. Co.*, 11 Fed. Rep., 495. The plaintiff's right to the use of these

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trade-marks may be regarded as settled by authority. *William Rogers Mfg. Co.* v. *Spurr & Rogers Mfg. Co.*, last cited; *Meriden Britannia Co.* v. *Parker*, 39 Conn., 460; *Rogers & Brother* v. *Rogers*, 51 id., 121.

Second. The stamp "(Eagle) Wm. Rogers (Star)," as used by the defendant, is an infringement of the plaintiff's trade-marks.

1. An exact imitation or similarity is not necessary. In *Meriden Britannia Co.* v. *Parker* it was found that the defendant's trade-mark resembled the plaintiff's "to that degree that it was calculated to deceive unwary purchasers and those who buy such goods hastily and with but little examination of the trade-mark; but purchasers who read the entire trade-mark on the defendant's goods, and who know the petitioner's trade-mark, cannot be deceived, nor can they mistake the respondent's goods for those of the petitioner." Upon this finding the court by CARPENTER, J., remarked:—"The fact that careful buyers, who scrutinize trade-marks closely, are not deceived, does not materially affect the question. It only shows that the injury is less; not that there is no injury. Another class of purchasers, to whom large quantities are sold, are deceived. Such purchasers, perhaps, will have no reason to complain, as they, if they are injured by the deception, must attribute the injury to their own want of diligence. But the petitioners stand on entirely different ground. No amount of diligence on their part will guard against the injury; an injunction is their only adequate remedy, and to that we think they are entitled." *Meriden Britannia Co.* v. *Parker*, 39 Conn., 460. "The criterion is not the certainty of success in misleading the public, but its probability—or even its possibility." DUER, J., in *Amoskeag Mfg. Co.* v. *Spear*, 2 Sandf., 549, approved by Mr. Upton in his work on trade-marks, p. 136, and by Judge CARPENTER in *Boardman* v. *Meriden Britannia Co.*, 35 Conn., 415. To the same effect are—*Consolidated Fruit Jar Co.* v. *Thomas*, Cox's Manual, No. 665; *Royal Baking Powder Co.* v. *McQuade*, id., No. 671; *Wamsutta Mills* v. *Allen*, 12 Phila., 535; *Glenny* v. *Smith*,

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11 Jur., N. S., 964; *Leggett* v. *Hines*, 2 Cent. L. J., 110; *Avery* v. *Meikle*, 27 U. S. Patent Office Gazette, 1027; *Manufacturing Co.* v. *Trainer*, 101 U. S. R., 65; *Landreth* v. *Landreth*, 22 Fed. Rep., 41. In *Williams* v. *Brooks*, 50 Conn., 280, the finding was of resemblance "to such a degree that they are liable to deceive careless and unwary purchasers who buy such goods hastily and with little examination; but purchasers who read the entire trademark and label on the defendants' goods cannot be deceived nor mistake the defendants' goods for the plaintiff's." It was not found that the defendants' goods were sold for the plaintiff's, and the defendants were found to have acted in good faith; but the defendants were enjoined. The findings in this case, in respect to similarity of marks, are as follows: "The stamp of the defendant is put upon the goods in the manner customary with other manufacturers;" that is, in the same place and manner as the plaintiff's. "Those who examine the whole stamp and are familiar with the stamps used by the plaintiff, have no difficulty in distinguishing;" which only means that there are differences which close examination and comparison reveal; but "those who regard the word Rogers or William Rogers only or who are not familiar with the stamp of the plaintiff, might readily confound them. A dealer or ultimate purchaser who desired goods made by the plaintiff, and was not familiar with its stamp, would readily take goods with the defendant's stamp, from the word 'William Rogers' being on the goods. The plaintiff's goods had been, for ten years or more, distinguished by the general appellation of 'William Rogers goods.' Since the defendant's goods, stamped as aforesaid, have been put upon the market, they have become generally known as 'William Rogers goods." "A purchaser ordering from a dealer simply 'William Rogers goods' would be as likely to get goods made by the defendant as those made by the plaintiff, unless he should designate the make, as Hartford or Wallingford goods, by which they are usually distinguished in the trade; and if the order were thus specific it might be filled by the goods of either, if he

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was not familiar with the respective stamps, or, being familiar, neglected to observe them." We submit that the finding, upon the point of similarity of marks, is quite beyond that to be found in any of the cases in which the court has granted an injunction.

2. It is not necessary to show that the defendants have acted fraudulently. The law is the same both as to trade-marks and trade-names. *Singer Mfg. Co.* v. *Loog*, L. R., 8 App. Cas., 15; Sebastian on Trade-marks, 226. This being a suit in equity the law which applies is that stated by Lord COTTENHAM, in *Millington* v. *Fox*, 3 Mylne & Craig, 338, where he says, "I see no reason to believe that there has in this case been a fraudulent use of the plaintiffs' marks. It is positively denied by the answer, and there is no evidence to show that the defendants were even aware of the existence of the plaintiffs as a company manufacturing steel. In short it does not appear to me that there was any fraudulent intention in the use of the marks. That circumstance, however, does not deprive the plaintiffs of their right to the exclusive use of those names." Sebastian in his last edition (1884) says, referring to this case, (p. 9,) "In equity the protection to the manufacturer was carried a stage farther in 1833 by the decision of Lord COTTENHAM in *Millington* v. *Fox*, since which time it has not been necessary to prove an actual fraudulent intention, the remedy being obtainable if the defendants' conduct has been such as to produce the effects of fraud, though he may, in fact, have acted in perfect innocence." Again, at page 11, he says: "It is not necessary that there should be fraud in the sense that the infringer knowingly and willfully makes a fraudulent attempt to appropriate to himself the fruits of another's reputation; if he acts so that custom intended for another is diverted to himself, and that the public buy and pay for one thing while intending to buy and pay for another, so that both vendor and purchaser are injured, there is fraud and the animus of the infringer is unimportant." And again, on page 156, he says:—"But the fraud does not consist in an intention to deceive on the part

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of the defendant, but in an actual deception, or in the creation of a probability of deception, independently of any fraudulent intention." In reply to a similar objection raised by the defendant in the case of this plaintiff against Rogers & Spurr Mfg. Co., 11 Fed. R., 495, Judge LOWELL says: "I believe it to be true that the Greenfield Rogers did not inquire, nor did the defendants care, whose reputation they were making available; but I am of opinion that any one of those who rightfully use the name may enjoin its interfering use by others." See also *Singer Manf. Co.* v. *Wilson*, L. R., 3 App. Cas., 391; *Filley* v. *Fassett*, 44 Misso., 173. But we need not rest upon this claim. It is found that "the defendants knew that the goods which had been made and sold by the plaintiff had become known as 'Wm. Rogers goods,' and when said advertisement was published, that their goods were in the market and that they were continuing business," and also that "the defendant knew that the use of said trade-mark and said advertisement would cause their goods to become known in the market as the 'Wm. Rogers goods.'" "All that courts of justice can do is to say that no trader can adopt a trade-mark so resembling that of a rival as that ordinary purchasers, purchasing with ordinary caution, are likely to be misled. It would be a mistake, however, to suppose that the resemblance must be such as would deceive persons who should see the two marks placed side by side. The rule so restricted would be of no practical use. If a purchaser, looking at the article offered him, would naturally be led, from the mark impressed on it, to suppose it to be the production of the rival manufacturer, and would purchase it in that belief, the court considers the use of such a mark to be fraudulent. But I go further. I do not consider the actual physical resemblance of the two marks to be the sole question for consideration. If the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market, may be as much a viola-

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tion of the rights of that rival as the actual copy of his device." *Seixo* v. *Provezende*, L. R., 1 Ch., 192. See also *Lee* v. *Haley*, L. R., 5 Ch., 155; *Singer Manf. Co.* v. *Loog*, L. R., 8 App. Cas., 15; *S. C.*, L. R., 18 Ch. Div., 417; *Hendriks* v. *Montagu*, L. R., 17 Ch. Div., 638; *Canal Co.* v. *Clark*, 13 Wall., 323; *Holmes, Booth & Haydens* v. *Holmes, Booth & Atwood Mfg. Co.*, 37 Conn., 278; *Meriden Britannia Co.* v. *Parker*, 39 id., 450. The defendants will claim that at the time of making the contract with William Rogers their conduct was not actuated by any motive towards the plaintiff; and that they had no knowledge that the plaintiff's goods were in the market, and will ask this court to believe that they were actuated by no improper motive, but solely by the desire to secure, in the manufacture of their goods, the superintendence and alleged skill of this "Rogers." If the defendants could establish ignorance on their part, we submit that such ignorance would not excuse them. But the finding shows both knowledge and fraudulent action as to the material parts of the case. "Prior to 1878 the defendant, through its officers and agents, had made several attempts to connect with itself in some way some man by the name of 'Rogers,' with a view to stamping such name upon its goods." This language is peculiar and suggestive, and clearly defines the animus of the defendants. The defendants had tried their own name; and while so stamped "their flat-ware, though of good quality and finish, did not find a ready market and its sales were quite limited." They were well aware of the large sale of flat-ware of similar quality bearing a so-called Rogers stamp. They wanted some Rogers, they cared not who, provided the name could be used upon their goods. Having negotiated, without success, in three other directions, they secured the present association. Their motive in making this contract is found to have been "to enable them to compete more successfully in the market with the makers of such goods, that is, 'genuine Rogers goods.'" Their first purpose was to secure the *name* "*William Rogers*," as a stamp, and it was the use of his name that is found to have

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effected the increased and increasing sale of their goods so manufactured and stamped. If in the making of the contract the defendant was not actuated by any motive toward the plaintiff as distinguished from other manufacturers of Rogers goods, yet as one of such manufacturers, of whom there were but three, its injury, though less perhaps in amount, was none the less real. And the motive found to have actuated the defendant as against such manufacturers in general may be relied upon by the plaintiff in this action. But further, the wrong complained of is not the making of the contract with Rogers, but the advertising, stamping and selling of goods which followed. At the time of these acts it is distinctly found that "they knew the plaintiff's goods were in the market, and that they were continuing business." These later acts at least were done with full knowledge of the plaintiff's rights. We quote the finding on this point: "The defendant knew that the goods which had been made and sold by the plaintiff had become known as 'Wm. Rogers goods,' and when the advertisement was published that their goods were in the market and that they were continuing business." "The defendant knew that the use of said trade-mark and said advertisement would cause their goods to be-become known in the market as 'Wm. Rogers goods.'" Nevertheless they continued the use of the stamp and published and circulated the advertisement in its aid, until they had created such confusion that careless and unwary buyers, and those not familiar with the plaintiff's stamps, or who did not examine the whole stamp, would confound them and buy their goods for those made by the plaintiff. The result followed as they knew it would and as they must be held to have intended that it should.

Third.—The defendant's stamp has given to their goods the exact name by which the plaintiff's goods had previously been known, and this fact alone is sufficient reason for the injunction sought. The finding upon this point is full and explicit. "The plaintiff's goods, from the time of the partnership, had been familiarly known as 'Wm. Rogers goods,' and no other goods by that name had ever been in the market

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until the time that goods made by the defendant were put upon the market, since which time said goods have generally been known in the trade as 'Wm. Rogers goods.'" This case is in this respect like that of *Orr, Ewing & Co.* v. *Johnson*, L. R., 13 Ch. Div., 434, in which the plaintiffs, dealers in yarn which they exported to India, had a ticket containing, among other things, two elephants, which ticket had given the yarn several names by which it was sold and familiarly known, one being the "two elephant goods." The defendants, who had for some years sold yarns bearing a ticket containing, among other things, one elephant, began to export similar yarn to the same market, and placed upon it a ticket containing two elephants, but in several other respects different from the ticket of the plaintiffs, and the defendant's elephants themselves were in several particulars unlike those used by the plaintiffs. In an action by the plaintiffs for an injunction to restrain the defendants from infringing their rights it was held—(1) That if the goods of a trader have acquired in the market a name derived from a part of the trade-mark which he affixes to them, a rival trader is not entitled to use a ticket which is likely to lead to the application of the same name to his goods, even though that name is not the only name by which the goods of the first trader have been known, or though it has always been used in conjunction with some other word. (2) That though it was not probable that English purchasers or Indian dealers would be deceived, it was not improbable that the ultimate purchasers in India would be. in consequence of defendant's ticket being calculated to obtain the same name of "*Bhe Hothe*," or "two elephant," as the plaintiffs'. (3) That it was not necessary to prove any fraudulent intention on the part of the defendants. (4) That the two elephants forming a material and substantial part of the plaintiffs' trade-mark having been taken by the defendants, the burden was upon them to disprove the probability of deception, and not upon the plaintiffs to prove it." Justice FRY said:—"It appears to me that there is a great deal of evidence, to which I attach weight, to show that these goods are sold largely by

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name, and that although the first dealers no doubt look at the tickets, yet that the ultimate purchasers and the purchasers from the dealers in Bombay, probably do not look at the tickets, and at any rate are liable to be deceived by the name by which the goods are sold." In another part of his judgment the same justice quotes from the case of *Edelsten* v. *Edelsten*, 1 DeG., J. & S., 202, in which Lord WESTBURY observed upon the fact that the goods derived their trade-name from that particular part of the ticket, and says—"I think therefore that when the defendants did take these two elephants they took that which was a material and substantial part of the plaintiffs' ticket. Now what is the result of that? It appears to me that the result of this is, it throws upon the defendants the burden of proving that their ticket did not deceive the purchaser so that they would believe that the defendants' goods were the plaintiffs' goods," and continues, quoting JAMES, L. J., in *Ford* v. *Foster*, L. R., 7 Ch., 623, to the same effect, and O'HAGAN, L. J , in *Singer Machine Mfg. Co.* v. *Wilson*, L. R., 3 App. Cas., 395, "If one man will use a name, the use of which has been validly appropriated by another, he ought to use it under such circumstances and with such sufficient precaution that the reasonable probability of error should be avoided, notwithstanding the want of care and caution which is so commonly exhibited in the course of human affairs." This language of O'HAGAN, L. J., has been quoted with approval by the courts of highest authority both in England and America, and has been lately adopted by this court in *Williams* v. *Brooks*, *supra*. The defendants appealed, and in the Court of Appeal COTTON, L. J., said (13 Ch. Div., 457), "Then we come to the question, is the use of this ticket, on goods exported by the defendants, calculated to lead to their goods being mistaken for those of the plaintiffs, or I may add to lead to their goods being sold under the name under which the plaintiffs' goods had frequently been sold, because that is really the same thimg? * * * The conclusion at which I have arrived is this, that the defendants either originally adopted that ticket with knowledge of the facts, from which

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the intention to mislead must be imputed to them, or at all events, if that is not so, that they persisted in the desire to continue to use that ticket when they did know the facts from which it was probable that the ticket, if used, would deceive. Therefore, in my opinion, the judgment of Mr. Justice FRY is right, and must be affirmed." On subsequent appeal to the House of Lords, WATSON, L. J., said: "Apart from all questions as to *bona fides* or *mala fides* of the appellants, I am disposed to hold that the circumstances to which I adverted afford sufficient ground for an injunction against the appellants. When a prominent and substantial part of a long and well-known trade-mark, denoting the manufacture of a particular firm, appears as the prominent and substantial part of the new trade-mark of a rival, it seems reasonable to anticipate that the goods of the latter may be mistaken for and sold as the manufacture of the firm to which the other trade-mark belongs." L. R., 7 App. Cas., 231. In the case of *Seixo* v. *Provezende*, L. R., 1 Ch., 192, the plaintiff and defendant used marks the similarity of which consisted solely in the use of the word *Seixo*, which was the name of the plaintiff's vineyard, and by which the defendants claimed that their vineyard was also called. But Lord Chancellor CRANWORTH said that, even assuming that to be true, it did not justify the defendants in adopting a device or brand, the probable effect of which was to mislead the public, and added: "I do not consider actual physical resemblance to be the sole question for consideration. If the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market may be as much a violation of the rights of that rival as the actual copy of his device." Here the defendants, knowing the plaintiff's goods to have been distinguished for years as "Wm. Rogers goods," and knowing that the stamp proposed to be used would cause their goods to be known in the market by the same name, contracted with a Wm. Rogers, for the purpose of availing themselves of the name Wm. Rogers

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as a pretended trade-mark upon a portion of their flat ware. Their goods have become known as "Wm. Rogers goods," and "the effect of the use of his name was soon manifest in the increased and increasing sale of their goods."

Fourth. The defendant's infringement is not to be justified or excused by reason of the contract between the defendant and William Rogers. Let us state the defendant's claim under this head as it really is when stripped of its dress and viewed in its nakedness. It is this: The plaintiff alleges and proves that the defendant has so imitated the plaintiff's trade-mark that goods bearing the defendant's simulated stamp will be readily taken by some purchasers who wish to buy the plaintiff's goods. The defendant replies that he has a right to so imitate the plaintiff's trade-mark because he has hired William Rogers, the son of his father, who possesses in a greater or less degree the skill of his father, to supervise his, the defendant's, manufacture, and he produces the deceptive imitation only by putting on his, the defendant's, goods the name of the man he has employed to supervise. Or the proposition may be concisely stated thus: If one has a trade-mark of which a personal name forms a part, his rival in business may pirate that trade-mark, provided he employs in his factory a superintendent who happens to possess the same name. The statement of the claim is its sufficient answer. No attendant circumstances can help out its inherent absurdity. It is the goods of Simpson, Hall, Miller & Co. that bear this deceptive imitation. They are in no sense the goods of William Rogers. He has no interest in them, direct or contingent. He neither makes nor sells them; he is an overseer, a supervisor; that and nothing more. If a man uses his own name as a stamp upon his own goods in a legitimate business way with no extrinsic deception it may be the doctrine of this court in *Rogers & Bro.* v. *Rogers* that he cannot be enjoined, though his goods are thereby passed as the goods of another; but it does not follow that a manufacturer may put the name of another on his goods and thus pass them as the goods of some one else in the market. Under no imagina-

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ble circumstances will a defendant be permitted thus to use another name as a stamp. The limit in this direction is certainly reached in the doctrine that a man may use his own name in his own business, whatever the result may be, so long as he intends no fraud. There is a shoreless and bottomless pit between that statement and the claim that a man may use another's name in his own business, or that a man may use his own name in another's business, no matter what the results may be. It has sometimes been argued that *Meriden Britannia Co.* v. *Parker*, 39 Conn., 450, justifies the theory that there can be a trade-mark the title to which depends upon supervision. No such doctrine is to be found in that or any other case. The reference to supervision is only to answer the defendant's claim that when the Meriden Britannia Company said to the public that the goods stamped "1847 Rogers Bros. A1" were manufactured by Rogers Bros., it was not such a material misrepresentation as disentitled the plaintiff to relief, because in fact and in truth the Rogers Bros., or some of them, supervised the manufacture of the goods. To assume that supervision may be the foundation of title to a trade-mark, and to attempt to jump from that to the assumption that supervision may be a justification of infringement, requires a wonderful amount of confidence. Trade-marks do not pass by inheritance. If they did, they would not pass to the eldest son alone. William Rogers inherited no trade-mark from his father. He cannot sell, for he does not own, his father's reputation; for the same reason, if for no other, he can not use or sell his father's name. If he has skill in the business which his father pursued, that skill may justly be the ground of compensation by his employer, but cannot be used by his employer or by himself to deceive others. The question is not whether, there being no other and prior trade-mark containing the words "Wm. Rogers" in the field, Simpson, Hall, Miller & Co. might under its contract with William Rogers put his name on its goods and thus acquire a good trade-mark as against new comers. Probably under the authority of *Meriden Britannia Co.* v. *Parker* it could, but

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the question is whether, there being such prior trade-mark in the field, it can under its contract with William Rogers infringe such prior trade-mark, and that case is authority in point that it cannot. According to that case, though Parker was enjoined at the instance of the Meriden Britannia Company, the latter corporation could have been enjoined at the instance of Rogers & Bro. of Waterbury, prior occupants of the field.

Fifth. The right of the plaintiff, as against this defendant, is perfect as to both of its trade-marks; but if William Rogers, Jr., were himself defendant, he would, upon the facts found, be estopped to deny the exclusive right of the plaintiff to the trade-mark "Wm. Rogers Mfg. Co." This was the name of the original copartnership, taken by contract with Wm. Rogers, Sr., and has been used by the copartnership and the plaintiff, without question or objection from either father or son, ever since its adoption in 1867. It is found that Rogers has several times complained of the use by the plaintiff of the stamp Wm. Rogers & Son, claiming it to be his personal mark, but no complaint is found because of the use of "Wm. Rogers Mfg. Co." This is the trade-mark which gave name to the goods as "Wm. Rogers goods." Had they been called after the other they would have been "Wm. Rogers & Son" goods. Can there be upon the facts any doubt that William Rogers himself would, if personally defendant, be estopped to deny the exclusive right of the plaintiffs to the use of this mark?

C. R. Ingersoll and *C. E. Mitchell*, for the defendant.

1. William Rogers, as a manufacturer of plated-ware, would have the right to use his own name as his trade-mark, or as a part of his trade-mark, whatever use had been made of the same name by any other manufacturer, and it is not necessary for us to deny the right of the plaintiff to the use of the trade-mark which it claims. The fact that two men bearing the same name may each have a high and valuable reputation in the same art, and may each give his name to the goods of his production, and that

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more or less inconvenience may result from the identity of such names, is no reason for requiring one of them to withdraw from the business of such art or trade, or to give up the valuable reputation to which he is entitled, by adopting some other name by which he will lose his personal significance. And this where both the men are in full life and active business. With much less reason can this plaintiff avail itself of the reputation of the William Rogers, the father, who died in 1873, to prevent William Rogers, the son, enjoying the reputation which he has largely made for himself since the death of his father. In any case, the inconvenience resulting from the mere identity of business names, if it be proved (which in the present case we deny), is *damnum absque injuria.* And this, too, has been settled by this court in *Rogers & Brother* v. *Rogers*, 53 Conn., 121. It also necessarily resulted from the decision of this court in *Meriden Britannia Co.* v. *Parker*, 39 Conn., 450, where the stamps of William, Asa and Simeon Rogers, individually and collectively, were held to be rightfully used, although concurrently, and under circumstances causing them easily to be confounded one with another.

