REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By EDWIN B. SMITH,
REPORTER TO THE STATE.

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JUDGES

OF THE

SUPREME JUDICIAL COURT,

DURING THE TIME OF THESE REPORTS.

HON. JOHN APPLETON, LL. D., CHIEF JUSTICE.
HON. JONAS CUTTING, LL. D.
HON. CHARLES W. WALTON.
HON. JONATHAN G. DICKERSON, LL. D.
HON. WILLIAM G. BARROWS.
HON. CHARLES DANFORTH.
HON. WM. WIRT VIRGIN.
HON. JOHN A. PETERS.

ATTORNEY GENERAL.

HON. HARRIS M. PLAISTED.

TABLE

OF THE CASES REPORTED.

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

BENJAMIN L. STAPLES *vs.* GEORGE B. WELLINGTON.

Costs. Pleading. Practice. Release. R. S., c. 82, § 115.

A discharge under seal, not fraudulently obtained, by which a verdict for $350 is released for $67, during the pendency of a motion for a new trial of the action, cannot be regarded as invalid for inadequacy of consideration.

A plaintiff, who has released a cause of action, and agreed to enter a discontinuance as soon as may be without costs to the defendant, will be liable to the releasee for any costs that may be subsequently occasioned by his ineffectual resistance to the execution of his agreement.

The liability of an assignee under R. S., c. 82, § 115, for the costs of an action prosecuted for his benefit, is not confined to cases in which the assignment is made before action brought.

ON EXCEPTIONS by both parties.

This was an action of assumpsit, originally instituted by Francis G. Brown, who died during its pendency, and it was subsequently prosecuted by his administrator, Benj. L. Staples.

At the February term, 1867, a verdict in favor of Brown, for $350, was rendered, and the defendant filed a motion for a new

trial, and the cause was continued to await the result of this motion. On the seventh day of May, 1867, the claim sued and all rights thereto and under the verdict were assigned by Brown to Edmund Madigan, for value; and on the seventh day of September, 1867, in consideration of $67 paid him by Mr. Wellington, Brown released the cause of action and directed his counsel to discontinue the suit, without cost to the defendant. At the September term, 1867, the motion for a new trial was withdrawn, Mr. Madigan filed his assignment, and Mr. Wellington his release, the validity of which was denied upon the ground of the insanity of Brown, and because it was obtained by fraud and circumvention, for a grossly inadequate consideration, after notice of the transfer of the claim to Mr. Madigan. By order of the court the cause was continued, the pleadings to be filed by the middle of vacation, which was done; the defendant formally pleading his release, and the plaintiff replying the matters above stated, in avoidance. At the February term, 1868, the death of Brown was suggested, Mr. Staples appeared as his administrator, and, under the direction of the court, two issues were framed for the jury: "1st, Did the defendant have notice of the assignment before obtaining the discharge? 2d, Was the discharge valid or void?" At the first trial the jury were unable to agree, but on the second presentation of the case, at the February term, 1869, a verdict was rendered for the defendant, the first question being answered in the negative, and the second that the discharge was valid. The plaintiff filed exceptions and a motion for a new trial, which were overruled by this court, as appears in the report of the case, 58 Maine, 453, the certificate being received by the clerk of courts, for Aroostook county, May 29th, 1871. At the September term, 1871, the plaintiff moved for judgment on the verdict originally rendered in his favor, (at the February term, 1867,) and the defendant moved for costs from the commencement of the action; the judge ruled, *pro forma*, that the defendant was not entitled to any costs, overruled both motions, and directed an entry of judgment for the defendant without costs. Both parties excepted.

Jos. Granger, *D. D. Stewart*, *L. Powers* and *E. Madigan*, for the plaintiff.

The original plaintiff obtained a verdict for $350, which, by the withdrawal of the defendant's motion for a new trial, remains in full force. The defendant does not now seek to set it aside but to avoid, or prevent, the entry of judgment by the release he has since obtained from Mr. Brown. The validity of the release having been determined by the jury, it must now take effect, but only according to its terms; i. e., that the action should be continued without cost to either party. *Coburn v. Whitely*, 8 Metc., 272-7. Wellington is not the prevailing party. Upon the sole issue raised upon the declaration, a verdict, still in full force, stands recorded against him. The validity of the release was a collateral issue, subsequently arising, which the court saw fit to submit to the jury for information. It was a question of interest to the parties, in the solution of which both incurred expense, but it was not the subject-matter of the action upon which either could be said to prevail. The statute giving costs refers to the party prevailing upon the issue presented by the plaintiff's claim and the defendant's denial. *Thayer v. Seavey*, 11 Maine, 292, last sentence; *Moore v. Mann*, 29 Maine, 559; *Ham v. Ham*, 43 Maine, 285.

Certainly, no costs are recoverable against Mr. Madigan. If the release was valid there was no claim left to assign. In the language of *Crosby v. Chase*, 17 Maine, 371, the defendant "cannot be permitted to defeat the deed for one purpose and set it up for another." He cannot deny the effect of the assignment to rob us of our verdict and then claim its validity to recover costs of us. Again, R. S., c. 82, § 115, identical (so far as this case is concerned,) with § 105 of the same chapter in the revision of 1857, applies only to actions "commenced in the name of the assignor," and not to the assignment of claims on which suits are already pending. Though, in successive revisions, the phraseology of the statute of 1846, c. 223, has been somewhat condensed, the meaning is preserved and the construction should be the same as was given to that.

J. C. Madigan & Donworth, for the defendant.

No special finding was sought as to the adequacy of consideration, but it was treated as involved in the question of fraud and the validity of the release. If there had been no proof, the sealing of the instrument imports a consideration sufficient in law.

The direction to discontinue operates as a discontinuance, *eo instanti;* is a bar to the further maintenance of the suit and annihilates the verdict. 1 Bouv. Law Dict., 307. Upon the issue which finally disposed of the case, and closes its record, the defendant is the "prevailing party" and, therefore, entitled to costs; at least from the day of filing this release.

PETERS, J. After the questions submitted to the jury had been finally determined, the plaintiff moved for judgment on the original verdict rendered in his favor for the reason, as he says, that even if the findings of the jury are correct as to matters of fact, still as matter of law, the release is not valid, because of inadequacy of consideration; that a payment of sixty-seven dollars is not a legal consideration for the release of three hundred and fifty dollars ascertained by verdict to be due the plaintiff, as in the case of *Bailey v. Day*, 26 Maine, 88. But this rule does not apply where the acknowledgment of satisfaction, as here, is by deed. *Lee v. Oppenheimer*, 32 Maine, 253. Nor does the rule invoked apply in this case, because, when the release was given there was an uncertainty, by reason of a pending motion, whether the verdict would stand or not. Courts incline to regard with favor any compromise, not fraudulently made, which puts an end to litigation. The rule itself however has been abolished by R. S., c. 82, § 38; so that any sum of money paid in full discharge of a larger indebtedness is a sufficient consideration therefor.

The defendant asks for his costs, and we think he is entitled to them from the date the release was offered and resistance made to its allowance by the plaintiff. He had the plaintiff's release, and how should he make it available? He could not plead it as *puis darrein continuance*, because, as laid down in the authorities, with

here and there an exception in particular cases, such a plea is too late after verdict rendered. Had judgment been entered upon the verdict for the plaintiff, before an opportunity had been allowed the defendant to interpose his plea, equity would have relieved him, as in *Devoll v. Scales*, 49 Maine, 320; or, a remedy would have been found in the writ of *audita querela*, as in *Gilbreth v. Brown*, 15 Mass., 178. The reason assigned in the cases why a plea since the last continuance cannot be allowed after verdict is that the party can resort to his writ of *audita querela*. But this writ has fallen into almost entire disuse, and in some of the States become abrogated, for the reason that the same remedy can be reached as well in the original action, in a summary way upon motion. In this case, the judge presiding adopted a course to ascertain the rights of the parties similar to that taken in the case of *Lister v. Mundell*, 1 B. & P., 428. In that case, just before execution awarded, a discharge of the defendant in bankruptcy was presented and relief prayed for on motion. Eyre, C. J., said, "by refusing this motion we shall drive the defendant to his *audita querela*, and I take it to be the modern practice to interpose in a summary way in all cases where a party would be entitled to relief on an *audita querela*." But as matters in avoidance were set up, the chief justice said there should be an inquiry into the facts to see whether there be anything to prevent the *audita querela* from taking effect, and so he required the defendant to plead his bankruptcy in order to frame an issue upon which the facts presented on both sides could be tried. So in the case before us, the defendant after verdict came in with a release moving for a discontinuance of the action. Questions of fact arose as to its validity which could only be settled by a jury, as see *Coburn v. Whitley*, 8 Metc., 272. The judge presiding ordered the defendant to plead, and the plaintiff to reply, so as to present an issue upon the questions involved. After several trials to the jury, and exceptions taken and overruled, as see this case reported in 58 Maine, 453, a discontinuance was entered by order of court. Now, why is not the defendant entitled to his costs precisely as if he had

pleaded his release as a plea since the last continuance? Has he not substantially and in effect done so? Are not all the incidents of proceeding and the result as they would have been, if the release had been pleaded before, instead of after, verdict rendered? Is there not as much reason to allow costs in this proceeding as there would have been in a new proceeding, had equity or *audita querela* been resorted to?

So far as the plaintiff up to the date of the release had prevailed, the action was settled. From that time another issue was raised, the determination of which put an end to the case. The defendant succeeded upon his motion to have a discontinuance entered, and in this result he was the party finally prevailing. But the plaintiff contends that by the terms of the release the discontinuance was to be entered "without costs to the defendant." But when, according to this agreement, was the discontinuance to be so entered? and what costs were referred to? Certainly, not costs which had not accrued when the release was delivered, and not then in the expectation of the parties as likely to accrue? It would be unreasonable to suppose the parties contemplated a settlement of the costs which the plaintiff would impose upon the defendant by a resistance against the very agreement in which the costs are claimed to have been adjusted. The discontinuance, by the agreement of release, was to be entered "as soon as it could be done." It could have been done at the September term, 1867. A discontinuance then without costs to the defendant would not extend to any costs growing out of a controversy carried on after that time.

The plaintiff contends that no costs are allowable upon the decision of a question resting merely upon a motion in a case. But this depends upon the character of the motion, and whether by a decision of it, the whole litigation is brought to an end. *Sweetsir v. Kenney*, 31 Maine, 288; *Turner v. Putnam*, Id., 557; *Reynolds v. Plummer*, 19 Maine, 22.

It is further contended that E. Madigan is not liable for costs as an assignee because the jury found the assignment to him ineffectual as against the controverted release. But the finding of the

jury did not establish that he was not in fact an assignee, and in that character he carried on the controversy upon the questions of the validity of the release, and whether there was a want of notice of the assignment, in either of which had he prevailed, the final result would have been favorable to him. It might as well be claimed, that an assignee of a claim who indorses a writ would never be liable to a defendant for costs upon the ground that a failure to win would always be evidence that there could have been no claim to be assigned.

It is still further contended that the assignee would not be liable to costs, because the assignment was not made anterior to the commencement of the suit. The assignee is by statute rendered liable where the writ or process "is commenced in the name of his assignor;" but it is not provided that the liability shall be limited to cases commenced in his name for the benefit of the assignee. The statute does not require that the claim shall be sued for the benefit of the assignee, but if it is prosecuted in the assignor's name (after a suit has been commenced) for the benefit of such assignee, his liability for costs becomes fixed. Any other construction would render the statute entirely nugatory. Assignments would not be made till after suit commenced; and, if made, would ordinarily be cancelled before suit and renewed afterwards.

Exceptions by plaintiff overruled.
Exceptions by defendant sustained.
Defendant allowed costs accruing since his motion for a discontinuance was filed.

APPLETON, C. J., CUTTING, WALTON, DICKERSON and BARROWS, JJ., concurred.

THEODORE CARY and others, in equity, *vs.* NELSON HERRIN.

Equity Practice. Master in chancery—effect of his findings. Payments—appropriation of.

The findings of a master in chancery are not conclusive when objections made before him are overruled, and exceptions founded on such objections are taken and properly brought before the court.

His findings have then every reasonable presumption in their favor, and are entitled to as much weight as the verdict of a jury.

If the bill contains no allegation of any payments upon the mortgage sought to be redeemed, the complainants relying upon extrinsic evidence to establish them, so much of an answer as relates to payments which the respondent denies to have been made upon the mortgage note, is not responsive to the bill.

The court cannot apply a payment to an unsecured note, instead of one secured by mortgage, if the parties have made no such appropriation and the existence of such unsecured note is not established by admission or evidence before the court.

BILL IN EQUITY.

Upon the twenty-second day of November, 1854, the late Shepard Cary mortgaged to Nelson Herrin certain real estate in Houlton and vicinity, to secure a note for $4,500 payable in six months with interest. The complainants, sole heirs at law of Mr. Cary, brought this bill to redeem the land which descended to them from this incumbrance, stating only the fact of its existence upon their property, so inherited, and that they had demanded of the mortgagee an account, under R. S., c. 90, § 13, which was refused; offering to perform the condition of the mortgage, and praying process to compel the appearance of the defendant and a release of his claim upon payment of what might be found legally and equitably due to him. There was no charge of any payments, nor of any other facts. The respondent, by his answer, conceded the truth of all these allegations, and then proceeded to state other facts and circumstances relative to his transactions with the late Shepard Cary, which it is unnecessary to recite any further than to

say that he claimed that the deceased had given him another note of $2,572, one for $428, and had borrowed $1,000 on another occasion, and still $2,500 more at a later date; that he collected $1,000 for Mr. C. upon the note of Sumner Whitney, held by Cary as indorsee, $300 of which Mr. Herrin paid to Cary, and averred that the other $700 was to be retained by him as extra interest upon his various loans to Mr. Cary. He also claimed that another collection of $400 made by him for Cary was, by arrangement between them, to be retained by Herrin as extra interest; and denied that any sum, except a store-bill of $67.37, was ever paid on the mortgage note. He asserted that all other sums by him received of S. Cary, were to be, and were, applied in diminution of the unsecured indebtment, and claimed so to apply the $700 and $400 items, if he could not legally retain them as extra interest. At the first hearing before the master Mr. Herrin was allowed to testify in his own behalf, to the effect above stated, so far as relates to the extra interest; as appears by the report of the case in 59 Maine, 361; for which cause the matter was recommitted to the master, who reported again that the $700 were, by agreement of the original parties, at the time of its reception by Mr. H., appropriated to the payment of extra interest; that the $400 and divers other sums received by defendant should be applied in reduction of the mortgage debt. At the time the $700 and $400 were received the statutes of this State prohibited the taking of usurious interest. Both parties excepted to the master's report; the complainants because the $700 were not applied to reduce the mortgage note, and the respondent because the $400 were so applied. The receipts which Herrin gave S. Cary for the $400 expressed that it was received "on account of interest;" that for the $700 simply said: "received of S. Cary seven hundred dollars on note of Lock to Sumner Whitney."

L. Powers and *Madigan & Donworth*, complainants' solicitors.

A. W. Paine and *C. M. Herrin*, for the respondent.

PETERS, J. Are the master's findings in this case conclusive? It has been held in this State, following the general rule of courts of chancery, that the findings of a master as matters of fact are conclusive. *Mason v. Y. & C. R. R. Co.*, 52 Maine, 83; *Simmons v. Jacobs*, Id., 147; *Bailey v. Myrick*, Id., 132. The doctrine thus stated was true as applicable to those cases, but it would not apply in cases where objections were taken before a master and overruled by him, and exceptions taken afterwards, based on such particular objections. In such case the objections should, if requested by the party making them, be presented in the report, and although it would be irregular for a master, even at the solicitation of parties, to report the testimony instead of his conclusions and findings upon the testimony; still, where objections are taken and overruled, the master, if so requested, should annex to his report so much of the evidence as bears upon such overruled objections, so that exceptions may be raised thereon. Taking the two reports together, it is evident enough that the present exceptions are properly before us. Being before the court in this way, the master's conclusions, if depending upon a conflict of testimony, would have every reasonable presumption in their favor, and are entitled to as much weight as the verdict of a jury, and are not to be set aside or modified without clear proof of error or mistake on his part. *Sparhawk v. Wills*, 5 Gray, 423; *Dean v. Emerson*, 102 Mass., 480.

Notwithstanding these favorable presumptions in behalf of the master's report in this case, we are of the opinion that his finding which disallows the item of $700 as a credit upon the mortgage, upon the ground that it was a payment not upon the contract secured by the mortgage, but upon certain usurious contracts outside of it, is not sustained by any legal evidence in the case. The error consists in admitting the answer of the defendant as evidence in his behalf upon the point in controversy. The correctness or error of such admission depends entirely upon the question whether or not that portion of the answer which sets out a special agreement of the parties to appropriate the $700 on usurious contracts

was responsive to the bill. We think it was not. The rule is thus stated by Story: "The plaintiff calls on the defendant to answer an allegation of fact which he makes; and thereby he admits the answer of that fact." The complainants in this case make no allegation about this payment, or any other payment whatever; and do not even allege that any payments were ever made; but merely call upon the respondent for a true account. At most they would be regarded as calling upon him in a general way for a statement of such payments, if any, as have been made upon the mortgage note, and not for payments not made upon it. The claim of the respondent is, that the $700 was to be appropriated upon a contract distinct and independent of the mortgage note; otherwise he would not come within the principle of the case of *Rohan v. Hanson*, 11 Cush., 44, on which his counsel relies; for, if it is admitted that the sum was taken or reserved as usury upon the mortgage note, it would have to be accounted for as a payment on such note in this bill for redemption. *Hunt v. Goldsmith*, 1 Allen, 145.

The answer would be responsive so far as its general denial goes that any payments (but one) were ever made upon the mortgage note, but that statement is clearly overcome by evidence of subsequent admissions made by the respondent himself. It is inferable from what occurred at an interview between the parties, that the construction which the respondent would give to these matters would be, that he should be allowed his principal and interest at twelve per cent. upon the several notes, and that all the sums receipted for should apply to that sum total, rather than that the $700 should be specifically applied upon the contract for extra interest. Inasmuch then as the respondent cannot testify through his answer; and it has been decided, he cannot as a witness, as see this case in 59 Maine, 361; and there is no other proof whatever to support the position claimed by him, the $700 item must be carried to the credit side of the account as stated by the master, and the $400 item stand as it is. To make this correction the court can modify the report without referring it back to the master. *Taylor v. Reed*, 4 Paige, 561.

It was suggested at the argument, that if the $700 must be appropriated upon any note it should be upon an unsecured note of $2,500, held by the respondent against the ancestor of the complainants. Parties can make such appropriation as they please; but if the law shall make the application of the payment, there must be some established or admitted claim to make it upon. The master does not report to us the existence and validity of any such note, nor was he by the respondent required to do so. No such claim can be assumed by us to exist.

The respondent's exceptions are overruled. The complainants' exceptions sustained. The report of the master to be modified by the court, so that upon the payment of the sum ascertained by the master, less the $700 and interest from November 1, 1858, the complainants will be entitled to redeem.

Decree accordingly and for costs.

Appleton, C. J., Cutting, Walton, Dickerson and Barrows, JJ., concurred.

Firman Cyr *vs.* Narcisse Dufour and others.

County Commissioners' judgment—when conclusive. Damages wrongly assessed. New trial—when granted. Practice. Trespass qu. cl. Verdict. Way.

When, in addition to the fact that the verdict is probably erroneous, it is certain that the damages have been assessed upon a wrong principle, the presumption of mistake or prejudice on the part of the jury is so much strengthened, that the court will not attempt to correct their estimate of damages, even although the error is small, but will set the whole verdict aside.

The validity of the location of a way by the county commissioners, in a case over which they have jurisdiction, cannot be collaterally questioned in an action of trespass *qu. cl.* against those employed in constructing such way; nor can the regularity of the appointment of the highway surveyor in charge of the work, be inquired into in such action.

Cyr *v.* Dufour.

The municipal officers can designate any citizen to superintend the making of a road which it is incumbent upon their town to build; and whether or not any one might not work on it if he chose, by the consent of the town or its officers, *quære?*

ON MOTION FOR A NEW TRIAL.

TRESPASS *quare clausum* against Narcisse Dufour and ten others for breaking and entering the plaintiff's close on the seventeenth day of July, 1871, and on divers days between that day and the date of the writ, July 27, 1871, breaking fences, destroying trees, digging up soil, &c., &c. The *ad damnum* was $500. The plea was the general issue with a brief statement that Dufour was a highway surveyor duly appointed and qualified, and directed to open a certain road, duly laid out by the county commissioners within the limits of the town of Madawaska; and that the other defendants were employed with him in making said road. It was proved, that the supposed acts of trespass were done in the construction of this road, which was located by the county commissioners upon the petition of Wm. C. Hammond and others, representing "that the public convenience requires that alterations be made in the location of the county road which leads from the east line of the State through Hamlin" and other towns "to St. Francis. They therefore ask your honors to view said route and make such alterations as you deem proper." The plaintiff claimed that the location was void for uncertainty in its commencement, "beginning in Madawaska on said county road, at a point six rods south of Joseph Lizott's south line," that Dufour's appointment as highway surveyor was not valid; and that the defendant worked on Cyr's land outside of the limits of the location. The jury rendered a verdict for the plaintiff for twenty dollars, and, in answer to questions submitted by the court, found specially that some of the acts done on the plaintiff's land were outside of the location, but that they were not all so done; and that the plaintiff ought to recover $20 for all the defendants' acts upon his land, both within and without the limits of said road. The defendants moved to set this verdict aside as contrary to the law and the evidence.

Jos. Granger and *E. Madigan*, for the plaintiff.

J. C. Madigan & Donworth, for the defendants.

WALTON, J. When a verdict is so clearly wrong as to satisfy the court that the jury must have acted corruptly or mistakenly, it will be set aside and a new trial granted. But the court will not infer either corruption or mistake, simply because the verdict is contrary to what the court deems a mere preponderance of the evidence.

But when in addition to the fact that the verdict is probably wrong, it is certain that the damages have been assessed upon a wrong principle, the presumption that the jury have been influenced by some improper motive, or that they have acted under a mistaken view of their duty in other respects, is so much strengthened, that the court will not attempt to correct their estimate of damages, although the error is small, but will, in the exercise of their discretion, and furtherance of what they believe to be the substantial merits of the case, set the whole verdict aside and grant a new trial.

Acting upon this principle we feel bound to set the verdict aside in this case.

The action is trespass against a highway surveyor and others, for opening a newly located county road. The plaintiff claims that the location of the road by the county commissioners is invalid; or, if not invalid, that the defendants in making it, did not keep within the limits of the location.

We do not think that the validity of the location can be questioned in this collateral way. It is well settled that the doings of county commissioners in locating highways are valid till reversed or quashed, however defective they may be, provided they have jurisdiction to commence them. *Small v. Pownal*, 31 Maine, 267; *Plummer v. Waterville*, 32 Maine, 566. The petition in this case was sufficient to give the county commissioners jurisdiction. *Inhabitants of Sumner v. County Commissioners of Oxford County*, 37 Maine, 112.

Nor do we think it would be of any avail to the plaintiff if it should appear that the highway surveyor who had charge of the work of opening the road was not legally chosen or sworn. It was competent for the selectmen to appoint any citizen of the town to open the road, whether he was a legally chosen surveyor or not. In fact we know of no rule of law that would prevent any one from working on a legally established highway, with the consent of the town, or its municipal officers, if he was willing to do so.

The only remaining question is, whether, in building the road, the defendants kept within its limits. We are inclined to think they did. But this, of course, was a question of fact for the jury; and if there was no other evidence of error on their part than the fact that upon this point they have decided contrary to what the court deems the weight of evidence, we should not be inclined to disturb their verdict. But this is not the only evidence of error. The jury found specially that "all the acts done by the defendants were not outside the limits of the road as laid out by the county commissioners," and yet they assessed the damages as if they were. This will be made plain by an examination of the special findings. This so much strengthens our conviction that the jury acted upon some improper influence, or fell into some error with regard to the case generally, that we feel bound to set their verdict aside and grant a new trial. *Motion sustained.*

APPLETON, C. J., CUTTING, DICKERSON, BARROWS, and PETERS, JJ., concurred.

ELBRIDGE G. DUNN *vs.* PARKER P. BURLEIGH and another.
ROBERT SCOTT *vs.* Same.

Constitutional law. Deed. E. & N. A. Ry. Co.—rights of, under grant from the State. Public Laws of 1872, *c.* 9. *R. S., c.* 5, § 7 *and c.* 98.

The E. & N. A. Railway Company did not obtain any title to township No. 11, Range 3, in Aroostook county, it being part of the "lands set apart and designated for settlement" by legislative resolve of 1859, c. 288, and thus excepted from the grant of the State to this corporation (Special Laws of 1864, c. 401,); nor does the timber upon that township belong to the railroad company, since standing trees pass with the soil, as part of the realty, unless a contrary intention is clearly expressed, and no such intent appears in the present instance. Therefore, one who is engaged in cutting and removing the timber upon said township, claiming to act in so doing, under a permit from the E. & N. A. Railway Co., has no cause of action against the land agent, and those acting under his orders, who interfere to prevent a destruction and removal of the timber, and take possession thereof.

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But neither the land agent nor those acting under him have any right to seize and sell, without legal process, the teams, supplies and property of those engaged in cutting and hauling said timber. The act of 1872, c. 9, assuming to authorize such summary proceedings towards alleged trespassers upon the public lands, is unconstitutional and void.

ON REPORT.

These two cases, requiring but one statement of facts, were submitted to the court together, to render judgment for the defendants if the actions were not legally sustainable; otherwise, to stand for trial upon the question of damages. The writs in both suits were issued the same day, Feb. 7, 1872, and ran against Mr. Burleigh, land agent of the State, and Lewis B. Johnson, sheriff of the county of Aroostook. Mr. Dunn's declaration was in case, and Mr. Scott's, in trespass *de bonis.* It was stipulated that they should be printed with the report, but no copy of them came into the hands of the reporter. It is apparent, however, that Mr. Dunn based his claim to recover upon the interference of the defendants with a lumbering operation which he was carrying on

upon Township No. 11, Range 3, in the county of Aroostook, under a permit from the European and North American Railway Company, granted September 26, 1871, for one year; and that Mr. Scott declared upon an unlawful taking of his teams, supplies and property, employed by him in cutting and hauling the timber upon said township, under a contract with Mr. Dunn. It was admitted that on, and prior to, March 24, 1864,—on which day the Special Law of that year, c. 401, authorizing a conveyance of the lands therein mentioned, upon certain conditions, to the E. & N. A. Railway Co., was approved—this township, which is located upon the waters of the St. John river, was the property of the State. The Railway Company completed their road and put it in operation in October, 1871. The plaintiffs relied upon the Special Laws of 1864, c. 401; of 1866, c. 146; of 1868, c, 604; upon deed from the State to the Railway Company dated May 13, 1868, and the permit given to Mr. Dunn on September 26, 1871.

By the first of these acts, § 3, certain State officials were authorized, upon the happening of a stated contingency, to transfer to the Railway Company "all the public lands lying on the waters of the Penobscot and St. John rivers for the uses and purposes set forth in this act. Provided, however, that there shall be excepted from said conveyance, and from the operations of this act all timber, lumber and lands, granted or voted by the present or any preceding legislature, reserving to the State the right to locate such grants within the present year of our Lord eighteen hundred and sixty-four, or within the time or times limited therefor in the several acts or resolves granting the same, all lands heretofore reserved or set apart for public schools, and all lands set apart and designated for settlement under existing laws; and all the lands set apart for the purposes of settlement shall be sold to settlers upon the same terms and conditions by the land agent as is now authorized by law." This act was approved March 24, 1864. By the act of February 21, 1866, c. 146, § 4, the corporation was authorized "to hold timber and lands by grant from the State of Maine in accordance with the provisions of" the preceding act of 1864, and to "sell and

convey the same for the purpose of raising money for the construction of its main line, in mortgage or trust as might be deemed most advantageous."

The last of these three acts was approved March 3, 1868, c. 604. The first section declares that "the governor of the State is hereby authorized and empowered to transfer and convey by deed to the European and North American Railway Company, all the timber and lands belonging to the State situated upon the waters of the Penobscot and of the St. John rivers, to be used by said company to aid in the construction of its line of railway as contemplated and provided" in the acts already cited, "subject to all reservations contained in and the obligations imposed by said acts."

Gov. Chamberlain's deed, made in pursuance of this legislation, recited the authority by which it was given, and conveyed "all the timber and lands belonging to the State situated upon the waters of the Penobscot and St. John rivers" * * * * "subject to all the reservations in and obligations imposed by said acts, except as therein provided; and reservations of land required by law for public uses; then detailing, "by letters, names, numbers and ranges," a large quantity of land, said to be "one million acres, more or less," and concluding with this sweeping clause "and all other lands belonging to the State, whether described or not, situated upon the waters aforesaid." In the *habendum* of the deed was the same reference to the reservations and obligations of the several acts under which it was given.

The defendant introduced Resolve of 1859, c. 288, by which Township No. 11, Range 3, in the county of Aroostook was set apart and designated for settling purposes; the provisions of R. S., c. 5, and of the Public Laws of 1872, c. 9. In 1859, by direction of the land agent, the township in question was surveyed into lots for settlement by Hiram Chapman, Esq., who returned a plan of his survey and lotting into the land office. Prior to the passage of the special act of 1868, c. 604, thirteen of these lots were taken up by actual settlers under the provisions of the settling acts, and certificates had issued therefor; and six of the lots had been actu-

ally conveyed by the State. Subsequently, and before January 11, 1872, when the property of Mr. Dunn, and the timber cut and claimed by Mr. Scott were seized, forty-three more of these lots had been taken up and certificates issued therefor. In operating under the Railway Company's permit the plaintiffs cut indiscriminately upon all the lots within its terms, some of the cutting being upon lots so taken up by settlers who held certificates. In December, 1871, the land agent was informed by a letter from an employee in the land office, dated on the fifth day of that month, "that Dunn's teams, with forty men, are at work on township No. 11, R. 3, on lots for which settlers' notes have been given and certi ficates granted from the land office;" that Mr. D. claimed the right to cut there under his "permit from the Railroad Company of the township, without any reserve of lots." The correspondent added: "great indignation is felt among the settlers, who protest against having their lots stripped of everything on them." Thereupon the land agent caused this notice to be served upon Mr. Dunn.

"State of Maine Land Office, Bangor, Dec. 25, 1871.

Hon. E. G. Dunn,

Sir: Notice is hereby given you that the State of Maine claims title to all the lands heretofore designated and set apart for settlement under existing laws; that township No. 11, Range 3, west from the east line of the State in the county of Aroostook, is claimed to be included within that designation; and that, as land agent, entrusted with the care of said lands, I shall regard all persons who may take or carry away any timber standing or being upon any of said lands, without authority from me, as trespassers and subject to be proceeded against as such by a forfeiture not only of the timber but of the teams, all which are by law made subject to seizure. This notice is given under advice and direction of the governor and council of the State.

PARKER P. BURLEIGH, Land Agent.

January 2, 1872, the executive council "ORDERED, that the land agent be requested and instructed to institute immediate legal pro-

ceedings under section 7, of chapter 5, of the Revised Statutes, to protect the timber lands belonging to the State from any and all persons found unlawfully trespassing thereon, and to take such other legal measures as may be necessary to protect the rights of the State;" which order the governor approved, upon the same day.

In obedience to this order, Mr. Burleigh issued this precept to his co-defendant.

"State of Maine Land Office, Bangor, Jan. 8, 1872."

"To Lewis B. Johnson, Esq., Sheriff of the county of Aroostook, or either of his deputies:

Information having been received at this office that certain persons without legal authority, are and have been engaged in cutting down and taking away trees and timber upon the public lands of the State, in township No. 11, Range 3, west from the east line of the State, in said county, which by law are under the care of the land agent, and being thus trespassers within the provisions of the Revised Statutes of the State, chapter 5, section 7.

You are hereby directed and authorized in behalf of the State, to procced at once to said township and ascertain the facts and seize all timber, and all shingles made from timber, which you may find so cut from said township, together with the teams, implements, apparatus, and supplies of provisions, or of other articles, used in committing and carrying on such trespass, all of which things, by the provisions of said statutes, are forfeited to the use of the State, and made liable to seizure as aforesaid. The logs you will mark S. M. for the State, and all the other property so seized you will take to some secure place for keeping, and there keep the same safely until further advised by me. You will employ and take with you all necessary aid and assistance requisite for the purpose of making effectual the seizure of said property and the safe-keeping of the same; and you will promptly report to me all your proceedings in the premises, together with this precept. This done under and in accordance with the instructions of the governor and council.

PARKER P. BURLEIGH, Land Agent."

On the fifteenth day of January, 1872, Mr. Johnson made return, that on the eleventh day of that month, he seized "the following described property then and there used by persons cutting and hauling timber on said township," enumerating the animals, teams and supplies, &c., belonging to Mr. Scott, and then stating that he also seized and marked S. M. twenty-two hundred logs; which were cut and claimed by Mr. Dunn as herein-before stated. February 21, 1872, the articles belonging to Mr. Scott, still in the custody of the sheriff, were appraised by three persons selected and sworn by Judge Downes, under instructions from the land agent; and, on the twentieth day of April, 1872, they were sold at Houlton, by Mr. Johnson, as a licensed auctioneer, under the official direction of Mr. Burleigh, who proceeded in making the sale according to the requirements of the act approved Feb. 16, 1872, c. 9, which is as follows:

"SEC. 1. Whenever any teams, implements, apparatus and supplies are or shall be seized under the provisions of section seven, of chapter five of the Revised Statutes, the land agent shall cause the same to be sold at public auction by giving notice of the time and place of sale, at least two weeks in some newspaper published in the county where the trespass was alleged to have been committed, and the proceeds after deducting expenses, charges and fees, shall be paid into the State treasury, and an account rendered thereof by the land agent to the governor and council at once."

It was admitted that it had been the custom to a greater or less extent, both in Massachusetts and Maine, to sell and grant timber, and the right to cut timber on the State's lands, distinct from the grant of the soil; particular instances of such sales were to be referred to, though the defendants denied their relevancy.

After the seizure made January 11th, 1872, of the teams, &c., and of the logs, Mr. Dunn discontinued his operations upon the township in controversy.

Charles P. Stetson and *J. W. Emery* for the plaintiffs.

I. The defendants cannot justify under R. S., c. 5, § 7 and laws

of 1872, c. 9, because there was no adjudication of forfeiture, nor was the property libelled as required by R. S., c. 98, within twenty days after seizure. Contrary to the principles of the Magna Charta and of our Federal and State constitutions, it is sought to deprive citizens of their property without "due process of law," which means without opportunity to answer and controvert the charge upon which their estates are seized and confiscated. *Saco v. Wentworth*, 37 Maine, 165, 171; *Saco v. Woodsum*, 39 Maine, 358; *Mayo v. Wilson*, 1 N. H., 56; *Hutchins v. Edson*, 1 N. H., 140; *Kingston v. Towle*, 48 N. H., 58, 59; *Taylor v. Porter*, 4 Hill, 146–7; *Greene v. Briggs*, 1 Curt. Cir. Ct., 325; *Greene v. James*, 2 Curt. Cir. Ct., 187; *Murray v. Hoboken*, 18 Howard, 372; *Rockwell v. Nearing*, 35 N. Y., 302; 2 Kent's Com., 13; Cooley's Const. Lim., 352, 354; 3 Kernan, 434.

Public laws of 1872, c. 9, is in violation of the constitution and void; therefore no justification of proceedings had under it.

II. This township, lying along the St. John river, passed to the Railway Co. under the deed to them, made in pursuance of the acts of 1864 and of 1868. The defendants say it did not pass because it had been designated and set apart for settlement under then-existing laws. What were the enactments in force March 24, 1864, relative to this subject? They are found in R. S. of 1857, c. 5, and public laws of 1859, c. 119; and require, 1st, That the township in which lands may be selected and offered for settlement must be located and designated by legislative resolve; 2d, That the lands be selected by the land agent from the townships named in such resolves and advertised by him each year; and, 3d, That the lands be surveyed and lotted for settlement under the direction of a board consisting of the governor, council, state treasurer and land agent.

The exceptions in this grant from the State to the Railway Co. should be construed strictly against the grantor. *U. S. v. Dickson*, 15 Peters, 165; *Darling v. Crowell*, 6 N. H., 421; *Klock v. Hudson*, 3 Johns., 375; *Jackson v. Gardiner*, 8 Johns., 406; *Jackson v. Blodgett*, 16 Johns., 172, 178.

All the requirements of law, not one or two of them, must have been complied with to bring any portion of the State's land or timber situate upon the waters of the St. John within the exception of the deed. The object of the grant then required that it be liberally construed to accomplish its purpose, which was to aid and secure the building of a great railroad, which this company has built, thereby paying the agreed consideration for the conveyance to them; an ample compensation, which now demands liberality in construing the deed. *Winslow v. Kimball*, 25 Maine, 463.

The legislature had for years been accustomed to "designate and locate" or "set apart" certain *townships*, by letter, number or name, for settlement; therefore we are led to believe that the use of the word "*lands*," instead of "townships of land" in the exception to the grant is significant, indicating that only such land as had, by a compliance with all the requirements of law, been thrown open to settlers was excepted.

The counsel then entered into an able and elaborate discussion, fortified by many citations of authorities and the phraseology of statutes and resolves relative to settling lands, to show that this was the true construction of the exception.

III. At all events, the timber upon this township passed to the Railway Co.

If there was no intention to convey the timber separate from the lands, in cases where the lands were within the exception of the act of 1864, then there was no occasion nor reason for putting the word *timber* into the statute of 1868 at all.

Trees and timber may be reserved by express *grant* so as to form a distinct estate of inheritance. *Clapp v. Drake*, 4 Mass., 266: *Adams v. Briggs*, 7 Cush., 367; *Putnam v. Tuttle*, 10 Gray, 48; *White v. Foster*, 102 Mass., 378; *Howard v. Lincoln*, 13 Maine, 122; *Kingsley v. Holbrook*, 45 N. H., 322; R. S., c. 71, § 185, and c. 109, and very many other statutes and resolves, &c.

A. W. Paine, for the defendants.

The defendants are the land agents of the State, and his servant

or deputy acting under written authority from him, specifying the thing to be done and the reasons for doing it. The law devolves upon the land agent the care of the public lands, including those held for settlement. It is his duty, then, to take all necessary measures to protect them from trespassers and to enforce the laws enacted for that purpose. This duty is enforced by R. S., c. 5, especially by § 7, under which the defendants justify, and under which their proceedings were had.

In resisting the claim of the E. & N. A. Ry. Co. the land agent rendered valuable service to the State; for more than forty townships and parts of townships, and the whole settlement policy of the State are involved in this question; giving to these cases an importance and interest not surpassed by any ever presented to this court for decision.

I. The first question is whether or not these lands were, at the time of the alleged trespass, the property of the State? They were so unless conveyed to the Railway Company by the deed of May 13, 1868, the validity and force of which depends upon the construction given to the acts of 1864, 1866, and 1868; and especially to the proviso of the act of 1864, c. 401, § 3:

"*Provided, however, that there shall be excepted from said conveyance and from the operation of this act * * * * all lands set apart and designated for settlement under existing laws.*" This language is so plain that no words can make its meaning more evident; "the court will not undertake to interpret what is too plain to need interpretation." *Bragg v. Burleigh*, 61 Maine 444.

But we can ascertain its meaning from what is omitted, as well as from what is expressed. A very large number of settlers had taken up lots in various parts of the public domain, and were then at work, performing the conditions of their certificates, in order to earn and receive their deeds. When this act passed there were thirteen settlers upon this township, who had increased to forty-three at the time of the trespass; and the company's permit is made to extend over some of these lots indiscriminately with those not taken up. With reference to these settlers already upon these

lands, under their contracts with the State, the act is entirely silent except in the reservation cited. This silence can only be accounted for on the ground that the legislature did not intend to give the Railway Company any power over them; but, in exercising the authority given by the act of 1866, c. 146, to mortgage their lands, the company actually make their deed to embrace the lot of every settler, in all these forty or more towns, who had not actually received his deed prior to that time—unless the construction for which we contend is adopted! Can the legislature for a moment be supposed guilty of enacting, not merely such a *folly* but such a *wickedness?*

II. The claim that the timber passed without the land is more absurd, if possible, than the other; resting solely upon the grant of "all lands *and* timber" in the act of 1868, though it is made subject to all reservations contained in the prior acts of 1864 and 1866. Just as though the legislature intended to give the company a perpetual permit to cut timber on the settlers' lots, roaming over their lands at pleasure from one generation to another, without leaving enough for building, fencing or fuel. The settler must clear fifteen acres to entitle him to his deed; how can he do it, without the company's consent, if their claim is well-founded? This township was sufficiently designated for settlement, by Resolve of 1859, c. 288. The reservation then was unconditional. The provisions as to the land agent's proceedings, are directory.

III. R. S., c. 98, was not intended to apply to cases like these, but to those where a forfeiture of personal property is incurred, in which private individuals are interested, as entitled to the whole or a part of it, who can alone institute the proceedings therein mentioned; or, at any rate, the legislature had a right to provide a different mode of procedure. Whether the act of 1872, c. 9, was constitutional or not, we say that the effect of the forfeiture—i. e., of the illegal act of trespass,—was to devest the owner of his property and to vest it in the State; and upon its seizure the title became absolute, then relating back to the time of the

original trespass. Hence, it is of no consequence whether Mr. Burleigh proceeded legally or not *after* the seizure, so far as these plaintiffs are concerned; that being entirely a matter between him and the State, as was decided in *E. & N. A. Ry. Co.* v. *Dunn*, 60 Maine, 453. The property was so completely devested from its former owner by the forfeiture and seizure that no subsequent error can make the officer a trespasser *ab initio*. 1 Hill'd on Torts, 123—125 and 221, note; 2 Ib., 75, 252-3, and 262-3. That the title to property seized relates back to the act which works a forfeiture, see *Clark v. Protection Ins. Co.*, 1 Story Cir. Ct., 109; 3 Wheaton, 246; 8 Cranch, 398 and 417; *French* v. *Rollins*, 21 Maine, 372.

IV. The act of 1872, c. 9, is constitutional. Only *unreasonable* seizures are prohibited, implying that there are some which are reasonable and authorized. Of this kind are those permitted in all States and recognized by all courts, for the protection of citizens against crime and public wrong, and exercised under federal laws, also; such as for omitting to make a manifest of cargo; for making a false entry of merchandise; and, particularly, smuggling, where the goods are sold upon mere advertisement. And persons are taken and carried away in like manner. 106 Mass., 223. The holder of property may so use it as to expose it to the liability of being taken and summarily destroyed. 2 Kent's Com., 339, 340; *Cummings v. Perham*, 1 Metc., 555; *Com. v. Alger*, 7 Cush., 84-85; *Salem v. East. R. R.*, 98 Mass., 443; *Blair v. Forehand*, 100 Mass., 139-140; *Att'y Gen'l v. M. C.*, 103 Mass., 456; *Hutchins v. Van Bokkelin*, 34 Maine, 126; 5 Hill, 99; 27 Vermont, 149; *Morey v. Brown*, 42 N. H., 373; Nott's case, 11 Maine, 208.

Besides numerous other statutes authorizing proceedings *in rem*, we will refer to our Pound law, which permits the detention, confiscation and sale of cattle taken *damage-feasant*, simply upon the pound-keeper's certificate and advertisement. The work-house law allows commitments to be made and continued upon overseers' warrants; paupers are removed from town to town in the same way; baskets for coal, and weights and measures generally, may

be seized and destroyed, if found not conformable to the statute, and they cannot be made so; staves, hoops, shingles, &c., &c., are forfeited if not properly packed, surveyed, or branded; and there is no feature of unconstitutionality about all these proceedings. *McCarthy v. Hinman*, 35 Conn., 53; *Happy v. Mosher*, 48 N. Y., 313.

The whole process of collecting taxes is extra-judicial, from beginning to end, but not unconstitutional. *Murray v. Hoboken*, 18 Howard, 272; in which it is well said that "Though generally both public and private wrongs are redressed through judicial action, there are more summary, extra-judicial remedies for both." The great mistake is in giving too narrow a scope and meaning to the terms "due course of law" and "by the law of the land." Their true meaning is not "by trial or adjudication of courts," but by the uniform operation of law, which may cast the decision upon any class the legislature may please to designate; and wherever it is placed, the decision is conclusive and binding. The assessor, overseer, sealer, collector or land agent may be endowed with the power of adjudication; if only they act under uniform laws, of a reasonable character, their decisions control.

WALTON, J. The principal question is whether the European and North American Railway Company obtained a title to township No. 11, Range 3, by virtue of their deed from the State, of May 13, 1868.