2. William Rogers is to be regarded as standing in the position of a manufacturer of the goods under his contract with the defendant. The case of *Meriden Britannia Co.* v. *Parker*, above referred to, indicates the rule which distinguishes between using a name as a decoy, and forming a legitimate business alliance with a man who is celebrated in his art, which gives him the supervision and control of the business, and makes him the manufacturer in the only sense that is vitally related to the stamp. In this case the court, after referring to the contract relations between the Meriden Britannia Company and the brothers Rogers, says: "We have thus referred to the details sufficiently perhaps to show conclusively that the public were in no sense defrauded by whatever representation the trade-mark contained, and that such representation, so far as it indicated that the Rogers brothers were the manufacturers of the goods in question, was in an important sense true. All

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that the public or the trade cared to know was, that the goods were the production of their skill and experience. This fact, as it seems to us, clearly appears. The further fact that the petitioners furnished capital and machinery, employed and paid laborers, and sold the goods, is entitled to but little weight so far as this question is concerned, although it shows that, in another sense, the petitioners were the manufacturers of the goods." All that the public cares to know of the goods marked "(Eagle) Wm. Rogers (Star)" is that they are the production of the skill and experience of the William Rogers whose name they bear. The stamp is right in saying that they are made by him in the only vital and important sense. They are his goods in respect of origin and quality, and his right to stamp them with his own name is incontrovertible unless capital is the only factor in business enterprises. What is there in the standing or conduct of the defendant which prevents it from co-operating with William Rogers in business, in the same way in which the plaintiff's predecessor and the Meriden Britannia Company co-operated with him and his father, and in so doing found themselves sanctioned by established usage and protected by the courts? But suppose we forget that this is a Rogers mark, and treat it as if it had no special genius and no distinguishing history, and suppose William Rogers is to be treated as if he had no more to do with the business than a salesman. In *Williams* v. *Brooks*, 50 Conn., 278, the goods of the plaintiffs, D. F. Taylor & Co., had a good reputation and ready sale as "Taylor's Hair-pins." The plaintiffs claimed to derive their right from a previous D. F. Taylor & Co., originator of the make, just as in this case. The defendants used the mark, "L. B. Taylor & Co.," claiming a right to do so because Levi B. Taylor (who had been employed with his father as early as 1869 in the hair-pin business) was associated with the defendant as his travelling salesman, with a remuneration depending upon the amount of sales effected by him. But there was no injunction against using the word "Taylor," although the plaintiffs' goods were sold as "Taylor's Hair-pins," among

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other names, and in neither opinion filed in the case is there a suggestion that L. B. Taylor might not make a contract for the use of his name for a continuing commission when he was so far connected with the business as to be its salesman, and have his rights protected under the rule that a man may do business in his own name and another may aid him in so doing. In *Hallett* v. *Cumston*, 110 Mass., 29, the defendant Cumston had marked pianos "Hallett & Cumston," having made an arrangement with a man by the name of Hallett, under which he claimed the right to do so. The plaintiff's name was Hallett, and he had formerly been in partnership with the defendant Cumston, making pianos marked "Hallett & Cumston." The defendant filed a demurrer, which was sustained by the court in an opinion by Judge GRAY, saying: "But they had a right, acting in good faith, to use the name of any other person with his consent, whether it was or was not the same as the plaintiff's. *Emerson* v. *Badger*, 101 Mass., 82. This bill cannot be maintained for an unlawful use of the plaintiff's name, for want of any distinct and sufficient allegation that the defendant used the name of Hallett with intent to represent it to be the name of the plaintiff, and thereby to defraud and injure him." This case related to the use of a personal name as a trade-mark on pianos. That which it was essential to allege in the Massachusetts case is essential to be proved in the pending case; but such proof is wholly wanting. Of course we distinguish our case from cases in which the name of an unknown person is used simply to carry out a scheme of fraudulent personation. Such a case was *Wm. Rogers Mfg. Co.* v. *Rogers & Spurr Mfg. Co.*, 11 Fed. Rep., 495. There the corporation defendant had hired the use of the pretended trade-mark of two Rogerses, in whose hands the mark had never had any vitality. In that case Judge LOWELL says: "The history of this trade-mark is that D. C. Rogers and George E. Rogers applied in February, 1879, to the patent office to register under the act of Congress a trade-mark consisting of the words 'Rogers & Son,' with an arrow. In the sworn application or 'state-

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ment and declaration' required by law, they represented themselves as doing business at Greenfield, Massachusetts, under the firm name of Rogers & Son, and declared that they intended to use the trade-mark upon table cutlery, knives, forks, etc. Mr. Grinnell of Greenfield, whom D. C. Rogers consulted upon the subject, asked him the pertinent question whether he intended to use his trade-mark himself, or merely to trade upon, and he answered that he intended to use it in the manufacture of goods himself; and the application to the patent office conforms to this answer. But what the father and son did was to trade upon it; they let it out to George W. Spurr & Co. for a royalty, and afterwards to the defendants for a royalty. This royalty is paid for a falsehood. The names of these Rogerses is not of the slightest value in the silver-plating business, which they never learned or practiced; nor were they ever partners, as I read the evidence, except in hiring out this trade-mark. It is impossible for this royalty to be paid for anything but the chance of purchasers supposing it to represent some other Rogerses. A court of equity cannot be expected to look with much favor upon a trade-mark thus acquired and used." A similar case is *Meriden Britannia Co.* v. *Parker*, 39 Conn., 450. In that case the defendant borrowed the name of C. Rogers & Bros. C. Rogers & Bros. had not been spoon and fork makers at all, and did not and could not control and guarantee the quality of the defendant's goods. They had no standing in the market as spoon and fork makers; they had no connection with the business of the defendant. The purpose of the defendant was clearly to borrow a name unknown in the business to personate a name that was celebrated in the business. Of course the court took no notice of such a subterfuge, and disposed of the case as if C. Rogers & Bros. had no existence. These two cases are the leading cases to sustain the proposition that the defendant may not say that he does not infringe because some person unknown in the art has lent the infringer a name which is like the name of the plaintiff; but it is needless to add that such cases throw no

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light upon the case in hand, excepting as they present facts which in their general scope and significance are the exact opposite of those which are found by the distinguished committee. And so we say that by long established usage in connection with the Rogers name, and by the decisions of the courts, William Rogers is authorized to do business in his own name, under his own stamp, and no injunction will lie against him, either directly or indirectly through the defendant. For an injunction against the defendant would be an injunction against William Rogers, and deprive the business world of the services and stamp of the only man who is to-day a skilled and recognized representative of the ancient name, and the only man whom the business world relies upon to see that the name shall remain untarnished for another generation.

3. The defendant has not exceeded its right in employing circulars and advertisements. A trade-mark is addressed to the ultimate purchaser, and goes with the goods for that purpose. An advertisement or circular is addressed to those who buy direct from the manufacturers, and expends its force either in guiding or misguiding sharp and intelligent men. A somewhat different rule is therefore applicable, arising out of the fact that what would mislead an uninformed consumer would have no tendency in that direction in the mind of the intelligent trader. But nothing could exceed the painstaking care with which the defendant and William Rogers have sought to direct attention to the fact that their goods are separate from all other goods in the market, because they are the only goods manufactured under the supervision of the only living, genuine Rogers. The finding disposes entirely of the claim that the defendant made any false representation by its advertisements or circulars.

PARDEE, J. This is a complaint for an infringement of a trade-mark, asking for an injunction and damages.

Between the years 1847 and 1850 William Rogers, Sr., acquired and preserved to his death in 1873 a valuable

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reputation in the market as a skillful and honest manufacturer of silver-plated ware. His son William Rogers, Jr., from boyhood had connection with the manufacture of such ware by the various concerns with which his father was connected. By reason thereof since 1864 to this present he has had a valuable independent reputation in the market for skill and integrity in such manufacture.

The plaintiff is a corporation organized in 1872 and engaged in the manufacture of silver-plated ware at Hartford, using since its organization trade-marks as follows:—"Wm. Rogers Mfg. Co.", "1865 Wm. Rogers Mfg. Co.", and "(Anchor) Wm. Rogers & Son;" claiming to own the exclusive right to them by the assent of William Rogers, Sr., and by long continued use, and denying to the defendant and William Rogers, Jr., the right to use any stamp of which the word "Rogers" shall be a distinctive and characteristic part.

The defendant is a corporation engaged in the manufacture of silver-plated ware at Wallingford, Connecticut. In 1878 it made a contract with William Rogers, Jr., by which it was agreed that he should exercise his skill in supervising the process of manufacture and control the quality and style of ware, and allow his name to be stamped thereon, and defend the use thereof. The consideration for this agreement is a commission upon sales. William Rogers, Jr., has performed his contract in every particular. The ware has been sent into the market bearing the stamp "(Eagle) Wm. Rogers (Star)." This stamp is liable to mislead those dealers and consumers who take note of the word "Rogers" or words "William Rogers" only, or who are not familiar with the stamps of the plaintiff. Of which the plaintiff complains.

The complaint and briefs of the plaintiff make it quite clear that the one valuable word in its name and trade-marks, the one word which it is the purpose of this proceeding to preserve for its sole and exclusive use upon silver-plated ware, is the word "Rogers," the right to the possession and use of which it derived from William Rogers, Sr., and it denies to

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William Rogers, Jr., the right either to manufacture silver-plated ware without the intervention of any agency, and stamp his name thereon; or the right to manufacture through the agency of the defendant, and stamp; or the right to manufacture under the particular arrangement which exists for that purpose with the defendant, and stamp. The prayer is that the defendant be enjoined from every form of representation that William Rogers, Sr., is in any way connected with it in the manufacture of silver-plated ware, and from offering for sale any ware upon which is impressed any mark or device of which the words "Wm. Rogers" are the distinctive and characteristic part.

The following are among the additional facts of the case: The defendant was well aware of the value of the name "Rogers" on spoons, if it represented a person who had belonged to the family of William Rogers, Sr., had been connected with him in the manufacture of silver-plated goods, and had acquired a valuable reputation in the market for skill in that art. It entered into the contract with William Rogers, Jr., for the purpose of using his name upon such goods as should be the result of his skill, and of availing itself of his taste, skill and judgment, and from the belief that consumers would regard spoons manufactured under his supervision as being the goods of a genuine Rogers, because his skill had been acquired under the instruction of William Rogers, Sr., his father. It stamped its goods "(Eagle) Wm. Rogers (Star)" for the purpose of informing the public that they were the product of the skill of Wm. Rogers, Jr., for the purpose of taking advantage of his reputation in the market; a reputation acquired because of the knowledge of the public that he had been associated with, and had acquired skill in the art from, his father and others. He had been known to the trade during many years and had acquired and retained a valuable independent reputation in the market; and goods known to have been the product of his skill alone had for that reason a better selling value. For the preceding thirteen years he had been almost constantly employed in connection with

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such manufacture with the plaintiff and the Meriden Britannia Company; and both of those companies had extensively circulated his portrait in connection with that of his father and had thus brought him prominently to the notice of the trade in connection with his father. He had always insisted that his name should be used only on goods of a certain high standard of value. He does in fact superintend the manufacture of all articles upon which his name is placed. His stamp has a high and independent value. By the terms of the contract between the defendant and William Rogers, Jr., the latter has the right to authenticate the goods made under his superintendence by stamping thereon his name, with such accompanying devices as he may adopt. The finding is that the stamp "(Eagle) Wm. Rogers (Star)" was not adopted by the defendant for the purpose of imitating the trade-mark of the plaintiff, but as a new and distinctive trade-mark indicating the personal supervision and control of William Rogers, Jr. It is also found that the arrangement is valuable to him and that it is only through the medium of this or some similar contract that he is able to make his special training in the business available to himself; also that the name of William Rogers, Jr., is not used by himself or the defendant in such association with place or marks, or symbols or signs, or forms of packages, or style or color of labels, as thereby to mislead consumers; and that the word "Rogers," used with or without differing symbols, is the misleading word. As a fact it does mislead many consumers who are not familiar with the marks both of the plaintiff and the defendant, and many who take no note of anything in the marks beyond the word "Rogers." This the plaintiff seeks to prevent.

Passing over the defendant's denial of the plaintiff's right to the exclusive use of the trade-mark which it has adopted, and assuming for the purposes of the case that the plaintiff is a person who, bearing the name William Rogers, has adopted and used his name as a trade-mark, yet the prayer for injunction must be denied.

By the rule prevailing in this jurisdiction the facts of this

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case have been conclusively settled by the court below, acting through the instrumentality of its committee. By the finding fraud in intent or deed has been eliminated from the case. The misleading has resulted simply from the fact that the plaintiff and William Rogers, Jr., bear the same name, and that such consumers only have been confused as would not take note of the distinguishing symbols accompanying the use of the name of William Rogers, Jr., by the defendant. When the second bearer of a name uses it with due distinguishing precautions and without actual fraudulent intent or representation that his wares are those of the first, he is not responsible for such confusion as results solely from the fact of similarity.

The law permits a manufacturer to use his name as a trade-mark. If he has the confidence of the public in his integrity and skill his name will doubtless be for some reasons the most advantageous trade-mark which he can adopt. It will be the most forcible and permanent presentation of the fact that his skill and integrity have gone into the article upon which his name is stamped. But such selection exposes him to this danger:—some other person bearing the same name may be the manufacturer of similar articles and may impress it upon them, thereby creating a possibility of mistake on the part of consumers as to the origin and ownership of the article they are about to buy. The law also gives to a manufacturer the right to use his own name as a mark upon his goods although it be the same as that of another manufacturer of similar goods who has previously made his name a part of his own trade-mark, if in such use by the former there is no false representation.

Because of confusion resulting from the use of identical names with distinguishing symbols there is not necessarily as a matter of law a fraudulent misrepresentation; actual frandulent intent remains to be proven as a fact. If the first appropriator of his name as a mark adopts the name simply, without any accompanying word or symbol by way of prefix or suffix, another manufacturer of similar goods having the same name may lawfully impress it upon his goods, if, as

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in the case at bar, he accompanies it by such distinguishing devices by way of prefix and suffix as that a consumer who will take note of the whole will not be misled. And if consumers who will take note of nothing but the name are misled, and there is consequent loss to either, it must be borne as the result of the act of taking a name as a trade-mark. If the first appropriator affixes such distinguishing marks, figures, symbols or words as he may lawfully subject to his exclusive use, the second may not use his name in connection with like marks, figures, symbols or words; nor with such as so closely resemble those of the first as that the association will probably mislead; nor make such use with intent to mislead. *Rogers & Brother* v. *Rogers*, 53 Conn., 121; Brown on Trade-Marks, (2d ed.) sec. 420.

In *Burgesss* v. *Burgess*, 3 D., M. & G., 896, Lord Justice TURNER said as follows: "I concur in the opinion that this motion should be refused with costs. No man can have any right to represent his goods as the goods of another person, but in applications of this kind it must be made out that the defendant is selling his goods as the goods of another. When a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses; but when the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff. It is a question of evidence in each case whether there is a false representation or not." Of this, in *Massam* v. *Thorley's Cattle Food Co.*, L. R., 14 Ch. Div., 748, JAMES, L. J., said as follows: "That I take to be an accurate statement of the law, and to have been adopted by the House of Lords in *Wotherspoon* v. *Currie*, L. R., 5 H. L., 508, in which the House of Lords differed from the view that I had taken in that case."

In Sebastian upon the Law of Trade-Marks, p. 25 et seq., it is said as follows: "The impossibility of a single manufacturer being allowed to arrogate to himself the exclusive use

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of a name which he shares in common with many other persons is apparent; and from this circumstance the rule was deduced that while, as against persons bearing a different name, a manufacturer's right in his name trade-mark is absolute and exclusive, as against persons bearing the same name no such exclusive right can be set up. Thus in *Dence* v. *Mason*, Sebastian's Digest, 534, MALINS, V. C., held that during the continuance of the partnership between two persons named Mason and Brand, they could not be prevented from using the latter's name in their business, notwithstanding that it was well known in connection with a similar old established business; and the Court of Appeal held that the same would be the case if a new *bonâ fide* partnership should be formed. This rule must, however, be qualified by the statement that where a person uses his own name for the purpose of fraud, and satisfactory evidence of fraudulent intention can be produced, such unfair conduct will be restrained, even though the free use of the man's own name may be thereby hindered, and the criminal law also admits of the punishment of such fraudulent uses of a man's own name. A valuable statement of the law was made by Lord CRAIGHILL in the Scottish Court of Session, in *Dunnachil* v. *Young & Sons*, in which he said: 'The name of a person may be a trade-mark; there may be other manufacturers of goods of the same description, and the latter are not precluded from placing their own names on their goods by reason of the fact that this name has already become the trade-mark of another manufacturer. The only condition they must fulfil is, that the name as used by them shall be accompanied with something which shall be a distinction, if the bare name would lead to the deception of the public and the injury of the trader on whose goods the name first appeared as a trade mark.' And in the New York case of *England* v. *The New York Publishing Co.*, 8 Daly, 375, DALY, C. J., said:—'The fact that a man has used his own name to designate the article he produces, and that the name has become valuable to him through the article becoming extensively known, gives him no right to exclude

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any other man of the same name from affixing his name upon the same kind of article, if he manufactures it. The test is, whether he uses the name honestly and fairly in the ordinary prosecution of his business, or dishonestly, to palm off his own commodity as the production of another.' " And on pp. 226 et seq. as follows:—" It was formerly sometimes supposed, and was held by the late Master of the Rolls and the Court of Appeal in *Singer Manufacturing Co.* v. *Wilson*, L. R., 2 Ch. Div., 234, that for an action to restrain the use of a trade-name to be successful fraud must be proved; on the ground that when a trade-mark was once affixed to the goods it passed with the goods from hand to hand, thus silently repeating to each successive purchaser the original misrepresentation of the original infringer, while the improper use of a name not affixed to the goods was not the necessary consequence of being in possession of marked goods, but was the individual act of each person who used it in respect of the goods; so that there might be held to be an infringement of a trade-mark when, in analogous circumstances, there would be no infringement of a trade-name. And when the case of *Singer Manufacturing Co.* v. *Wilson*, L. R., 3 App. Cas., 376, was remitted by the House of Lords to the Court of First Instance, on the ground of insufficiency of evidence, some of the law peers seem to have thought that different principles of law might possibly be applicable to trade-marks and trade-names. But Lord CAIRNS, Chancellor, said, " It may well be that if an imitated trade-mark is attached to the article manufactured, there will from that circumstance be the certainty that it will pass into every hand into which the article passes, and be thus a continuing and ever present representation with regard to it; but a representation made by advertisements that the articles sold at a particular shop are articles manufactured by A. B., (if that is the legitimate effect of the advertisements, which is a separate question,) must, in my opinion, be as injurious in principle, and may possibly be quite as injurious in operation, as the same representation made upon the articles themselves; and in *Singer Manufac-*

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turing Co. v. *Loog*, L. R., 8 App. Cases, 15, Lord BLACKBURN took the view that the law of trade-marks and trade-names, when not affected by legislation, was the same. Whether there is or is not property in a trade-name, as Lord BLACKBURN suggested, it is a fraud on the part of one person to attract to himself the custom intended for another, by a false representation, direct or indirect, that the business carried on by himself is identical with that of the other person by whose ability and exertions the name has acquired the reputation it possesses. The question is not whether the defendant's business is represented as being similar to the plaintiff's, but whether it is represented as being that very identical business. If such a false representation has been made, whatever may have been the motive of the persons making it, when proceedings are taken in consequence of it, all the court requires is to be satisfied that the names are so similar as to be calculated to produce confusion between the two—so calculated to do it that, when it is drawn to the attention of those adopting the name complained of that that would be the result, it is not honest for them to persevere in their intention, though originally the intention might not have been otherwise than honest."

The cited remark of Lord BLACKBURN was made by him in determining a case in which the defendant neither bore nor had acquired any right to use the name of "Singer," the distinctive and conspicuous portion of the plaintiff's trade-mark. *Singer Mfg. Co.* v. *Loog*, L. R., 8 App. Cases, 15; and such is the fact in *Singer Mfg. Co.* v. *Wilson*, L. R., 2 Ch. Div., 434; and we think we are correct when we say that the same fact pertains to all of the cases cited by Mr. Sebastian, and that neither the citations nor his comments concern cases where the question is between parties bearing the same name.

By the law applicable to the facts established by the finding, William Rogers, Jr., as a manufacturer of silver-plated ware, had the right to impress thereon the stamp complained of; had the right to contract with the defendant that it

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should make the ware for him under his supervision, he to receive, stamp and sell it for himself; the defendant to receive a percentage of the profits for its labor and its capital; he a percentage for his skill, supervising labor and valuable reputation in the market—his capital. By the present contract the defendant furnishes machinery and materials; William Rogers, Jr., the supervising labor and skill, the valuable reputation and stamp, and defends the use of the latter; the defendant sells the ware, and receives payment therefor; the profits are divided. Under one mode he would sell, and take the risk of payment; under the other the defendant would sell and take that risk; the same rule for division of profits presumably would obtain under either mode. The law regarding substance more than form will not withhold from him in one of these modes what it would concede to him in the other. The law does not find in the mode in which he makes his skill, integrity and valuable reputation available as his capital, any sufficient reason for barring him from access to the public and from the resulting profits. Hiss kill and supervising labor have gone into the ware bearing the stamp complained of; it is equal in quality to that of the plaintiff; as between him and the plaintiff, the question being as to his right to go into the market with his own name, the putting of his supervising skill and labor into the work, with the reception of a share of resulting profits, constitutes him a manufacturer thereof in the eye of the law. It is not a legal prerequisite that all of the capital and all of the profits shall belong to him; consumers have the result of his skill and integrity; and to them that is all there is in the word "manufacturer"; he determines the kind, form, quality and value of the ware; it is his creation; the defendant simply executes his commands. Indeed, it must be a matter of indifference to the plaintiff as to which of these modes of reaching the market he shall adopt. Therefore, passing by the form, and going directly to the substance, we take the case as if of record William Rogers, Jr., were defendant.

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In no other way can the real question be reached and disposed of.

If any person or corporation shall hereafter place upon the market silver-plated ware bearing a stamp the conspicuous and valuable part of which shall be the word "Rogers," and therefore liable to mislead consumers as to the origin and ownership of the same, the right to do so can be subjected to the test of judicial investigation and determination. If the judgment is that a person having the same name as that which this plaintiff has rightfully adopted and used, and a valuable name and reputation in the market for skill and integrity in the manufacture of silver-plated ware, has made an arrangement with a person or corporation having capital, by means of which, upon a division of profits, he can gain access to the market and make his skill and name available to himself and beneficial to the public; that there is no intent upon the part of either to mislead consumers; that there has been no use of the name in association with misleading signs, words, figures or symbols; and that in fact consumers are not misled by anything except the presence of the word "Rogers," and the omission to note distinguishing symbols, the law does not condemn the arrangement. The injurious result is one of the disadvantages assumed by the person on whom it falls when he selected a personal name as his mark. The objection on the part of the plaintiff at this point rests not upon any legal principle, but upon its distrust as to the ability of the court to detect and prevent fraud. But it is to be remembered that contests between persons bearing the same name as to their right respectively to stamp it upon goods, turn largely upon the intent; that it is a question of fact; and that courts have been and presumably will continue to be equal to the determination of it.