We think they did not. The deed to them is by its own terms made subject to all the reservations contained in the act of March 24, 1864. Special Laws, vol. 9, c. 401. One of the reservations contained in that act, is of "all lands set apart and designated for settlement under existing laws." See section 3 of the act above cited. By a then existing law—to wit, the resolve of April 4, 1859—the township in question was set apart and designated for settlement. Resolves of 1859, c. 288. It is therefore clear that the township in question was not conveyed to the Railway Company. It was expressly reserved. A simple reading of the

deed and the act and the resolve referred to, will make this conclusion plain.

Nor do we think the Railway Company obtained a title to the timber independent of the land. It is true that the timber standing and growing upon land may be sold,—that is, a license to cut it and take it away may be granted, when the land itself is not conveyed. But as standing trees are part of the realty, as much so as the soil itself, the presumption that they adhere to and pass with it will prevail, unless a contrary intention is clearly expressed. With respect to this land we think a contrary intention is not clearly expressed. On the contrary, the presumption that the timber was not conveyed, is very much strengthened by a consideration of the purpose for which the land itself was reserved. It was reserved because it had been designated and set apart for settlement. Is it probable that the State intended that land reserved for such a purpose should be stripped of all its timber? Could the Railway Company have understood that such a result was intended? We think not. There is nothing in the deed from the State to the Railway Company, nor in the acts and resolves of the legislature authorizing it, which in our judgment will justify such a conclusion. By the unconditional reservation of the township in question, the timber trees standing upon it were also reserved, no words being used expressive of a contrary intention.

But while we thus find no difficulty in determining that neither the land of township No. 11, Range 3, nor the timber upon it, was conveyed to the Railway Company, we are unable to find any justification for the seizure and sale of the plaintiff's property in the summary manner stated in the report.

The constitution of the United States declares that no State shall deprive any person of life, liberty or property, without due process of law. Fourteenth amendment, section one. And while it may not be safe to undertake to determine in advance what, in every case, will be deemed due process of law, we feel no hesitation in saying that in a case like this, where the State undertakes to

confiscate a person's property upon the ground that it has been used in committing a trespass upon the public lands, something more is necessary than an *ex parte* determination and command of the land agent. It will be noticed that the same protection is secured to property as to life and liberty. Will any one contend that it is competent for the legislature to pass an act authorizing the land agent to seize the person of a trespasser upon the public lands, and hang him, or imprison him for life, without any other trial of his guilt than the *ex parte* determination of the land agent himself, and no other authority than his own personal command? Of course not. No more is it competent for the legislature to pass an act authorizing the land agent to deprive a person of his property in such a summary mode; for what is due process of law in the one case must be equally so in the other. In the constitution, life, liberty and property are all grouped together in one sentence, and the same protection which is secured to one is secured to all.

Nor do we think such an arbitrary and despotic mode of dispossessing one of his property is compatible with our own bill of rights. For if the proceeding cannot be regarded as a criminal prosecution, nor a civil suit, it certainly involves a "controversy concerning property"; and in such a case the constitution guarantees the right of trial by jury, unless it can be shown that at the time of the adoption of the constitution a different practice prevailed; and it is believed that no such practice can be shown. Constitution, art. 1, secs. 6 and 20.

Whether the right be tried by the United States constitution or our own, we find it impossible to justify such a summary proceeding against the property of a supposed trespasser as was had in this case.

We do not mean to decide that the property used in perpetrating a trespass upon the public lands, may not be seized and held till judicial proceedings can be instituted to try the right to have it declared forfeited. Nor do we mean to decide that in this case legal proceedings might not have been had under the ninety-eighth

chapter of the Revised Statutes, which provides for libelling and obtaining a judgment of condemnation of personal property which is claimed to be liable to forfeiture. All we mean to decide is that the seizure and sale of the property of a supposed trespasser upon the public lands, without any other authority or proceedings whatever than the command of the land agent, is illegal; and that any statute authorizing such a summary proceeding is, to that extent, unconstitutional and void.

The plaintiff, Scott, is therefore entitled to recover; and the action must stand for trial for the assessment of damages, as stated in the report.

The plaintiff, Dunn, having no interest in the property seized, and suffering no other damage than the interruption of his business, which, for the reasons already stated, he had no right to pursue, cannot maintain his suit against the defendants, and judgment must be rendered in their favor.

Judgment accordingly.

APPLETON, C. J., CUTTING, DICKERSON, BARROWS and PETERS, JJ., concurred.

RUFUS MANSUR *vs.* EBEN C. BLAKE.

CHARLES H. SLEEPER *vs.* SAME.

Deed—construction of. Easement. Mills. Practice. Prescription.

When the lines of a deed beginning at a road, run thence to an artificial pond; thence by the side of the same a specified distance; thence by a line parallel with the first line to the road; thence to the place of beginning;—the grant is to the centre of the pond.

When the line on such pond begins at the middle of a bridge; thence joining the pond to the corner of another lot which extends to the centre of the same pond—the grant reaches to the middle thread of the stream. When a lot of land is bounded by a pond artificially created by the flowing of a stream by a mill-dam, the same rule applies to the pond as was applicable to the stream before the dam was built.

Mansur *v.* Blake.

When the owners of a mill claim an easement by prescription in another's lot, and the mill and the lot in which the easement is claimed are, during part of the twenty years next preceding, owned by the same person, the time of such ownership is excluded from the period required to establish a right by prescription.

When there is an offer of evidence to prove an easement in a lot of the plaintiff, and likewise a disseisin of the same lot for more than six years, and a specific objection is made, confined to the evidence offered to prove the easement and is sustained, it cannot be regarded as an exclusion of the evidence offered to prove a disseisin.

On report.

Trespass *quare clausum* for depositing logs upon the plaintiffs' lots, which they claimed extended to the centre of the Meduxnekeag stream in Houlton, where a mill-pond had been formed by the dam connected with the Kelleran Mill (so called), in that town.

The defendant denied that the plaintiffs' land went beyond the shore of the pond, and by brief statement claimed ownership of the *locus in quo*, and also an easement to flow the same and deposit logs thereon, acquired by more than twenty years uninterrupted and undisputed exercise of that privilege, under claim of right; "that Rufus Mansur, on the sixteenth day of May, 1857, then owning both the Kelleran Mill and Privilege and the *locus in quo*, by his warranty deed of that date, conveyed the said sawmill and all the privilege thereunto belonging, to Henry Sincock, and that the said right and easement to lay logs upon the *locus in quo* was then used and enjoyed by said Mansur, and was conveyed to said Sincock in connection with said mill; and the defendant, under said Sincock and legal conveyance, has held and enjoyed the said right of laying and depositing his logs upon the *locus in quo* as aforesaid, the continued exercise of which is the trespass complained of" in these actions. "And further, the said defendant says that if the plaintiffs and those under whom they claim were ever seized of the *locus in quo*, they were disseised by the defendant and those under whom he claims more than six years before the commencement of this action, and so the same is barred by the Statute of Limitations."

The phraseology of the title deeds under which the plaintiffs derive title, is sufficiently stated in the opinion. The report recited that the "defendant offers to prove that he and those under whom he claims have for a period of more than twenty years prior to the commencement of this action enjoyed the easement in connection with his saw mill and privilege in Houlton, called and known as the Kelleran Mill and Privilege, as set forth in his brief statement in this case; and also that he and they have had adverse possession of the *locus in quo* for more than six years next before the commencement of this action, by depositing his and their logs thereon, and placing booms to hold the same, and removing stumps and other obstructions therefrom. The plaintiffs objected to the evidence of the defendant to show an easement, because (as the defendant admits) the plaintiffs were the owners of both the dominant and servient estate from 1852, to May 15, 1857. The presiding judge sustained the objection and rejected the evidence."

L. Powers, *Madigan & Donworth*, for the plaintiffs.

Jos. Granger and *C. M. Herrin*, for the defendant.

Appleton, C. J. "Fresh water rivers, of what kind soever, do, of common right," observes Lord Hale, "belong to the owners of the soil adjacent; so that the owners of one side have of common right the propriety of the soil, and consequently the right of fishing, *usque filum aquæ*; and the owners of the other side the right of soil, ownership and fishing unto the *filum aquæ* on their side." *Prima facie*, the owner of each bank of a stream is the proprietor of half the land covered by the stream. The conveyance of land bounded upon a highway or innavigable stream, carries the grantee to the centre, unless there be decided and controlling or specific description showing a contrary intent. "The law," observes Cowen, J., in *Starr v. Child*, 20 Wend., 152, "does not stop to criticize the words by which a man is made owner; it inquires, 'Is he the shore owner? If that be so, he touches the water.' "

The owner of land touching the water of a stream, goes to the centre. *Herring v. Fisher*, 1 Sandf., 344.

Where a lot of land is bounded by a pond artificially created by the flowing of a stream by a mill-dam, the same rule applies to the pond as to the stream before the dam was built. If the line of land conveyed be described as commencing by the side of a mill-pond created by a dam across a stream, and thence running from the pond and returning to another stake "by the side of the river or mill-pond," and running "by the said pond to the first mentioned bounds," the grant extends to the thread of the river. *Lowell v. Robinson*, 16 Maine, 357. A grant of land bounded by a pond artificially raised, is presumed to go to the centre of the stream. *Robinson v. White*, 42 Maine, 216.

Where land is bounded by a pond in its natural state, the grant, it would seem, extends only to the water's edge. *State v. Gilmanton*, 9 N. H., 461.

July 22, 1826, Samuel Kendall and wife conveyed a tract of land to John Partridge, the boundaries of which, so far as they are material to this case, are as follows: "thence north ten degrees and thirty minutes to the mill-pond; thence northerly by the side of the pond to the first mentioned bounds," &c. The line to the pond touches the water. The line therefrom goes by the side of the pond,—that is, by the pond. It is immaterial whether the language is by the pond, or by the side of the pond. The meaning is the same. *Lowell v. Robinson*, 16 Maine, 360.

Eunice Kendall on the thirteenth day of August, 1834, conveyed to Seth W. Eels, from whom the plaintiff derives title, a tract of land described as follows, viz.: "beginning at the south-westerly part of a piece of land which I sold and deeded to Mr. Partridge, being the same piece of land that is recorded in the registry of deeds for the northern district in the county of Washington, book number two, page number two hundred and five, where said land joins the town road; thence southwesterly by said road till it forms a junction with the Maine military road in the centre of a bridge built by the general government; thence northerly and

easterly around a certain piece of land joining the mill-pond, as was flowed in the year of our Lord, 1814, till it comes to the bounds of the aforesaid Partridge lot; thence by said land to bounds first mentioned."

The first monument on the water is the middle of a bridge. Thence "around a piece of land joining the mill-pond, as was flowed in 1814." The land, for aught that appears, is flowed as much now as then. The land conveyed touches the water in its whole length by the pond. It could not join the mill-pond, if not in contact therewith. The water of the pond is a boundary. Whether the land is bounded on a stream or pond, or joins a stream or pond, can make no difference. In either case, it touches the water;—and the law carries the grant to the centre of the stream or pond which it touches in all cases unless this conclusion is rebutted by the peculiar language of the grant. Nothing in the language of the deed tends to negative the general presumption of law that a proprietor owning to the water of a stream owns to its centre. The water line runs from the centre of the bridge to the bounds of the Partridge lot, which, as has been shown, is in the centre of the pond, touching the water all the way and carrying the same rights to the grantee as if the line had run on or by the pond.

The right to flow existed in 1814. The deed to Eels assumes the existence of that right. The title of his grantor was probably subject thereto. This clause was inserted as an intimation of the fact and a restriction upon the covenants, not as a limitation of the grant.

Nor are these views at variance with adjudicated cases. In *Bradford v. Cressey*, 45 Maine, 9, the line run not on the creek, but on the west bank of the creek; and therefore, not touching or joining the water. In *Lapish v. Bangor Bank*, 8 Maine, 85, the description commenced the line of boundary at a stake on the bank, and returned it to a stake and stones on the bank, and connected the points by a line running on the bank to high-water mark at the first bound.

It was in evidence that the plaintiff, Mansur, between 1852 and

May, 15, 1857, was the owner of the land upon which the alleged trespass was committed, and the mill now occupied by the defendant.

The trespass complained of consists in the defendant building a boom and in booming logs therein, for the use of his mill. The acts done are admitted or proved, and the defendant justifies upon the ground that he and those owning the mill before him had acquired by prescription an easement to lay logs for the use of the mill upon the land where the alleged trespass was committed; and that the plaintiff had been disseised by the defendant more than six years before the commencement of this suit.

The defendant offered to prove that he and those under whom he claims have for a period of more than twenty years prior to the commencement of this action, enjoyed the easement in connection with his said mill and privilege in Houlton, called and known as the Kelleran Mill-Privilege, as set forth in his brief statement in this case; and also that he and they have had adverse possession of the *locus in quo* for more than six years next before the commencement of this action, by depositing his and their logs therein and placing booms to hold the same, and removing stumps and other obstructions therefrom.

The plaintiff objected to the evidence to show an easement, because, as the defendant admits, the plaintiff was the owner of the dominant and servient estate from 1852 to May 15, 1857. This objection was sustained and the evidence excluded.

The lot in which the easement is claimed is some —— rods distant from the defendant's mill and lot, other lots intervening between them. An easement in another's land may be acquired by grant or by twenty years of adverse, continuous and open enjoyment. No grant is pretended. As the plaintiff could not have an easement in his own land, the five years, during which he was the owner of both estates, must be excluded, and then there is no offer made which would give the defendant an easement by prescription. The evidence was properly excluded.

The law is well settled that where a disseisin has continued more than six years, the disseisor is entitled to betterments, and

that the disseised owner cannot maintain trespass *quare clausum* for acts done during the time of such adverse possession. *Chadbourne v. Shaw*, 22 Maine, 450. *Paine v. Marr*, 35 Maine, 182. To enable him to maintain such action, he must regain possession.

But the defendant cannot invoke this principle of law, because the objection was only made to the evidence offered to establish an easement. It did not apply to that offered to show adverse possession. The exclusion was precisely commensurate with the objection ; so that, for aught appearing, the defendant might have introduced the evidence offered if it had existence.

A log owner who builds a boom upon another's land to hold logs to be sawed at his mill, is not within any of the provisions of R. S., c. 43, and is liable in trespass for such erections when made on the land of another. *Default to stand.*

WALTON, DICKERSON, BARROWS and PETERS, JJ., concurred.

JOHN V. PUTNAM in equity, *vs.* WILLIAM H. BURRILL and another.

Costs and Practice in Equity. When case will be sent to a master.

Where one brings a bill in equity for a release and conveyance of lands from the administrator of an insolvent estate, on the ground of a resulting trust subsisting in the intestate, unless the administrator's answer admits such knowledge of the facts and of the state of the accounts between the plaintiff and the deceased in relation to the trust estate, as will be sufficient to justify an immediate and absolute decree of conveyance, the case must go to a master upon whose report the character of the decree will depend.

If the complainant is found to have paid and accounted for his proportion of all dues and receipts, he will be held entitled to a decree for a release and conveyance, without costs to either party.

BILL IN EQUITY.

The complainant seeks to obtain a conveyance of certain land described in his bill, which is brought against the administrator

and a minor heir at law of the late James White, in whose name the record-title to the premises stood at the time of his death.

In October, 1851, James White and John V. Putnam entered into a written contract to jointly purchase a half township of land in Aroostook County, belonging to the trustees of Belfast Academy, and to hold the same in equal shares, as co-tenants. The last payment was made in 1853, and thereupon, upon the suggestion of White, that it would be for their mutual advantage, the deed was made to him alone, although there was no change of their real interests, each having put an equal amount into the land. No controversy ever arose between these parties from that time up to that of the sudden death of Mr. White, on the twenty-fourth day of December, 1870; since which time all of his heirs who have attained their majority have released to the complainant, but the administrator was unwilling to do so without a decree of the court to that effect, and submitted the question for determination, not denying the statements of the bill in his answer, but admitting their truth, so far as the purchase of and interest in the land were concerned, professing ignorance as to White's alleged readiness to convey at the time of his decease, and adding that Mr. Putnam had been in charge of the premises in question, receiving the rents and profits, during the joint ownership; and whether or not these had been equally divided, or aught yet remained due to Mr. White's representative, the respondent was not informed. The minor heir, by his guardian, *ad litem*, expressly admitted the truth of the complainant's allegations.

C. M. Herrin, for the complainant.

L. Powers, for the respondents.

Barrows, J. The plaintiff alleges in his bill that in October, 1851, he and James White, since deceased, upon whose estate the respondent Burrill administers, entered into a written agreement to purchase and hold, as tenants in common, equally interested, certain lands in Ludlow, in the county of Aroostook, particularly described in

the bill and in certain conveyances to which reference is made; that the purchase was made in pursuance of said agreement, the plaintiff and said White each furnishing one-half of the purchase-money; that it was thought expedient and "most advantageous for the management, control and disposal of the lands," that the deed should be taken in the name of said White alone, and it was so made; that the plaintiff, however, in fact managed the joint property, and sold portions of the lands on their joint account, procuring purchasers of lots, receiving payments therefor, and paying over to said White his half of the proceeds and income, and having stated settlements with said White, which he offers in his bill to produce; that White was ready and willing to convey to plaintiff at any time his undivided half of the portions remaining unsold, but was prevented by his unexpected death, which occurred Dec. 24, 1870; that since the death of said White, his heirs, with the exception of the one named as co-respondent with the administrator in this bill, have conveyed all their interest in said lands, to Russell H. White, one of their number, who recognizing the right of the plaintiff to an undivided half of the unsold parcels, released and conveyed the interest of said heirs therein to him. The co-respondent is a minor, living out of the State, and represented here by a guardian *ad litem*. White's estate proves insolvent, and the administrator refuses to convey to the plaintiff without a decree from the court.

The answers of both the respondents, admit upon information and belief, the truth of the allegations in the bill relating to the agreement, the purchase, and management of the property, in a manner which would create a resulting trust in White, in favor of the plaintiff as to an undivided half of the unsold land. But the administrator says nothing in his answer to indicate that he has any knowledge of the state of the accounts between the plaintiff and White in relation to the common property, and he disclaims any knowledge that White was willing to convey at the time of his last sickness, as alleged in the bill, though he admits this may have been the fact.

White's creditors, whom the administrator represents, seem more concerned to scrutinize the plaintiff's claim with care, than the heirs, who take nothing if the estate finally proves insolvent. The settlements with White, which the plaintiff offers to produce, are not before us. To protect the interest which White's creditors may possibly have in the premises, the case must go to a master for the examination of the accounts and settlements referred to in the bill. Upon the coming in of his report, if it appear thereby, that the plaintiff has paid and accounted for all he ought to pay and account for, a decree will be made for the release and conveyance requested, without costs to either party.

Bill sustained; master to be appointed.

APPLETON, C. J., CUTTING, WALTON, DANFORTH, and PETERS, JJ., concurred.

ISAAC H. CLARK *vs.* JOHN T. SCAMMON and another.

Deed.

If in a deed the land thereby conveyed is described as the lot set off and run off by a particular person for a designated purpose, the grantees are confined to the bounds established by such survey, even although the lot thus restricted, be found to contain a much fewer number of acres than that mentioned in the conveyance.

ON REPORT.

TRESPASS *quare clausum* for breaking and entering a close in Franklin, in the possession of the plaintiff and cutting trees thereon. The defendants claimed the right to cut where they did under a deed, expressed in the language quoted in the opinion, which purported to convey three hundred and twenty acres of land, but referred to the running out of the lot by John Black, according to whose plan it contained but two hundred and eighty-

five acres. The court ruled that the defendants were restricted to the lines of Black's survey, whereupon they consented to a default, to be taken off if this ruling was erroneous.

Hale & Emery, for the plaintiff.

A. Wiswell, for the defendants.

APPLETON, C. J. This is an action of trespass *quare clausum*. The defendants justify their right to enter and cut timber under a deed from William Freeman to Tyler Scammon *& al.* dated Sept. 2, 1867, which conveys to the grantees therein named "a certain tract or parcel of land situated in said Franklin, containing three hundred and twenty acres, more or less, being a lot reserved by the State of Massachusetts for future disposition, and sold and conveyed by said State to William Emerson, Abner Coburn and Isaac Farrar, and by said Emerson, Coburn & Farrar to me (said Freeman), reference being had to the deeds thereof given by Geo. W. Coffin, land agent of said State, to said Emerson, Coburn and Farrar, and the deed of said Emerson, Coburn and Farrar to said Freeman. *It being also the same lot of land, set off and run off by John Black, Esq., agent of the Bingham Proprietors and Heirs for and as the public lot reserved by Massachusetts as aforesaid.*"

The grantees can hold no more land than is conveyed to them. The two descriptions in the deed refer to the same identical lot of land. No evidence has been offered to show any variance between the two descriptions; one referring to the title acquired by the grantor, and the other to the survey of Black. The defendants show no title to any land outside of Black's survey, nor is there any reason apparent upon the papers before us why they should claim more. *Default to stand.*

CUTTING, WALTON, DICKERSON, BARROWS and PETERS, JJ., concurred.

ROBERT GERRY, JR. *vs.* DANIEL H. EPPES.

Assumpsit on award of arbitrators under R. S., c. 108.

Gerry contracted in writing with Eppes to furnish at a certain ship-yard, all the timber of certain descriptions, and some other materials described in the contract, at a stipulated price, on or before a day named, necessary to build a vessel of a certain size. Eppes agreed by the same contract, on his part, to build the vessel in a workmanlike manner, and to have her finished in the following August, and to pay Gerry for the timber and materials thus furnished by a part of the vessel at her cost. Gerry furnished timber which was used by Eppes in the construction of a vessel, which he caused to be enrolled in the names of himself and others, giving Gerry no part thereof.

Held, that the mutual claims and demands of the parties under the contract were a proper subject of submission to arbitration under R. S., c. 108, § 1; that it was competent for the arbitrators to award payment for the timber furnished by Gerry, partly in a piece of the vessel, according to the agreement, and partly in cash; that if Eppes failed to perform the award and make over the portion of the vessel which he was ordered to convey by the arbitrators in a reasonable time after demand, Gerry might maintain assumpsit to recover his damages for such failure; and that proof of the acceptance of the award, and the rendition of judgment thereon, and of demand upon Eppes and refusal, were sufficient to entitle Gerry to judgment for the amount of the award and interest.

ON REPORT.

ASSUMPSIT upon an award of referees under a statute submission, R. S., c. 108; the subject of which and all the facts necessary to an understanding of the case, are sufficiently stated in the opinion of the court.