It is the argument of the plaintiff that its goods became known in the market as "Rogers goods;" that the defendant's goods are also known by the same designation; and, therefore, that the latter should be enjoined. But the disadvantages attending the choice of the name of a person as a mark affect every result flowing from such choice. The

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speech of the market, calling the plaintiff's goods "Rogers goods," is only the spoken trade-mark of consumers in repetition of the one stamped upon the ware, induced by that. If William Rogers, Jr., has a right to put the name "Rogers" on similar ware, that right cannot be affected by the fact that consumers apply the same spoken trade-mark to it; he is not to be injuriously affected by any use the public may make of a mark which the law allows him to use. The plaintiff has no greater right to prevent the misleading of consumers in the matter of calling the goods of both "Rogers goods" than it has to prevent the same result in the matter of using identical names accompanied by differing symbols as stamps. The mischief is the same in origin, kind and degree. If the plaintiff had impressed the form of two elephants upon its ware as its trade-mark, neither the defendant nor William Rogers, Jr., would have the right to so impress two elephants upon ware as to mislead consumers as to the origin and ownership of the goods. If by reason of the plaintiff's mark its goods had come to be known in the market as "two elephant goods," neither the defendant nor William Rogers, Jr., would have the right to so mark goods as that they should come to be similarly known. William Rogers, Jr., has a right to the use of his own name; but he has no right whatever to the use of the form of two elephants in such manner as to interfere with the right of the first appropriator of that device. He would be a trespasser from the beginning in a forbidden field; and without necessity or excuse, for every other form in nature is at his service; and this regardless of his intent; and even if he had done it in ignorance that the device had been appropriated by another.

The first count in the complaint charges the defendant with the publication of an advertisement to the effect that it is a manufacturer of the celebrated William Rogers, Sr., spoons, forks and knives. The finding is that the defendant knew that the use of the mark and the publication of the advertisement would cause its goods to be known in the market as "Wm. Rogers goods;" but the advertisement was not intended or calculated to induce the public to

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believe that the goods so designated were manufactured by the plaintiff. The purpose of the publication was to direct public attention to the fact that the manufacture of its goods was controlled by William Rogers, Jr., whose name they bear, and to the celebrity of its goods because of his supervising skill and reputation. Upon the facts, the defendant by permission from William Rogers, Jr., for its own advantage and for his as well, has availed itself of whatever right he had to use his own name, with cautionary accompanying devices, for the honest purpose and intent of informing consumers that his labor and supervising skill have gone into the manufacture of spoons at the manufactory of the defendant at Wallingford. The word "Rogers," regardless of the devices, is the sole source of confusion.

The portion of the defendant's circular complained of in the second count is as follows: "Sectional Plated Spoons and Forks—(Eagle) Wm. Rogers X 12. Triple plated upon all points exposed to wear. Plated by the method invented by Wm. Rogers in 1855, who was the original inventor of Sectional Plate. Wm. Rogers, (since 1878,) Wallingford, Conn., formerly of Hartford and West Meriden."

The finding is that it "is not misleading to a person familiar with the facts stated therein and with the fact that William Rogers, Sr., died in 1873; but persons not so familiar might be led by it to suppose that the William Rogers who was the inventor of sectional plate in 1856, was in the employ of the defendant at the time the circular was printed" in 1880.

Upon the finding these statements are true; and there is no finding that they were made with the fraudulent intent to mislead the public into the belief that the goods so advertised were those of the plaintiff, and, as in all of the other parts of the case, upon the last analysis the confusion is found to reside in the fact that two manufacturers bearing the same name, having equal skill and reputation in the same art, have each stamped his name upon his goods with distinctive symbols. As has been said, having equal rights,

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under such circumstances they must share both the advantages and disadvantages of the situation.

The Superior Court is advised to dismiss the complaint.

In this opinion CARPENTER and GRANGER, Js., concurred. PARK, C. J., and LOOMIS, J., concurred fully in the legal principles laid down in the opinion, but thought that, under the arrangement made by William Rogers, Jr., with the defendant company for the manufacture and sale of the ware stamped in the manner in question, he could not be regarded as standing in the position of a manufacturer of the ware.

GABRIEL S. GRAY *vs.* THE BOROUGH OF DANBURY AND THE NEW YORK & NEW ENGLAND RAILROAD COMPANY.

Fairfield Co., Oct. T., 1886. PARK, C. J., CARPENTER, PARDEE, LOOMIS and GRANGER, Js.

A railroad was carried over a street in a borough by a bridge, which was built at a height above the street directed by the borough and approved by the railroad commissioners. Afterwards the road-bed was raised fourteen inches, in part from natural causes and in part from the placing of gravel thereon by the borough. The plaintiff, in passing under the bridge upon a load, was injured, without negligence on his part, by his head striking an iron truss of the bridge. The railroad company was found to have been guilty of no negligence, but the borough to have been negligent in causing or permitting the road-bed to be filled up till the space under the bridge was insufficient. Held that the borough was liable for the injury, and that there was no liability on the part of the railroad company.

The railroad company was clearly not bound to raise the bridge from year to year as the street was raised, and was not bound to remove the earth and gravel placed there by the borough. The borough alone could make repairs, and it alone was responsible for doing it improperly.

There is no law that fixes the height of railroad bridges over highways. It should be sufficient to reasonably accommodate the public travel, and what is reasonable must depend in some measure upon the circumstances of each case.

Where the railroad company, its engineers, the railroad commissioners,

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and the borough within which the highway lay, regarded the height of the bridge sufficient when made, and the injury was attributable wholly to the raising of the road-bed below, it was held that the court below was justified in finding that the railroad company had been guilty of no negligence in the original construction of the bridge.

The statute (Gen. Statutes, p. 324, sec. 30) provides that railroad companies at all crossings of highways shall make and maintain such bridges, embankments and approaches as the convenience and safety of the public travel on the highway may require. Held that this statute imposed no duty upon the railroad company, when the bridge was once properly made, to maintain the highway in such condition as should prevent the bridge from interfering with public travel.

The existence of a railroad interfering with a highway, although the company may have done all that is required of them by statute, will often impose additional burdens upon towns in maintaining highways, but this expense the towns may reasonably be required to bear.

The statute (Gen. Statutes, p. 232, sec. 10) provides that when an injury is caused by a structure legally placed on a highway by a railway company, the company, and not the party bound to keep the road in repair, shall be liable therefor. Held not intended to apply to a case where the structure was a bridge over the highway, and the injury resulted wholly from the negligence of the party bound to keep the highway below it in repair.

(Argued January 5th—decided February 11th, 1887.)

ACTION for an injury from a defective highway of the defendant borough and a defective bridge of the defendant railroad company; brought to the Superior Court in Fairfield County. Each of the defendants suffered a default, and the case was heard in damages before *Andrews, J.*, and the following facts found:—

The borough of Danbury is by law bound to maintain and keep in repair all the highways within its limits. West street in it is a much traveled public highway, formerly an ancient town road, leading westerly from the borough. In the year 1880 the New York & New England Railroad Company constructed its track, by a substantial iron bridge, over West street and within the borough. The borough at the time, in view of its liability for the highway, insisted that the bridge should be built according to its wishes; and such negotiations were had between the borough and the railroad company, that the bridge was built upon plans furnished or approved by the borough, and was put at such a

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height above the ground as was required by the borough. The bridge consists of three spans. Under the south span a small stream of water flows. The other two spans are so constructed that public travel can pass under them. The north span is about seventeen feet wide, and its height above the ground was, at the time the bridge was built, about twelve and a half feet. The middle span is twenty-eight feet wide. Its height above the ground under it, owing partly to the level of the ground and partly to the construction of the bridge, was never greater than about ten and a half feet. Soon after the bridge was completed the borough put the ground under the north and the middle spans into suitable condition for public travel. The pier which stands between these two spans of the bridge so divided the former highway that the straight line of travel is under the middle span. The north span, while open and available for travel, is almost entirely abandoned. Almost the entire travel that goes under the bridge passes under the middle span. For all practical purposes the middle span is the highway.

Approaching the bridge from the west along the highway, the ground descends to, or nearly to, the bridge itself. The sand and earth had washed down the hill and been deposited under the bridge, and in repairing the highway the persons employed by the borough had placed earth and other material along both sides of and under the bridge from time to time, to so great an extent that at the time of the injury complained of the vertical space under the middle span had become reduced to nine feet and four inches. The highway was thereby made defective, insufficient and dangerous for public travel.

On the 27th of March, 1883, the plaintiff was coming from Mill Plain, a village about four miles west of the borough, to the borough, with a medium-sized load of hay on a large farm wagon arranged with hay-rigging. The load was drawn by two horses, one ten years old and the other twenty-eight, and both well-broken and gentle. The plaintiff was sitting on the forward end of the load, driving. He

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came safely to a point about one-eighth of a mile westerly from the bridge. He was descending the hill, when in attempting to hold in his horses to a walk, the right-hand rein broke. The team became unmanageable, ran swiftly down the hill, keeping in the regular line of travel, and went under the middle span of the bridge. The plaintiff had no time to get off the load or to help himself in any way. His head was brought into violent contact with the lower iron truss of the bridge. He was knocked off the wagon into the road, made senseless, and was seriously and permanently injured.

The plaintiff was guilty of no negligence in respect to his harness, his team, or his own conduct. The railroad company was guilty of no negligence. The borough was negligent in causing or permitting the roadway under the bridge to be filled up till the space under it was too small to satisfy the requirements of common convenience and necessity. The injuries to the plaintiff were caused by the negligence of the borough.

The borough claimed that all the ground under the middle span was outside the limits of the highway. The plaintiff claimed that it was, at the time of the accident, within the highway, either because it was within the limits of the ancient town road as originally laid out, or because it had become highway by dedication and acceptance. The only evidence to show how wide the town road was laid out and where its lines were, was the evidence from usage. There was much evidence to show a dedication.

Upon all the evidence in the case the court found that so much of the ground under the middle span as was not included within the original layout of the town road, if any, had been dedicated to and accepted by the public, and that it was all within West street at the time of the injury.

For the purpose of proving his claim in this part of his case the plaintiff offered in evidence, in connection with much other evidence, certain votes of the borough which were objected to by the counsel for the borough and admit-

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ted by the court, but which, in the view taken of the matter by the court, it is not necessary to state.

The counsel for the borough claimed, as matter of law—

1. That the plaintiff could not recover because of the variance between his proof and allegation in that the complaint alleged the neglect of duty by the borough in the following words: "Said highway under and about said bridge was defective in this—that it had been so raised and filled in by said borough at, about and under said railroad bridge, and was so high and so near the said bridge over the same as to interfere with, obstruct, impede and render dangerous and unsafe, ordinary public travel on said highway," and that the proof showed that the road under the center span had been allowed by the borough to be raised and filled in by earth and sand washed there by rains and accumulated there in other ways, and that the borough had neglected to repair the road and to remove the earth and sand, whereby the road became so high and so near the bridge as to render unsafe and obstruct ordinary public travel thereon.

2. That the land under the center span could not in such a short space of time between the opening of it to public travel and the time of the accident, in the absence of any written proof of a grant of the land by the railroad company to the public for a highway, be held to be a highway by dedication.

3. That if the land under the center span was a highway by dedication, so that the duty of maintaining and keeping it in repair was upon the borough, such duty was confined solely to the road-bed, and did not extend to the bridge over the highway, or to the highway in reference to the bridge above it.

4. That if, under the facts in this case, either of the defendants were liable, it was the railroad and not the borough.

5. That under General Statutes, p. 324, sec. 30, it was the duty of the railroad company after the land under the center span became a highway by dedication, to maintain the bridge and the approaches to it, and the center span of the bridge, as the convenience and safety of public travel

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upon the highway under the center span and the approaches thereto required.

6. That if, after the building of the bridge by the railroad company, the old highway was enlarged by its own act or the act of another, by taking within its limits the land under the center span, the duty of the company was then also enlarged and increased, and it became its duty to take off iron girders or wings on the bottom of the bridge at the top of the center archway, or some part of them, or in some other way maintain the bridge and the center arch thereof as the convenience and safety of public travel underneath required.

The plaintiff claimed that upon the facts proved both the borough and the railroad company were liable for substantial damages, but the court held that the borough only was liable for substantial damages and rendered judgment for two thousand dollars against the borough and for one dollar against the railroad company. The plaintiff and the borough appealed.

S. Tweedy, for the plaintiff.

It is conceded that the plaintiff is entitled to substantial damages from one or the other of the defendants. If the court should decide that the borough is not liable then the plaintiff's right to damages from the railroad company is saved by his appeal. He has no further interest in the matter than to have the judgment for nominal damages against the railroad company set aside if the court shall hold that company and not the borough liable. All the essential elements of a liability under the statute, by force of which the plaintiff claims damages, here exists. Gen. Statutes, p. 232, sec. 10. The plaintiff was injured in person by means of this defective road, without any contributory negligence on his part, and the statute fixes a liability for an injury so received upon the party bound to keep such road in repair. That party is clearly the borough, through whose negligence the road was made defective, and the injuries caused. Such would seem to be a proper construction of that statute, and

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in that manner has the court interpreted it. No question is raised by this appeal as to any claimed contributory negligence on the part of the plaintiff, and the court below has determined that question.

G. Stoddard and *H. W. Taylor*, for the Borough of Danbury.

1. Under the facts of this case the railroad company, and not the borough, was by law required to keep the space sufficiently clear under this bridge to accommodate public travel. It is a just principle of interpretation that "charters of corporations which confer exclusive privileges for the particular advantage of the grantees, are to be construed liberally for the benefit of the public and strictly as against the corporations." By availing itself of the right to cross this highway the railroad company came under the obligations imposed upon it by the law which conferred the right, namely, the obligation of restoring "said highway thus intersected to its former state, or in a sufficient manner not to impair its usefulness." Gen Statutes, p. 323, sec. 28. The 30th section of the same statute also requires a railroad company to "make and maintain such bridges, abutments, tunnels, arches, excavations, embankments and approaches as the convenience and safety of the public travel upon said turnpike, highway or street may require." The obligation imposed by section 28 is not discharged by the fulfilment of the original duty, but it is a continuing one, to be exercised whenever the necessity, convenience or safety of the public demands it. The case of *English* v. *New Haven & Northampton Co.*, 32 Conn., 243, contains this general statement as to the policy of our law: "The excavation through Temple street was made by the corporation to whose rights and obligations the defendants have succeeded, by authority of their charter, and it is eminently just and proper, and in accordance with our legislation, to require that company, or the defendants, to bridge the excavation to any extent which public convenience and necessity might then or at any time require. * * * In view of the policy of our leg-

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islature to charge such corporations with the duty of restoring highways, when disturbed, to their former state of usefulness, we think it entirely clear that they intended to provide that the highway in question should be so restored, * * * and as a continuing duty." And this statement of the general policy of our law is amply sustained and enforced in the cases of *New Haven* v. *New York & New Haven R. R. Co.*, 39 Conn., 132, and *Burritt* v. *New Haven*, 42 Conn., 198. This question has been distinctly raised in other states, and the weight of authorities supports our proposition. In *Roberts* v. *Chicago & North Western R. R. Co.*, 35 Wis., 679, the court say: "Where a statute requires a highway, over which a railroad is constructed, to be restored 'to its former usefulness,' the railroad company must so restore it that its use by the public shall not be materially interfered with, nor the highway rendered less safe or convenient to persons and teams passing over it." This certainly means that the future use of the highway shall not be interfered with by reason of the railroad company's having laid its track across it. This is the doctrine in *People* v. *Chicago & Alton R. R. Co.*, 67 Ill., 118; and the same is held in *Eyler* v. *County Commissioners*, 49 Md., 257, although by a statute the obligation is in express terms only not to obstruct the safe use of the highway. The case of *Cooke* v. *Boston & Lowell R. R. Co.*, 133 Mass., 185, is very similar to the case at bar. In *Wellcome* v. *Leeds*, 51 Maine, 313, where a statute provided that "a railroad shall be so constructed as not to obstruct the safe and convenient use of the highway," the obligation of the company was held not to be limited to the original construction. "It must keep the railroad so constructed at all times. Its obligation so to do is continuing." In *Keefe* v. *Sullivan County R. R. Co.*, 63 N. Hamp., 271, the court decides that a provision in the charter of a railroad corporation, that the road shall be so constructed as not to obstruct the safe and convenient use of any private way which it crosses, imposes upon the corporation the duty of maintaining a safe and convenient crossing for such private way." In *City of Newton* v. *Chicago, Rock Island & Pacific R. R.*

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Co., 66 Iowa, 422, it appears that, by a statute of Iowa, "any corporation may raise or lower any turnpike, plank road or other highway for the purpose of having its railway cross over or under the same; and in such cases said corporation shall put such highway, as soon as may be, in as good repair and condition as before such alteration." The court say: "The defendant contends that the repairs contemplated by the statute are original repairs: that is, such as are necessary in the construction of the crossing to put it in a proper condition. But it was held in the suit of *Farley* against the same company, 42 Iowa, 237, that the company was bound to keep the crossing in a safe condition. * * * Under that ruling it appears to us that the defendant's position cannot be sustained." In *Cott* v. *Lewiston R. R. Co.*, 36 N. York, 217, it appears that a statute empowered a railroad company to construct its road across any stream of water, but required it to restore the stream "to its former state, or to such a state as not unnecessarily to have impaired its usefulness." The court say:—"The plain intention of the statute is, that the company shall restore the stream to its former proprietors as little impaired in its utility as practicable, so as to subject such owners to no loss or injury, or at any rate to make the loss as trifling as possible. To effectuate this clear intent, it must be held that the company must not only in the first instance make the channel as perfect as practicable, but continue and preserve it in that state as long as it continues to divert the water from its natural channel. * * * This legislative permission is given, charged with the duty of restoring the stream as near as practicable to its former usefulness. This is not by any means done if it is restored burdened with the charge of keeping the new channel in repair. That is a burden to which the previous enjoyment of the stream was not subject." In *People* v. *N. York Central R. R. Co.*, 74 N. York, 305, in construing a statute similar to ours the court says: "Here the duty of restoring is enjoined by statute, and, as we have seen, the duty is continuous." See also 2 Wood's Railway Law, 969, 976; *Chicago, R., Island &*

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Pacific R. R. Co. v. *Moffit*, 75 Ill., 524. Before the bridge was placed across the highway it was unquestionably the duty of the town to keep in repair that portion of the highway which now lies under the bridge. It cannot be that the legislature, in granting to railroad companies the right to cross highways either at grade or above or below grade, intended thereby to impose upon those whose duty it had previously been to keep such highway in repair, the additional burden of keeping it, not in such a state of repair as would formerly have been ample for the convenience and safety of public travel, but in that state of repair which the presence of, and the relation of the highway to, the bridge demanded. This bridge is no natural obstruction which the town ought to provide against, but is a purely artificial structure, which is necessary in the construction and operation of the railroad. *City of New Haven* v. *N. York & New Haven R. R. Co.*, 39 Conn., 132. Even should it be held that the town was under obligation to keep that portion of the highway under the bridge in its former state of repair, still justice would seem to require that whatever additional burden of repair the presence of the bridge might demand, should be assumed by the railroad company for whose benefit the bridge was constructed. The state of repair in which the road-bed was at the time of the accident in question would in former times have been ample; if it was inadequate when the accident occurred, it was solely because of the presence of the bridge above it. Should the taxpayers of the town be required to bear the additional expense of digging out and carrying away the earth which had accumulated under the bridge, in order that such bridge might be maintained at a safe height above the highway? This is an expense rendered necessary by the presence of the bridge solely. The railroad company should bear it.

2. But the railroad company is liable, under Gen. Statutes, p. 232, sec. 10, which provides that "any person injured in person or property by means of a defective road or bridge, may recover damages from the party bound to keep it in repair; and when the injury is caused by a structure legally

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placed on such road by a railroad company, it, and not the party bound to keep the road in repair, shall be liable therefor." *Allen* v. *N. Haven & Northampton Co.*, 50 Conn., 217; *Lee* v. *Barkhampsted*, 46 id., 217. The whole question resolves itself briefly into this: Section 28, above alluded to, imposed upon the railroad company the duty of restoring the highway to its former state so as not to impair its usefulness. This, as we have seen, is a continuing obligation. Section 30 imposes upon the railroad company the additional obligation of making and maintaining bridges, abutments etc., whenever the railroad shall cross over or under the highway; and section 10 provides that when the injury is caused by a structure legally placed on the highway by a railroad company, it, and not the party otherwise bound to keep the road in repair, shall be liable therefor. It is difficult to see how the legislature could have more clearly fixed the liability in a case like the present, than these three acts show it to have done.

R. E. DeForest and *J. E. Walsh*, for the New York & New England Railroad Company.

1. There are but two conceivable grounds upon which any such liability of the railroad company could be claimed: 1st, upon general principles of the common law, and 2d, by virtue of the statute law of the state. It is too plain for argument that upon the facts found no common law liability is shown. Nobody denies that it had a right to construct and maintain its road over this highway. It appears as a fact that in so doing it has been guilty of no negligence. Now at common law of course there could be incurred no liability for damages to any one by simply doing without any negligence a thing in itself lawful. The question of negligence is here a question of fact, and the direct finding that there was none is conclusive upon that point. *Beers* v. *Housatonic R. R. Co.*, 19 Conn., 566; *Park* v. *O'Brien*, 23 id., 347; *Brennan* v. *Fair Haven & Westville R. R. Co.*, 45 id., 297. But if it were a question of law to be reviewed by this court, upon the whole record every circumstance revealed emphati-

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cally repels the charge. The bridge was a structure in itself substantial and safe. It was built at a safe height above the road. The only danger was occasioned by the subsequent filling in and raising up of the roadway under the bridge, and in that way only the plaintiff's injuries were occasioned. All this is found. Besides all this, the railroad company obtained and was guided by the advice and direction of the borough through which the highway ran, the people and authorities of which were most cognizant of the amount and nature of the public travel and most interested in securing its greatest safety and convenience. What more could the company have done in the exercise of the highest possible degree of vigilance and caution?