Such judgment as the law and evidence required was to be ordered.

George P. Dutton, for the plaintiff.

A. Wiswell, for the defendant.

The controversy between these parties was not a proper subject of submission under R. S., c. 108, § 1, since payment was to be

made in part of a vessel, and a court of law could not enter up judgment upon the award. *Butler v. Mace*, 47 Maine, 425; *Henderson v. Adams*, 5 Cush., 610. The referees had no authority to say that part of the plaintiff's claim should be paid by a share of the vessel and the rest in cash. *Colcord v. Fletcher*, 50 Maine, 398.

BARROWS, J. In December, 1869, the plaintiff and defendant entered into a written contract whereby the plaintiff undertook to furnish to the defendant all the timber, plank and knees necessary for a vessel of about 180 tons, of certain kinds and descriptions, at prices fixed in the contract, and to deliver the same at the ship-yard in Ellsworth, by the tenth day of May then next, and the defendant agreed to build the vessel in a thorough and workmanlike manner, and to have her finished and launched in August following, and to pay for the materials furnished by the plaintiff as aforesaid with an interest in the vessel at the cost.

The plaintiff furnished some timber for the vessel—to what amount or when, or where, does not appear—but at all events a controversy arose between the parties, and after the completion of the vessel the defendant caused her to be enrolled December 3, 1870, (at which time she was finished and ready for business) in the names of himself and certain others, not including the plaintiff, as co-part-owners. The plaintiff's claim against the defendant growing out of this transaction, and the said defendant's "offset if any he has," were submitted by the parties under the statute (R. S., c. 108) to arbitrators, by whose final award it was determined that the whole cost of the vessel when completed was $13,274.72; that there was due plaintiff for timber $1,271.92, and that he was entitled to have three thirty-second parts of the vessel from the time she was finished and ready for business at a cost of $1,244.50, and the balance of his bill ($27.42) to be paid by defendant in cash with interest from the time of the completion of the vessel, each party to pay half the costs of arbitration taxed at $18.

This report was accepted at the October term of this court, 1871, and execution issued for the costs, and on Nov. 7, 1871, plaintiff made a demand in writing upon the defendant for a bill of sale of three thirty-second parts of the vessel, and the balance of money in pursuance of the award, with which demand the defendant refused to comply, and this action of assumpsit was commenced Feb. 12, 1872, in support of which the plaintiff relies upon the award. The defendant objects to any recovery upon the award because he says that the controversy here was not such an one as could be the subject of a personal action, and hence not a subject of arbitration under R. S., c. 108—in fine, that the remedy should have been sought in equity to compel a specific performance. But herein, we think, he is in error. The holder of a promissory note payable in specific articles cannot be compelled to resort to equity to enforce its payment. Here it would seem that each party insisted that the other had broken the contract and the claim for damages for such breach was unquestionably the subject of a personal action, or of a submission to arbitration. It was competent for the arbitrators to order payment to be made in the particular mode mentioned in the original contract of the parties, if they were of the opinion that justice required it. It is strongly implied in *Banks v. Adams*, 23 Maine, 259, that an award to do some act other than the payment of money may be the foundation of an action of assumpsit, provided such award makes the act to be done so certain that a specific performance could be decreed. And we see no reason why arbitrators under the statute may not make a valid award for the transfer of the title and possession of any goods and chattels which are the subject of the contract when the mutual claims and rights of the parties under that contract are submitted to them, provided they make the thing to be done sufficiently certain to prevent further contest as to what it really is which is to be transferred.

It is this power in arbitrators to do equity untrammelled by the strict rules of a purely common law proceeding, which induces parties not unfrequently to submit their controversies to arbitration. If

it is not practicable to enforce a judgment on their decree by any direct process known to the common law, this action of assumpsit upon the award seems to be an appropriate remedy for a non-compliance with its terms.

It is not a nullity because execution cannot be issued upon it directly. But the defendant urges that if the award was valid it is merged in the judgment, and debt—not assumpsit—is the proper remedy. Mr. Chitty calls debt "a more extensive remedy for the recovery of money than assumpsit or covenant," but he limits its use to cases "where the demand is for a sum certain, or is capable of being readily reduced to a certainty," and says it is not suitable where the demand is rather for unliquidated damages than for money. More particularly, he instances among cases in which it lies "on simple contracts and legal liabilities," "an award to pay money, but *not* if it were to perform any other act, unless there were an arbitration bond." 1 Chitty's Pleading, 101, 102.

In 2 Williams' Saunders 62, *b*. note 5, it is said "where an award is for performance of a collateral act, when the submission was without deed, it was formerly holden that there was no remedy to enforce it: but, however, the law is now taken to be that the party may have assumpsit to compel performance." *Purslow v. Bailey*, 2 Ld. Raymond, 1040. In the present case while there is nothing offered in evidence by either party, to indicate that the damages for the non-performance of the award, so far as it relates to the conveyance of the part of the vessel, ought to differ from the sum which it cost as found by the arbitrators and interest thereon, it is easy to see that a variety of circumstances might change the result, and enhance or diminish very greatly the sum recoverable in this action. Where the award is in part for the performance of some particular act, as to deliver a certain chattel or the like, we think assumpsit is the proper remedy for the breach of the defendant's duty, if he fails or refuses to perform.

But, finally, defendant asserts that the arbitrators exceeded their authority in awarding a payment of a small part of the sum found due from the defendant for the timber, in cash. Not so. The

fair construction of the agreement for submission, loosely and carelessly as it is expressed, seems to be that all the claims of the parties against each other, growing out of the contract, and their doings, misdoings and omissions in respect thereto, should be submitted to the arbitrators; and as no limitation was imposed upon them, it was competent for them to award payment by the defendant to the plaintiff for the timber he furnished in the manner stipulated for in the contract, or, as that had been broken, in cash, or part in cash and part in the property stipulated for, if they thought justice would be thereby promoted. They were under no obligation to direct the conveyance of minute and inconvenient fractions of the vessel to cover the small balance due the plaintiff over and above the three thirty-second parts to which they found him entitled. That the subject matter of this controversy and the mutual claims and demands of the parties, and the power of the arbitrators over all were well understood, may fairly be inferred from the fact that no objection seems to have been interposed to the acceptance of the report of the arbitrators, or to the rendition of judgment upon it. That judgment has neither been reversed nor satisfied, nor has the defendant shown any good reason why he should not respond in damages for his failure to meet its requirements. *Judgment for plaintiff for* $1271.42, *and interest thereon from Dec.* 3, 1870.

Appleton, C. J., Cutting, Walton, Dickerson, and Peters, JJ., concurred.

ALEXANDER B. SWETT *vs.* WILLIAM T. HOOPER.

Burden of proof. Demand. Interest. Promissory Note.

Where the holder of a note, given for spirituous liquors, shows that he purchased the same for value, in due course of business and under circumstances not calculated to awaken suspicion, it will be presumed that he had no notice of the illegality till the contrary is shown.

A demand is not necessary to enable the holder of a note, payable on a certain time, to recover interest thereon from the maturity thereof, although it is not upon interest before that time.

ON EXCEPTIONS.

ASSUMPSIT, commenced March 19, 1872, on a promissory note for $125.32, signed by the defendant and dated at Castine, March 26, 1867, payable to J. & N. & E. L. Plummer in ninety days from date, and endorsed by the payees to the plaintiff more than two years after it was due. The defence was that the consideration of the note was spirituous liquors sold in violation of law.

The Judge instructed the jury that if the note was endorsed and sold by the payee to the plaintiff, for a valuable consideration, the plaintiff then having no knowledge that the consideration for the note was spirituous liquors, he would be entitled to recover. He also instructed the jury that if they found for the plaintiff, they should cast interest on said note from the time it was due, though no demand for payment was made at the time the note became due; and that the burden of proof was on the defendant to show that the plaintiff did have knowledge of the illegal consideration of said note at the time he purchased it.

The jury returned a verdict for the plaintiff with interest on the note from the time it was due; and to the foregoing rulings and instructions, the defendant excepted.

C. J. Abbott, for the plaintiff.

A. Wiswell, for the defendant

PETERS, J. The rulings, as to what burden of proof rested upon the respective parties in this suit, are sustained in *Field v. Tibbetts*, 57 Maine, 358, and *Hapgood v. Needham*, 59 Maine, 442. The counsel for the defendant questions the correctness of the latter case as not consistent with earlier decisions. It is true that, in many cases, as in *Aldrich v. Warren*, 16 Maine, 465, and *Munro v. Cooper*, 5 Pick., 412, it is said in general terms that where it is shown that a note is procured by fraud, or founded on an illegal consideration, the indorsee who sues the note must show that he came by it without knowledge of the fraud or illegality. But the rule, more accurately stated, is that the plaintiff must show that he is the holder for value, in the due course of business, unattended with any circumstances justly calculated to awaken suspicion. This appearing, the presumption arises that the note was obtained without any knowledge of the fraud or illegality, upon the part of the purchaser, until the contrary is shown. That is what the ruling complained of amounted to in this case.

A point is taken that, upon a note not payable with interest, and given upon a time certain, interest is not recoverable excepting after demand made at the time the note becomes due or afterwards. But this cannot be regarded even as an open question. In England there has been much less liberality in the allowance of interest than here. But in both countries the rule has been established, adversely to the position taken by the defendant, for many years. In *People v. New York*, 5 Cowen, 331, the principle was correctly and tersely stated; "that whenever the debtor knows what he is to pay, and when he is to pay it, he shall be charged with interest if he neglects to pay."

Exceptions overruled.

APPLETON, C. J., CUTTING, WALTON, DICKERSON and BARROWS, JJ., concurred.

MONROE YOUNG and another, in equity, *vs.* CARLTON MCGOWN.

Equity—mistake as a ground of relief.

An execution was satisfied by levy upon real estate; by mistake the appraisers, in their certificate, described a different parcel from that in fact taken; and the officer, in his return, adopted this erroneous certificate and description, the error not being discovered for several years; the judgment creditor quitclaimed to one of the complainants, who conveyed to the other with warranty, both deeds using the language of the appraisers to describe the premises thereby conveyed.

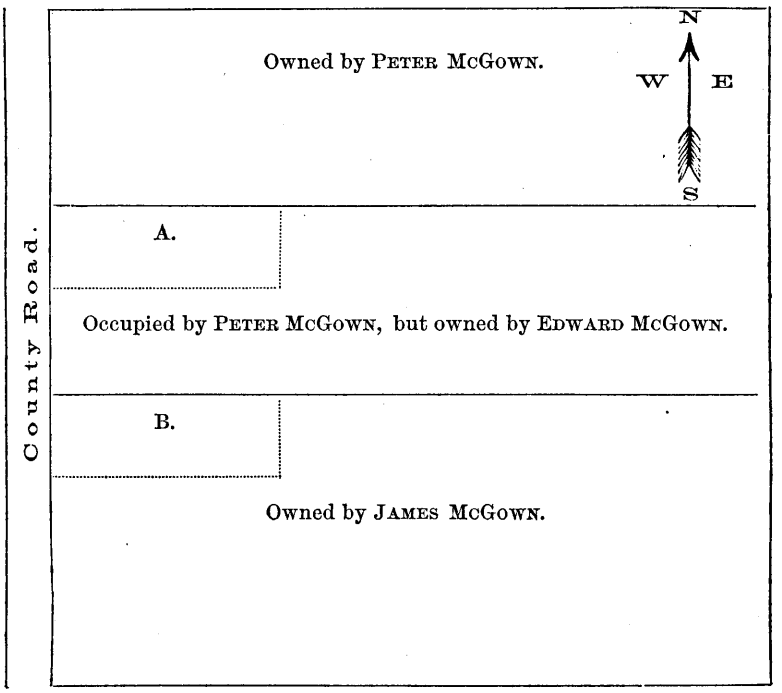
Held, that a bill in equity to so reform the levy as to make it apply to the land really taken could not be maintained by these complainants against the son and grantee of the execution debtor, after the death of the father and of two of the appraisers, even if it could have been supported in favor of the original creditor against his debtor.

This bill has no equity, since the land conveyed by the deeds was not that actually seized on execution, the title to the latter (if any passed by the levy) remaining in the judgment creditor; nor have the complainants any joint interest; nor was there any mutual mistake, as the original proceedings were *in invitum*, and the debtor was passive.

Mistake, to afford any ground for relief in equity, must be that of both parties.

BILL IN EQUITY.

Upon an execution in favor of one Pinkham against James McGown, the lot marked B. in the accompanying plan was seized, but, owing to the mistaken supposition that the estate which actually belonged to Edward McGown—though in the occupancy of Peter McGown, and known as "the Peter McGown lot," being under contract for a purchase by said Peter—was the property of Peter McGown, the appraisers' certificate was made applicable only to the lot marked A. on the plan, which never belonged to James McGown.



The description in the levy was as follows: "Beginning at the eastern side of the county road leading from Ellsworth to Bangor *at the Southwest corner of Peter McGown's lot*; thence running easterly, along the line of said McGown's lot, fifty rods; thence southerly, at right angles with the aforesaid line, twenty-one rods to a stake and stones; thence westerly, on a line parallel with the first-mentioned line to the county road; thence northerly on said road to the place of beginning." The running really began at the Southwest corner of the *Edward* McGown lot, which was erroneously supposed to belong to Peter, as before stated, and was carried around lot B.; but, by beginning on the road at the lower corner of the land then in fact owned by said Peter, and running the given courses and distances, lot A. will be inclosed.

In an action at law, *Young v. McGown*, 59 Maine, 349, this court held that lot A. was the one that answered the calls of the levy, and that parol evidence was inadmissible to show that B. was the lot intended.

The officer making the levy adopted the certificate and description of the appraisers and made them part of his return upon the execution.

The further statements of the bill and of the relief prayed for are sufficiently given in the opinion; except that it may be well to add that Pinkham entered upon and held lot B. under his levy up to August 18, 1860, when the deeds to the complainant, Parker, and from him to Young, were made; both conveyances copying the description, as above quoted, from the appraisers' certificate.

The defendant demurred, and the hearing was upon the demurrer.

A. Wiswell, for the complainants.

Hale & Emery, for the respondent.

Appleton, C. J. This is a bill in equity in which the complainants ask the aid of the court to correct and reform the mistakes in the descriptive portion of a levy, to which the plaintiff, Young, claims title by mesne conveyances from the judgment creditor; or, rather, to compel the defendant, who has title to the land upon which the judgment creditor *intended* to levy, but which his levy entirely fails to describe, to release to him the land so intended to be (but not) levied upon.

It appears from the allegations in the bill, the truth of which is admitted by the demurrer, that one Vassal D. Pinkham, at a court holden at Augusta, in and for the county of Kennebec, on the fourth Tuesday of November, A. D., 1857, recovered judgment against one James McGown, for the sum of sixty-eight dollars, debt or damage, and one hundred and twenty-one dollars and twenty-one cents, costs of suit; that on this judgment execution duly issued, and on the twenty-sixth day of January, 1858, the

said Pinkham caused the execution to be levied on certain real estate, as the estate of said McGown; that there is a mistake in the description of the premises as described in the appraisers' return, and adopted by the officer making the levy, by which, according to the description, a different lot is set forth as having been levied upon than was levied upon in fact; that on the eighteenth day of August, 1860, said Pinkham conveyed the premises, as described in the levy, by deed of quitclaim, to Orrin Parker, who, on the same day, conveyed them by deed of warranty to the complainant, Young; that said Young entered upon the premises upon which the levy was intended to be made, but which were erroneously described; that on the seventeenth day of July, 1862, said James McGown conveyed to his son, the defendant, his homestead farm, embracing the premises in controversy; that the consideration of the conveyance was the maintenance of said James by this defendant; that the said defendant well knew that these premises were in possession of the complainant, Young; that two of the appraisers have deceased, so that their certificate cannot be amended; that the said James has deceased, leaving no estate; and that this defendant has commenced a suit against this complainant, Young, to recover possession of the premises upon which it is alleged the levy was intended to be made.

The prayer of the bill is, that this respondent may be enjoined from prosecuting his suit against the complainant, Young, and be ordered to pay damages, and further be decreed to release to said Young the premises as claimed by him to have been actually appraised, and upon which the levy was intended to be made.

To this bill a demurrer has been filed. The only question presented is whether, assuming the allegations of the bill to be true, it sets forth sufficient cause for the equitable interference of the court.

It was determined in *Young v. McGown*, 59 Maine, 351, that the levy was not made upon the land owned by James McGown, the judgment debtor, but upon land in the occupation of Peter McGown, the title to which was in one Edward McGown. Con

sequently the judgment creditor acquired nothing by his levy. The grantee of the judgment creditor now seeks to compel a conveyance of land to which his grantor had no title, and upon which no levy, according to the officer's return, has ever been made. The premises described in the levy were conveyed by Pinkham, the judgment creditor, to Orrin Parker and by him, by deed of warranty, to Munroe Young.

This bill is brought in the name of Young and Parker. But the land conveyed to them is not the land upon which they claim the levy to have been made, or of which a release is asked for. Their deeds convey the tract of land which belonged to Edward McGown. There is no allegation of mistake in these deeds. There has been no conveyance to them of the land upon which the levy was actually made. The title (if any has been acquired by the levy as intended to be made) in the premises levied upon in fact, still remains in Pinkham. He has made conveyance of the land which the bill alleges was appraised and set off to him, and to which the judgment creditor had no title because there was none in the judgment debtor.

Further, it is difficult to see how these complainants can properly join. Parker has no interest in any land in controversy. He owns nothing jointly with Young to whom he conveyed. The complainants are not entitled to, nor do they pray for, joint relief. Story's Eq. Pl., §§ 509, 510. Besides, if the relief was granted, Young would have as its result, the land which the levy should have embraced, and the covenants of warranty of the deed of his co complainant, which would remain outstanding.

These complainants cannot claim relief on the grounds of trust or of fraud, for no trust is shown, and no fraud is pretended.

The bill is sought to be maintained because of the mistake of the appraisers and the officer in making their return. But "in order to sustain a bill for relief under this equity, it is essential that the error be on both sides, and that it be admitted by the defendant or distinctly proved. It must be a mistake on both sides, for if it be by one party only, the altered instrument is still

not the real agreement of both. A mistake on one side may be a ground for rescinding a contract, or for refusing its specific performance; but it cannot be a ground for altering its terms." *Addams' Equity*, 171. Here, however, there is no mutual mistake. The proceedings were under the Statutes of the State and *in invitum*. The debtor made no mistake, nor was he in any way responsible for the one which was made. The mistake arose from the negligence of the creditor, or the carelessness of his officer. The sheriff should have made his return of a levy on the land of the judgment debtor. He did make it upon the land of a stranger. The mistakes which equity will correct are not those which might have been avoided by common and ordinary care, and which are the results of negligence.

It seems that equity will not reform a voluntary deed as against the grantor. *Brown v. Kennedy*, 33 Beavan, 147; *Phillipson v. Kerry*, 32 Beavan, 637. Upon the same ground, the remedial power of a court of equity does not extend to the case of a defec tive fine against the issue, or of a defective recovery, as against the remainder man. 1 Story's Eq. Jur., §§ 177, 178.

As two of the appraisers have deceased, the misdescription of the premises in their return cannot be amended. "The plaintiff," observes Hathaway, J., in *Lumbert v. Hill*, 41 Maine, 482, can not have the relief he seeks, unless the officer can have leave to amend his return on the execution. To reform the levy and deeds as prayed for, and thereby change the existing legal titles of the parties, if it could be done, would render the registry of deeds of little value, as furnishing any certain evidence of title to real estate." The power of the court to grant leave to an officer to amend his return is ample for the protection of the legal rights of all parties interested in his doings.

It is to be borne in mind that the parties to this bill were not parties to the levy, and that the judgment debtor has long since deceased.

It is for the creditor to point out to the officer holding his execution the land upon which he wishes the levy to be made. It is for

the officer to see that a compliance is had with the requirements of the statute. It is no part of the duty of a court of equity to relieve against the negligence of the one, or to correct the blunders of the other. *Bill dismissed with costs.*

CUTTING, WALTON, DICKERSON, and BARROWS, JJ., concurred.

BREWER BRICK COMPANY *vs.* INHABITANTS OF BREWER.

Constitutional law. R. S., 1871, *c.* 6, § 6. *Taxes—exemption from by vote of town.*

It is for the legislature to determine what property, real and personal, shall be subject to, and what shall be exempted from, taxation.

The legislature cannot constitutionally transfer to municipal corporations the power of determining upon what property, real or personal, taxes shall and upon what they shall not be imposed.

It is essential to all just taxation that it be levied with equality and uniformity.

Exemption of property from taxation is the imposition of increased taxation upon non-exempt property.

The vote of the town of Brewer by reason of which the plaintiffs claimed to be exempt from the payment of taxes therein is void, because the legislation purporting to authorize such municipal action is unconstitutional.

ON FACTS AGREED.

ASSUMPSIT to recover $309.75 paid by the plaintiffs under protest, on the twelfth day of March, 1873, as the tax for the year 1872, upon their buildings, machinery and property used in their manufacturing establishment in Brewer.

At their annual town-meeting, holden March 14, 1870, the defendants "VOTED, that the town will exempt from taxation for a term of ten years, manufacturing and refining establishments hereafter erected in town, and the capital used for operating the same, together with such machinery hereafter put into buildings already

erected, but not now used as such, and the capital used for operating the same; *provided*, that the capital invested shall not be less than ten thousand dollars; and *provided*, further, that this vote shall not be construed to apply to manufacturing or business now carried on in the town; and no distillery of intoxicating drinks or malt beer shall be entitled to the benefit of this vote."

The Brewer Brick Company organized under the general law of this State, (now found in R. S., 1871, c. 48, § 18,) on the fourth day of June, 1870, for the purpose of making brick by machinery, under a new process, operating by steam. Immediately after its organization, this corporation proceeded to erect the necessary buildings in the defendant town, and to fit them up with the requisite patented machinery, boilers, engine, &c., and have ever since been engaged in carrying on the business contemplated at its creation, having a capital invested in it of more than ten thousand dollars. The business of brick-making has been constantly carried on for more than fifty years in different parts of the town by the old hand process and horse power.

In 1871 no tax was assessed upon the plaintiffs, but in 1872 their property was assessed without any regard to the vote, and to avoid a distraint the tax was paid as aforesaid.

No objections were made to the *form* of proceedings by the town at the annual meeting of 1870, or in their assessment of the tax. If the plaintiffs were liable to be so assessed they were to be nonsuit; if not, they were to have judgment for $309.75, and interest from March 12, 1873.

Wilson and Woodward, for the plaintiffs.

The question is whether R. S., 1871, c. 6, § 6, ninth clause, and the previous legislation condensed in that clause, is constitutional or not. Waiving all discussions of political economy, of the policy or impolicy of such a law, the inquiry now is, whether or not it is one which our State constitution permits the legislature, in the exercise of its discretion, to pass; the U. S. constitution does not touch the subject. *Ohio Life Insurance and Trust Co. v. Debolt*, 16 Howard, 416.

States, as well as individuals, may make unwise contracts, or may fail to realize from them the anticipated advantage; may erroneously suppose it advisable to exempt banks, or other corporations from taxation; or by chartered contracts give or surrender valuable rights. Whether this State has erred or not, acted wisely or foolishly, is not the matter to be determined here: but has its legislature acted constitutionally? It is in the power of the State to say what property shall be exempt from, and what shall be subject to, taxation. *Gordon v. Appeal Tax Court*, 3 Howard, 133; *State B'k v. Knoop*, 16 Howard, 369; *Home of the Friendless v. Rouse*, 8 Wallace, 430.

The presumption is in favor of the validity of an act which has passed both branches of the legislature and received the approval of the executive. Lunt's case, 6 Maine, 412. So long as any doubt remains the court will uphold the statute. *Fletcher v. Peck*, 6 Cranch., 87; *Dartmouth College v. Woodward*, 4 Wheat., 625; and numerous other cases.

Five years after Maine became a State, the first act exempting property of certain manufacturing corporations from taxation was passed. Public Laws of 1825, c. 288. In 1831 this act was modified by one which discriminated in favor of these corporations, while not exempting them entirely.

In 1834 the Portland Manufacturing Company were, by name, exempted from taxation for three years from August 1, 1833.

When the act of 1825 was wholly repealed, in 1836, it was provided that the rights of no company previously incorporated should be affected thereby. In 1859 a law like the present, exempting for a limited time certain manufacturers of cotton and wool, was passed; in 1864 its operation was extended to all manufacturing enterprises, and explanatory acts were passed in 1867 and 1869. Public Laws of 1859, c. 91; of 1864, c. 234; of 1867, c. 76; and of 1869, c. 65.

These provisions were substantially incorporated into R. S., 1871, c. 6, § 6, ninth item. The only case in which either of these statutes has come before this court is *Gardiner, &c., Cotton Co. v. Gar-*

diner, 5 Maine, 133. Though the constitutionality of the act of 1825 was not discussed in this cause it was necessarily involved in its decision, which held that certain property was exempt under the statute of 1825, c. 288.

The constitution of Maine, Art. IV., part third, § 1, gives the legislature "full power to make and establish all reasonable laws and regulations for the defence and *benefit* of the people of this State, not repugnant to this constitution nor that of the United States." What laws are reasonable and beneficial is for the legislature to determine. Cooley's Const. Lim., 27; *Moor v. Veazie*, 32 Maine, 343; *State v. Noyes*, 47 Maine, 189. The action of eight or ten legislatures shows what that branch of the government thought for the benefit of the people; and that the court acquiesced. 5 Maine, 133. Art. IX provides that "all taxes upon real estate shall be assessed equally"; not that they shall be a charge upon all real estate; consequently, that of religious and charitable associations has long been exempt.

We do not question the correctness of the decision in the case of *Allen v. Jay*, 60 Maine, 124; we deem it sound law; but the case at bar is different. The plaintiffs claim exemption under a general statute; the special law, declared unconstitutional in 60 Maine, 124, under the guise of taxation, took money from all the other citizens to give it to the persons mentioned by name in that act. Inasmuch as it is only property subsequently brought into the town that is to be exempt, no person had any existing liability to taxation increased thereby. The courts of other States have held legislation exempting certain classes of property constitutional. *Brewster v. Hough*, 7 N. H., 138; *Parker v Redfield*, 10 Conn., 490; *Seymour v. Hartford*, 21 Conn., 481. "The taxing power may select the objects of taxation." *State Bank v. Knoop*, 16 Howard, 369; Cooley's Const. Lim., 514; *N. J. v. Wilson*, 7 Cranch, 164; *McGee v. Mathis*, 4 Wallace, 143; *Dodge v. Woolsey*, 18 Howard, 331; *Wash. Uni. v. Rouse*, 8 Wallace, 439.

The constitution, Art. I, § 22, says, "No tax shall be imposed without the consent of the people, or of their representatives in the legislature." In this instance that consent has been withheld.

If this exemption is unconstitutional, then all the property and polls which our statutes purport to exempt are equally liable to taxation.

A. W. Paine, for the defendants.

Two questions arise: FIRST, as to the proper construction of the vote of Brewer; and second, whether or not it is constitutional. The first *quœre* arises under the proviso that the exemption shall not apply to business now carried on in the town. The idea was to introduce new *kinds* of business, not new competitors for old business. Brewer is a town of clay banks, its capacity for brick-making only bounded by infinity. It needed and intended not to offer inducements to new comers in a branch of business in which a large proportion of its citizens had already become interested, and could only be injured by competition.

This privilege of exemption is in derogation of the great principle of equality of rights and burdens, and, therefore, to be construed strictly, not extending it to any not indubitably within its terms.

SECONDLY, we say the legislation under which the vote was passed is unconstitutional. We can hardly add anything to the exhaustive arguments in the appendix to 58 Maine, 590–623; *Parker v. Milford*, 59 Maine, 315; *Allen v. Jay*, 60 Maine, 124; *Saunders v. Hanover*, 23 Pick., 188; and the case of the Boston Fire Loan.

There is as much right to raise money by taxation to give to an individual as to exempt him. The difference between giving money to a man and relieving him from the burden of a legal obligation to pay money is imperceptible; it is practically the same thing. Taxes are laid for public uses upon the principle of equality among those who enjoy those uses, according to their respective means; to relieve one and charge others is to make the latter bear the former's burden. If the general sum of taxation were reduced, it might be more questionable; but when the inevitable result is to excuse some and in the same proportion increase the tax of others, it cannot be sustained.

Sometimes we can test the correctness of a principle by extending its operation and making its application general. Test this rule in that way and suppose all the merchants, or mechanics, or any other class, should be exempt, all except the agriculturists or boarding-house keepers. These very classes of exempts greatly increase the public burdens and add to the necessities of taxation. The public roads, the schools which they make necessary, the fire department which they bring into use, and all the other items of public charge add largely to the taxable burden, and the exemption throws all this new and old burden upon the few non-exempts. Are these last, then, not required to pay out money for the direct use of the exempts, vastly more than they would be if they were not in town? And wherein is this extra payment different from that which they would be required to make if called upon to pay for their board and clothing. The particular provision of the objectionable statute adds force to these suggestions. Reference is made to that requirement of the law, "that all property so exempted shall be entered from year to year upon the assessment books and returned with the valuation of the several towns and cities when required by the State for the purpose of making the State valuation."

So that although the property is exempt from *town* tax, it notwithstanding goes to enhance the State tax and the county tax, which the town has to pay. This thus affords a very strong additional objection, strengthening that already adduced from the *general* nature of the statute.

The taking of money by taxation under such circumstances is objectionable in two fold manner. In the first place, the tax payer is called upon to pay on his own property, a sum which *another* and not *he* ought to pay, and secondly, he is obliged to pay an additional sum over what he would have to pay by reason of the increased or enhanced necessity of raising more money than would be requisite, but for the favored exemption. For as the court tersely remark in the Jay case, "capital is not *created* by taxation," as tax money is merely a removal of it from one man's pocket to

that of another; and when that money is increased by illegal means, the whole is illegal, and the law condemns the act.

Following up the idea, the court make the further remark in the Jay case. "*Our government is based on an equality of right, the State can not discriminate among occupations, for a discrimination in favor of one, is a discrimination against all others,*" &c.

Now, the exemption in question in its two fold operation, as already explained, has a most direct effect to increase that inequality and render most disastrous this discrimination among occupations. The facts of the case at bar afford a most striking illustration of the truth and correctness of this position of the court. By the exemption as claimed, the business of brick-making as carried on by the plaintiffs has not only the advantage over other brick-making establishments in town, by its extra facilities for producing its manufactures cheaply, and thus a great advantage over others in the market, but it has also the additional advantage of exemption from the public burdens, which make the manufactures of other establishments more expensive, and have less to their advantage in the market. And what makes the case still more aggravated is the fact that these burdens are rendered all the more oppressive by reason of this very establishment, which comes in to make expense without paying its cost. Such a discrimination is, as the court suggest, at war with republican constitutions, and so much at variance with our own, in very many of its wholesome provisions, that it is felt that no further words are requisite to give force to the position. In *Cooley v. Granville*, 10 Cush., 56, the court, in deciding a question similar to this, say very pertinently: "*For the purpose of abating taxes, especially a particular* CLASS *of taxes, towns can not raise money by taxation.*" To change the proposition to meet our case, will not change its sense; "to raise taxes for the purpose of *freeing a portion of the citizens from taxation*, a town has no power."

In *Hooper v. Emery*, 14 Maine, 379, which is an elaborate discussion of the "surplus revenue" cases, the court reason the point now presented most forcibly, and particular attention is called to

the remarks of the Chief Justice, on page 380, as being most particularly applicable here.

APPLETON, C. J. This is an action of assumpsit to recover three hundred and nine dollars and seventy-five cents paid by the plaintiffs for taxes. The proceedings on the part of the defendants are admitted to have been correct, and the only question presented is whether the property of the plaintiff, upon which the tax in question was assessed, is liable to assessment.

The business of brick-making has been carried on in the defendant town for more than fifty years until the present time, by the old process of making bricks with horse power.

The plaintiff corporation was organized under the general law of the State, on the fourth day of June, 1870, for the purpose of manufacturing brick in the defendant town, and after its organization, proceeded at once to erect the necessary buildings and machinery for the manufacture of brick by new processes, in which business it has been engaged to the present time.

At the annual town meeting of the defendant town held March 14, 1870, the following vote was passed, viz: "Voted that the town will exempt from taxation for a term of ten years, manufacturing and refining establishments hereafter erected in town, and the capital used for operating the same, together with such machinery hereafter put into buildings already erected, but not now used as such, and the capital used for operating the same, *provided* that the capital invested shall not be less than $10,000, and *provided*, further, that this vote shall not be construed to apply to manufacturing or business *now* carried on in the town, and no distillery of intoxicating drinks or malt beer, shall be entitled to the benefit of this vote."

The estate of the plaintiffs was duly assessed for its just and proportional share upon the whole valuation of the property of the town liable to assessment. The plaintiffs claim exemption from contributing toward the public expenses, under and by virtue of this vote of the town.

By an act approved March 8, 1864, c. 234, § 1, it is enacted, that "all manufacturing establishments, and all establishments for refining, purifying, or in any way enhancing the value of any article or articles already manufactured, hereafter erected by individuals or by incorporated companies, and all the machinery and capital used for operating the same, together with all such machinery hereafter put into buildings already erected, but not now occupied, and all the capital used for operating the same, are exempted from taxation for a term not exceeding ten years, after the passage of this act, where the amount of capital actually invested, shall exceed the sum of two thousand dollars; *provided*, towns and cities in which such manufacturing establishments or refineries may be located, or in which it may be proposed to establish the same, shall in a legal manner give their assent to such exemption, and such assent shall have the force of a contract, and be binding for the full time specified; *and provided further*, that all property so exempted, shall be entered from year to year on the assessment books, and returned with the valuations of the several towns and cities, when required by the State for the purposes of making the State valuation." By an act approved Feb. 8, 1867, c. 76, § 1, the exemption referred to in the act of 1864, c. 234, § 1, takes effect from the date of the contract authorized by that act. By an act approved March 12, 1869, c. 65, § 1, the exemption referred to takes effect "from the date of the assent given by the town to such exemption." The preceding legislation on this subject is found condensed in R. S., 1871, c. 6, § 6, ninth clause.

Taxation exacts money from individuals as and for their contributory share of the public burdens. A tax is generally understood to mean the imposition of a duty or impost for the support of government. *Pray v. Northern Lib.*, 31 Penn., 69. "Taxes are burdens or charges imposed by the legislature upon persons or property," says DILLON, C. J., in *Hanson v. Vernon*, 27 Iowa, 28, "to raise money for public purposes or to accomplish some governmental end." Private property may be taken under the power of eminent domain for public purposes, if just compensation there-

for be made. But for private purposes it cannot be wrested from its owner even with compensation.

It has been settled by a series of decisions that the legislature cannot constitutionally authorize towns to raise money by taxation to give or loan to individuals or corporations for private purposes. A good public house may be very desirable, but in *Weeks v. Milwaukee*, 10 Wis., 242, the Supreme Court of Wisconsin, justly treated with little consideration, the claim of a right to favor, under the power of taxation, the construction of a public hotel, though the aid was to be rendered expressly "in view of the great public benefit which the construction of the hotel would be to the city." It was there decided that the public could not be compelled to aid such an enterprise from any regard to the incidental benefits to be derived therefrom. It may be very desirable to have a saw-mill in a town, and those who wish it, have full liberty to erect it; but the inhabitants cannot legally be taxed to raise money to give or to loan to those, who propose, for their own benefit, to erect one, or to take down one already erected, and to remove it from one town to another. *Allen v. Jay*, 60 Maine, 124. A terrible conflagration sweeps over a city destroying its wealth by millions. Its rebuilding is absolutely necessary for its commercial wants. But each lot of land is private property; each building to be erected thereon will be private property. Its erection is for private use. After full consideration, it was decided that the inhabitants of the city could not be taxed to raise money to loan to the sufferers to enable them to rebuild. *Lowell v. Boston*, 110 Mass. In the *Commercial Bank v. the City of Iola*, 2 Dillon, 353, it was held that the legislature of a State had no authority to authorize taxation in aid of *private* enterprises and objects; and that municipal bonds issued under legislative authority to be paid by taxation, as a *bonus* or donation to secure the location, or aid in the erection of a manufactory or foundry, owned by private individuals, are void even in the hands of owners for value.

Contingent and incidental benefits may arise from the introduction of manufacturing capital whenever the enterprise is successful.

But the reverse may equally ensue, and the enterprise become an injurious failure. The inhabitants of a town cannot legally be taxed to raise money to give or to loan to individuals or corporations for private purposes on account of any supposed incidental advantages which may possibly accrue therefrom. The benefits are precisely those arising from the introduction of capital or labor, and none other. It matters not whether it be the building of the huge factory of the capitalist or the cottage of the laborer, the benefits are the same in kind and differ only in degree. There are benefits arising from the introduction of capital well invested and of labor well employed; but they are of the same nature as those arising from the existent capital of the place in which the incoming capital is to be invested, and the incoming labor employed. One is just as much entitled to protection as the other, and no more. But this benefit, whatever it may be, if any, arises from all capital and all labor; and as all labor and all capital is equally entitled to equal protection according to its extent, it follows that equal protection to all leaves the matter as it found it. Hence, it is universally held that the incidental benefits of capital afford no justification for partial taxation.

It is conceded in the argument that towns and cities cannot constitutionally be authorized to raise by taxation money to be given away. The plaintiff's share of the expenses of the defendant town for all public purposes, is conceded to be $309.75. If the town were empowered to raise that sum to give the plaintiffs, it is admitted that the act so empowering them would be unconstitutional, for if the town may raise money to give to A., they may do the same for B., and so on; and the property of the minority would be subject to the will of the majority. But the remission of a tax by a vote of the town is in substance and effect the same as a gift. What matters it to the plaintiffs or the defendants whether the town votes to give $309.75 to the plaintiffs, or to exempt their property from its just and proportional tax, and assess the amount of such exemption upon the remaining estate liable to taxation? It is a gift. The money raised by the rest of

the tax-payers is raised to give away; and if it may be done for these plaintiffs, it may be done for any other inhabitant as well.

But there are other and grave objections to the constitutionality of the statute upon which the plaintiffs rely.

"By the constitution, article 9, § 7; "while the public expenses shall be assessed on polls and estates, a general valuation shall be taken at least once in ten years."

The expenses for which assessments are to be made shall be public; those appertaining to the public service. No authority is given, either expressly or by implication, to assess for merely private purposes; as to give away, or to loan to individuals.

By article 9, § 8: "all taxes upon real estate, assessed by authority of this State, shall be apportioned and assessed equally, according to the just value thereof." Though this section applies specially to real estate, yet the very idea of taxation implies an equal apportionment and assessment upon all property, real and personal, "according to its just value." It cannot for a moment be admitted that the constitution authorizes an unequal apportionment and assessment upon real and personal estate, without any reference to its "just value."

The power to impose taxes is broad and liberal:—for roads, that there may be facilities for travel; for schools, that the people may be educated; for libraries, that their means of improvement may be increased; for the poor, lest they may suffer from want; for the police of the State, for the safety of the public, that crime may be detected; for the courts of law, that individual rights may be protected and enforced, and that crime, when proved, may receive its fitting punishment;—in fine, for any and all purposes which, in the most liberal sense, can be deemed public. "Taxation having for its only legitimate object, the raising of money for public purposes and the proper needs of government, the exaction of moneys from the citizens for other purposes, is not a proper exercise of this power, and must therefore be unauthorized." Cooley's Const. Lim., 487.

The legislature may determine the amount of taxation and select

the objects. They may exempt by general and uniform laws certain descriptions of property from taxation, and lay the burden of supporting government elsewhere.

But while there are no limits in the amount of taxation for public purposes, nor in the subject matter upon which it may be imposed, the requirement that it shall be uniform and equal upon the valuations made is universal.

The general tax act is based upon the whole valuation of the State. The taxes are apportioned among the several towns in the ratio of their respective valuations. The manufacturing capital to be exempted by this statute is included in the valuation of the town in which the investment is made. Whether there shall be an exemption or not depends upon the vote of the town. Now it is for the legislature to impose taxes and to exempt from taxation. But exemption from taxation includes the imposition of taxes. To the precise extent that one man's estate is exempted from taxation, to that same extent is there an imposition of the amount exempted upon the rest of the inhabitants. The $309.75 of which the plaintiffs would escape the payment, would be imposed upon the residue of the inhabitants of Brewer. This imposition of, and this exemption from, taxation are by the town and not by the legislature.

To have uniformity of taxation, the imposition of, and the exemption from taxation, must be by one and the same authority—that of the legislature. It is for the legislature to determine upon what subject matter taxation shall be imposed; upon land, upon loans, upon stock, &c., &c.; but the subject matter once fixed, the rule is general, and applies to all property within its provisions. So it may relieve certain species of property from taxation, as the tools of the laborer, the churches of religious societies, &c.; but upon the non-exempted estate the taxation must be uniform as the exemptions are uniform. It cannot be pretended that it would be constitutional to impose a tax on a church in A., and to exempt one of the same character in B.; to say that all or a part of the farms in the former shall be subject to a tax, while those in the latter shall be free from taxation. But if it be conceded that each

town has the right to tax part and exempt part of the property located therein, whatever its character, uniformity in relation to the subject-matter, as well as to the ratio of taxation, is at an end.

If, of the innumerable varieties of manufacture, different towns exempt different, or the same species of manufacture, the utter want of uniformity is obvious. The cotton manufacturer in one town is exempt, while in the next the woolen manufacturer pays his proportional share of the public burden. Nor is this all:—if the same kind of manufacture has been heretofore carried on as is proposed to be exempted from the payment of taxes, then in the same town in case of exemption, will be seen the remarkable spectacle of two manufacturers, engaged in the same industrial pursuits, the one with his capital freed from all public burdens, the other bearing his just and proportional share. The larger the investment of exempted capital, the heavier the burden upon the non-exempted capital. Of two competing capitalists, in the same branch of industry, one goes into the market with goods relieved from taxes, while the goods of the other bear the burden. One manufacturer is taxed for his own estate and for that which is exempted, to relieve his competing neighbor, and to enable the latter to undersell him in the common market;—and that is precisely the relation these plaintiffs bear to their competing brick makers;—a grosser inequality is hardly conceivable!

Nor is there any conceivable benefit to any one from this injustice. The town voting the exemption will be one in which the proposed manufactures thereby to be exempted could, or could not, be advantageously carried on. If the former, the very principle of self-interest will induce such manufacturer to establish himself in the town so voting, without the inducement of such vote. It would, then, be the unnecessary giving of money to one whose interests would be promoted by manufacturing in the place in question. It would be compelling the rest of the inhabitants to add to the gains of a capitalist without participation therein. If otherwise, and the town so voting is an injudicious place for the location of the manufactures to be exempted, it is an invitation to

the manufacturer to engage in a losing business with a proffer to bear the loss to the extent of the exemption. The exemption is either unnecessary or unwise.

The plaintiffs have only paid their proportional share of the taxes in the defendant town according to its valuation. The plaintiffs are not entitled to recover. To permit them to do so would be to approve unconstitutional taxation for private purposes and to sanction a system which would destroy all uniformity as to the property upon which taxes are to be imposed, and all equality as to the ratio, so far as regards the valuation. It can never be admitted that the constitution of this State permits or allows the taxation of a portion of its citizens for the private benefit of a chosen few, and that the taxes raised for such a purpose shall be assessed without reference to uniformity of taxable property, or equality of ratio.

It becomes, therefore, entirely unnecessary to consider whether or not the plaintiffs are within the provisions of the statute or the terms of the vote under which they claim exemption from taxation.

Plaintiffs nonsuit.

WALTON, DICKERSON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

CUTTING, J., concurred in the result.

PETERS, J., having been of counsel for plaintiffs, did not sit in this case, but he concurred in a similar opinion and result in *Andrews v. Oxford*, involving precisely the same question.

Simon B. Fifield *vs.* Maine Central Railroad Company.

Conversion. Delivery. Temporary track, not owned by the Company, held personalty. Trover.

Persons, who contracted to build a railroad, were the owners of certain rails and sleepers, consisting of a side track connected with the main track, used for the purpose of conveying materials upon the road bed during construction, and when the road was delivered to the Railroad Company, at the request of the Company and for their accommodation and use, the contractors consented that the track should remain a while, to be returned to the contractors anywhere upon the line of the road whenever called for; and while in that situation the rails and sleepers were seized and sold upon executions as the personal property of the contractors. *Held*, that they were not a part of the realty, but personal chattels, liable to be so seized and sold.

The officer could give and the purchaser receive, a delivery, without taking any other possession of the rails and sleepers than such as could be had without disturbing their situation as a track.