2. It is said however that the company is liable by virtue of the statute law. Section 30, page 324, and section 10, page 232, of the General Statutes are relied upon to sustain this claim. Section 30 provides that "every railroad company which may locate and construct a railroad across any turnpike, highway, or public street, shall construct it so as to cross over or under the same; and may, under the direction of the railroad commissioners, raise or lower the same at said crossing or change the location thereof, and shall make and maintain such bridges, abutments, tunnels, arches, excavations, embankments and approaches as the convenience and safety of the public travel upon said turnpike, highway or street, may require; but the railroad commissioners may, upon due notice to said company, and to the selectmen of the town, or mayor of the city in which said crossing is situated, direct such company to construct its railroad at such crossing upon a level with the turnpike, highway or street." Has not the railroad company fully complied with that statute? Has it not constructed its road so as to cross over the highway? Has it not made and maintained such a bridge and approaches as the convenience and safety of the public travel on the highway required? The finding of the court shows that it has. Neither the bridge, nor its abutments, arches or approaches, caused this injury or made the

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crossing unsafe to any one. It was unsafe only from the defective condition of the roadway which the statute does not in this case require the railroad company to keep in repair. The roadway each side of the bridge was of course in a certain sense an approach, but certainly it cannot be seriously contended that it was an approach within the meaning of this statute. *Whitcher* v. *City of Somerville*, 138 Mass., 454. And it is absurd to insist that maintaining the bridge so as the safety and convenience of the public travel required, legally involved raising and lowering it with every change in the grade of the roadway beneath. The bridge is originally erected at a perfectly safe and convenient height above the highway. It is a substantial, durable, immovable structure. The expense of changing its elevation necessarily involving changes for long distances in the grade of the railroad track and embankment and the stone foundations, would in most instances be nearly as great as its original cost. The grade of the road below on the contrary is susceptible of easy and inexpensive alteration. If by accident, the wrongful act of any person, or the negligence of the party charged with the duty of repairing the highway, the grade of the roadway under the bridge is so much raised as to make the passage way unsafe, the danger can be easily, speedily and inexpensively obviated by a reduction of that grade. This however, as we have seen, is no part of the defendant railroad company's duty, but the duty of the borough. Gen. Stat., p. 232, sec 7. The railroad company has no right even to change that grade, originally, or subsequently, if at all, without the consent of the railroad commissioners. It would then be an intolerable injustice to compel the railroad company to change the elevation of its bridge, originally safely and properly constructed, to accord with every whimsical or accidental alteration of the grade of the highway. The borough contends again that the company is rendered liable by section 10, page 232, of the General Statutes. It reads as follows:—"Any person injured in person or property by means of a defective road or bridge, may recover damages from the party bound

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to keep it in repair. * * * And when the injury is caused by a structure legally placed on such road by a railroad company, it, and not the party bound to keep the road in repair, shall be liable therefor." Two things are here spoken of—defective roads and defective bridges. The reference to them is in the alternative and not in combination. It is a bridge by itself that is supposed to be defective, or it is a road by itself that is supposed to be defective; and there is no reference here to a danger or defect from a combination of bridge and road. Now is it claimed that this is a case of a defective bridge under this statute? This claim is utterly untenable, because, in the first place, this part of the statute has no reference to and does not affect bridges built over highways by railroad companies. It was passed before railroads were invented or imagined. It appears in the statutes of 1672. It obviously has reference to bridges which constitute a part of the highway itself, and which, with the road leading up to them and from them, the public travel on; such as toll bridges, bridges maintained by turnpike companies, and others. And second, this claim is untenable because, if by any possibility this part of the statute relates to bridges over highways, still it would have to appear that the bridge was out of repair, and that for want of such repair the injury was occasioned. For this statute simply declares the remedy for injuries arising from neglect to perform the duty of repairing roads—a duty existing by virtue of the statute only. *Hewison* v. *City of New Haven*, 34 Conn., 136; *Allen* v. *New Haven & Northampton Co.*, 50 id., 217. Here there was no want of repair, and therefore there could be no liability under the statute. It may, however, be insisted that the latter clause of the statute fixes the liability. This portion of the statute has no reference to a bridge. Here it is the road that must be defective, and the defect that causes the injury must be a structure legally placed on such road by a railroad company. The legislature did not at all contemplate the case of a bridge or any other structure suspended over the road, but only those structures on the road—

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on the surface of the road—such as ties, rails and planks, whose lawful presence there prevents the town or borough, or other person or corporation charged with the duty of keeping the roadway in repair at that point, from performing their duty. It is upon this ground that the liability in such case is transferred to the railroad company—the ground that because the railroad has a lawful right to place and maintain that structure there, therefore the town, borough or other party cannot, and therefore is not required to keep the road in a safe condition at that point. *Allen* v. *New Haven & Northampton Co.*, 50 Conn., 219. This is an entirely different case. We have no structure on the road here. There is nothing whatever to interfere with the grading and repair of the roadway under the bridge by the borough, and the borough alone has the right and is by law bound to do that grading and repairing. *Potter* v. *Castleton*, 35 Verm., 435; *Willey* v. *Portsmouth*, 35 N. Hamp., 313; *Aston* v. *McClure*, 102 Penn. St., 322. The injury here is not caused at all by the bridge, but by the unduly elevated and therefore defective condition of the road below. If, however, it could be said that this bridge was a structure on the road within the meaning of the statute, and that by reason of it the road was defective, and in consequence of such defect this accident happened, yet the railroad company would not be liable in the absence of all negligence. The company in such case would not be liable, except in the same manner and to the same extent that the borough, town, or other person or corporation would ordinarily be liable for negligence. *Bill* v. *City of Norwich*, 39 Conn., 222; *Allen* v. *N. Haven & Northampton Co.*, *supra*. Here the court finds there was no negligence. This imports the absence of everything that might imply negligence—even notice of the defect and opportunity to repair. We contend, therefore, that the railroad company was not liable by either statute, and not being liable as we have seen upon any principle of the common law, is not liable at all.

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CARPENTER, J. This is an action against the borough of Danbury and the New York & New England Railroad Company to recover damages for injuries received by coming in collision with a railroad bridge over the highway. There was a hearing in damages upon default, and judgment against the borough for actual damages and against the railroad company for nominal damages only. The borough and the plaintiff appealed.

Each appeal presents this question: Is the railroad company liable for actual damages?

The material facts are briefly these: In 1880 the railroad company constructed a bridge over West street, in the borough of Danbury, for the purpose of carrying the railroad over the street. The plaintiff was guilty of no contributory negligence. It is expressly found that the railroad company was guilty of no negligence. The bridge was built "upon plans or directions furnished or approved by the borough," and was put at such height above the street as the borough required. When first built the vertical space between the bridge and the road-bed was ten feet six inches; when the accident happened it was nine feet and four inches. The difference, fourteen inches, was caused by raising the road-bed from year to year, partly from natural causes and partly from placing gravel thereon by those repairing the street. Therein the court found the borough guilty of negligence. The finding is conclusive in favor of the railroad company, unless the court can see as a conclusion of law from the facts stated that the company was negligent. The supposed negligence consists either in a faulty construction of the bridge or in failing to take measures to preserve the original space between the bridge and the street.

1. Was there negligence in the construction of the bridge? It may be that ten and one half feet is in fact a scant height for a railroad bridge over a highway; but are we justified in saying so as a legal conclusion? We are aware of no law, statute or otherwise, that fixes the height of such bridges. They should be constructed so as

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reasonably to accommodate the public travel. What is reasonable must depend in some measure upon the circumstances of each particular case. It seems that the railroad company, its engineers and the railroad commissioners deemed the height sufficient; otherwise it would have been their duty to insist upon its being greater. The borough, in view of its liability for the highway, insisted that the bridge should be built according to its wishes, which was done. The borough then considered the height sufficient. In addition to this, the fact appears that the injury was caused, not by the bridge being too low in the first instance, but by reason of the height being practically reduced by raising the street. These facts, we think, justify the Superior Court in finding that the company was not negligent in constructing its bridge.

2. Was it negligent in failing to keep this vertical space at its original height? That could only be done in one of two ways; by raising the bridge, or by preventing the accumulation of earth upon the road-bed. Surely it will not be claimed that the company was bound to raise the bridge as the street was raised from year to year. To impose upon it such a duty would be unreasonable.

Neither was the company bound to prevent the street from being raised. The duty of repairing the street was on the borough. The company was under no obligations to see that the borough did its duty, and it had no power to control the manner of doing it. Any attempt to remove the earth and gravel placed there by the borough would have been an unwarrantable interference with its rights and duties. The borough alone could make repairs, and it alone should be responsible for doing it improperly. The court below was justified in finding that "the borough was negligent in causing or permitting the roadway under the bridge to be filled up till the space under it was too small to satisfy the requirements of common convenience and necessity."

But it is claimed that the railroad company is liable by statute. Two sections are cited as bearing upon the case:

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Gen. Statutes, p. 323, sec. 28, and p. 324, sec. 30. The 28th section has more particular reference to grade crossings and cases where the location of the highway is changed in order that the railroad may be laid in the most feasible place. The 30th section is the one more particularly relied on. It provides that the railroad company "shall make and maintain such bridges, abutments, tunnels, arches, excavations, embankments and approaches as the convenience and safety of the public travel upon such turnpike, highway or street may require," etc. It seems to be claimed that under this statute the railroad company was bound to maintain the highway under the bridge, at least so far as to prevent the bridge from interfering with public travel. We think this is a strained and unnatural construction of this section. No word in it aptly describes this piece of road, and the whole section falls far short of imposing upon the company any such duty.

In this connection it was urged by counsel for the borough that "whatever additional burden of repair the pressure of the bridge might demand, should be assumed by the railroad company, for whose benefit the bridge was constructed. The state of repair in which the roadbed was at the time of the accident in question, would in former times have been ample; if it was inadequate when the accident occurred, it was solely because of the presence of the bridge above it. This is an expense rendered necessary by the presence of the bridge solely." This is plausible, but it is reasoning from false premises. It assumes that it was more expensive to maintain the road at its former grade than to raise it up, whereas the reverse was doubtless true. It also assumes that the inadequacy of the highway was "solely because of the presence of the bridge," whereas the finding clearly shows that the bridge was harmless, and would have remained so if the borough had done its duty properly.

It is not to be inferred, however, that the presence of a railroad will in no case impose additional burdens upon towns in maintaining highways. It may well be that their duties in that behalf will be changed or modified, and that

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they will be somewhat restricted in the use of means, as in this case. Such modifications may involve some additional expense which the towns may reasonably be required to bear.

It is further claimed that section ten, page 232, of the General Statutes, which makes the party bound to keep a highway in repair liable in damages caused by any defect therein, makes the company liable under the concluding clause of that section, which is as follows: "And where the injury is caused by a structure legally placed on such road by a railroad company, it, and not the party bound to keep the road in repair, shall be liable therefor."

We cannot suppose that the legislature intended to make the company liable in a case like this, where the structure is a bridge over the highway, and the accident clearly resulted from the negligence of the party bound to keep the highway in repair.

The counsel for the borough also raise a question of evidence. It is insisted that the testimony, on which it is found that the borough at the time of the erection of the bridge, in view of its liability for the highway, insisted that the bridge should be built according to its wishes, and that it was so done, was inadmissible.

We are not satisfied that the statute which requires the record to show that the question was distinctly made on the trial has been complied with. A large number of votes of the borough and of the warden and burgesses were offered in evidence by the plaintiff, and objected to by the borough. Most of these votes were offered for other purposes; and so far as those purposes are concerned, the objection is not pursued. Among those votes was one passed by the warden and burgesses January 19th, 1880, as follows: "*Voted*, that the board approve of the doings of the N. Y. & N. E. R. R. Co. in building a bridge across West street." That has some tendency to establish the facts objected to; but it does not appear that the objection to the evidence was for that reason; and it cannot be presumed, for, in addition to the fact that it was offered for another purpose, and by the

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plaintiff, the record discloses no attempt by the plaintiff to show that the railroad company was not liable. But aside from this, the facts must have been found mainly on other evidence. What that evidence was does not appear; neither does it appear that it was objected to.

There is no error.

In this opinion the other judges concurred.

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APPENDIX.

OBITUARY SKETCH OF ANDREW C. LIPPITT.*

ANDREW CLARK LIPPITT, son of Christopher and Marcia Gooding (Wilbur) Lippitt, was born in Warwick, Rhode Island, May 21st, 1812, and died in New London, Connecticut, August 8th, 1884. He was married May 3d, 1842, to Lois Emeline, daughter of Amos Cobb, of Norwich, Connecticut, who, with two of three children born of the marriage, survives him. Having completed a preparatory course at the Plainfield Academy, an institution of some note in the early part of the present century, he entered Amherst College in 1833, and graduated in the class of 1837. He studied law in the office of La Fayette S. Foster, of Norwich, was admitted to the bar in June, 1839, and at once began practice at New London, where he continued to reside until the time of his death.

The habits of thrift and industry to which he was bred, the indefatigable energy that he brought to bear on every undertaking in which he engaged, his fine personal presence and attractive manners, and his thorough preliminary training, assured his professional success from the start. He at once took front rank among the younger members of the bar of his county, and within a few years was one of its acknowledged leaders. His active practice continued without interruption until a few months prior to his death.

Among the chief secrets of his success at the bar were his wonderful industry and persistency. He never failed to thoroughly identify himself with the interests of his client, and every cause committed to his charge received conscientious and faithful attention. He was of a most sanguine temperament, and rarely entered upon the trial of a case, no matter how desperate the chances might be, without an abiding confidence that all obstacles could be surmounted. He never contemplated defeat until it overtook him. An abundant fund of common sense and ability of a practical every-day order brought him a measure of success that lawyers more subtle and profound often fail to achieve. His cases were always thoroughly prepared, and always tried for their full value at every stage from beginning to end. As an advocate he was remarkably effective. He never attempted flights of eloquence, but he had a rare faculty of putting the salient points of a case in plain and forcible Anglo-Saxon, refreshing to court and jury alike.

* Prepared at the request of the Reporter by John A. Tibbitts, Esq., of the New London County Bar.

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The younger members of the bar, who practiced with him when he had become a leader, will not forget the kind and considerate treatment, professional and personal, that they received at his hands. He was always ready with a word of encouragement or praise, and never failed to extend substantial aid whenever opportunity offered.

Mr. Lippitt in the years prior to the war of the rebellion took a somewhat active part in public affairs. He was a democrat in politics. In 1844 he represented the town of New London in the General Assembly, and his last public service was in the same capacity at the session of 1878. He proved himself on both occasions, a capable and faithful legislator. From 1850 to 1853 he was mayor of the city of New London, and in that position displayed executive ability of a high order. In 1860 he was a delegate to the national democratic convention which nominated Stephen A. Douglas for the presidency, and in the canvass that ensued he took an active part. When the rebellion broke out he joined the ranks of the war democracy, and during the four years following was an unwavering and enthusiastic supporter of the Union cause.

In his home life, after the professional duties of the day were done, Mr. Lippitt found his chief pleasure and almost his only recreation. He was a great reader of books and papers, always kept himself informed as to current events in the world's history, and had a passion for scientific and mechanical literature which he gratified to the fullest extent. During the rebellion he was a close and eager student of all military movements, keeping track of the armies of both sides evening after evening in his library, and many a time before the end of the great struggle came, he had, with that sanguine temperament to which allusion has already been made, fought the battle of the Union to a successful issue on the maps.

For a number of years prior to his death Mr. Lippitt had been a communicant of St. James's Protestant Episcopal church in New London. His life was that of a good citizen, a wise and honorable counsellor, a painstaking and competent public servant, a faithful friend and a loving husband and father.

OBITUARY SKETCH OF GEORGE C. WOODRUFF.

George Catlin Woodruff was born on the first day of December, 1805, in that portion of the town of Litchfield known as South Farms, which has since been incorporated under the name of Morris. The eldest son of Major General Morris Woodruff and Candace Catlin, he was the fruit of the union of two of the oldest families of Litchfield County, families on both sides illustrious in the annals of that county.

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Obituary Sketch of George C. Woodruff.

His early education was pursued at the then famous Morris Academy, where he fitted for college. Entering Yale in 1821, he graduated four years later among the foremost scholars of his class. After graduation he studied his profession under Judge Gould at the Litchfield law school. Wishing to select a favorable place for the practice of his profession he took, for those days, an extensive journey through the Ohio valley, but finally deciding upon Litchfield as his home, he opened an office there in 1827. From that time on Mr. Woodruff took a leading position at the bar of Litchfield county, gradually rising until he became its acknowledged head. This of itself is no small praise when speaking of a bar that was second to none in the state, where in early life he was daily thrown into conflict with those giants in our profession, the two Churches, Huntington, Bacon, Smith, and others of their able contemporaries. Early sought out by his fellow citizens for offices of public trust almost every official duty that could be performed by an American citizen was at various times confided to him—justice of the peace, grandjuror, postmaster, town treasurer, town clerk, bank director and president, clerk of the Superior Court, colonel in the militia, member and clerk of the General Assembly, judge of probate, member of congress—the duties of each in turn performed with that rigid exactness and scrupulous integrity which marks the perfect man. As a member of the thirty-seventh Congress he served with distinction on the committee on public lands, his exact legal training fitting him to be of special use to the country in legislation affecting the lands and titles of our public domain. As chairman of the judiciary committee in our own state legislature his legal talents had a wide range of topics and more clearly demonstrated his varied learning. To him the state at large owes many of the best features of the revision of our statutes adopted in 1875. In 1873 he was elected by the senate a judge of the Superior Court, but owing to the influence of "King Caucus" his election was not concurred in by the House, and a life devoted to the legal profession was denied this crowning honor.

As a lawyer Mr. Woodruff was prominent in those branches where certainty is possible. The law of real property, of descent, of construction of statutes, was to him an exact science. He searched the books for principles and authorities with an industry that never tired till the end was reached. He began the trial of a cause with every point guarded, and if the evidence sustained his theory, or an adversary inadvertently granted his premise, then his law, his authorities, his logic were incontrovertible. It was in the trial of questions of law, the drier and more abstruse the better, that his most consummate skill was shown. In the Supreme Court of Errors not infrequently his entire argument was written out with the most pains-taking care.

That all classes of people should implicitly trust Mr. Woodruff was natural. That confidence was begotten of an honesty, a faithfulness, a

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zeal that was unswerving. No better proof of this could exist than the fact that at some time he was not only the counsel for every town in Litchfield county but of many of the towns in adjoining counties.

It need hardly be said of Mr. Woodruff that he was a religious man; few gain the highest rank in our profession without being such, so firmly are the everlasting principles of law and equity based on the justice and love of God. In his personal character he was the embodiment of the best elements of Puritanism—a democrat in politics because he believed not only in man's ability to govern himself, but in the absolute duty of self-government, he carried the same principle into his religion and his worship. A Congregationalist by instinct and education, he not only believed in the principles of Congregational government, but his sturdy manhood could brook no interference with its exercise. The liberty of worshipping God after the dictates of his own conscience was to him no meaningless phrase. To him the fatherhood of God was man's proudest claim to manhood. In his intercourse with his fellow men he was quiet, unobtrusive, reserved; he was of that honesty that loathes dishonesty, of that truth that hates a lie, of that manliness that despises a sham. To him life was duty, duty life. Even his pleasures were tinted in that hue. Fond of nature, it was after all in his garden and orchard, gathering their fruits, rather than skeptically examining the mysteries of nature's laboratory, that his greatest pleasure was found. His favorite reading was history, and he was himself the author of a history of Litchfield; genealogies delighted his leisure hours.

Of Mr. Woodruff's domestic life, pleasing a picture as it presents, crowned as it was by a golden wedding, this is not the place to speak, and yet there is one feature of it so intimately connected with his professional life and which had so powerful an effect upon it, that a word may not be amiss. Early in life he married a sister of the late Chief Justice Seymour, and Judge Seymour married the only sister of Mr. Woodruff. Side by side these gentlemen lived and practised their profession. Sometimes as associates, and again as opponents, so zealously contended each for the rights of his client, that jealousy itself never harbored a suspicion that all honorable means were not used to succeed. These conflicts were often close and exciting, and yet their friendship was never broken; rather was their esteem increased as their days lengthened. Such contests left each combatant stronger, better able to serve his clients and the state.

Mr. Woodruff died at Litchfield on the 21st day of November, 1885, in his eightieth year. In whatever relation of life one looks at him, as citizen, as neighbor, in private life or public station, as counsellor or judge, he was one of the best products of our American civilization.

Strong and hale up to his last sickness, possessed of the respect and esteem of all, every faculty perfect, he passed away, leaving one more of those noble examples of which our bar and state may justly be proud.

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OBITUARY SKETCH OF MAHLON R. WEST.*

THE death of MAHLON ROCKWELL WEST, on the 22nd of April, 1886, closed a life of most worthy aims and uncommon industry. A just estimate of its success involves the knowledge of his early struggle with and mastery of adversities, such as the lack of fortune and education ever opposes to the ambitions of youth.

Mr. West was born at Stafford in Tolland County, August 27th, 1826. His father was a farmer with a large family and small estate. Arriving at his majority, young West found himself the possessor of an ordinary district school education, and a few dollars earned by teaching. His resolution to seek a wider field of labor and influence found no encouragement except from his own earnest aspirations. But he determined to become a lawyer; and so, in 1848 we find him a student at Stafford, in the office of Mr. A. P. Hyde, since of Hartford, and daily going nearly three miles from his father's house to his books. His preparatory studies ended in 1850, by his admission to the bar at the March term of the Tolland County Court, and he immediately commenced practice in his native town, where he remained more than nineteen years, with a constantly increasing business, and the respect and confidence of every one; and he was finally recognized as the leading lawyer of the county.

In November, 1869, he removed to Hartford, and there successfully continued his practice until his last sickness, which was brief. From November 1st, 1869, until November 1st, 1876, David S. Calhoun was his law partner.

He was a delegate to the democratic national convention of 1860, and steadily supported the nomination of Stephen A. Douglas. In 1874–5 he was an alderman of his city, and for one year was president of the board. He represented the town of Hartford in the legislatures of 1877 and 1881.

On the 23d of May, 1854, he married Miss Julia A. Smalley, of Northfield, Vermont. A son was given them, his only child, who died at Hartford, January 24th, 1871. Mrs. West died April 3d, 1880, after a protracted illness. Miss Marcia A. Fairman, of Stafford, became his wife October 11th, 1881, and she is now his widow.

In his private life Mr. West was not merely blameless. He was trusted and beloved. Tender in sympathy, steadfast in friendship, upright in all his dealings, sensitive to criticism but loyal to every command of duty, simple in habits and modest in manner, ready with

* Prepared at the request of the Reporter, by David S. Calhoun, Esq., of the Hartford Bar.

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head, hand and heart in every movement for the welfare of individuals or the community, he entered no relation, whether domestic, social or with the church of which he was a devout member, in which his affectionate, faithful, self-denying nature did not compel a warm appreciation.

As honesty was the leaven of his private character, so it naturally pervaded his public and professional life. Public recognition was grateful to him; but when it came it was a tribute to his worth, and not the dividend of a selfish trade or the reward of court paid to rascally jobbers in votes. Zealously attached to the political faith which was his by inheritance and conviction, he never forgot that he owed a higher fealty than to party.