The railroad corporation would not be liable to an action for conversion of the rails by a reasonable use of them while they had no notice that the ownership of them had changed; nor by a mere non-compliance with a written demand served upon its president at a place other than where the rails were, the corporation making no objection or resistance to the plaintiff's taking possession of them.

On exceptions.

Trover for the conversion of a specified number of bars of railroad iron of various lengths, valued at $2,500, alleged to have been taken July 17, 1871, in Brooks.

Wilson, Tennant & Co. were contractors for building the Belfast and Moosehead Lake Railroad, furnishing the iron themselves. November 1, 1870, they delivered the road to the company. The iron claimed in this action was then laid down in two side tracks, fastened to the main track by frogs, and previously used by the contractors in the transportation of gravel, being moved from place to place, as occasion required; and on that day last named, they were placed in the gravel pit for a temporary purpose.

The contractors did not intend to deliver the iron in these side

tracks to the company, and had commenced to remove another side track owned by them on the line of the railroad, preparatory to removing the side tracks in controversy, and have them disconnected from the line of the road at the time of delivery, but on request of the president of the road, as a matter of accommodation, they consented to allow these two side tracks to remain there temporarily, on his promise that the rails in them should be delivered to them, free of expense, at any point on said railroad which they might designate. The B. & M. L. R. R. Co. leased their road, on the twenty-eighth day of April, 1871, to the Me. Cent. R. R. Co., and possession was given on the tenth day of May, 1871. Prior to this lease, the B. & M. L. R. R. Co. had used these side tracks, as occasion required, and subsequently thereto, the Maine Central R. R. Company used them in like manner.

Upon the nineteenth day of November, 1870, three writs were sued out of this court for Waldo County, in favor of the plaintiff and others, against Wilson, Tennant & Co., and attachments made of about two hundred and sixty bars of railroad iron, lying along the railroad, and near the west end of the Belfast lower bridge, in Belfast. Judgment was obtained in all these cases at the ensuing April term, and executions issued May 3, 1871, upon which the iron in dispute was sold to the plaintiff. It is uncertain whether these side tracks were connected with, or disconnected from, the main track at the time of these attachments; but it is admitted, that on the first day of December, 1870, they were disconnected by the B. & M. L. R. R. Co., for purposes of their own, and connected again prior to their lease to the defendants, and have ever since so remained.

The officer selling on execution made delivery by standing upon the rails and taking hold of them, and the plaintiff, also standing upon them, accepted them. At that time the rails were spiked down and fastened to the sleepers, and connected with the main track so they could not then have been removed, for lack of proper tools, there being no opposition to their removal.

A written demand was made upon the president of the defendant

company by Mr. Fifield, July 7, 1871, upon which no action was taken by the defendants. The judge ruled that the rails when attached and seized, were the attachable personal property of Wilson, Tennant & Co., and that a valid title thereto passed to the plaintiff by the sale upon execution, and ordered judgment in his favor; to which the defendants excepted, the cause having been submitted to the presiding judge with leave to except.

J. S. Rowe, for the defendants.

The railroad track, and the rails spiked to it, are fixtures. *Strickland v. Parker*, 54 Maine, 263-7; *Farmers' Loan & Trust Co. v. Hendrickson*, 25 Barb. (N. Y.) 488.

If personalty, there was no attachment, because no actual taking and retention of the rails by the officer. *Lane v. Dalton*, 5 Mass., 156.

No attachment of any iron except that in Belfast, since there was no certificate filed in the office of the town clerk of Brooks. R. S., c. 81, § 24.

J. F. Godfrey, for the plaintiff.

To hold these rails, defendants must show that they were connected with the main track, by Wilson, Tennant & Co., with the intent of making them, permanently, a part of the same. *Parsons v. Copeland*, 38 Maine, 546; *Strickland v. Parker*, 54 Maine, 263.

All the possession and delivery of which the property was, from its nature and situation, susceptible, was taken and made. *Gilbreth v. Vining*, 39 Maine, 496. At all events, sufficient was done to pass the title as against these defendants holding tortiously. *Webber v. Davis*, 44 Maine, 147.

Non-compliance with the proper demand for this property made July 7, 1871, authorizes the maintenance of this action.

PETERS, J. The defendants contend that the rails in controversy were a fixture, or part of a fixture, and not attachable as personal property.

In *Hunt v. Bay State Iron Co.*, 97 Mass., 282, it was decided, that rails delivered under an agreement that they should be laid down on a specific part of a railroad, and continue the property of the vendors until a specific price was paid for them, remained the personal property of the vendors until payment, and were not, when laid, so inseparably annexed to and incorporated with the realty that they could not be removed for non-payment of the price. The same question was decided in the same way in *Pierce v. Emery*, 32 N. H., 484, and in *Haven v. Emery*, 33 N. H., 66.

In these cases it is said that, without notice, subsequent *bona fide* purchasers of title to the road would not be affected by such private agreement, changing the natural and legal character of the road from real to personal, but would have a right to suppose that they acquired all the incidents and appurtenances, which, by the general rules of law, would result from such a purchase. How far this qualification of the general principle, stated in these cases, would obtain as a rule of construction in this State, may be an important question not now necessary to decide. The case of *Russell v. Richards*, 10 Maine, 429, and subsequent cases, establish the doctrine here, that *bona fide* purchasers, who even without notice, acquire the title to land, are not entitled to claim such structures as a house, store, or mill standing on the land at the time of purchase, if such buildings were, at such time, the property of a third person, although from their situation upon the land, they had the appearance of being a part of the realty. The case of *Russell v. Richards* does not accord with the adjudged cases in Massachusetts and New Hampshire in this respect, and the general course of decision is rather opposed to it. See enumeration of cases compared in the extensive notes to the case of *Elwes v. Mawe*, 2 Smith's Lead. Cas., 99.

We arrive at the conclusion, that the rails in controversy, were attachable as personal property, upon the ground, that they in no respect partook of the character or quality of fixtures, but that they were merely personal chattels, belonging to the original party sued; and therefore were no part of the iron laid on "the track"

of the one corporation leased to the other. Thus they were the acknowledged property of Wilson, Tennant & Co., from whom the title had not, at least, voluntarily passed. No one else claimed them; they were merely loaned to the railroad corporation, returnable whenever called for; were laid entirely for temporary and not permanent purposes; had before that time been removed from place to place, and were designed for or altogether used in, no particular locality; were no part of the road track proper, nor a necessary incident or appendage of it. Such tracks constitute a part of the means used in constructing a road, but are not a part of the structure. They are usually of hasty and rude construction, and as often as otherwise, passing over lands outside the limits of the corporation prescribed by charter. It makes no difference that the two tracks were connected by frog and switch, certainly further than the immediately connecting rail was concerned, as the others could be removed without in the least degree disturbing the uses of the road; nor, that the rails were laid upon sleepers, as these too were seized and sold with the rails. It might as well be contended that the scaffolding, ladders and appliances, used in constructing, which a mechanic temporarily leaves about a newly finished house, becomes the property of the householder, so as to pass as a fixture upon his conveyance of the real estate.

As there was no intervening change of title, it is immaterial whether the attachment was valid or not, if the rails were legally sold upon execution. The legality of this proceeding is contested by the defendants, upon the alleged ground that the officer never obtained an actual custody and possession of them. It may be, as contended by the plaintiff, that no actual delivery was necessary to establish title as between the officer and him; but the objection urged is rather that by such seizure and possession only as were taken, the officer had no rails to deliver, and could give no title. It is not pretended but that if the rails had been taken up and removed, a sufficient seizure would have been made of them; and, what essential difference would there be whether the rails,

when sold were arranged upon sleepers or were differently situated? They were as much within the control and possession of the officer in the one condition as the other. There can be no doubt that an attachment of such property, without removal, would be valid and effectual, if a return to the town clerk's office was made instead of keeping possession and custody. R. S., c. 81, § 24. *Nichols v. Patten*, 18 Maine, 231. It is not perceived why property in a condition to be attached, could not in such condition also as well be sold. An officer who sells a house or a mill as personal property, makes no removal of the building, but merely surrenders a possession of it upon the premises where it stands. The purchaser afterwards may keep such possession as he is entitled to. We deem the steps taken in this case sufficient and effectual to pass to the plaintiff a title to the rails. *Hemmenway v. Wheeler*, 14 Pick., 408; *Doty v. Gorham*, 5 Pick., 487; *Polley v. Lenox Iron Works*, 4 Allen, 329; *Vining v. Gilbreth*, 39 Maine, 496.

Has there been a conversion of the rails by the defendants? To constitute it there must have been either a wrongful taking, or wrongful detainer, or an illegal using, or a misusing, or an illegal assumption of ownership. *Polley v. Lenox Iron Works*, 2 Allen, 184. The defendants did not wrongfully take them, because it was by consent. Have not claimed to own them. Have not abused, nor is there any evidence that they have wrongfully used them; that they were used since the written demand was served, does not appear; and there is nothing in the case to show that up to that time, the defendants had any notice whatever that the title to the rails had passed from their bailors. Using the rails subsequently to the sale, could not be regarded as a wrongful act of the corporation as long as they had no notice that the title to the rails had changed. Where the owner of chattels in the possession of another as bailee to such owner, makes a sale of them to a third person without notice to the bailee and without disturbing his possession in any way, the title of the vendee is necessarily affected by and subject to the possession in the bailee, and will so remain

until by notice or in some other way the right of the bailee to continue such possession is terminated. Otherwise the undertakings of agents, trustees, bailees, carriers and the like would be exposed to hazardous and unreasonable consequences. The defendants as bailees would undoubtedly be liable to the plaintiff for the value of the use of the rails since he acquired title by the sale upon execution, but not to the extent of their value for a conversion.

Nor have the defendants wrongfully detained the rails. They were under no obligation to make an actual delivery to the plaintiff anywhere, and they have not objected to or resisted his taking them. It is said in *Dame v. Dame*, 38 N. H., 459, that a refusal to assent to the removal of a building, owned by one person, from the land of another, would not constitute conversion if no resistance was made. Here there was no refusal even, but only a non-compliance with a written demand for a delivery served upon an officer of the defendant corporation when in Bangor, while the property demanded was in Brooks, without any statement as to when or where the plaintiff desired to receive the property demanded.

There are cases in which it has been decided that a written demand left at a house or place of business, or sent through the mail and received, may be sufficient; but it is where a person is in possession under some contract or permission, and under such circumstances that a duty is imposed upon him to make a re-delivery; as, for instance, where one person has borrowed of another and has neglected to return. This case differs from the class of cases where such a demand has been held sufficient. *White v. Demary*, 2 N. H., 546; *Pattee v. Gilmore*, 18 N. H., 460; *Durgin v. Gage*, 40 N. H., 302.

The plaintiff should have undertaken to take the rails, or have forbidden the defendants to use them; or at least have notified them of a change of ownership; and a resistance to such taking, or using the property after such notice would have been evidence of

conversion; but upon the case as presented it is not established; and, on this account the result must be,

Exceptions sustained.

APPLETON, C. J., CUTTING, WALTON, DICKERSON and BARROWS, JJ., concurred.

ELI HANSON *vs.* EUROPEAN AND NORTH AMERICAN RAILWAY COMPANY.

Assault—justification of. Liability of common carriers for injuries inflicted by their servants upon passengers. Punitory damages.

Railroad Companies, as well as other common carriers, are responsible for the misconduct of their servants and for assaults and batteries by them committed upon passengers, without justification; affirming *Goddard v. G. T. R. Co.*, 57 Maine, 202.

If the servant be first assaulted he may defend himself, and may use sufficient force to overcome any unauthorized opposition to his proper performance of any duty. But the assault being over, or the resistance ended, he cannot pursue and punish the wrong doer, and will make himself and the carrier both liable if he do so.

He who seeks to justify a *prima facie* case of assault must show that no more force was used than was suited in kind and degree to the exigencies of the occasion, or the justification fails.

Disobedience to the rules of a company by a passenger will justify the carrier in refusing to carry him further; but not in maltreating him while continuing to perform the contract for his conveyance.

There is sufficient in the evidence to sustain the verdict of the jury in this case. They were authorized to award punitory damages, and, though the sum given is large, the injury was severe, and we do not think the damages evidently excessive, or that the verdict should be disturbed.

ON EXCEPTIONS AND MOTION FOR A NEW TRIAL.

TRESPASS, commenced by writ dated Sept. 1, 1871, for injuries received March 22, 1871, by the plaintiff at the hands of William Fos-

ter, then a brakeman in the employ of the defendants. Ad damnum, $10,000. The plaintiff, a man forty-three years old, a lumberman, and proprietor of the Mansion House in Bangor, left his lumbering-camp to come to that city, upon the twenty-second day of March, 1871, over the European and North American Railway, intending that "his faithful dog shall bear him company." He testified that he took the train at Mattawamkeag about four o'clock in the morning, his dog entering the passenger car with him without caution or objection from anybody as to the animal going in there; that soon after the cars started, the brakeman, Foster, came in, and as he stooped to put some wood in the stove, discovered the dog lying under a seat, and after inquiring whose it was, said it was no place for him, and he "must go off this car;" at the same time taking hold of him and dragging him out into the alley; that the plaintiff thereupon, said if he would wait till they arrived at Winn, he would take the dog off himself, but that he could not let the dog be put off while the train was in motion; that when he first addressed Foster, he clapped his hand on F.'s shoulder saying, "my friend, what is the trouble? to which F. replied, "the dog must go off;" that, upon the plaintiff's repeating that the dog could not be removed while the train was moving, Foster rose right up and grabbed Hanson by the breast; whereupon he took F. by the shoulder and set him down on a seat running parallel with the side of the car, and told him to sit there; that F. drew his feet up and kicked plaintiff, breaking the pane of glass behind him in doing so, but not releasing himself; that F. asked who was going to pay for that glass, and H. said F. should; that F. then asked H. to let him up, and plaintiff said he would if F. would behave himself; and on his saying he would, the plaintiff permitted him to rise, and turned round to go and resume his own seat; when, while his back was towards F., he suddenly received severe blows with a poker, (which F. had taken from the other side of the car, where it lay by the stove) about the head and shoulders, one being directly over the eye;—which blows constituted the assault and battery, for which this suit was brought.

The medical testimony was that Mr. Hanson had a severe wound upon the temple, and two more upon the top of his head, the external table of the skull was cracked, and his eyes badly affected, indicating danger of palsy of the optic nerve and entire loss of its functions.

The poker was of iron, about two feet long, and a half-inch in diameter. The whole occurrence did not occupy more than five minutes. The court stenographer, J. D. Pulsifer, Esq., who was in the car returning home with Judge Dickerson and others, from the term at Houlton, which had adjourned the day before, was called as a witness and corroborated the plaintiff as to the fact of his having turned and entered the aisle to resume his seat, when he was struck from behind by the brakeman.

Mr. Foster, as witness for the defendant, testified that he asked for the owner of the dog, and that he (the owner) should remove the animal, but nobody answered, so he (witness) was about to take him into the baggage car, when Hanson came up and told him to let the dog alone; that the dog should not go out of the car, and Foster said he should go; whereupon (he said) Hanson caught and twitched him over a seat and jammed his head through the window; that H. had unbuttoned his coat, adding that "his (H.'s) hand was going into his breast, and I (F.) thought I would not let him shoot me if I could help myself, and I jumped right back to the stove and picked up the poker and hit him over the head with it." He swore, also, that he "told him (H.) the rules and spoke up loud enough for him to hear;" that the superintendent discharged him (F.) the next day; but on cross-examination stated that he was, at the time of trial, employed "way up on the line of the railroad" by Charles Sawyer of Bangor, who was cutting wood for the defendants, and that the defendants paid him (F.) his wages monthly. It further appeared that the only "rules" by which he was governed, upon the subject of dogs, was that "most generally" whenever the conductor saw a dog in the passenger car he would tell Foster to take him into the baggage-car.

KENT, J., presiding at the trial, instructed the jury that "if Foster was acting in the performance of his duty as a brakeman, he would be justified in using a reasonable degree of force, necessary and proper to accomplish the removal of the dog from the car, but if he used more violence than was necessary, and inflicted upon Mr. Hanson blows that were unnecessary to perform his duty, the company would be liable, and the jury may, in that case, award punitive or exemplary damages."

The defendants requested an instruction that they were not liable if Hanson's conduct materially contributed to the injury; also that they were not liable if, while Foster was in performance of his duty, he was interrupted or resisted or assaulted by Hanson and afterwards a personal quarrel ensued between Foster and Hanson in which Foster inflicted the injury complained of.

The judge did not comply with these requests in the form proposed, but instructed the jury, that a passenger has a duty to perform as well as the company; he is bound to conduct in such a way as not to give excuse for violence to his person; that a person cannot go into the cars and violate the reasonable rules and regulations of the company or of propriety or decency. If he does so he cannot complain of the company for enforcing their regulations, because he himself is the party that has been guilty of wrong, and the company has done what it had a right to do. The obligations are not all on one side, but are mutual. If Foster was acting in performance of his duty as brakeman he would be justified in using a reasonable degree of force, necessary or proper to perform the act. But if he used more violence and inflicted blows that were unnecessary to perform that duty, the company would be liable. Was it necessary for him to use the poker in putting out the dog? The question is, during the whole matter, did he use violence more than was necessary?

No further instructions were given. The verdict was for four thousand dollars and the defendants excepted, and moved to have it set aside as against law and evidence and because the damages were excessive.

Charles P. Stetson and *J. W. Emery*, for the defendants.

I. The quarrel was personal, after the attempt to remove the dog had ceased. The assault was not within the scope of his duty; hence the defendants are not liable. *McManus v. Crickett*, 1 East, 106; *Wright v. Wilcox*, 19 Wend, 343; *Harlow v. Humiston*, 6 Cowen, 189; *Richmond v. Vanderbilt*, 1 Hill, 480 and 2 Comst. R., 482; *Thames v. Housatonic R. R. Co.*, 20 Conn., 40; *Isaacs v. 3d Av. R. R. Co.*, 47 N. Y., 122; *Roe v. Birkenhead Co.*, 6 Railway & Canal Cases, 795; *Poulton v. London Co.*, 2 Law R., 534; *Eastn. Co. v. Brown*, 6 Exch., 314; *Edwards v. London*, 5 Law R., (Com. Pleas) 545; *Walker v. South*, Id., 640; *Little Miami Co. v. Wetmore*, 18 Ohio St., 110 and 9 Am. Law Reg., 621, which is a parallel case.

II. The jury should have been told that if Hanson's conduct or want of ordinary care contributed to the injury, he was not entitled to recover. *Murphy v. Deane*, 101 Mass., 466; *Hickey v. B. & L. R. R. Co.*, 14 Allen, 429; *Todd v. O. C. R. R.*, 7 Allen, 207; *Lucas v. N. B. Co.*, 6 Gray, 64; *Gavett v. M. & L. Co.*, 16 Gray, 501; *Gonzales v. N. Y. Co.*, 38 N. Y., 440; *Bancroft v. B. & W. Co.*, 97 Mass., 275; *Nichols v. Middlesex Co.*, 106 Mass., 463; *Forsyth v. B. & A. Co.*, 103 Mass., 510; *R. R. Co. v. Aspell*, 23 Penn. St. R., 147; *P., Ft. W. & C. R. Co. v. Hinds*, 53 Penn. St. R., 512.

This is not a case for vindictive damages, as against the corporation.

Wilson & Woodward, for the plaintiff.

WALTON, J. Passenger carriers are responsible for the misconduct of their servants. Railroad companies, as well as other carriers of passengers, are responsible for assaults and batteries committed by their employees upon passengers. *Bryant v. Rich*, 106 Mass., 180, where the case of *Goddard v. Grand Trunk Railway Company*, 57 Maine, 202, is cited, and the carrier's liability, as there declared, approved.

This responsibility of course rests upon the assumption that the

battery cannot be justified. If it can be, no responsibility attaches to any one. If it cannot be, both the servant and the carrier are liable.

If the servant is first assaulted, he may defend himself. If he is resisted in the performance of any duty, he may use force sufficient to overcome the resistance. But the assault being over, or the resistance ended, he cannot pursue and punish the wrong-doer.

The rule applicable to such cases is this, that when a *prima facie* case of assault and battery is sought to be justified, it is incumbent upon the one who justifies, to show that no more force was used than the exigencies of the case called for. The force used must be suitable in kind and reasonable in degree, otherwise the justification fails. *Rogers v. Waite*, 44 Maine, 275; *Brown v. Gordon*, 1 Gray, 182; *Com. v. Clark*, 2 Met. 23; 2 Greenl. Ev. § 98.

It is the duty of the conductor, and other employees upon a train of cars, to treat the passengers with civility, and to abstain from all unnecessary violence toward them. It is also the duty of passengers to observe the rules and regulations of the company, and to conduct themselves generally so as not to invite uncivil treatment, nor provoke violence.

But it is not true that disobedience to the rules of the company will operate as a license to the employees to maltreat a passenger. If a passenger persists in violating the reasonable rules of the company, after notice of the rules, and a request to him not to act contrary to them, the carrier will have a right to rescind the contract for his conveyance, and refuse to carry him further. But he will have no right to maltreat him while continuing to perform the contract for his conveyance.

Nor is it true that an uncivil word by a passenger at the beginning of his journey, will justify the carrier's servants in treating him with insolence to the end of it. Nor is it true that an assault, or resistance to the performance of a duty, will justify the servant in pursuing and punishing the passenger, after the assault or the

resistance is over. If he does, he makes the carrier as well as himself, liable for the injury.

If, therefore, it be true, as the defendants contend, that the plaintiff was the aggressor, that he first assaulted the brakeman and resisted him in the performance of a legitimate duty, it was still a question of fact for the jury to determine, whether the brakeman did not use greater violence than the exigencies of the case demanded; whether he did not pursue the plaintiff, and inflict the blows upon his head with the iron poker, after the latter had ceased his assault, had ceased his resistance, and was returning to his seat with his back to the brakeman. Under the instructions of the court the jury must have so found, or they could not have returned a verdict for the plaintiff; and in our judgment the evidence fully justified the finding.

Nor are we satisfied that the damages assessed by the jury are so clearly excessive as to justify us in setting aside their verdict. It is true that the damages are large, but it is equally true that the injury was a very severe one.

The right of the jury to give exemplary damages in this class of cases, was first declared in this state in *Pike v. Dilling*, 48 Maine, 539. The whole doctrine of exemplary damages was again fully and carefully examined in *Goddard v. Grand Trunk Railway Co.*, 57 Maine, 202, and its application to railroad companies for the wilful and malicious acts of their servants, affirmed. It is not now an open question in this State, and will not be further discussed.