As a lawyer he did not quote the precedents of legal license to satisfy the doubts of conscience; for his conceptions of right overlapped those of the law. And by this broader rule of justice he tested every proposed plan of professional action, apparently insensible to those temptations which many find so hard to resist. Clients, therefore, ever found him a reliable counselor. Courts and juries saw him candid, and his brethren knew him, both as an antagonist and an associate, as generous, truthful and fair. His early necessities had made him prudent and ecomonical; but he prized the true honors of his profession more than its gains, and a just cause needed not the added stimulus of a full purse to enlist his interest and best service.

Mr. West's position at the bar was such as his diligence, ability and integrity had won and deserved. He always lamented the limited educational opportunities of his youth, and to them an occasional diffuseness in pleading and argument may be attributed in part, and partly, perhaps, to an imperfect faculty of method. But his reading was varied and accurate, his memory trusty, his judgments of men and their motives unusually quick and correct, his application of legal principles to facts ready and sound, and his care in the preparation of causes unlimited except by time; for he was an insatiable and tireless worker. Though of slight frame and a nervous temperament, and with no outward signs of uncommon vigor, his endurance of prolonged mental exertion was surprising. No point in a case escaped his scrutiny. In his office labors he was cautious, pains-taking and thorough; but in a trial he was alert, ready in resource, and prompt to discover and to act; and in his arguments there came successive troops of crowding and fervid thoughts, which scoured the whole field of contest and left unnoticed no point of attack or defense. As a speaker he found force, earnestness and simple illustration more ready and effective than graces of style or arts of elocution. There was nothing in his presence or manner to alarm an opponent; but on the one who augured from them an easy victory, there always waited a bewildering surprise, and usually defeat. If any one of his fellows was

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more vigilant and devoted in the conduct of a cause through all its stages, his name is unknown to the writer.

There was no secret in Mr. West's success. He attempted no grotesque imitation of some admired model. His faith in his professional future had this simple creed:—Labor is man's omnipotence, and it is best to be honest and true. Guided by these maxims his life attested their value.

It is but just to the memory of Mr. West to say that the death of his son, in 1871, quenched in the father somewhat of ambition and much of hope. Thereafter, though diligent and faithful, his work lacked its former inspiration, and in his last years, to a few, who knew him most intimately, he sometimes spoke with reverent yearning of the time when he might rest from his labors. And to him, so life-weary after thirty-six years of continuous toil in office and in court, and with such heart longings for dear ones sadly missed and with such a Christian hope, surely death was the door of life.

OBITUARY SKETCH OF AMOS S. TREAT.*

Amos Sherman Treat, who died at Bridgeport on April 24th, 1886, within a few hours after his return from a trip to Mexico for health and relaxation, was born in Bridgewater in this state, February 5th, 1816. He was a lineal descendant of Robert Treat, the famous warrior in the days of King Philip, and for many years governor of Connecticut.

On the maternal side Mr. Treat belonged to a branch of the Sherman family, including Gen. William T. Sherman, and John Sherman, former secretary of the treasury, and at this writing, United States senator from Ohio.

He entered Yale College, after leaving which, he taught school in South Carolina and later in New Jersey. He studied law in Morristown with Jacob W. Miller, afterwards U. S. senator from New Jersey.

He was admitted to the bar at Litchfield in 1843, and commenced practice in Newtown, in Fairfield County, a locality which had gained no little fame for astute lawyers there educated and trained, and where this new aspirant soon developed qualities which made his subsequent professional career successful.

He held various local offices there, including that of judge of probate, member of the board of education, and during one administration, postmaster.

In 1854 he removed to Bridgeport, where he was clerk of the courts

*Prepared at the request of the Reporter, by Samuel B. Sumner, Esq., of the Fairfield County Bar.

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until 1859. He was appointed by Governor Buckingham, member of the U. S. Peace Congress in 1861. He represented Bridgeport in the Connecticut General Assembly in the years 1858, 1862, 1869 and 1879, and the town of Woodbridge in the same body in the years 1871, 1872 and 1873. In 1872 he was speaker of the House, and at its adjournment was presented with a testimonial in recognition of the dignity, courtesy and fairness with which he had filled the position.

His residence for a time in Woodbridge followed upon his marriage, December 15, 1869, with Mary Treat Clark, daughter of Treat Clark of Woodbridge, who, with her daughter, Mary Clark Treat, survives him.

Mr. Treat, as has happened to others, made his highest professional mark late in life, for, in its mediæval period—so to speak—he was much engrossed in side affairs of politics, and largely interested then, as always, in other business enterprises, which brought him such material returns as the mere lawyer seldom realizes. Later, as legal contemporaries somehow gave place, he was perforce, as it were, brought to a front position at the bar of his county, which he was fully endowed and equipped to hold.

He loved politics, was prominent in the councils of the republican party from its inception, and his directing hand was always seen, or at least felt, in the shaping of affairs, state or local, in which he took an interest. He had ambition for place, for which he had accorded capacity, and was favorably mentioned often for high judicial, legislative and executive position. Whatever antagonisms in later life he had, grew out of a disposition—rather common and forgivable—to have his own way in the conduct of things.

Aside from routine of duty Mr. Treat was a most genial and companionable man. He was bright at repartee, fond of anecdote, and could always come up with the next good story, over which his own laughter was contagious.

He was very fond of the Masonic fraternity, and had held its highest places and honors; and as an illustration of his genial and social character, was always glad to lend an hour to participate in its ceremonies, public or private.

He was a noticeably kind and paternal friend to younger members of the profession.

He was not formally connected with any church communion, but was a regular attendant at the First Congregational Church in Bridgeport.

In person Mr. Treat was tall, stately and dignified. Quite untrained in certain graces of oratory, he was nevertheless sure to be remarked and heard with attention whenever and wherever he spoke.

His sudden decease, although at a ripe age, created a general shock in his immediate community, and a visible vacancy in domestic, social, political and professional circles, not in his own generation to be filled by any other.

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OBITUARY SKETCH OF DEXTER R. WRIGHT.*

DEXTER RUSSELL WRIGHT, who died in New Haven, July 23d, 1886, was a member of the New Haven County Bar for nearly forty years. He was born at Windsor, Vt., June 27th, 1821. The days of his childhood were passed in and near St. Lawrence County, N. Y., where his father was engaged in the milling and lumber business.

Mr. Wright was prepared for college and entered the Wesleyan University at Middletown, where he graduated in the year 1845. After teaching school, as principal of the Meriden academy, for a short time after his graduation from college, he entered the Yale law school at New Haven, from which he graduated in 1848. While a member of the law school, he was a clerk in the office of E. K. Foster, Esq., of New Haven. He was admitted to the bar in the fall of 1848, and opened an office at Meriden, where he continued to practice until 1862, with the exception of a brief period of business and legal experience with the pioneers of California in 1850 and 1851.

In November, 1863, Mr. Wright opened a law office in New Haven, and continued in the active practice of his profession in that city from that time until his decease. While in Meriden Mr. Wright had much experience as the counsellor of many of the leading business men and corporations of that growing town, and his early practice there made him a thoroughly well-equipped business man's lawyer. He came to New Haven with a good reputation which he had earned by hard work in Meriden, and a large and lucrative practice soon came into his hands from many prominent business firms of New Haven and vicinity.

Mr. Wright, during his long and busy career as a lawyer, was one of the hardest workers in the profession. Devoted to the interests of his clients he neglected no opportunity to protect them. His mind was naturally logical, and his tenacious memory enabled him to hold at command the leading principles of the common law and the decisions of the courts. He rarely counselled litigation if the rights of his clients could be fairly protected by an honorable settlement. In his early life he had been an extensive reader of the best English literature, and his command of the English language was remarkable. His briefs for the Supreme Court were prepared with great neatness, skill, and ability. His urbanity to his fellow members of the legal profession and his courtesy to the court and jury were marked. His commanding form and fine carriage, added to his learning and eloquence, gave him much influence in all his forensic arguments, with both court and jury.

* Prepared at the request of the Reporter, by Lynde Harrison, Esq., of the New Haven Bar.

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Obituary Sketch of Dexter R. Wright.

Mr. Wright began life as a democrat, and was a warm adherent of the principles of that party as they were declared in the period prior to 1861. In 1849 he was elected to the state senate from the sixth senatorial district, being supported by both the democrats and free-soilers, who in that election united upon many of the congressional and legislative candidates for office. During the next few years he was frequently considered as a coming candidate of the democratic party for congress from the second congressional district. In the election of 1860 Mr. Wright agreed with those democrats who, under the lead of the Hartford Times, supported the nomination of Senator Breckenridge of Kentucky for the presidency, but when in the following winter the secession of the southern states began, he, and his long-time intimate friend in business and politics, Charles Parker of Meriden, discussed the grave situation of public affairs, and their loyalty and devotion to the cause of the Union were such that when Fort Sumter was fired upon in April, 1861, both of them became attached to the cause of the war for the Union. Mr. Wright made several speeches in support of the government, and with Mr. Parker, James T. Pratt, Roger Averill, and other democrats, made earnest efforts to bring the democratic party of the state firmly and decidedly to the support of the administration at Washington in its efforts to preserve the Union. In this effort they were partially successful for a time, and in May, 1862, Mr. Wright was commissioned as lieutenant colonel of the 14th regiment then being organized at Hartford. In August, 1862, he received a commission as colonel of the 15th or New Haven county regiment of Connecticut volunteers. Col. Wright took this regiment to Washington, and with great zeal, and by hard study, soon made it one of the most promising of the new regiments stationed in or about that city in the fall of 1862. Four other regiments were brigaded with the 15th, and Col. Wright, as senior colonel, had command of the brigade thus provisionally formed. Gen. Casey, then in command of the defenses of Washington, admired Col. Wright's ability, which displayed itself in constant thoughtfulness and care for the men of his command, and also by hard study of text books and military tactics both in theory and in practice. His headquarters tent was constantly a place for study, and the military instruction of field and line officers. Gen. Casey promised Mr. Wright all his influence for the early bestowal of a commission as brigadier general, and had the latter possessed the political influence of many men who were his inferiors in other respects, he would doubtless have received the star then so much coveted by every colonel in the service. Mr. Wright, however, was then known only as a union democrat and he had no political influence with the leading men of the republican party either in Connecticut or Washington.

Early in December, 1862, Col. Wright was directed to take his brig-

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ade to Fredericksburg. Although he had been recently injured by being overturned in an ambulance while riding near the railroad which ran from Washington to Alexandria, he led his brigade promptly to Falmouth, and there reported for further duty. To the surprise of the 15th regiment and its colonel, the brigade which Gen. Casey had formed was broken up, and Col. Wright found his regiment attached to one of the older, but numerically weaker brigades, with but little prospect of receiving a commission as brigadier general. He was under the command of men younger than himself, and with less ability, except that they had had a few more months of military experience. After a few months Col. Wright found himself still suffering from the injury he had received near Alexandria, and also from sickness contracted by exposure in Burnside's futile movements near Fredericksburg, and in March, 1863, he resigned his commission by the advice of his surgeon, and returned to Meriden. Here he threw himself into the cause of the union republican party as an orator in the campaign then in progress between the democrats, with Thomas H. Seymour as their candidate upon a peace platform, and William A. Buckingham as the candidate of the republican party. Mr. Wright was nominated by the republicans of Meriden as their candidate for representative, and was elected by a handsome majority. During the sessions of May and November, 1863, he acted as chairman of the committee on military affairs, which, during the civil war, was considered, with the exception of the judiciary committee, the most important in the Assembly. Mr. Wright, through the whole of that session and the extra sessions of November, 1863, and January, 1864, was one of the acknowledged leaders in a house which contained such men as Chauncey F. Cleveland, John T. Adams, John S. Rice, David Gallup, Alfred Coit, William W. Eaton, James Gallagher, Harris B. Munson, and others. A long debate, continuing for many days, was conducted by these gentlemen over resolutions denouncing the arrest of Clement L. Vallandingham of Ohio, and eloquent speeches were made concerning the powers of the federal government in the prosecution of the war, and it was conceded that that made by Mr. Wright was the most logical and eloquent of all. Mr. Wright reported the bills at the extra sessions of the Assembly for the organization of colored regiments from Connecticut, and the 29th and 30th regiments were organized under the provisions of the bill reported by him.

In the summer of 1863 Mr. Wright was made a commissioner of the enrollment board for the second congressional district, acting with the late Dr. Park as surgeon, and Captain Richard M. Clark as provost marshal. He filled this office with general acceptance to the government and the public until the termination of the war. From this time Mr. Wright allied himself with the republican party and became one of its recognized leaders in the state.

As a presiding officer he had no superiors and few equals; he was

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president of the convention of 1866 which nominated Joseph R. Hawley for governor. He was devoted to public affairs as a citizen of New Haven, and for several years was a member of the board of common council and of the board of aldermen. In 1872 and 1873 he was corporation counsel of the city of New Haven; from 1865 to 1869 he was assistant U. S. district attorney for Connecticut; in 1878 he was eleeted as representative from the town of New Haven to the General Assembly, and at the session of January 1879 was elected speaker of the House of Representatives, which position he filled with signal ability and with great popularity. In 1880 and 1884 he heartily supported the nominations of James A. Garfield and James G. Blaine for the presidency. During all these years, while he was interested in public and political affairs, Mr. Wright never neglected his duty to his clients nor his earnest work in his profession.

As a citizen of Meriden in his early life, and of New Haven in later years, Col. Wright was always deeply interested in the improvement, growth and prosperity of those cities; he served upon several public boards connected with the local government, and was frequently a commissioner having charge of the erection of public buildings.

He was married, February 3rd, 1848, to Miss Maria H. Phelps, daughter of Col. E. L. Phelps of East Windsor, Conn., and had six children, four of whom survive him. His youngest son, Arthur B., who was admitted to the New Haven county bar in 1884, practiced his profession in the same office with his father until the death of the latter

OBITUARY SKETCH OF DWIGHT MARCY.

Dwight Marcy was born in the town of Union, Tolland county, June 8th, 1840, prepared for college at the Lawrence Academy, Groton, Mass., and graduated from Yale College in 1863. After graduation he taught school for a time, studied law and was admitted to the bar in Tolland county in 1865. He began practice at Central Village, in Windham county; afterwards removed to Tolland in Tolland county, and thence to Rockville, in the same county, where he remained in the practice of his profession to the time of his death, which occurred May 7th, 1887. In 1867 he was appointed state's attorney for Tolland county and held the office for two years. He was elected assistant clerk of the House of Representatives in 1867, a year later clerk of the House, and the year following clerk of the Senate. He represented the town of Vernon in the General Assembly in the years 1878, 1879 and 1880, and

* Prepared at the request of the Reporter, by B. H. Bill, Esq., of the Tolland County Bar.

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the latter year was speaker of the House. He was a delegate from Tolland County to the republican national convention in 1876.

Such is a brief outline of Mr. Marcy's career. He was eminently a self-made man, having few adventitious aids. He had rare resources of will power, was self-reliant and self-dependent, industrious and energetic, ambitious and laudably aspiring.

His physical powers were good until a few years before his death, when he was stricken with the fatal disorder of which he finally died.

His mental characteristics were distinctively marked. His mind was not rapid in its processes. It wrought slowly but surely. He never hastily rushed to his conclusions, but reached them by careful and cautious approaches.

In his public trusts he acquitted himself acceptably to the public and with credit to himself.

As a lawyer he was faithful and devoted to the interests of his clients. He never betrayed or deserted them and never counseled them with a view to his own interests and to the neglect of theirs. He was diligent in the preparation of his cases and thorough in his attention to the law involved. As an advocate he was not eloquent or brilliant, never fervid or vehement, always cool, dispassionate, methodical, logical. His style was without embellishment of any kind, a plain, persistent, undeviating adherence to the law and the fact. He very seldom spoke in public except in his professional duties and upon business matters in town meetings. Even in his legislative experience he was rarely heard in debate.

In his social intercourse he was not familiar, free and confiding. He was always unobtrusive, undemonstrative, reserved and cautious. None, not even his personal friends, could get within the citadel of his guarded nature without a protracted siege. He never seemed to relish merriment, had little appreciation of the ludicrous, was never jocose, never indulged in jest or repartee. With such ingredients in his composition the marvel is that he should have any love or affinity for politics. But, incongruous as it may seem, he was active and zealous in the political arena. He seemed fond of its excitements and loved its preferments. While he sought the honors of political life, his reserved, quiet and ingenuous nature would not allow him to resort to the blandishments, the arts and wiles of the popular, professional politician.

His personal habits were good. His private life was irreproachable, and his domestic relations always happy.

Very little is known of his religious views. So secretive and uncommunicative was he in his nature that he gave very scant if any clues to his religious convictions, yet in the last hour of his life they forced expression in the language of the familiar hymn: "Oh Beulah Land! Sweet Beulah Land!" two lines of which he faintly repeated and requested that the hymn be sung by his bedside.

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ABATEMENT OF SUIT BY PENDENCY OF ANOTHER.

1. The law will not permit a plaintiff to have two suits pending against a defendant for the same cause of action. The existence of the first is ground for abating the second. *Damon* v. *Denny*. 253
2. And in determining whether the first suit is for the same cause of action with the second, parol evidence is admissible. *ib.*
3. And where the pending suit is one in which it is legally possible for a judgment to be rendered upon the cause of action alleged in the second and was brought for the purpose of obtaining such a judgment, the plaintiff is bound to exhaust the possibilities of that suit before subjecting the defendant to the cost of a second suit. *ib.*

ACCOMPLICE.

1. It is a general rule that the testimony of an accomplice ought to be corroborated as to some fact tending to connect the prisoner with the offense; but the testimony of an accomplice may be so strong and convincing as to justify a verdict of guilty without corroboration. *State* v. *Maney*. 178
2. The testimony of an accomplice had been corroborated as to important facts connecting the prisoner with the offense. Held that evidence was admissible corroborating his testimony as to minor facts not connecting the prisoner with the offense, his credibility as to his entire testimony being a matter for the jury to determine. *ib.*
3. The judge in his charge to the jury said :—The testimony of the accomplice comes to you under such circumstances as to call for the most careful scrutiny. As a general rule it is unsafe to convict upon such testimony alone. It ought to be corroborated in material facts connecting the prisoner with the crime; but the degree of credit to be given to his testimony and the amount of corroboration necessary to render it satisfactory, are matters to be considered and determined by the jury. They have the right upon his naked testimony to find a verdict of guilty, but ought never to do so unless such evidence is so clear, strong and convincing that it removes every reasonable doubt from their minds. But taking this to be the rule, the state claims that there is no occasion for its application in the present case, because the witness has been corroborated as to material facts. The judge then called their attention to the corroboration claimed. Held that the fair import of the whole charge was, that if the jury, after making due allowance for the suspicious circumstances under which the testimony was given, were fully convinced of the prisoner's guilt, they might return a verdict of guilty; that the charge made it clear to them that the testimony of the accomplice was not to be weighed in the same scales with that of an ordinary witness; and that, if the charge taken

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by itself was open to question, yet as there was confirming evidence sufficient for the jury to find that there was corroboration as to material facts, the jury could not have been misled by it. *ib.*

ADEQUATE REMEDY AT LAW.

See INJUNCTION, 5, 6.

ADVERSE USER.

A private right of way by prescription was claimed over what had formerly been a public highway, but had been abandoned and fenced up. Held that the right of way could have been acquired only by a user that was adverse, that the user could not have been adverse while the highway was open to public use, and that therefore there must have been fifteen years of adverse user after the highway had been abandoned and closed up. *Black* v. *O'Hara.* 17

APPEAL.

1. Under the act of 1882 (Session Laws of 1882, chap. 50, sec. 8) which provides that errors are not to be considered on an appeal unless it appears on the record that the questions made were distinctly raised at the trial and decided adversely by the court, the court will hold itself at liberty to lay such errors out of consideration even though no objection is made by the opposing counsel in the argument. *Cooley* v. *Gillan.* 81
2. The fourth section of the same statute provides that on an appeal to this court the judge, at the request of either party giving notice of an appeal, shall make such a finding of the facts as may be necessary for the proper presentation of the questions of law, and that the appeal need not be filed with the clerk of the court until ten days after such finding has been filed. A finding was made by a judge and filed with the clerk which stated that "on the 2d day of July, 1884, the administrators of *A* filed with the clerk of the court (the court not being in actual session) their application to be made parties to the action." Several months later, at the request of the appellant, the judge amended the finding by striking out the words "the court not being in actual session." Held that the amendment was not to be regarded as a filing at that time of the finding with the clerk, and did not operate to give the appellant ten days from that time within which to file his appeal. *Comstock's Appeal from Probate.* 116

APPEAL FROM COMMISSIONERS.

1. Upon the presentation of claims to commissioners on insolvent estates, it is only necessary that the claim should be so stated that it can be understood, and no pleadings are necessary. The whole question is whether the claim should be allowed against the estate. *Tolles's Appeal from Commissioners.* 521
2. And where an appeal is taken from the doings of the commissioners in allowing or disallowing a claim, the same rule applies. The whole question is still whether the claim should be allowed against the estate. *ib.*
3. This being so, either party desiring to have the case set in the jury

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docket and allowed by statute to have cases so placed upon an issue of fact being closed, is bound to have it so set in the jury docket at the first term of the court, unless the parties shall afterwards agree or the court order that it shall be so placed. *ib.*

ARBITRATION.

See SELECTMAN, 1; RAILROAD CO., 12.

ATTACHING CREDITOR.

See OFFICER, 1.

ATTACHMENT.

See PARTIES TO ACTION, 1.

BASE FEE.

See TAXATION, 3.

BOND.

J being pregnant with an illegitimate child, the defendant executed a bond to the plaintiff town by which, on condition that neither the town nor the parents of *J* would institute any legal proceedings against him on account of her condition or for the support of the child or of the mother, he covenanted that the child should not become a charge to the town during such time as the father would by law be liable for its support, the amount not to exceed that to which such father would by law be liable and the town to give him one week's notice before taking any legal steps for the support of the child or its mother. Upon a demurrer to a complaint setting out the bond, in a suit brought by the town upon it, it was held—1. That the bond was not void for uncertainty as to the amount for which the defendant was liable, nor as to the time the liability should continue. 2. That it was not void as an agreement that no criminal prosecution should be brought against the defendant, the "legal proceedings" referred to being civil proceedings, which alone the town, or the parents of *J*, or she herself could have instituted. 3. That the provision for one week's notice before taking any legal steps for the support of the child, had no reference to a suit on the bond. *Town of Hamden* v. *Merwin.* 418

BOND FOR COSTS.

See REPLEVIN, 1.

CHARITABLE BEQUEST.

1. Bequest of a fund to trustees "to appropriate the principal and interest, as they shall deem proper, to the aid of such indigent, needy and meritorious widows and orphans of the town of *W* as may need temporary help to keep them from being chargeable to the town as paupers, leaving it to the trustees to exercise a sound discretion as to who shall be made the subjects of such aid." Held to be a valid gift to a charitable use. *Camp* v. *Crocker's Adm'r.* 21
2. *W* conveyed to a charitable corporation a quantity of land in this state, to be used for the charitable purpose for which the corporation was

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organized, with a proviso that if it should abandon such use it should pay the market value of the property as it received it to the selectmen of the town of *M*, to constitute a fund of which the selectmen and their successors in office should be trustees, the interest of which should be applied by them to the aid of indigent young men fitting themselves for the ministry. The corporation accepted the property and used it for the purpose intended for about ten years, when it abandoned the use of it, but did not pay the value over to the selectmen of *M*. Soon after the corporation and the selectmen quitclaimed to the widow of the original donor all their interest in the land. Held that the land remained charged with the incumbrance in favor of the selectmen of the town. *Storrs Agricultural School* v. *Whitney*. 342

3. This second charity was not void as contravening the rule against perpetuities by reason of the uncertainty when it would vest, because it was preceded by a charity, and one charity thus made contingently to succeed another does not fall within the reason of the rule against perpetuities. *ib.*
4. The charity being a valid one, the declining of the selectmen to accept the trust could not affect it. *ib.*
5. The gift "to aid indigent young men in fitting themselves for the evangelical ministry," held not to be void for uncertainty." *ib.*

CHURCH

See TAXATION, 1.

CONDITION BROKEN.

A right to enter for condition broken is not assignable at common law, but is so under our statute (Gen. Statutes, p. 471, sec. 1 of part 5). *Hoyt* v. *Ketcham*. 60

CONSTITUTIONAL PROHIBITION OF INCREASE OF COMPENSATION.

1. The 24th amendment of the state constitution prohibits the legislature from increasing the compensation of any public officer during his continuance in office. Held that by continuance in office was meant continuance in office under one appointment. *Smith* v. *City of Waterbury*. 174
2. A city attorney was appointed in 1877 and held the office until July, 1881, when he was re-appointed. Held that he could take the benefit of an increase of compensation allowed by a statute passed before his last appointment. *ib.*
3. The state constitutional prohibition held to render illegal a vote of the common council of a city to pay a joint-standing committee of the council for services rendered by the committee, the office of councilman being one without compensation and the services being those ordinarily rendered by such a committee. *Garvie* v. *City of Hartford*. 440

CONTRACT.

Where a contract will bear two constructions, one of which would make it legal and the other illegal, that which will make it legal will be given to it. *Town of Hamden* v. *Merwin*. 418

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CORPORATION.

See NOTES AND BILLS, 2–6.

COSTS.

In replevin for sundry articles of personal property the court rendered judgment for the plaintiff as to all the articles but one, as to which it rendered judgment that it be returned to the defendants. The court allowed full costs to the plaintiff and only the cost of certain witnesses to the defendants. Held to be no error. *Cooley* v. *Gillan.* 81

COSTS NOT TO EXCEED DAMAGES.

See TITLE IN ISSUE, 1.

COUNCILMAN.

See CONSTITUTIONAL PROHIBITION, 3.

DAMAGES.

The question whether damages are excessive can be considered only when the whole evidence is brought up on the appeal. *Page* v. *Merwin.* 427

DEBT DUE.

See FOREIGN ATTACHMENT, 1, 2, 3.

DEED.

1. A warranty deed described certain property conveyed, being part of a larger tract belonging to the grantors, as "the horse shed on the west side of the highway, with the land covered by the same; the grantee to have the right to go on land of the grantors around the shed for the purpose of repairing the same." Held that the highway referred to as the eastern boundary was the apparent highway, and not the line of the highway as found by actual survey, and that the land conveyed was that actually covered by the shed, without reference to its situation in relation to the true line of the highway. *Bristol Mfg. Co.* v. *Barnes.* 53
2. The question was regarded as one wholly of the construction of the language of the deed, and the provision in the deed that the grantee was to have the right to go around the shed on the land of the grantors for the purpose of making repairs, was regarded as showing clearly that the parties did not intend to convey or acquire any other land than that actually covered by the shed. *ib.*
3. A deed of a tract of land contained the following provision: "If any building shall be erected on said tract, the cost of which shall be less than four thousand dollars, or used for other purposes than as a dwelling house, then the whole of said land shall be forfeited and revert to the grantor, his heirs and assigns." Held—1. That this provision was not a mere restriction or limitation of the right conveyed, nor a mere personal covenant of the grantee that terminated with his death, but was a condition of the title. 2. That this condition was released by a conveyance to a party who held the title, of all the grantor's interest in the property, by the administrator of the grantor with the will annexed, the will giving the executor the power to convey, and the ad-

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ministrator with the will annexed having by statute (Session Laws of 1877, ch. 40) the same power to convey that the executor had. *Hoyt* v. *Ketcham.* 60

4. A quitclaim deed, in this state, is an ordinary and primary instrument of conveyance, and carries to the releasee whatever interest the releasor had in the premises. *ib.*

5. The grantee in the deed above mentioned took back a mortgage for a part of the purchase price, and afterwards, on payment of the mortgage, gave the mortgagor a quitclaim of all his interest, not limiting it to his interest as mortgagee, nor referring to the payment of the mortgage, though stating the fact of its existence. Held that the quitclaim conveyed the entire interest of the grantor and released the condition of the original deed. *ib.*

6. The defendant agreed in writing to sell to the plaintiff a lot with a dwelling house thereon, "and the use of the sewer through the grantor's adjoining land to the Church street sewer." Soon after a deed was executed by the defendant and delivered to the plaintiff, which contained only the following provision as to the sewer: "Reserving to myself and my heirs and assigns the right to connect sewer pipes with the sewer now leading from said described premises through my adjoining land to Church street." The plaintiff, supposing that the deed secured to him the right to the use of the sewer, accepted it and paid the defendant the price agreed for the lot conveyed. In an action afterwards brought by him for a breach of the contract in not conveying to him the sewer right, it was held—1. That the deed did not convey such right. 2. That the plaintiff's acceptance of the deed, being made under a mistake as to its effect, did not conclude him. *Butterfield* v. *McNamara.* 94

7. The mistake, though as to the legal effect of the deed, was yet essentially a mistake of fact. *ib.*

8. The land through which the sewer ran was afterwards conveyed to *O*, and by *O* to *C*, each deed containing the following provision as to the sewer: "Together with the right to connect sewer pipes with the sewer now leading from said *B*'s (the plaintiff's) land to the Church street sewer." Also: "And said premises are conveyed subject to such rights, if any, as said *B* has to maintain a sewer across said premises." Held that nothing was conveyed to the plaintiff by these provisions. *ib.*

9. A misdescription in a deed does not affect its operation so long as the property intended to be conveyed is otherwise so described that it can be identified. *Sherwood* v. *Whiting.* 330

10. Especially is this so where the mistake is in some statement of fact with regard to the title, and not in the description of the property. *ib.*

11. *A* made a conveyance to *B* of a quantity of real estate described thus:—"All the real estate of *D* deceased, which was distributed to *E* and afterwards conveyed by *E* to me." In point of fact *E* had conveyed to *A* before the distribution and not after, but his deed fully described the land conveved to *A*. Held, in a suit for the correction of the deed, that it needed no correction. *ib.*

12. And held that the question whether the conveyance by *E* to *A* was not

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made to defraud creditors and whether therefore *E* could recover the property back, did not enter into the question whether the deed of *A* was sufficient to convey the property. *ib.*

DEMAND.

See REPLEVIN, 3.

DISCHARGE.

See RECEIPT, 1.

DISSEIZIN.

See TITLE IN ISSUE, 1.

DISTRIBUTION.

1. The statute (Gen. Statutes, p. 372, sec. 5,) provides that intestate estates shall be distributed by three distributors under oath appointed by the probate court, "unless all the persons interested shall be legally capable to act, and shall make and file in court a division of the same, made, executed and acknowledged like deeds of land, which instrument being recorded in said court shall be a valid distribution of said estate." Held that a division of such an estate made in writing among the persons entitled to it, all being capable to act and all joining, but where the division was not made, executed and acknowledged like a deed of land, and was not filed and recorded in the probate court, did not preclude a regular probate decree ordering a distribution of the estate. *Dickinson's Appeal from Probate.* 224
2. An order for the distribution of a certain amount as the balance left on the settlement of an administration account, and an acceptance of a distribution made under the order, but where by mistake the amount was not large enough, are not necessarily erroneous, but the distribution may be good so far as it goes, and a further order of distribution made for what remains. *ib.*

EMINENT DOMAIN.

See RAILROAD, 2.

EMPLOYER AND EMPLOYEE.

1. The defendants, a manufacturing company, had a standing rule known to their workmen, that "all employees not engaged for a definite time must give two weeks notice before leaving; that any workman giving such notice and working the two weeks would then be paid in full; and that any workman leaving without giving such notice should forfeit all unpaid wages." The plaintiff was working for the defendants for no definite time, but at an agreed price per piece for his work, and the defendants gave him notice that they should begin the next day to pay him a reduced price for all the work done on and after that day. The plaintiff refused to accept the reduced payment and left their service. In a suit brought to recover an amount due for his work to that date, it was held that the rule had no proper application to the case. *Schietenger* v. *Bridgeport Knife Co.* 64.

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2. The defendants rather than the plaintiff ended the relation of employer and employee. They refused to keep him except at a reduced rate of payment, and he had never agreed, and was under no obligation, to continue to work at a reduced price. *ib.*
3. Even if the plaintiff could be regarded as having the right under his contract to work longer at the old price, yet he had a full right to join with the defendants in rescinding the contract. *ib.*

ENTRIES.

1. Where the person who made entries which are admissible in evidence is beyond the reach of process or is incompetent to testify, it is the same as if he were dead, and his handwriting may be proved. *Town of Bridgewater* v. *Town of Roxbury.* 213
2. To make entries upon an account book admissible it is not necessary that the transaction to which they are applied should be directly between the original creditor and debtor. *ib.*
3. Nor that they should be against the interest of the person making them. *ib.*
4. In the case of an entry against the interest of the person making it, the entry is admissible at whatever time it was made; but in the case of an entry that becomes admissible only because made in the course of business, it is essential that it shonld have been made at the time of the transaction to which it relates. *ib.*
5. In a suit for supplies furnished by the plaintiff town to a pauper of the defendant town, a selectman of the latter testified to having employed a physician to attend upon the pauper and to his having been afterwards paid by the town, but he could not fix the date of the attendance, which became important. Held that entries upon the account book of the physician, (who had since become mentally incompetent,) made in the regular course of his business, charging the town for his attendance upon the pauper, with the date, and crediting the town with payment, were admissible for the purpose of showing the time when the service was rendered. *ib.*
6. They were also admissible to corroborate the testimony of the selectman. *ib.*
7. Also as evidence of the fact that the medical service was rendered. *ib.*
8. The entries made by the physician were not to be excluded on account of his interest as an inhabitant of the defendant town. No controversy with regard to the pauper had then arisen, and it was not reasonable to suppose that the entries were made in anticipation of any benefit to the town. *ib.*
9. A possibility of a corrupt motive always exists in respect to human acts, but some probability of it ought to appear in order to exclude entries fairly and regularly made. *ib.*

EQUITY.

1. No written contract is beyond the reach of a court of equity for the purpose of reforming it, if the prayer for relief is presented in due season. *Palmer* v. *Hartford Ins. Co.* 489
2. There is of course a strong presumption in favor of the written agreement over a mere oral one by which it is sought to be corrected,

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and the prayer for relief in such a case must be supported by overwhelming evidence or be denied. *ib.*

ERROR.

See APPEAL, 1.

EVIDENCE.

1. In proving the value of property for the purposes of a foreclosure the rental value may be shown. Also what it would cost to reproduce the buildings. *Winchell* v. *Coney.* 25
2. In showing the rental value it is questionable whether the mere judgment of an expert would be proper evidence. The rents actually received, deducting therefrom the expense, would ordinarily be the proper proof. *ib.*
3. On an appeal from a decree of probate approving a will, on the ground that the will had been obtained by undue influence, the appellant offered in evidence the declaration of *C*, one of the legatees, that he and *F*, (another legatee,) "had got the will fixed as they wanted it." *C* and *F* afterwards testified, for the appellees, that they had used no undue influence. Held that *C*'s declaration was admissible for two purposes:—as an admission of a fact in issue, by a party to the controversy, to affect him; and to affect his credibility as a witness. *Saunders's Appeal from Probate.* 108
4. And it did not affect the case that it was admitted before he had testified, as the order of testimony was a matter for the discretion of the court, and the same use could be made of the declaration after he had testified as if it had then been first introduced. *ib.*
5. *F*, the other legatee, also testified that there had been no undue influence used. Held that *C*'s declaration could not in any way affect her or her testimony. *ib.*
6. Proof that, at the time a note was executed and put into the hands of the payee, an agreement was made that it should be returned to the maker upon a certain day if he should then demand it, does not contradict or attempt to vary the terms of the note, and the agreement may be proved by parol evidence. *McFarland* v. *Sikes.* 250
7. The judge charged the jury that if the proof preponderated in favor of the plaintiff their verdict should be in his favor, but if they found a preponderance the other way and in favor of the defendant, their verdict should be for the latter. Held, taken by itself, to be erroneous in not instructing the jury how to find if there was an equipoise of proof; but that it was clear from other parts of the charge that the jury could not have been misled upon the point and that therefore the defendant was not harmed by the error. *City Bank's Appeal from Commissioners.* 269
8. Where the defendant was charged with having slanderously imputed to the plaintiff the paternity of a certain illegitimate child, it was held that a written agreement entered into secretly by the defendant with the selectmen of the town, for the payment of the expense of supporting the child, and which the court regarded as not of the nature of a compromise, was admissible as tending to prove that the defendant himself was the father of the child. *Page* v. *Merwin.* 427

See ABATEMENT OF SUIT, 2; ACCOMPLICE, 1, 2, 3; ENTRIES, 1-9.

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EXECUTORS AND ADMINISTRATORS.

See PARTIES TO ACTION, 1.

FOREIGN ATTACHMENT.

1. The statute with regard to foreign attachment (Gen. Statutes, p. 397, sec. 2,) provides for such attachment "where a debt is due from any person to such defendant." Held that the word "due" is not used in the restricted sense of "payable." There must, however, be an existing indebtedness. *Sand-Blast File-Sharpening Co.* v. *Parsons.* 310
2. Where there is a condition precedent to the liability there is no indebtedness. *ib.*
3. *P* entered into a contract with *R* by which the latter was to sell for him licenses to use a patent, which were to be paid for by drafts on New York payable to the order of *P*, *R* to receive a commission on sales within ten days after *P* should receive payment, which commission was to be in full of all his services and expenses. *R* sold licenses to a party who was to pay for them in three installments, each by a draft on New York, in three, six and nine months. The first installment had fallen due and been paid, and *R*'s share paid him out of the money. Before the next installment fell due or any draft had been given for it, *P* was factorized as the debtor of *R*. Held that there was no existing indebtedness that could be taken by foreign attachment. *ib.*

FRAUD.

The fact that a purchaser of goods was not able at the time to pay all his debts if his creditors had pressed for immediate payment, is not enough to show that he was at the time insolvent, and much less that he was guilty of fraud in the purchase. *Millard* v. *Webster.* 415

GOOD WILL (SALE OF).

1. A sale by one partner in a manufacturing firm to the other of all his interest in the property of the firm of every kind and in the good will of the business, gives the vendee the right to carry on the same business at the same place as the successor of the old firm. *Cottrell* v. *Babcock Printing Press Manf. Co.* 122
2. But it does not preclude the selling partner from setting up a similar business in any place he chooses, and by advertisement, letters and personal application soliciting the custom of the old customers of the firm, so long as he does not represent himself as the successor of the old firm or represent the purchasing partner as not carrying on the business. *ib.*
3. To warrant a court of equity in decreeing a restraint of trade, there must be a clear contract for such restraint. *ib.*
4. The question whether an advertising card, issued in such a case by the selling partner, is of such a character as to deceive purchasers, is one of fact. *ib.*

HIGHWAY.

1. The statute (General Statutes, p. 233, sec. 16,) provides that persons authorized to repair highways may make water courses where necessary to draw off the water from the highway upon the adjoining land;

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a later statute (Acts of 1881, ch. 65,) providing that it shall be so done as to cause the least damage, and that the water shall not be discharged into any door-yard or enclosure for storage or sale of merchandise. Held that municipal corporations, so long as their acts are kept within the authority of the statute, are not liable for the damage done to such adjoining land by the water turned upon it. *Bronson* v. *Borough of Wallingford.* 513

2. And independently of the statute, since such corporations are required by law to construct and repair their highways, they would not be liable for the damage done by such acts, so long as no wanton or unnecessary damage was done, and they were not guilty of negligence in causing the damage. *ib.*

See ADVERSE USER, 1; HORSE RAILROAD CO., 1; RAILROAD CO., 13–19.

HORSE RAILROAD COMPANY.

A horse-railroad company was required by its charter to grade and keep in repair the surface of the street for a space not less than two feet in width on each side of each rail. Held that where an injury was caused by the defective condition of such part of the street the company was entitled, before being liable to a suit, to written notice of the injury, under the statute (Session Laws of 1883, p. 283), which provides that no action for an injury from a defective highway shall be maintained against any town, city, corporation or borough, unless written notice of such injury and of its nature and the place of its occurrence shall be given within sixty days. *Fields* v. *Hartford & Wethersfield Horse R. R. Co.* 9

HUSBAND AND WIFE.

See MARRIED WOMAN.

INFORMATION.

1. All offenses involving continuous action and which may be continued from day to day, may be charged as committed from one date to another. *State* v. *Bosworth.* 1

2. In a complaint for cruelty to animals, one count charged the defendant with overworking certain oxen from the first to the fourteenth day of a certain month, and another with neglecting to provide them with proper food and shelter for the same time. Held that each count charged but a single offense, and properly charged it as a continuing one. *ib.*

3. The overworking and the neglect to properly feed and shelter cattle may be charged as one offense. *ib.*

INHABITANT.

1. Upon the creation of a new town out of the territory of an existing one, where the legislature does not otherwise provide, any settled inhabitants of the original town who become paupers are to be considered as belonging to the new town if they had their residence as such inhabitants upon the territory embraced within it. *Town of Haddam* v. *Town of East Lyme.* 34

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2. The town of *E* was incorporated from territory taken from the towns of *W* and *L*. The resolution provided that "all the inhabitants now or at any time residing within said limits, excepting the paupers of *W* now in its poor-house, shall be a separate corporation." Held that the provision with regard to a portion of the paupers, and the omission to provide for any others, and the comprehensive language used, did not take the case out of the application of the general rule. *ib.*

3. The statute (Gen. Statutes, p. 196, § 4,) provides that an "inhabitant" of any town in this state may gain a legal settlement in any other town by supporting himself and paying all assessed taxes for six years. *L* was born in 1836 in Massachusetts, his father being an alien residing there. When he was five years old his father removed with his family to this state, residing in different towns, but acquiring no settlement in them, and finally settling in *N*, where he resided till after *L* became of age. After reaching his majority *L* resided more than six years in *N*, self-supporting and paying all assessed taxes. Held—1. That *L* acquired by birth citizenship in the United States. 2. That when he became of age he began to acquire a settlement by commorancy in *N*. 3. That in coming from another town in this state to *N* he came as an "inhabitant" of the former town, although not then of age, and having no legal settlement there. 4. That he became a settled inhabitant of *N* at the end of the six years. *Town of New Hartford* v. *Town of Canaan.* 39

4. A minor, born in Massachasetts, was supported by that state for several years during his minority at the Deaf and Dumb Asylum at Hartford in this state. From there he went, about three years before his majority, to the town of *C*, where he staid nearly two years. He then went to the town of *S*, where he became of age and remained for nearly twenty years, supporting himself, but with no taxes assessed against him. Held that he acquired a settlement in *S*. *Town of Canton* v. *Town of Simsbury.* 86

5. While residing in *C* he was an *inhabitant* of that town, though having no settlement there, and although a minor, and when he removed from there to *S* he began to acquire a settlement in the latter town as an inhabitant of one town removing to another, under Gen. Statutes, p. 196, sec. 4. *ib.*

INJUNCTION.

1. The defendant town instructed its selectmen to open and grade as a part of the highway a strip of land in front of the plaintiff's dwelling house, which he claimed as his private property and on which trees and shrubs were growing. The selectmen were proceeding to do this, acting solely under the instructions. The plaintiff brought a suit for an injunction against the town. The court below found that the strip was the property of the plaintiff free from the public easement, and granted the injunction. Held—1. That the injunction was properly issued against the town, since the selectmen, though agents of the law in removing nuisances from highways, were yet the agents of the town and acting solely under its vote in attempting to commit the trespass threatened. 2. That the court below having found that the acts threatened would, if committed, work irreparable injury, it was a proper case for an injunction. *Wetherell* v. *Town of Newington.* 67

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2. Where privileges of a public nature are also beneficial to private property, as in the case of land upon a public square, the enjoyment of them will be protected against encroachments by injunction. *Wheeler* v. *Bedford.* 244
3. And the owner of such private property is a proper party complainant in applying for such injunction. He is not a mere volunteer assuming to protect the rights of the public, but is seeking to protect his own private interests. *ib.*
4. And it makes no difference that it is the statutory duty of the town authorities to remove nuisances and encroachments, and that he could apply to them. *ib.*
5. That remedy is not the adequate remedy at law which excludes equitable jurisdiction. *ib.*
6. Adequate remedy at law means a complete remedy to which the complainant may resort at will and which he can control. *ib.*

INSOLVENCY.

See FRAUD, 1.

INSURANCE (FIRE.)

1. The plaintiffs had held a policy of insurance of the defendants upon a quantity of merchandise, and on the policy expiring applied to the defendants for a renewal policy to be on the same terms with the expiring one, which the defendants promised to give. The defendants wrote and delivered to them a new policy and received the premium. The plaintiffs, supposing it to be on the same terms with the first, did not examine it until after the loss of the property by fire three months later, when, on reading it, they discovered an important variance from the former policy, materially affecting their right of recovery. If they had known of the change they would not have accepted the policy. In a suit for the reformation of the policy and a recovery of what would become due under it, it was held that the plaintiffs could not be regarded as guilty of laches in not examining the policy and applying earlier for its correction, since they had a right to believe it to be in all essential respects like the former one. *Palmer* v. *Hartford Ins. Co.* 488
2. The defendants, having promised that the new policy should be on the same terms with the first one, were not in a position to charge the plaintiffs with neglect in not discovering that it was not so. *ib.*

INSURANCE (LIFE.)