We think the case was submitted to the jury upon correct principles of law, and that their verdict is neither against law, nor the weight of evidence; nor are we satisfied that the damages are so clearly excessive, as to justify us in setting the verdict aside on that ground. The verdict must therefore stand.

Motion and exceptions overruled.

Appleton, C. J., Cutting, Dickerson and Barrows, JJ., concurred.

Peters, J., having been of counsel, did not sit.

WILLIAM PLAISTED, and another, *vs.* INHABITANTS OF LINCOLN.

Contract. Municipal vote. Tax.

The defendants voted to exempt from taxation any improvements "upon the water-power" on a stream, by erections for manufacturing purposes; the plaintiffs erected a tannery, to be operated by steam, on the bank of the stream, and purchased the right to obtain water for the use of the tannery, from a mill-pond thereon, by means of a force-pump and pipe:—*Held*, that the tannery is not exempted from taxation by such vote, not coming within its terms or spirit.

ON FACTS AGREED.

ASSUMPSIT to recover one hundred dollars paid under protest, November 9, 1871, for taxes assessed that year upon the plaintiffs' tannery in Lincoln. That town voted, on the twenty-sixth day of April, 1869, "to exempt from taxation for the term of ten years from date, any improvements that may be made upon the water-power on the Mattanawcook stream in the town of Lincoln, by the erection of mills and buildings for manufacturing purposes," &c. June 29, 1870, the plaintiffs purchased of the Mattanawcook Mill Company a lot of land in Lincoln upon the bank of the mill-pond of that corporation, with the privilege of laying pipes and drawing water from the pond, for the use of the tannery which was erected upon said land at an expense of $40,000, and operated by steam power. The water is drawn through six hundred feet of 2 1-2 and 3 inch pipe, and used in prosecution of the business, but not as a motor. If, in the opinion of the court, the tannery was, under said vote of the town, exempt from taxation, judgment was to be rendered for the plaintiffs for $100, and interest from Nov. 9, 1871; otherwise the plaintiffs were to be nonsuit.

H. M. Plaisted, for the plaintiffs.

W. C. Clark, for the defendants.

PETERS, J. We are of opinion that the tannery of the plaintiffs is not within the description of property designed by the vote of the town, to be exempted from taxation. It is evident that the object of the town, was to induce an investment of capital into a development and use of the water power on the Mattanawcook stream, for manufacturing purposes. The terms of the vote require that the improvements shall be made "upon the water power" of that stream. The plaintiffs do not contribute to such a result. They employ a steam power, and not a water power. Their works are above instead of below the dams, which render the water power of the stream available for manufacturing. To be sure, they take up for their use a quantity of water from the mill-pond; but it is not shown how much; nor does it appear but that the same amount could as easily be drawn by them from the stream in its natural condition, without any dams or improvements thereon. Strictly speaking, the plaintiffs, instead of making "any improvements upon the water-power of the Mattanawcook stream," as contemplated by the vote, actually decrease the volume, and probably the value, of the stream as a water power, by using a portion of it for other purposes.

The further question, whether the vote was void, as contravening constitutional provisions, is therefore immaterial.

Plaintiffs nonsuit.

APPLETON, C. J., CUTTING, WALTON, DICKERSON, and BARROWS, JJ., concurred.

SAMUEL W. POLLARD and wife *vs.* GRAND TRUNK RAILWAY COMPANY.

New trial. Verdict.

A verdict which has no other support than the testimony of a deeply interested party to the suit, in opposition to that of five disinterested, intelligent and unimpeached witnesses, will be regarded as so manifestly against the weight of evidence, that a new trial will be granted.

ON MOTION FOR A NEW TRIAL, upon the ground that the verdict was against the law and the evidence, and the weight of the evidence.

Wilson & Woodard, for the plaintiffs.

Charles P. Stetson and J. W. Emery, for the defendants.

WALTON, J. A verdict clearly against the weight of evidence should be set aside, and a new trial granted.

A verdict which has no other support than the testimony of a deeply interested party to the suit, in opposition to the positive testimony of five intelligent, unimpeached and disinterested witnesses, called by the other party, must be regarded as clearly, manifestly, against the weight of evidence.

These plaintiffs, (husband and wife) have obtained a verdict for $1300 against the Grand Trunk Railway Company of Canada, for personal injuries received by the wife, while attempting to get on to the defendants' train of cars at Coaticook station in Canada.

The declaration avers that with the consent of the conductor, Mrs. Pollard left the cars at the station named, to surrender a check for a trunk which she wished to leave at that place; and that notwithstanding such consent, he did not detain the train long enough for her to transact said business, but ordered the passengers

on board so soon that she, in trying to get on board, was thrown down upon the track and injured.

In support of the action, Mrs. Pollard testified that when the train stopped at Coaticook, she went immediately to the baggage car; that just as she got there, she heard the call "all aboard," and that without stopping to surrender her check, she turned and walked back to the car she had got out of; that just as she took hold of the outside rail of the car, the train started back; that she lost her balance, and swung round, and fell. She says, "I had on a woolen glove, which slipped, so that I fell directly across the track."

She was rescued from her perilous situation by some gentlemen present, so that she received no other injury than some bruises and a sprained ankle.

If this testimony of Mrs. Pollard were uncontradicted, it would be difficult to find enough in it to make the defendants liable for her injury. If it were true, that she had actually reached the steps of the car and taken hold of the rail before the train moved, it would seem as if ordinary care and prudence would have enabled her to reach the platform in safety.

But it is unnecessary to consider this point, for we are satisfied that her account of the transaction is not true. She is contradicted by the two gentlemen who rescued her from her perilous situation, and without whose aid she would probably have been run over and killed, and by three or four other witnesses, in every material particular.

It is proved beyond a reasonable doubt that the train was not standing still when Mrs. Pollard first attempted to get on; that it was then in motion, and had acquired such a rate of speed as to make it in the highest degree imprudent for her to attempt to get on.

It is also proved beyond a reasonable doubt, that the train stopped at that station for a sufficient length of time to enable her, with the exercise of ordinary diligence, to go to the baggage-car and surrender her check, and return to her seat, without hurrying.

It must also be borne in mind that Mrs. Pollard is a deeply interested witness; that she attempts to support her claim against the railroad company by her own testimony alone; that she is corroborated by no one; that, on the contrary, she is contradicted in every material particular by every other witness to the transaction; that these witnesses are apparently intelligent, disinterested, and had as good an opportunity to know the truth as she had; and that it is also shown, by at least two witnesses, that her testimony upon the stand is in conflict with her own account of the transaction given immediately after the accident occurred.

To allow a verdict to stand upon the sole testimony of such a witness, thus contradicted, would be a mockery of justice.

Motion sustained.

APPLETON, C. J., CUTTING, DICKERSON and BARROWS, JJ., concurred.

PETERS, J. did not sit, having been of counsel.

AMOS RINES, in equity, *vs.* LUCY A. BACHELDER and others.

Costs in chancery. Equity. Purchaser pendente lite—how affected by decree. Resulting trust—proof and effect of.

The heirs of a person who received a conveyance of real estate at the request of the party who paid out of his own money and means the consideration of such conveyance, are liable in equity to be required to convey the property to such party, even though they may, since the commencement of the process to compel such conveyance, have sold and conveyed to some one else.

One who buys "*pendente lite*," takes a conveyance which is liable to be avoided by the decree in the pending suit, and it is not necessary that he should be made a party to it.

If such purchaser has erected buildings upon the land before he took his deed, with the consent of the party holding the legal title, he will be entitled to a reasonable time to remove them as his own personal property. They do not, under such circumstances, become the property of the *cestui que trust.*

Heirs who are thus called upon, on the ground of a resulting trust, to convey property of which their ancestor held the legal title, ought to be furnished with proof of the validity of the claim, beyond the mere assertion of the party who sets it up, sufficient to satisfy reasonable minds.

In the absence of such proof, and when considerable time elapses before the commencement of a suit, to enforce the claim of the *cestui que trust*, if they, believing in good faith that the property is theirs, free of any trust, make valuable improvements thereon, they will be entitled to be reimbursed by the *cestui que trust* for the increase in value by reason of such improvements, and to the cost of all necessary repairs to prevent waste, and will be subjected to no costs, unless, by a captious and unreasonable defence, they make needless cost for the complainant.

BILL IN EQUITY.

Amos Rines represents that May 7, 1855, Haven Rundlett owned certain real estate in Athens known as "the Davis farm," and on that day conveyed it to Charles F. H. Greene to hold in trust for Rines, who paid the whole consideration therefor and entered upon and occupied the estate, taking all its rents and profits till Nov. 26, 1856, when, at Rines' request, Greene conveyed it to Samuel Pratt, a brother-in-law of Rines, and father of Lucy A. Bachelder and Ellen Pratt, the respondents, and sole heirs at law of said Samuel, who died suddenly in the fall of 1863.

After holding the estate conveyed to him by Greene till Nov. 14, 1857, Pratt conveyed it, at Rines' request, to one Coombs, taking a deed of the Coombs farm in Oldtown in exchange for it. Pratt leased this estate, accounting to the complainant for the rents and profits for several years, and for nearly all received before the death of Pratt, who held it in trust for Rines all this time; and the complainant charged in his bill that Pratt's heirs inherited the estate from their father subject to this same trust in his favor.

The respondents answered that they knew nothing of the facts alleged in the bill, and required proof of them, as they had learned that Rines, on several occasions, when interrogated on oath, had denied that he had any interest, legal or equitable, in the estate now claimed by him; therefore they required proof of the charges of his bill.

Testimony was introduced as to the statements made by Rines

in a deposition taken to be used in an action brought by Pratt against the sheriff, for taking certain produce and stock as the property of Rines upon an execution against him (Rines); but, upon production of the deposition, it appeared that this particular real estate was not mentioned. From the depositions of Greene, Coombs and others, it was evident that the negotiations for the different farms, were conducted by Rines, who paid the consideration, and that Pratt recognized the fact that he only held them as trustee for Rines. It was contended for the defense that the land was so held in order to defraud Rines' creditors; but the complainants argued that, as between Rines and Pratt or his representatives, this was immaterial if true; and, at the same time, denied it to be true.

D. D. Stewart, for the complainant.

A. W. Paine, for the respondents.

Barrows, J. The plaintiff brings his bill in equity to compel the respondents, who are the heirs at law and widow of Samuel Pratt, to convey to him certain real estate situated in Oldtown, upon the ground that he bought and paid for the property with his own money and means, and had the conveyance made by the grantor to Pratt, who thereupon took and held the estate during the remainder of his life, subject to a resulting trust in favor of this plaintiff, and that Pratt's sudden death prevented his conveying the same to the plaintiff, whereupon the legal title descended to the respondents; subject, however, to the same trust.

The general principles pertaining to this class of suits have been so recently discussed in this State in the case of *Dudley v. Bachelder*, 53 Maine, 403, and the cases there cited, that reiteration seems needless. Clear statements of these principles, and abundant citations of cases similar in their general description, may also be found in Perry on Trusts, §§ 126, 133, 134, 137, 138, 139.

Not controverting them, the learned counsel for the respondents, labors with his wonted diligence to make it appear from the evidence, that although the plaintiff made the trade for this prop-

erty and for that which was given in exchange and part payment for it, Pratt paid all or part of the consideration for the conveyance, out of his own money and means, only verbally agreeing with Rines to convey to him when he should be reimbursed for his advances. He relies mainly upon testimony given by the plaintiff in relation to transactions between himself and Pratt, which appear to be entirely distinct from, and independent of the one out of which the present claim grows. It totally fails to rebut the testimony given by Greene and other unimpeached and uncontradicted witnesses produced by the plaintiff, tending to establish the state of facts claimed in the bill. Perhaps it tends to excite a suspicion that this transaction, as well as those, was designed on the part of the plaintiff to enable him more effectually to defeat and delay his creditors. But the testimony fails to establish that fact, and the respondents totally ignore it, claiming through their counsel that Pratt acted throughout in good faith, receiving his deed and holding the property only to secure his own advances, and ever ready to convey it when they should be repaid. Failing to rebut the evidence adduced by the plaintiff to show that this purchase was made altogether with his money and means, the defence must fail.

But we must not be considered, in sustaining the bill, as affirming the proposition upon which the plaintiff's counsel falls back,—that, if it appeared that the conveyance to Pratt was made in order to keep the property from the creditors of the plaintiff, it would be, as between these parties, wholly immaterial. The truth of such a proposition must depend upon the relative position of the parties in the suit. If a voluntary conveyance is made for some illegal or fraudulent purpose, e. g., to delay, hinder or defraud creditors, no trust will result to the grantor. Perry on Trusts, § 165. In such a case, both law and equity will leave the parties to the transaction, precisely where their own acts and deeds leave them.

It is conceded in the bill that Pratt accounted to the plaintiff for most of the rent of the premises which accrued during his lifetime. It appears that the plaintiff made known his claim to the respondents very shortly after Pratt's decease. They have remained in

possession for quite a number of years since that time, and must account to the *cestui que trust* for the rents and profits. It appears that they have laid out a very considerable sum in repairs and improvements; that in 1866 or 1867, apparently before the commencement of this suit in December, 1867, they bargained the premises to James Burnham, who thereupon proceeded to erect other buildings upon the lot with the assent of the respondents, but got no deed of the same from them until 1870. This conveyance having been made *pendente lite* can have no effect to prevent the respondents from being required ultimately to convey to the plaintiff. He who takes a title under such circumstances takes the risk of having it avoided by the decree of the court in the pending suit. *Snowman v. Harford*, 57 Maine, 397, and cases there cited. *Crooker v. Crooker*, id., 395.

But Burnham having placed his buildings upon the land with the consent of the party holding the legal title, should have a reasonable time to remove them as his own personal property, to which the *cestui que trust* acquired no title by reason of their being placed there. The respondents must account to the *cestui que trust* for the use of the lot for such additional buildings during the time they hold the title, and for the damage to the realty, if any, caused by their removal. It remains to be determined what equity requires with regard to the repairs and improvements made by the respondents themselves, and the question of costs.

A portion of the repairs seems to have been necessary to prevent waste, and for these, there can be no doubt that the respondents should be reimbursed.

"It is said by Lord King to be a rule, that the *cestui que trust* ought to save the trustees harmless as to all damages relating to the trust; therefore, when a trustee has honestly and fairly, without any probability of being a gainer, laid out money by which the *cestui que trust* is benefited, he ought to be repaid." Greenl. Cruise, Tit. 12, c. 4, § 48.

The plaintiff does not appear to have accompanied the notice of his claim which he gave to the respondents, with the exhibition of

anything like decisive evidence of its validity, and he delayed for four years to bring this suit, while he must have known that the heirs were using the property as their own and while these improvements were in progress. It has been very properly said that "courts will not enforce a resulting trust after a great lapse of time, or laches on the part of the supposed *cestui que trust*, especially when it appears that the supposed nominal purchaser has occupied and enjoyed the estate." Perry on Trusts, 112, § 141.

While we do not think the delay or neglect here so great as to preclude the enforcement of the trust, seeing that Samuel Pratt, the father, is shown to have held for the benefit of the plaintiff, and to have expressed his readiness to convey to him, yet considering that heirs not cognizant of the facts, could not prudently yield a ready assent to a claim of this description unsupported by cogent proof when it was presented to them, and that they probably relied in good faith upon the mistaken belief of their father's legal advisor and administrator, we are of opinion that the plaintiff, who has thus delayed his suit ought not to be the gainer by reason of improvements made before the assertion of his claim was fortified by the production of the proof upon which we sustain it.

Accordingly, the master who must be appointed to ascertain the rents and profits for which the respondents should account, will be instructed to find the actual cost of the repairs and improvements made by the respondents, and also ascertain how much the value of the estate has been enhanced by the improvements. For all repairs necessary to prevent waste, the respondents will be entitled to be fully reimbursed, and for the actual increase of value in the estate by reason of the improvements. If these sums exceed the rents and profits accrued, the decree for a conveyance must be conditioned upon the plaintiff's paying or securing the payment of the balance found against him. If on the other hand, they prove to be less than the amount for which the respondents must account, he will be entitled to execution for the balance in his favor.

We cannot hold the plaintiff altogether free from fault in so conducting his transactions with Samuel Pratt, as to leave the

respondents so long in a state of doubt and uncertainty as to the genuineness of his claim. All things considered, he should take no costs against them up to the filing of the rescript which goes with this opinion. His right to costs henceforth must await the developments of the master's report, and may depend upon the course which shall be pursued by the respondents.

Bill sustained. Master to be appointed. Decree for conveyance to be ultimately made in conformity herewith.

APPLETON, C. J., CUTTING, WALTON, DICKERSON and PETERS, JJ., concurred.

JOHN ROGERS *vs.* INHABITANTS OF NEWPORT.

Defective way. Proximate cause. R. S., c. 18, §§ 40, 46 and 65. *Way—must be so passable as to be safe.*

In an action against a town for an injury on a highway caused by a snow-drift therein, the law regards the direct and not the remote cause of the injury; and if the drift alone directly caused the injury, and certain deposits of wood and cedar within the limits of the highway contributed to the formation of the drift, the wood and cedar would not be defects for which the town would be responsible, but the drift might be such a defect.

R. S., c. 18, § 46, requiring highway surveyors forthwith to make the highways within their limits "passable," when they become blocked up or incumbered with snow, does not repeal, supersede or qualify § 40 of the same chapter in respect to such highways, which requires towns to keep their ways safe and convenient for travellers, nor does it exempt towns from the liability imposed by § 65.

Highways are not only to be kept "passable," but they must be so passable that travellers may use them with safety and convenience by the exercise of ordinary care.

On exceptions.

Trespass on the case to recover amount of damage sustained by plaintiff through the over-setting and breaking of his sleigh in a snow-drift, upon the highway leading from Corinna through Newport to Stetson. The location of the way, notice of its condition, such as it was, and the injury were admitted; but it was denied that there was any defect in the road, or that the plaintiff exercised due and ordinary care in driving. It appeared that there was a pile of cedar lying outside of the wrought portion of the road, but within its limits as fenced out, and a range of cord-wood, about fifty feet long, piled upon "the shoulder of the turnpiked road," extending its length four feet into that portion of the public way lying between the ditches, and dedicated to public travel. These two piles were about a rod apart. Before or since that time no drifting of snow had ever been known at that point. The accident happened on Monday. The first of the previous week there had been a snow-storm, prior to which this road had been safe and convenient, and much travelled.

The wood had been hauled and piled there within a week or two before the storm, forming a drift extending in width from the cedar to the wood-pile, and lengthwise across the whole road. The snow had not drifted for a long distance in either direction from this spot. On the next day after the storm, the highway surveyor of that district broke out the road with a common wood-sled turned over, and a log eight feet long lashed to it. When the sled struck this drift it slewed, making a curve in the travelled path around the end of the drift as left; thus, though the road was made passable for the width of eight or ten feet around this drift, it changed the direction of the travel, crowding it to the opposite side of the way.

Upon the day of the accident, Mr. Rogers was driving along southward, at a rate of about five miles an hour, in a north-east hail storm, a friend with him holding an umbrella so as to protect them. The plaintiff did not see the drift; whether prevented by the umbrella or not he did not know. He sat upon the right side

of the sleigh and the drift was on his left, extending four or five feet by the wood-pile into the road, and its end toward the road was six or eight feet wide and two feet high, by a perpendicular embankment. The sleigh-runner hit this embankment, about six inches from the edge or end, thus tipping the sleigh over, and causing the injury. From the end toward the opposite side, there was a passable road, broken out from eight to ten feet, with nothing to prevent the travel from going close to the wood the whole length of the pile. After passing this drift there was no obstruction within that portion of the road dedicated to public travel.

The plaintiff desired to have the jury instructed, that if these deposits of wood and cedar caused the drift, and the drift caused the injury, then the wood and cedar were defects for which the town would be liable, and that the road must be safe and convenient for the public travel; this instruction was refused, and the jury were told, that if the drift alone directly caused the injury, and the wood and cedar merely contributed to the formation of the drift, the week before, they should not consider the wood and cedar as in the case; and that the town would not be responsible in this action for their being there. The judge read to the jury the forty-sixth section of the eighteenth chapter of the Revised Statutes, and instructed them, that if the defendants had complied with the provisions of that section, they were not liable under the fortieth section of that chapter. To the instruction given and that refused, the plaintiff excepted.

Lewis Barker, for the plaintiff.

E. Walker and *Geo. W. Whitney*, for the defendants, cited *Moulton v. Sanford*, 51 Maine, 127; *Marble v. Worcester*, 4 Gray, 395; *Jenks v. Wilbraham*, 11 Gray, 142; *McDonald v. Snelling*, 14 Allen, 290.

Dickerson, J. Action to recover damages for an injury to the plaintiff's sleigh, by reason of a snow-drift upon the highway of the defendants.

There was evidence in the case, that there was a pile of cedar lying outside the turnpiked portion of the road, but within the limits of the highway, and a pile of cord wood on the shoulder of the road, extending some four feet into the travelled part of it. It further appeared in evidence that a snow-drift was formed, extending from the pile of cedar to the wood pile, and thence across the road.

The learned counsel for the plaintiff requested the court to instruct the jury that if those deposits of wood and cedar caused the drift, and the drift caused the injury, the wood and cedar were defects for which the town would be liable, and that the road must be safe and convenient for travellers.

The justice presiding refused to give the requested instruction, but instructed the jury that if the drift directly caused the injury, and the wood and cedar merely contributed to the formation of the drift the week before, they should not consider the wood and cedar in the case, and that the town would not in any way be responsible in this action for their being there.

The burden was upon the plaintiff to prove, not the cause, but the existence of the defect. With the former he had nothing to do; his right to maintain this action did not depend, in any respect, upon the cedar and wood-pile. If the snow-drift which was there constituted a defect, and alone caused the injury, the rights, duties and liabilities of the town in respect to it would be the same whether the cedar and wood-pile contributed to produce it or not. The law in such cases regards proximate, not remote causes. The sleigh did not come in contact with the wood-pile, but with the snow-drift which was the proximate cause, if cause it was, of the injury. The justice presiding, therefore, properly refused to give the first branch of the requested instruction, and gave other appropriate instructions.

But the counsel for the plaintiff further requested the court to instruct the jury, that the road must be safe and convenient for the public travel. This request was not complied with, but they were instructed that if the defendants had complied with R. S., c. 18,

§ 46, they were not liable under the fortieth section of the same chapter.