A non-forfeiture life insurance policy for the term of ten years for $1,000 contained a provision that the policy should lapse upon the non-payment of any annual premium and of interest annually in advance on any outstanding premium notes which might be given ; but that, after the payment of two annual premiums, in case of default the company would convert the policy into a paid-up one for as many tenth parts of the sum originally insured as there had been annual premiums paid when the default was made, provided application for such conversion was made within one year after the default. The insured had paid two annual premiums, a part in cash and the remainder in premium

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notes which were outstanding. He made default in the payment of the next premium and applied to the company for a paid-up policy. The company thereupon indorsed upon the policy that it was to pay $200, "subject to the terms and conditions expressed in the policy." Thereafter the insured paid the interest on the outstanding premium notes annually for two years, but paid no interest thereafter. Held—1. That the indorsement upon the policy was equivalent to a paid-up policy. 2. That the policy as thus indorsed was to be construed as forfeitable upon the non-payment of the interest on the outstanding premium notes. *Holman* v. *Continental Life Ins. Co.* 195

INTOXICATING LIQUORS.

1. The act of 1882 (Session Laws of 1882, ch. 107, part 2, sec. 2,) provides that where any town shall have voted against the granting of licenses for the sale of intoxicating liquors, a delivery of such liquors within such town shall be deemed a sale in such town, although the contract for the sale shall have been made in another town. Held not necessary that the prosecuting officer, to avail himself of this statute, should found his complaint upon it, but that an ordinary charge of a sale of the liquors in the town would be sufficient. *State* v. *Basserman.* 88
2. Under that statute a delivery by an agent is in all respects the same as a delivery by the vendor himself. *ib.*
3. Aside from the statute, a delivery in one town of liquors ordered in another town, is a sale in the former town if the liquors were not separated from others until the delivery. *ib.*
4. Proof of a sale of liquors will sustain a charge of offering to sell. *ib.*
5. The act of 1882 (Session Laws of 1882, ch. 107, part 6, sec. 1,) forbids all persons, without a license therefor, to sell intoxicating liquors "by sample, or by soliciting or procuring orders." Held that a contract for a sale, made in this state by a traveling agent of a firm in another state, of liquors to be delivered in such other state, is a violation of the statute. *State* v. *Ascher.* 299

JUDGMENT LIEN.

See MORTGAGE, 3

JURISDICTION.

See PARTIES TO ACTION, 1.

JURY DOCKET.

See APPEAL FROM COMMISSIONERS, 3.

LIBEL.

1. A libel is a false and malicious publication concerning a person, which exposes him to public ridicule, hatred or contempt, or hinders virtuous men from associating with him. *Donaghue* v. *Gaffy.* 257
2. The defendant published of the plaintiff and his brother, who were a firm of wholesale liquor dealers, the following:—"To the Liquor Dealers of Hartford: In order that you may be on your guard against the base treachery of a concern you may be doing business with, I desire to state a few facts in regard to my experience with this firm. I refer

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to Donaghue Bros., consisting of William and Edward Donaghue. I have been in the habit of buying nearly all my goods of them for years, but because I quit buying of them they went to the savings bank, of which I rented my place, and offered ten dollars more a month than I was paying, and, after getting their lease, served a notice on me to immediately vacate. The firm is not worthy of our support, being guilty of foul and unfair dealings to get square, as they say, with one who exercises the right to trade where he likes, and I sincerely believe they deserve that kind of warfare known as 'boycotting,' and request those who believe in the fair thing, as between man and man, to give their support to some other house. For further particulars call on the undersigned. J. H. GAFFY." In an action for a libel in this publication it was held that it was not a libel *per se*, and that the plaintiff could not recover without proof of special damage. *ib.*

3. In actions for libel there is a substantial agreement in the decisions of the courts that the court be may required to pass upon the effect of the language of a publication by a demurrer to the declaration, as also when the question is whether the verdict is contrary to the evidence. Where the question is not thus raised the courts differ upon the question whether the court or the jury shall determine the question of libel or no libel. *ib.*
4. But where the publication is in terms so clear that no circumstances are required to make it clearer, the better rule seems to be that the question of libel or no libel is one of law to be determined by the court. *ib.*

LIMITATIONS (STATUTE OF.)

See STATUTE OF LIMITATIONS.

MANDAMAS.

1. The writ of mandamus will not be issued to compel the secretary of a private corporation to allow a stockholder to transfer his stock on the books of the corporation. *Tobey* v. *Hakes.* 274
2. And as a general rule it will not be issued where the applicant has other adequate remedies. *ib.*

MARRIED WOMAN.

1. A married woman can make a valid mortgage of her real estate to secure a debt of her husband. *Stafford Savings Bank* v. *Underwood.* 2
2. The husband must join in the execution of the mortgage in the same way as in any other conveyance of her real estate. *ib.*

MORTGAGE.

1. It is not necessary that a note should be described with entire accuracy in the condition of a mortgage given to secure it. It is enough if it appears with reasonable certainty to be the note intended. *Winchell* v. *Coney.* 24
2. Notes for a large amount were payable in five years from date "with interest annually at six per cent." but were described in a mortgage as "bearing interest at six per cent. per annum." In a suit for foreclosure for non-payment of annual interest and for a reformation of the mortgage, it was held—1. That the notes expressed the real contract between the parties as to the time of payment of interest, and controlled the

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description of them in the mortgage. 2. That the description of them in the mortgage as "bearing interest at six per cent. per annum," was sufficient to put a purchaser of the property on inquiry as to the time of payment of interest expressed in the notes. 3. That the mortgage and notes taken together made the former a security for the payment of annual interest, and that against a subsequent purchaser as well as the original mortgagor, and that no reformation of the mortgage was necessary. *ib.*

3. Where a creditor holds a mortgage on real estate and obtains a judgment lien on other real estate of the mortgage debtor for the same debt, there is no rule of equity which will prevent his taking a general decree of foreclosure on the mortgage and judgment lien at the same time. *Gushee* v. *Union Knife Co.* 101

4. The statute of 1878 (Session Laws of 1878, ch. 129, sec. 2,) which provides for the appraisal of mortgaged property where on a foreclosure the mortgage becomes absolute, and for the recovery in a later suit of only the balance of the debt above the value of the property taken by the foreclosure, does not apply to the case. *ib.*

5. A mortgagee in possession, whether the possession has been acquired by actual entry or by attornment of tenants, is bound to apply the rents and profits in discharge of the debt and can be compelled to account for them. *Chamberlain* v. *Conn. Central R. R. Co.* 473

6. And an equitable mortgagee stands in the same position, as does also an assignee of the mortgagee. *ib.*

See DEED, 5; MARRIED WOMAN, 1, 2.

NEGLIGENCE.

1. Reasonable care is care proportioned to the danger to be guarded against. *Dexter* v. *McCready.* 171

2. It is not the duty of the court to instruct the jury that certain facts, if proved, will constitute negligence, but to leave all the evidence to the jury for them to decide upon it whether the conduct in question was that of an ordinarily careful person in the circumstances. *ib.*

3. There is no different rule for determining what is negligence in a plaintiff from that which is applied in the case of a defendant. *ib.*

NOTES AND BILLS.

1. The defendant was a manufacturing corporation of this state, having its principal office in the city of New York, and limited by its charter to such use of mercantile paper as should be necessary to the convenient prosecution of its business, which paper its treasurer, by vote of its directors, was authorized to execute for the company. *S*, who had been its president and was still a large stockholder, drew drafts upon the company in London, England, where he was engaged in stock speculations, which were accepted by the treasurer of the company, but were subsequently protested for non-payment. *S* had previously had large funds in the hands of the company, against which he had previously drawn, and the drafts had been accepted and paid, but at the time the protested drafts were made his account was largely overdrawn and the acceptance of them was for his accommodation. These drafts, at the time they were drawn, and before acceptance, were dis-

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counted by the plaintiff company, through *W*, who was a member and its managing director, and the proceeds were delivered to *S*, and by him at once placed to his credit with *W & Co.*, a firm to which he was largely indebted and of which *W* was a member. The plaintiff company had previously discounted for *S* like drafts, which had been accepted and paid; and the treasurer of the defendant company had previously accepted drafts of *S* for his accommodation, with the knowledge of the directors. In a suit upon the drafts it was held—1. That though the defendant company had power by its charter to deal only in mercantile paper necessary to its business, yet as it had that power it would be holden by the acceptances in question except against a party who took the paper knowing that they were accommodation acceptances. 2. That the plaintiff company established a *primâ facie* case when it presented the drafts duly drawn and accepted, there being no circumstances to indicate fraud or illegality, and that the burden of proving that the plaintiff company had knowledge of the accommodation character of the acceptances was on the defendant company. 3. That the whole question became therefore—whether the plaintiff company took the paper in good faith for value. 4. That it did not follow that it took it in bad faith because of the object for which *S* procured the money, since he might have drawn upon funds of his own in the defendant's hands, and if so the intended use of the money was of no consequence. 5. That it did not affect the position of the plaintiff company that it discounted the paper before acceptance, and that no new consideration passed from it to the defendant company upon the acceptance. 6. That the plaintiff company was not to be regarded as not a holder for value by reason of the fact that the money obtained was placed to the credit of *S* with *W & Co.*, to whom he was indebted; since the fact that *W* was a member and managing director of the plaintiff company and also a member of *W & Co.* did not create a community of relation to the transaction on the part of the two companies. *Credit Company* v. *Howe Machine Co.* 357

2. While it is a general rule that persons dealing in commercial paper of a corporation are bound to take notice of the extent of its power, yet a distinction is to be observed between the terms of a power and the circumstances under which it is exercised. Parties may well be required to take notice of the former, but to require them to take notice of the latter would frequently result in gross injustice. *ib.*

3. Especially is this so where the officer of the corporation which exercises the power at the same time represents the corporation, and speaks for it in giving information as to the circumstances under which it is exercised. *ib.*

4. In the present case the treasurer of the defendant company, who, by virtue of his office, was the proper person to accept drafts on the company, was also the person held out by the corporation as the proper one to inform holders of drafts whether they were drawn on funds of the drawers; and by accepting the drafts in question he practically declared that they were so drawn. *ib.*

5. The defendant was a manufacturing corporation of this state, having its principal office in the city of New York. *S*, in London, England, made a draft on the company, which was accepted for the company by

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the treasurer, payable at its office in New York. The draft was discounted by the plaintiffs, and the proceeds applied to an existing indebtedness of the drawer to them, they not discharging the debt, or relinquishing anything of value. *S* had at the time no funds in the drawer's hands, and the acceptance was wholly for his accommodation; but this fact was not known to the plaintiffs. By its charter the company was limited in the use of mercantile paper to that necessary for the convenient prosecution of its business. In a suit on the acceptance it was held—1. That the contract was governed by the law of the state of New York. 2. That by that law the plaintiffs were not *bonâ fide* holders for value. 3. That the burden of proof, after the accommodation character of the acceptance was shown, rested on the plaintiffs to show that they were *bonâ fide* holders for value. 4. That not being such the defendant could interpose any defense that it could have availed itself of if the drawer had been the plaintiff. 5. That a provision in the charter, that the company should have a lien upon the stock of its members for any indebtedness to the company, could not be regarded as a permission to the stockholders to borrow and to the company to lend to them its capital. 6. That the corporation could not acquire the right to accept drafts for accommodation by assuming and repeatedly exercising the right. Neither the directors nor stockholders, by permission or ratification, could confer the power on any of the officers. 7. That the taking up and paying of the draft by the plaintiffs as indorsers did not change their position, which was fixed by their first relation to it. *Webster* v. *Howe Machine Co.* 394

6. Where a party takes such an acceptance without notice that it is for the accommodation of the drawer, and the acceptance is by an officer of the company authorized to accept if the drawer has funds in the company's hands, the holder is not affected by the extrinsic fact of want of funds, and can recover upon the acceptance if he is a *bonâ fide* holder for value. *ib.*

See EVIDENCE, 6; PLEADING, 1.

OFFICER.

Sundry parties, some of whom had attached and others were about to attach certain personal property of a debtor, and others of whom were threatening to carry the debtor into insolvency, agreed that the property should be sold by the officer who held it upon executions obtained by some of the parties, and that the proceeds should be divided by him among them *pro rata*. The property was located in different towns in the county, and it was agreed that it should all be sold together in one of the towns. Held—1. That the agreement had wholly superseded the rights of the parties as attaching creditors. 2. That the sale of the property by the officer, though in form an official sale, was yet made by him under the agreement of the parties and as their agent, and that his compensation was to be a reasonable sum, and was not limited to the statutory fees of an officer. *Blake* v. *Baldwin.* 5

PARTIES TO ACTION (JOINDER OF).

S had made a written contract with the defendant to collect for him a certain claim against an insolvent life insurance company at an agreed

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percentage, and, with the defendant's assent, made an arrangement with *H* (the plaintiff), an attorney at law, to assist him in the business at a certain lower percentage, accounting to him for the moneys collected and looking to him for payment, and delivered to him his contract with the defendant to hold until he had been fully paid. *H* attended to the business, proved the claim and procured it allowed, and a dividend upon it was paid by the receiver of the insurance company to the defendant. *S* afterwards died. *H* soon after brought a suit against the defendant, upon the contract with *S*, averring that it was assigned to and owned by him. While the suit was pending the administrator of the estate of *S* moved to be admitted as a party plaintiff, alleging that he had been duly appointed such administrator, and that the contract in question had been delivered by *S* to *H* under an agreement that the latter should hold and own the same for the purpose of taking out of the moneys collected the amount that was due to him, and that whatever balance was left was to be the property of *S*. The court allowed the administrator to enter as a co-plaintiff and afterwards rendered a joint judgment in favor of *H* and the administrator. Held—1. That *S* retained an interest in the contract which would have enabled him to sue upon it jointly with *H*, and that his administrator therefore could properly be admitted as a co-plaintiff with *H*. 2. That it was not necessary that the administrator, before being admitted as a plaintiff, should make proof of his appointment; such proof being never necessary in the first instance, as the question remains open for proof on the trial of the case, and such proof being dispensed with under the Practice Act (sec. 3), if the defendant does not deny in his answer the right of the plaintiff to sue as administrator. 3. That it was not necessary that the administrator should file a new complaint, as his claim was identical with the one set out in the original complaint. 4. That it did not affect the case that *H* had in his complaint alleged the ownership of the contract by himself, as the administrator in his application to be made a party had alleged his interest in the contract. 5. That it did not affect the case that the suit was in a city court, that the defendant was a non-resident, and that jurisdiction had been acquired only by an attachment of property in the city in *H's* suit; the Practice Act (sec. 19) providing that no change of parties should impair an attachment. The attachment inured to the benefit of the joint parties obtaining the judgment. 6. That it did not affect the right of the court to take jurisdiction of the administrator's part of the case that he was a non-resident. It is enough to give a city court jurisdiction if one of several joint plaintiffs resides in the city. *Hamilton* v. *Lamphear*. 237

PARTNERSHIP.

1. A payment by a partner on the partnership account in the regular course of the partnership business cannot be made the ground of a legal claim against his co-partner before the partnership accounts are settled. *Bishop* v. *Bishop*. 232
2. *B* was a member and managing agent of a co-partnership which received on storage a quantity of oil belonging to *C*, which he afterwards sold

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and divided the proceeds among the partners. *C* then brought suit against the company for the value of the oil, making service only on the partners within the jurisdiction, and obtained a large judgment. *B* effected a compromise of the claim, and with the consent of all the partners paid the amount agreed and charged it in his private account against the company. Held that his claim stood on the same ground with any other claim of a partner for money advanced for the firm, and was governed by the above principle. *ib.*

3. Notes were made by one of two partners, indorsed by the other, discounted at a bank, and the proceeds placed to the credit of the firm. The firm having gone into insolvency, the question arose upon a claim of the bank upon its estate, whether the firm was indebted on the notes or only the individual partners, the trustee in insolvency claiming that the maker owed the firm, and delivered the notes to it on account of his indebtedness, and the bank that the notes were made in that form for a special reason, but were intended as the notes of the firm. The court charged the jury that if the maker was indebted to the firm and made the notes as a means of paying his debt, the bank could not recover, that the question was one of fact, that the notes on their face showed an indebtedness of the individual partners and not of the firm, and that the burden of proof was on the bank to show that they were intended as a joint obligation of the partners. Held, on an appeal by the trustee, that the charge covered the whole ground so far as the rights of the estate were concerned, and that the court did not err in refusing to charge that, upon the facts claimed by the trustee, the contract between the bank and the firm was, as a matter of law, a purchase of the notes and not a loan of money by the bank. *City Bank's Appeal from Commissioners.* 269

PAUPER.

Where a town employs a physician to attend upon a person who is in fact a pauper and is in need of medical attendance, it is not necessary that the pauper should know that the physician is to be paid by the town. And so with any supplies furnished. *Town of Bridgewater* v. *Town of Roxbury.* 213

See INHABITANT, 1, 2.

PLEADING.

When property has been sold on time for a price payable in installments on different dates, and notes have been given for the installments, which have become due and are unpaid, the creditor, in an action for the amount due, may allege in a single count that the debtor owes him to an amount equal to the entire price, and that his obligation to pay is evidenced by several promissory notes, and may prove this debt by the introduction of the notes in evidence. *Morse* v. *Frost.* 84

See INFORMATION, 1, 2, 3.

PRACTICE.

See APPEAL, 2; VERDICT, 1.

PRACTICE ACT.

See APPEAL FROM COMMISSIONERS, 3; PARTIES TO ACTION, 1.

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PROBATE COURT.

A probate decree appealed from remains in full force until the appellate court reverses it; but the probate court ought properly to be advised as to the action of that court, although a judgment affirming the decree is not necessary. *Dickinson's Appeal from Probate.* 224

PROMISSORY NOTES.

See NOTES AND BILLS.

PUBLIC USE.

See TAKING OF LAND FOR PUBLIC USE.

RAILROAD COMPANY.

1. A railroad company for the purpose of raising money to pay a large floating indebtedness, issued under legislative authority and sold for cash nineteen thousand shares of preferred stock, dividends on which to the amount of seven per cent. annually were to be paid from the net earnings of the company before any dividends on the common stock, the seven per cent., or any part of it, where not paid by dividends, to accumulate. A general statute provided that no corporation should declare any dividend while its capital was impaired. There had been a large deficiency prior to the issuing of the new stock. Held that a dividend could be made on the preferred stock out of the net earnings of the road since the issuing of the same, without regard to the prior deficiency. *Cotting* v. *N. York & N. Eng. R. R. Co.* 156
2. The tracks of two railroads crossing a city street at grade and the public safety requiring a change, the General Assembly passed an act appointing a board of commissioners with power to adopt some plan for bridging either the street or the tracks and altering the location of either so far as necessary, in its own name to take lands necessary for the purpose, to procure the appointment by the court of appraisers of the property taken, and to apportion the expense among the corporations interested; the property taken to vest in the particular corporation occupying it for its highway or track, and to be paid for before being occupied, and the award of damages, when recorded in court, to have the effect of a judgment. Held—1. That the word "taken" in the constitutional provision that "private property shall not be taken for public use without just compensation therefor," means the actual assumption by the party taking it of exclusive possession, at the termination and as the result of judicial proceedings. 2. That the act in question sufficiently secured compensation to the owner of the land taken in making actual payment of the assessed damages a prerequisite to the passing of any right to it to the corporation taking it. 3. That the legislature had power to give to its commissioners a standing in court to ask that land might be subjected to the use of the different corporations interested, and could impose upon each the same obligation in relation thereto that would have resulted from their asking for and receiving the land in their own names. 4. That in apportioning the expense to be incurred by the taking of land the commissioners had power to require either of the corporations to pay to either of the others a certain portion of the sum paid by the latter for land taken;

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and a requirement that the city should pay a portion of the damages assessed for land taken by the railroad companies would not be in conflict with the constitutional prohibition of municipal aid to railroads. *Woodruff* v. *Catlin.* 277

3. The act of 1881 (Session Laws, ch. 92,) provides that where any injury is done to "a building or other property" by a fire communicated by the locomotive of a railroad, without contributory negligence on the part of the owner of the property, the railroad company shall be responsible in damages; and that every railroad company shall have an insurable interest in the property for which it may be so held responsible and may procure insurance thereon. Held—1. That the act was not unconstitutional and invalid, either (1) as denying to railroad corporations the equal protection of the laws, in making them liable for the consequences of a lawful act without negligence on their part, or (2) as taking away their property without due process or law in depriving them of a legal defense, or (3) as impairing the rights given them by their charters, which authorize the use of fire in operating their locomotives and require them to run their trains, for the unavoidable consequences of which they are made liable. 2. That the statute, under the expression "buildings or other property," includes fences and forest trees. *Grissell* v. *Housatonic R. R. Co.* 447

4. It is not necessary that the property should be such as is ordinarily regarded as insurable. The statute creates an insurable interest, which is independent of the question whether an insurer could be found to take the risk. *ib.*

5. The statute is valid in its application to railroad companies which had taken the land for their road and paid the assessed damages before the act was passed. *ib.*

6. This is especially so where the charter of such a railroad company contains a provision that it may be altered at the pleasure of the General Assembly and that it shall be subject to all general laws that may be enacted. *ib.*

7. The Connecticut Central Railroad Company, in 1875, under authority of its charter, made a mortgage to the state treasurer of all its estate present and to be acquired, to secure an issue of coupon bonds payable in 1895, but to become due at the election of the holder six months after default in the payment of the interest coupons. The New York & New England Railroad Company, which owned a connecting road, in 1880 took a lease of the road and all its property, the lease to run until 1895, and in place of paying rent the lessee was to apply the net income from the use of the road to the payment of the interest coupons. Soon after taking the lease the lessee became the owner of all the bonds. Upon a suit brought by the state treasurer, as trustee for the bondholders, for a foreclosure of the mortgage, upon an alleged default in the payment of the interest coupons, it was held—1. That there had been no default if the net receipts from the road had been sufficient to pay the interest coupons—2. That in accounting for these receipts the New York & New England Railroad Company was bound to account for and apply the net receipts from this road by itself, and had no right to pro-rate them with its receipts upon its own road upon the entire mileage. *Chamberlain* v. *Conn. Central R. R. Co.* 472

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8. And held that the matter was not affected by the lease, since by it the lessee had agreed to do only what as a mortgagee in possession it would have been bound to do. *ib.*

9. Also that it did not affect the matter that the lease conveyed all right that the lessor had or might acquire in certain terminal advantages and connecting roads, since the mortgage itself covered future acquired rights, and the lease itself provided for the deducting of the expenses incurred on account of those connections and advantages from the gross earnings of the leased road. *ib.*

10. The foreclosure suit was brought by the state treasurer as trustee for the bondholders at the request and for the benefit of the New York & New England Railroad Company, and that company was brought in as a co-defendant. Held that, as that company held all the bonds, it was to be regarded as really the plaintiff, and that the whole question of accounting was to be treated as if it was so. *ib.*

11. And the suit having been brought at its request and for its benefit, the company did not stand in a position to take advantage of a provision of the lease for an arbitration in case of any disagreement between the parties. *ib.*

12. But it is well settled that such an agreement to submit to arbitration will not be held valid where its effect is to oust the court of jurisdiction. *ib.*

13. A railroad was carried over a street in a borough by a bridge, which was built at a height above the street directed by the borough and approved by the railroad commissioners. Afterwards the road-bed was raised fourteen inches, in part from natural causes and in part from the placing of gravel thereon by the borough. The plaintiff, in passing under the bridge upon a load, was injured, without negligence on his part, by his head striking an iron truss of the bridge. The railroad company was found to have been guilty of no negligence, but the borough to have been negligent in causing or permitting the road-bed to be filled up till the space under the bridge was insufficient. Held that the borough was liable for the injury, and that there was no liability on the part of the railroad company. *Gray* v. *Borough of Danbury.* 574

14. The railroad company was clearly not bound to raise the bridge from year to year as the street was raised, and was not bound to remove the earth and gravel placed there by the borough. The borough alone could make repairs, and it alone was responsible for doing it improperly. *ib.*

15. There is no law that fixes the height of railroad bridges over highways. It should be sufficient to reasonably accommodate the public travel, and what is reasonable must depend in some measure upon the circumstances of each case. *ib.*

16. Where the railroad company, its engineers, the railroad commissioners, and the borough within which the highway lay, regarded the height of the bridge sufficient when made, and the injury was attributable wholly to the raising of the road-bed below, it was held that the court below was justified in finding that the railroad company had been guilty of no negligence in the original construction of the bridge. *ib.*

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17. The statute (Gen. Statutes, p. 324, sec. 30) provides that railroad companies at all crossings of highways shall make and maintain such bridges, embankments and approaches as the convenience and safety of the public travel on the highway may require. Held that this statute imposed no duty upon the railroad company, when the bridge was once properly made, to maintain the highway in such condition as should prevent the bridge from interfering with public travel. *ib.*

18. The existence of a railroad interfering with a highway, although the company may have done all that is required of them by statute, will often impose additional burdens upon towns in maintaining highways, but this expense the towns may reasonably be required to bear. *ib.*

19. The statute (Gen. Statutes, p. 232, sec. 10) provides that when an injury is caused by a structure legally placed on a highway by a railway company, the company, and not the party bound to keep the road in repair, shall be liable therefor. Held not intended to apply to a case where the structure was a bridge over the highway, and the injury resulted wholly from the negligence of the party bound to keep the highway below it in repair. *ib.*

RECEIPT.

1. A receipt in full, given upon the part payment of a debt, in the absence of any impeachment of it for fraud or mistake, is valid and a discharge of the entire debt. *Aborn* v. *Rathbone.* 444

2. Where, upon part payment of a debt, a receipt in full is given for the purpose of aiding the debtor to settle more favorably with his other creditors and on his promise to pay the balance, the creditor cannot avail himself of these facts to set aside the receipt. *ib.*

REFORMATION OF CONTRACT.

See EQUITY, 1, 2.

REMOVAL OF CAUSE.

1. A case in the Superior Court was, in form, removed to the United States Circuit Court, which court held that it was not removable. Held that the action of the former court in allowing the application for removal, accepting the bond given, and treating the case as no longer in court, did not operate as a dismissal of the case for want of jurisdiction, but that it still remained in the Superior Court. *Winchell* v. *Coney.* 24

2. The action of the clerk in restoring the case to the docket was all that was necessary, and this action could be taken without an order of the court. *ib.*

3. An appeal to the Supreme Court from the order of removal made by the Superior Court, did not take it out of the latter court. *ib.*

REPLEVIN.

1. The statute (Gen. Statutes, p. 484, sec. 2,) requires a bond to be given by the plaintiff in all replevin suits, to prosecute the suit to effect and pay any judgment that the defendant may recover in the suit. Another statute (Gen. Statutes, p. 397, sec. 3,) requires bonds for costs in all suits brought by non-resident plaintiffs. Held that the special-

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bond required in replevin suits necessarily covered the costs that might be recovered by the defendant as a part of the judgment that might be rendered in his favor, and that it was not necessary for a non-resident plaintiff in such a suit to give the ordinary bond for cost. *Singer Manufacturing Co.* v. *Rhodes.* 48

2. The statute with regard to replevin of goods unlawfully detained (Gen. Statutes, p. 484, sec. 2,) requires the filing of an affidavit by the plaintiff stating "the true value of the goods which it is desired to replevy." A later section gives a form of affidavit which requires a description of the property, but omits the words—"which it is desired to replevy." An affidavit, upon a writ of replevin of articles of furniture, described the articles in the same terms as the writ, but did not state that they were the goods which it was desired to replevy. Held—1. That it was enough that the affidavit was in the precise form authorized by the statute. 2. That it would be presumed that they were the same goods desired to be replevied until the contrary was shown. *Brown* v. *Poland.* 313

3. A married woman hired a quantity of household furniture, agreeing to return the goods if she changed her residence. She decided to change her residence, but her husband refused to allow the goods to be returned. She then, in the name of the lessor, made demand upon him for the goods to be delivered to the lessor, but he refused. Replevin was brought by the lessor without other demand. Held—1. That the husband's right to the possession of the goods was only through his wife, and no greater than hers, and that as she had no right he had none. 2. That a demand was not necessary to make his detention of the goods wrongful, but that the demand by the wife in the lessor's name and his refusal, were evidence of the wrongfulness of his possession. *ib.*

4. Replevin lies only for specific property, distinguishable from other property of the same kind. *Mead* v. *Johnson.* 317

5. And the plaintiff must have a general or special property in the particular thing sought to be replevied. *ib.*

6. It will not lie to recover damages for a mere breach of contract in not delivering property. There must be a tortious taking or detention of it. *ib.*

See Costs, 1.

RESCINDING OF CONTRACT.

The defendant agreed to purchase certain real estate for the plaintiff, for which the latter furnished him $345 of the $550 to be paid. The defendant purchased the property for the sum agreed and took a deed to himself, mortgaging it back for the unpaid part of the price. The defendant then made a quitclaim deed, had it recorded, and delivered it to the plaintiff, but by mistake had put in another name than that of the plaintiff. The error being discovered the defendant altered the name in part, still leaving it incorrect, and delivered the deed to the plaintiff, who could not read or speak English, and he, supposing the deed to be valid, went into possession of the premises and remained in possession for several months. After a while the invalidity of the deed was discovered and the plaintiff called on the defendant for a

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new deed, informing him that he was ready to pay the balance of the price, but the defendant refused to give it, and finally he demanded back the money paid unless the deed was given. The defendant refused to give the deed or pay back the money. In an action for the recovery of the money it was held—1. That as the defendant refused to carry out the agreement the plaintiff had a right to treat it as rescinded. 2. That the plaintiff's having taken possession and held it so long, did not, in the circumstances, stand in the way of his abandoning the contract and demanding back the money. 3. That the defendant's absolute refusal to give the deed removed the necessity on the part of the plaintiff of tendering the balance of the price when he demanded the deed. *Nothe* v. *Nomer.* 326

SALE (CONDITIONAL.)

It is well settled that a contract for the sale of personal property, to be at once delivered to the vendee, but the title to remain in the vendor until the price is paid, is valid. *Cooley* v. *Gillan.* 80

SCHOOL DISTRICT.

1. The statute (Gen. Statutes, p. 134, secs, 1, 6 and 7), provides that towns may form, unite, alter and dissolve school districts within their limits; that an appeal may be taken from such action to the Superior Court; that the court upon such appeal shall have the same power to act in the matter that the town had; and that no alteration of the lines fixed by the decree shall be made except by the court. A town divided an existing district and created a new district of one of the parts, and the district thus divided appealed to the Superior Court, which by its decree set aside the action of the town but passed no further decree in the matter. Held not to be such a fixing of the lines of the district by the decree of the court as precluded the town from making any alteration of the same at the same place. *Sixteenth School District* v. *Eighteenth School District.* 50
2. In the absence of record evidence of the establishment of a school district, its legal character as such may be proved by reputation. *State ex rel. School District* v. *Bradley.* 74
3. A school district originally legally organized in the town of *N* claimed that a portion of the adjoining town of *M* had been annexed to and become a legal part of it. There was no record evidence of the fact. Held that the legal annexation of the part in question might be shown by such conduct of the district and of others with regard to it for a period of forty years as raised a presumption of such annexation. *ib.*
4. And held that the district claiming the territory in question must show a definite line bounding it, *ib.*
5. Sundry facts considered which were held sufficient to raise a presumption of such annexation. *ib.*
6. And sundry facts considered which were held sufficient to determine the existence and location of such a boundary line *ib.*

SEA-SHORE.

A piece of land on the sea-shore was divided between two distributees of an estate by a line extending through the upland to the shore line, but

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not running through the flats between high and low water mark. The shore was a convex curve. Held—1. That the law supplied the rule for the division of the flats. 2. That by that rule the line was to run perpendicularly to the shore line from the point of division at that line to low water mark. 3. That in determining the curve of the shore its general trend for a considerable distance was to be considered, omitting to notice small indentations and projections. *Morris* v. *Beardsley.* 338

SELECTMAN.

One of three selectmen of a town submitted the question of the settlement of a pauper to arbitration. Of the other selectmen one had agreed that this one "should attend to the case," and the other had not been consulted. Held that the town was not bound by the award. *Town of Haddam* v. *Town of East Lyme.* 35

See INJUNCTION, 1.

SETTLEMENT.

See INHABITANT.

SHORE.

See SEA-SHORE.

SLANDER.

1. Words are actionable *per se* which impute the commission of crimes involving moral turpitude, although they are not denominated infamous. *Page* v. *Merwin.* 426
2. To charge another with fornication is slanderous *per se.* *ib.*

STATUTE OF LIMITATIONS.

An admission of indebtedness by an instrument under seal, to save the claim from the running of the statute of limitations against it, can have no greater effect of any kind by reason of its being under seal. *Tolles's Appeal from Commissioners.* 522

STATUTES COMMENTED ON.

State Constitution, 24th Amendment, (increase of compensation of public officer). *Smith* v. *Waterbury*, 174; *Garvey* v. *Hartford.* 440

Gen. Statutes, tit. 11, ch. 5, secs. 1, 6, 7, (school district boundaries). *Sixteenth School Dist.* v. *Eighteenth School Dist.* 50

Id., tit. 12, ch. 1, sec. 4, (assessment list). *Hartford* v. *Champion.* 436

Id., tit. 12, ch. 1, sec. 12, (exemption from taxation). *Conn. Spiritualist Camp Meeting Asso.* v. *East Lyme.* 153

Id., tit. 15, ch. 1, sec. 4, (settlement). *New Hartford* v. *Canaan*, 39; *Canton* v. *Simsbury.* 86

Id., tit. 16, ch. 7, sec. 16, (water from highway). *Bronson* v. *Wallingford.* 513

Id., tit. 18, ch. 11, art. 2, sec. 5, (distribution of estate). *Dickinson's Appeal from Probate.* 224

Id., tit. 19, ch. 1, sec. 2, (foreign attachment). *File Sharpening Co.* v. *Parsons.* 310

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Id., tit. 19, ch. 1, sec. 3, (bond for costs). *Singer Mfg. Co.* v. *Rhodes.* 48
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Id., 1883, ch. 105, (notice of injury on highway). *Fields* v. *Horse R. R. Co.* 9
Practice Act, sec. 19, (jurisdiction acquired by attachment). *Hamilton* v. *Lamphear.* 238
Id., sec. 22, (jury docket), *Tolles's Appeal from Commissioners.* 521

STOPPAGE IN TRANSITU.

K, at *W* in this state, ordered goods of the plaintiffs in the city of New York, and they were there shipped, and reached *W*, and were deposited in the freight house of the railroad subject to *K's* order. Later on the day of their arrival, *K* made an assignment for the benefit of his creditors under the insolvent law. Two days later, not having removed the goods from the freight house, he re-marked them and ordered them sent back to the plaintiffs. After this, but before they were sent back, the probate court, upon *K's* assignment, ordered an officer to take possession of his property, pending the appointment of a trustee in insolvency. The officer took possession of these goods while they were being transferred to the cars to be returned to New York. Held that there was no stoppage *in transitu* on the part of the plaintiffs. *Millard* v. *Webster.* 415

SURFACE WATER.

See HIGHWAY, 1, 2.

SUIT (ABATEMENT OF).

See ABATEMENT OF SUIT.

TAKING OF LAND FOR PUBLIC USE.

See RAILROAD COMPANY, 2.

TAXATION.

1. A camp meeting association, chartered for religious, charitable and

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social purposes, with power to hold, lease and sell real estate, and to erect wharves, and keep and operate steam, sail and other boats in connection with its camp ground, purchased a large tract of land for a camp ground, and erected a central building upon it, known as the pavilion, two stories in height, the lower story of which was an open hall, used on Sundays exclusively for religious services, and on week days for social gatherings and amusements, for admission to which a small sum was sometimes charged, and a place for the sale of refreshments; the upper story containing lodging-rooms, which were occupied without charge by the speakers of the association and for a small charge by other visitors; all the receipts from the sale of refreshments, from admission fees, from the lodging rooms and from its boats, going into the general treasury and being used for the general purposes of the association. Held that the building was not exempt from taxation as a church, under Gen. Statutes, p. 154, sec. 12. *Conn. Spiritualist Camp-Meeting Asso.* v. *Town of East Lyme.* 152

2. The statute does not intend to exempt any building earning money applicable to secular uses. *ib.*
3. The association, by instruments in the form of a lease, conveyed numerous lots, for a price paid in advance, to persons who erected cottages thereon. The leases were to the lessees and their heirs and assigns, but were forfeitable on the breach of certain conditions. Held that the title of the lessees was a base or determinable fee, and that the lots and the buildings on them were to be taxed as the property of the lessees and not as that of the association. *ib.*
4. The statute (Gen. Statutes, p. 153, sec. 4,) provides that where any resident tax-payer fails to give in a sworn list of his taxable property the assessors "shall fill out a list for him, putting therein all property which they have reason to believe is owned by him liable to taxation, at the actual value thereof, from the best information they can obtain, and add thereto ten per cent. of such valuation." Held not necessary that the assessors should get knowledge of specific property kept back from taxation, but that it is enough if they ascertain the fact that property is thus kept back, and use their best judgment as to the amount and value of it. *Town of Hartford* v. *Champion.* 436
5. It is sufficient if, from information obtained by inquiry, and from their own judgment upon the general facts of the case, they come to the honest belief that property is thus kept back. *ib.*
6. Assessors inserted the following item in a list thus filled out by them, after specifying other property: "All taxable property not specifically mentioned, $25,000." Held to be legal. *ib.*

TITLE IN ISSUE.

The statute (Gen. Statutes, p. 445, sec. 8,) provides that in all actions of tort brought to the Superior Court or Court of Common Pleas, if the damages found do not exceed fifty dollars, the plaintiff shall recover no more costs than damages, unless the title to land, or a right of way, or to the use of water, is in question, the value of which property is found to exceed fifty dollars. Held—1. That the title must be so put in issue as to be settled, but that it makes no difference whether it is put in issue by the nature of the complaint or by the pleadings on

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the part of the defendant. 2. That as, under the Practice Act, the complaint for disseizin contains substantially the same allegations of fact as were required in the old action of disseizin, the title is put in issue by it. 3. That it is for the court and not for the jury to find the value of the property, the title of which is determined in the case. 4. That it is enough to bring the case within the exception of the statute if the part of the demanded premises as to which the title is put in issue is of the value required, and is so described in the pleadings or in the verdict as to be identified and to admit of valuation. *Bristol Manufacturing Co.* v. *Barnes.* 53

TOWN.

See INJUNCTION, 1; SELECTMAN, 1.

TRADE MARK.

1. William Rogers, for twenty-five years before his death in 1873, had a valuable reputation in the market as a manufacturer of silver-plated ware. A son of the same name acquired skill under him in the same manufacture, and since 1864 had had a valuable independent reputation in the market as a manufacturer of the same goods. In 1878 the second William Rogers made a contract with the defendant corporation by which it was agreed that he should exercise his skill in superintending their manufacture of silver-plated ware, and direct as to its quality and style, and allow his name to be stamped thereon and defend its use, in consideration of which he was to receive a commission upon sales. The plaintiff corporation had since 1872 been engaged in the manufacture of silver-plated ware, and used sundry trade-marks, of which the name "William Rogers" was the principal part, claiming to own the exclusive right to such stamps by the agreement of the first William Rogers and by long-continued use. In a suit brought by the last-mentioned company against the other for an injunction against the use of the name "William Rogers" as a trade-mark, it was held:—1. That the second William Rogers had the right to use his name as the important part of his trade-mark so long as it was accompanied with devices to distinguish it from the trade-marks of the plaintiffs, and was not used for the purpose of misleading purchasers, although purchasers who took note only of the words "William Rogers," or were not familiar with the stamps of the plaintiffs, were liable to be misled. 2. That under the arrangement by which the goods were manufactured by the defendant corporation under the superintendence of the second William Rogers, and with an interest on his part in the manufacture and sale, they had a right to use the name of William Rogers in their trade-mark in the same manner that he could have done if he had been the direct manufacturer. *Wm. Rogers Mfg. Co.* v. *Simpson.* 527

2. When the second bearer of a name which has become the distinguishing part of a trade-mark used by another manufacturer, uses the same name as a part of his own trade-mark, with proper distinguishing devices, it is not a sufficient reason for enjoining the latter against the use of the name, that the goods of both manufacturers become known in the market by the same name. He is not to be injuriously affected

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by any use the public may make of a mark which the law allows him to use. *ib.*

3. If purchasers who will take note of nothing but the name upon the trade-mark are misled, and there is consequent loss to either of the parties entitled to use the name, it must be borne as a consequence of the act of taking the name as a trade-mark. *ib.*

TRIAL.

1. A city ordinance provided that the city attorney should receive a certain salary in lieu of all other compensation. A later statute gave him fees for the trial of cases for the city. Held that the statute was not to be construed as applying only to cases in the local court. *Smith* v. *City of Waterbury.* 175
2. Held also that a trial before the railroad commissioners was to be regarded as coming within the provision of the statute. *ib.*

VERDICT.

Where a general verdict has been rendered on several counts, a defendant who has not requested the court to order separate verdicts, can not complain of it. *State* v. *Basserman.* 89

WILL.

1. A testator gave certain estate to his son, with a gift over if he should die during minority or without issue. Held, upon a construction of the whole will, that the word "or" should read "and," and that the son's estate became indefeasible on his attaining his majority. *Phelps* v. *Bates.* 11
2. The existence of undue influence in procuring a will may be inferred from the facts and circumstances of a case, even if there be no direct and positive evidence of it. But the facts and circumstances ought to be such as to lead justly and reasonably to such a conclusion. *Saunders's Appeal from Probate.* 108
3. Where a will has been duly executed and the testator had sufficient capacity to make a will, the presumption is that it was executed freely, and without fraud or mistake, and the burden of proof to show the contrary rests on the party opposing the probate of the will. *Rockwell's Appeal from Probate.* 119
4. Where undue influence was relied on to invalidate a single bequest in a will, and the court, in sustaining the claim and setting aside that part of the will, found "that there was no sufficient proof to show that the bequest was made a part of the will by the direction or with the knowledge of the testatrix," it was held that the court erred in setting aside the bequest on that ground, since the proponents of the will were not bound to offer any evidence whatever on the subject. *ib.*
5. A testator, after making bequests to his widow, his daughter and certain other near relatives, gave the residue of his estate to three trustees of whom his daughter was one, who were to hold the property during the life of the daughter and pay her the income, and on her death without children attaining the age of twenty-one, the trust was to cease and the property to be divided into sixteen equal shares and distributed

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among relatives named; and in case a vacancy should occur among the trustees a trustee to fill it was to be "nominated to the judge of probate by at least one third of the devisees above named." Held—1. That by "devisees above named" the testator intended only those who were ultimately to participate in the trust fund, and not all the beneficiaries under the will. 2. That the probate court had the right for good cause to refuse to appoint a person regularly nominated as a trustee. 3. That the mere fact that a person nominated as a trustee lived in another state was not a sufficient reason for rejecting him. *Wilcox's Appeal from Probate.* 320

6. A testator by the first clause of his will gave his wife a life use of all his real estate, and after giving sundry pecuniary legacies to his children, made the following residuary bequest :—"All the residue of my estate of whatever kind I give to my wife." No other disposition was made of the fee of the real estate. Held that under this clause the widow took the fee of the real estate of which by the first clause she took only a life use. *Warner* v. *Willard.* 470

7. There is a presumption against the intention of a testator to leave any part of his estate intestate. *ib.*

8. A testator gave his property to a son, a grandson, and two granddaughters, with a provision that if any of the legatees should die without issue the share of such decedent should go to certain others. Held to mean a dying without issue in the lifetime of the testator, and that the legatees surviving the testator took an absolute estate in the property given. *Coe* v. *James.* 511

See CHARITABLE BEQUEST, 1; EVIDENCE, 3.

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ERRATA.

Vol. 50. P. 655, 2d line, for "434," read "424."
" 51. P. 166, 8th line from bottom, for "235" read "335."
" " P. 198, 8th line from bottom, for "interest" read "estate," and in the next line for "estate" read "interest."
" " P. 261, 2d line, for "32" read "31."
" " P. 385, 7th line from bottom, for "condition" read "conditional."
" " P. 397, 4th line, for "1838" read "1883."
" " P. 439, 7th line from bottom, for "4 Kent's Com." read "2 Kent's Com."
" " P. 472, 2d line, for "19" read "119."
" 52. P. 453, 15th line from bottom, for "C. H. Briscoe" read "C. H. Owen."
" 53. In Table of Cases Reported insert in proper place "Appleton *v.* Norwalk Library Corporation, p. 4," and "Norwalk Library Corporation, Appleton *v.*, p. 4."
" " P. 64, 7th line from bottom, for "Herskell" read "Heiskell,"
" " P. 92, bottom line, for "Graham" read "Granger." (This annoying error is owing to a disturbance of the type after the last proof was corrected.)
" " P. 169, 8th line, for "executrix" read "testatrix."
" " P. 601, 9th line, for "Daniel P. Brown" read "Daniel P. Tyler."
" " P. 607, 10th line from bottom, for "1184" read "1814."
" " P. 608, 3d line, for "James H. Huntington" read "James Huntington."
" " P. 608, 11th line from bottom, for "William F. Wilcox" read "Washington F. Willcox."
" " P. 612, 23d line, for "1582" read "1682."
" 54. P. 248, 4th line, for "Sanford, J.," read "Torrance, J."
" " P. 407, 5th line, for "829" read "329."
" " P. 418, 17th line from bottom, for "defendant. The" read "defendant, the."

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