Section 46 provides that where the ways within the limits of a highway surveyor are blocked up or incumbered with snow, he shall forthwith cause so much of it to be removed or trodden down, as will render them "passable." Section 40 requires that highways townways and streets, legally established, shall be opened and kept in repair so that they are safe and convenient for travellers with horses, teams and carriages. Section 65 of the same chapter gives a party who receives any injury to his person, or suffers any damage in his property through any defect or want of repair in any highway, a right of action against the town obliged by law to repair the same.

Section 46 was not intended to operate as a substitute for, or a repeal of section 40 in the specified class of cases, nor to exempt towns from the liability imposed by section 65. The duty of towns "to keep their highways safe and convenient" is not conditioned upon the performance or non-performance by the surveyor of highways of the duty imposed upon him by section 46, but it is imperative. The provision in section 46 is a precautionary measure to prevent travellers from being subjected to nnnecessary inconvenience and delay by reason of the way remaining impassable from a specified cause; not to shield the town from liability when it allows the way, though "passable," to remain defective, unsafe and inconvenient. It is not enough that towns make their ways passable; they may be passable when they can only be used by the exercise of extraordinary care which is a higher degree of care than the law requires. Few ways are absolutely impassable at any season of the year. Highways are not only to be made and kept "passable," but they must be so "passable" that travellers may use them with safety and convenience by the exercise of ordinary care. The terms "safe and convenient" and "passable" are not synonymous; it is obvious that a highway may be passable, and at the same time, not safe and convenient. The requested instruction that "the road must be safe and convenient for the public travel"

contains a principle of law strictly applicable to the issue, and should have been given. *Exceptions sustained.*

WALTON and PETERS, JJ., concurred.

BARROWS and DANFORTH, JJ., concurred in the result.

APPLETON, C. J., and CUTTING, J., did not concur.

STATE OF MAINE *vs.* MASON A. WALTON.

Collector of taxes. Embezzlement. Indictment. Pleading. R. S., c. 120, § 7. Tax.

It is not necessary in an indictment against a town officer for the embezzlement or fraudulent conversion to his own use of moneys in his possession and under his control by virtue of his office, to allege to whom the money belonged or that it was the property of another.

R. S., c. 120, § 7, declares three different classes of offenders liable to be deemed guilty of larceny. It is not necessary to the validity of an indictment under the provisions there found to set out the various facts that would be necessary to constitute larceny as elsewhere defined. It is sufficient to allege the acts and facts which that section declares shall be deemed larceny.

A town collector of taxes is a public officer within the meaning of that section, and cannot successfully object to the maintenance of an indictment under that section for the fraudulent conversion to his own use of moneys which have come into his possession and under his control, by virtue of his office, that he and his sureties are liable to account to the town for the money which he collects for it according to his bond, and that the money is not the town's money until it is paid into the treasury.

ON EXCEPTIONS.

INDICTMENT alleging that the defendant, on the first day of December, 1871, was a public officer, to wit, the collector of taxes of the town of Alton, and that, by virtue of and while employed in that office, he received and had in his possession and control, nine hundred dollars of the property of the inhabitants of Alton, and fraudulently embezzled and converted it to his own use; the

second count averred that the defendant not being an apprentice, nor below the age of sixteen years, having in his possession and under his care by virtue of his employment, bank-bills, the property of said inhabitants, of the value of one thousand dollars, did embezzle and convert the same to his own use, and took and secreted these bills with the intent to embezzle them and convert them to his own use. The first count concluded with an averment that by such embezzlement the defendant did feloniously steal, take and carry away the money so in his custody as collector. A demurrer filed by the defendant was overruled, and he excepted. It was agreed that, if his exceptions were overruled, he might plead anew.

A. Sanborn and *J. H. Hilliard*, for the defendant.

R. S., c. 120, § 7, does not mention a collector of taxes *eo nomine*; nor does such an officer come within the spirit of the act, or the mischief which the act was designed to prevent.

The money though held by him in consequence of his official position, was his own and not the property of the town of Alton, though it might be expected to become so by payment into its treasury; and to secure such payment the defendant had given bond satisfactory to the town.

A tax is not a debt; hence, cannot be offset against a claim of the person assessed against the town. *Pierce v. Boston*, 3 Metc., 520. It is *sui generis*. If not a debt due the town from the individuals assessed, then it is not one when collected and in the hands of the collector.

The only exception is that by R. S., c. 6, § 113, in certain cases it is made a debt to the collector, and not to the town, and he is authorized to sue for and recover it in his own name. His collections, then, are his own,—like those of an auctioneer, or any other bill-collector—so long as they are in his hands. *Com. v. Stearns*, 2 Metc., 343; *Colerain v. Bell*, 9 Metc., 499; *Hancock v. Hazzard*, 12 Cush., 112; *Packard v. Stinger*, 36 Ind., in Am. Law Reg. for June, 1873, page 406; *Look v. Industry*, 51 Maine, 375.

The tax-payer, illegally assessed or distrained, in order to recover, must prove the money paid into the treasury of the town. *Lincoln v. Worcester*, 8 Cush., 59.

It is manifestly unjust to say that the collector is liable for the money, though lost, because it is his money, and liable as an embezzler, if he does not pay it over promptly, because it is the town's.

H. M. Plaisted, Attorney General, and *Charles P. Stetson*, County Attorney, for the State.

BARROWS, J. Section seven of chapter one hundred and twenty of the Revised Statutes declares that offenders of three distinct classes, who would otherwise at most be held liable for embezzlement or breach of trust, or for fraudulent connivance in such breach of trust, shall be deemed guilty of larceny.

I. Embezzlement, or the fraudulent conversion to his own use, or the taking and secreting with that intent of the property of another, in the possession of the offender, or under his care by virtue of his employment, committed without the consent of his employer or master by an officer, agent, clerk or servant of a person, copartnership or corporation, the offender not being an apprentice, nor less than sixteen years of age, is to be deemed larceny.

II. "If a public officer, or an agent, clerk or servant of a public officer, embezzles or fraudulently converts to his own use, or loans, or permits any person to have or use for his own benefit, without the authority of law, any money in his possession or under his control, by virtue of his office or employment by such officer, he shall be deemed guilty of larceny, and be punished accordingly."

III. The same result follows as to him who, without authority of law and with intent to convert the same to his own use, knowingly receives from a public officer, or his clerk, servant or agent, any money in the possession or under the control of such officer by virtue of his office.

More or less of the elements necessary to constitute the crime

of larceny, as elsewhere defined, are wanting in each of these cases. But it was clearly competent for the law-making power to extend the definition of the offence, so as to include these cognate cases. This they have done. In order to ascertain whether an indictment can be maintained against an offender of either of these three classes, we must look to see whether it includes allegations of those facts which the legislature have declared essential to constitute the offence which it purports to charge. Beyond these we are not to seek. It is not for the court to require either allegation or proof of that which the legislature have omitted in their definition of the crime, nor to carry that which is descriptive of one class of offences, into either of the others, as an essential requisite.

When the legislature is declaring what kind of embezzlement or fraudulent conversion shall be deemed larceny in an officer, agent, clerk or servant of a person, copartnership or corporation, it is careful to say that it must be of the property of another, in the possession or under the care of the offender by virtue of his employment, and that it must be shown that it was without the consent of his employer or master, and that the offender is not an apprentice, nor less than sixteen years old; and these various conditions must appear in the indictment and be supported by the proof when a case of this class is under consideration.

But several of these conditions are omitted in declaring what embezzlements or fraudulent conversions by a public officer shall constitute larceny. As against such an officer, it is sufficient to allege and prove the fraudulent conversion to his own use of any money that comes into his possession or under his control by virtue of his office. As against a public officer the allegation of these acts and facts will suffice without going further, and without alleging that the money was the property of another, or whose money it was, or that the offender was not an apprentice, nor less than sixteen years old, or that he appropriated the money without the consent of any of the inhabitants of the municipal corporation whose officer he was. We need not follow the ingenious refinements of the defendant's counsel upon the question of the owner-

ship of the money, nor consider here the effect of the decisions that the collector must account for it to the town, according to the terms of his bond, though it has been lost without his fault, and other decisions that seem to imply that in a certain sense, and for certain purposes, he may be considered the owner of it himself. The questions here are—was he a public officer? Has he fraudulently converted to his own use, money which he had in his possession and under his control, by virtue of his office? It is set forth in the indictment, that the defendant, being a public officer, to wit, the collector of taxes of the town of Alton, did, by virtue of his office and while employed therein, receive and have in his possession, certain money to a large amount, to wit, the amount of nine hundred dollars, of the property of the town of Alton, and the said money did then and there unlawfully and fraudulently embezzle and convert to his own use, and so did steal, take and carry away the same. The defendant's demurrer admits the facts alleged, and his counsel might as well attempt to argue that there was no larceny, because in the very nature of the case, there was no actual taking and carrying away of the money from the possession of the inhabitants of Alton, as because it was not, perhaps, to all technical intents and purposes, their property before it had been paid in to their treasurer. It is not necessary for us to decide whether it was or not. It may have been precisely because of technical difficulties in determining to whom money thus situated belongs that the legislature omitted to require it. It is guarded by this statute because to whomsoever it belonged, it came to this defendant's possession, and into his control, by virtue of his office. When thus received, this statute makes the fraudulent appropriation of it to his own use, in violation of his official oath, tantamount to larceny, and punishable as such, though there is no felonious taking and asportation from the possession of the owner, and though the fraudulent official and his sureties may be held bound by his contract with the town to account for it under circumstances when an ordinary bailee would be excused. If necessary, the allegation as to the ownership of the money, might be treated

as surplusage. It was the fraudulent breach of official duty and trust, which but for this statute, could not be held to amount to larceny that the legislature aimed to punish. That collectors of taxes are public officers there can be no doubt. They are specially mentioned among those that are to be chosen at the annual town-meetings in pursuance of R. S., c. 3, § 10. Even in the absence of such special statutory recognition, they have been so regarded, and held liable to the penal provisions of statutes of like character with that under which this indictment is found.

The case of *The People v. Bedell*, 2 Hill, 196, arose under a New York Statute which provides that "where any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every wilful neglect to perform such duty * * * shall be a misdemeanor punishable as herein described."

The defendant was appointed collector of the Geneva Village Corporation by the trustees, and gave bonds for the faithful discharge of his duty. Warrants and tax-bills were given him for collection. He finally went off a defaulter for from three to five hundred dollars, and was indicted under this statute. It was objected that the charter of the village corporation did not authorize the appointment by the trustees; and, if it did, defendant was not a public officer within the meaning of the statute. The collector is not mentioned among the officers to be chosen for the corporation, but power is given to the trustees to appoint one attorney, street commissioner, fire-wardens and certain other officers specially named, and also "such other officers as shall be authorized by this act." The collector is not named in any list of officers in the act; but one section provides that "the collector shall collect all moneys which shall be ordered by the corporation to be raised by tax." Hereupon, in an opinion drawn by *Bronson*, J., the court held: I. That the collector was one of the officers authorized by the act, and might be appointed by the trustees. II. That he was a public officer; and that officers of such a corporation are "none the less public officers because their powers are con-

fined in narrow territorial limits." The court remark that he was required to take the oath and to give bail for the faithful performance of his duties, "and he was not the less a public officer because the office is not mentioned in the statute enumeration and classification of public officers."

In the case before us the defendant was a public officer. He admits by the demurrer the fraudulent conversion to his own use of money which he had in his possession and under his control, by virtue of his office. The demurrer cannot be sustained.

According to the agreement entered on the docket when it was filed, he may have leave to withdraw it and plead anew.

Exceptions overruled.

APPLETON, C. J., CUTTING, WALTON, DICKERSON and PETERS, JJ., concurred.

NATHANIEL WILSON *vs.* EUROPEAN & NO. AMERICAN R. R. Co.

Partition. R. S., c. 88, § 17.

On a petition for partition the law does not authorize the commissioners to set off to one of the land owners, against his will, more than his proportionate share of the land, and require him to pay the difference in value in money to the other owners.

ON EXCEPTIONS.

PETITION FOR PARTITION of a parcel of land owned in common by the parties, one-third by the plaintiff and two-thirds by the defendants. The commissioners awarded one portion of the estate to the defendants and another portion to the plaintiff and that the former also pay the latter $400 in money. When the plaintiff offered the report for acceptance the defendants filed written objections which were overruled and its acceptance ordered; to which order the defendants excepted.

Charles P. Stetson, for the defendants.

We could not be compelled to buy land we did not want against our will. *Codman v. Tinkham*, 15 Pick., 364.

N. Wilson pro se. *Hanson v. Willard*, 12 Mass., 142; *Codman v. Tinkham*, 15 Pick., 364; *Wood v. Little*, 35 Maine, 107.

WALTON, J. The question is whether, in proceedings under a petition for partition, one of the part owners can be compelled, against his will, to take more than his share of the estate, and pay for the excess to another owner who has less than his share. The question is not whether he may be allowed to do so, if he is willing, but whether he can be compelled to do so, whether he is willing or not. The statute relied upon in support of such an authority is as follows:

"When any parcel of the estate to be divided is of greater value than either party's share, and cannot be divided without great inconvenience, it may be assigned to one party by his paying the sum of money awarded to the parties who have less than their share; but the report shall not be accepted, until the sums so awarded are paid or secured to the satisfaction of the parties entitled thereto." R. S., c. 88, § 17.

It will be noticed that the language of this section is permissive, not mandatory. "May be assigned," not "shall be." "By his paying." Here a condition is imposed, but the language employed does not imply that its performance is to be forced. On the contrary the next sentence seems to negative such an inference. It declares precisely what the result of a non-payment shall be. The party to whom the larger share was allotted shall not have it. "Until the sums so awarded are paid or secured to the satisfaction of the parties entitled thereto, the report shall not be accepted." *Expressio unius, exclusio alterius est.* Having declared expressly what the consequences of a non-performance of the condition shall be, all others are impliedly excluded. No authority is given to the court to enter judgment for the amount. Certainly no such au-

thority is given in express terms. If it exists, it exists by implication alone. And we think it is a power too arbitrary, too much in conflict with the dictates of natural justice, to be established by implication, unless the implication is clear and irresistible. In effect it compels a party to buy what he does not want, and to pay a price which he has no voice in fixing. Certainly such a power is not to be assumed upon slight grounds. The argument *ab inconvenienti* cannot be urged in its favor; for it does not follow that because one of the part owners cannot be compelled to take and pay for more than his share, therefore the estate must remain undivided or be so divided as greatly to impair its value. By process in equity the whole may be sold for the most that can be obtained for it, and the proceeds divided among the owners. Such is the usual course in England, and in most of the states in this country. *Wood v. Little*, 35 Maine, 111; 1 Story's Eq. Jur., c. 14. And this court now has equity jurisdiction in such cases. R. S., c. 77, § 5, cl. 6.

Our conclusion is that one part owner of real estate cannot be compelled against his will to take more than his share of the estate, and to pay for the excess to the other part owners who have less than their share. He may do so, if he is willing; but the law will not compel him to do so, against his will. We think the meaning of the statute is that where the estate cannot be divided without great inconvenience, it may be assigned to any one of the part owners, who will accept it, and pay the price awarded by the commissioners. Such is the exact language of the statute authorizing proceedings for partition in the probate court; and we cannot doubt that in this particular the two statutes were intended to be in harmony, and that they do in fact mean the same thing. R. S., c. 65, § 12; c. 88, § 17.

The result is that if the respondents do not finally conclude to take the portion allotted them, and pay the sum awarded the petitioner to make the division equal, the report of the commissioners must be rejected and a new partition ordered. If neither party will consent to take more than his share, and to pay for the excess

to the other, then the division must be equal. The right of either owner to have a partition in some form is unquestionable.

Exceptions sustained.

APPLETON, C. J., DICKERSON, BARROWS, VIRGIN and PETERS, JJ., concurred.

NATHANIEL WILSON *vs.* FRANK S. PRESCOTT and another.

Landlord and tenant—how relation is terminated.

A lease at will may be determined by either party by a thirty days' notice in writing, terminating on a pay-day of rent; but a landlord may terminate the same by a notice irrespective of pay-day, provided that when the notice expires any rent due before that time then remains unpaid.

Where a tenant who terminates a lease at will by the statutory notice leaves rubbish upon the premises, he will be liable for any damages occasioned thereby; but such act will not necessarily amount to a waiver of the notice, or to a continued use and occupation of the estate.

ON REPORT.

ASSUMPSIT upon an account annexed. The only subject in dispute was the amount due the plaintiff from the defendants for rent; upon which issue the presiding justice found and reported the following facts. The defendants, one of whom was a son of the plaintiff, desiring to go into business, the plaintiff, in order to assist them in doing so, took from Adams H. Merrill a lease under seal, dated April 1, 1869, running five years at a rental of $500 payable quarterly, of a wharf in Bangor, and bought a store upon this wharf which he fitted up for the occupancy of the defendants, who took the premises with an oral agreement or understanding that they would occupy them during the term aforesaid and would assume all the responsibilities of the plaintiff under the lease, precisely the same as if it was running to them, the lessor endorsing thereon his consent to this underletting, "but not releasing said

Nathaniel Wilson from any of the agreements, conditions and stipulations set forth in said lease," which was delivered into the possession of the defendants, they paying Merrill the rent quarterly as it fell due, and it was endorsed on the lease as paid up to Jan. 1, 1872. The rent of the store was $150 *per annum*, making a total of $650, for that and the wharf. The store rent was paid in a lump sum which carried it from April 1, 1869, to Oct. 1, 1871, at the rate specified. Nov. 22, 1871, the defendants dissolved partnership, young Wilson retired, "and the subsequent proceedings interested him no more,"—Prescott giving him an indemnity against all the firm indebtedness, and now making this defence.

Upon the first day of December, 1871, the defendants caused to be served on the plaintiff a notice in due form, terminating the tenancy on the first day of January, 1872, on which day the key of the store was tendered to and refused by him, and it was left upon his premises without his consent. One quarter's rent of the store ($37.50) fell due that day, which it is admitted the plaintiff must recover, together with other items of his account annexed ($19), making due in all $56.50 and interest, unless the defendants were entitled to offset against it certain store-bills partly due to their firm, partly to Prescott alone, and partly to him and another partner who came in after Mr. Wilson, Jr. retired. There was no set-off filed and no special agreement so to apply these bills; but, during their occupancy of the store, it had been customary to deduct the plaintiff's store bills from the rent and pay only the balance. The plaintiff did not assent to the termination of the tenancy under the notice aforesaid, but protested against it. He received no rent after Jan. 1, 1872, except $53.18 wharfage, but had to pay rent to Merrill till Oct. 17, 1872.

The plaintiff claims that the defendants did not vacate the wharf Jan. 1, 1872, because they then left some ashes thereon, the facts about which were these; one Perkins had been in the habit of landing cargoes of ashes on the wharf with the consent of the defendants, paying wharfage, and in November or December 1871,

without any notice to defendants and without their knowledge, though under such consent as was supposed or implied between them from instances of the same kind before, landed a cargo of ashes which soon became frozen, and it was not practicable to remove them by Jan. 1, 1872, and they were not finally cleared away till June, 1872, but they were not the cause of preventing the property from renting in the meantime.

Upon the foregoing facts and findings the full court were to enter such judgment as might be proper.

N. Wilson, pro se.

A. W. Paine, for the defendants.

PETERS, J. The plaintiff claims to hold the defendants to the terms of a lease not signed by them. They expected to execute it, but neglected to do so. If a verbal lease is not binding beyond a tenancy at will, *a fortiori* a verbal agreement to make a lease would not be. The plaintiff adds nothing to the strength of his position by insisting that thereby the defendants committed upon him an act of fraud. The act alone, and not the motive for it, furnishes the criterion whether there has been a compliance with the requirements of the statute. It does not appear that the defendants would not have signed the lease upon request, at any time before a dissatisfaction grew up about the occupancy of the premises.

The defendants gave due notice that they would quit the premises on Jan. 1, 1872, when the quarter's rent was payable. It is argued that they could not terminate the tenancy at will on that day, because they were then, and ever since have been, owing a small amount of rent for their occupancy before that time. This question involves a construction of the provision of the statute, that "all tenancies at will may be determined by either party by thirty days' notice * * excepting cases where * * * no rent is due at the time the notice expires." This clause is awkwardly worded, if not obscure. We are satisfied, that the con-

struction placed upon it by the counsel for the defendants, is the correct one. The expiration of the thirty days' notice to terminate the lease at will must be coincident in point of time with a pay-day of rent. Such notice given by either side will be valid. But there is an exception to this requirement, so far as a termination by the landlord is concerned. His notice to the tenant may be thirty days without respect to any pay-day, if when the notice expires, the tenant shall be in any arrears of paying his rent. That is, it matters not whether any rent becomes payable on such particular day or not, if any rent previously due then remains unpaid. The privilege of giving the limited notice is accorded only to the landlord. Of course the tenant cannot take advantage of his own wrong. The correctness of this construction is the more apparent from a reference to the act contained in R. S., of 1841, c. 95, § 19, from which the idea of the present statute is derived, which is this:—"all tenancies at will may be determined by either party, by three months notice in writing, for that purpose given to the other party; and, when the rent, due upon such lease, is payable at periods of less than three months, the time of such notice shall be sufficient, if it be equal to the interval between the days of payment; and, in all cases of neglect or refusal to pay the rent due on a lease at will, thirty days' notice to quit, given in writing by the landlord to the tenant, shall be sufficient to determine the lease."

The plaintiff further contends that leaving the ashes on the wharf, in the manner described in the report of the case, was a waiver by the defendants of the notice to terminate the tenancy, and amounted to a continued use and occupation of the estate. We think otherwise. So far as the tenants, by any act of their own, left the premises in an untenantable condition, they would be liable for the extent of the injury in a special action adapted to the facts of the case.

The defendants admit $37.50 to be due for a balance of rent on Jan. 1, 1872, and claim that it is more than paid by certain store accounts to be allowed thereon. Upon the facts presented, how-

ever, this point is not made out. Therefore a default is to be entered for a sum equivalent to the sums of $19, and interest from the date of the writ, and $37.50 and interest from August 1, 1872.

Judgment for $56.50 *and interest.*

APPLETON, C. J., CUTTING, WALTON, DICKERSON, and BARROWS, JJ., concurred.

BENJAMIN W. BLANCHARD *vs.* IVORY A. HODGKINS and another.

Admissions. Exceptions. Evidence. Practice. Leading questions.

Exceptions do not lie to the permission by the presiding justice of leading questions to a witness in the progress of his examination in chief. It is a matter within the discretion of the judge to sustain or overrule objections to the form of the questions.

Since the passage of the statutes making parties witnesses, it is competent to prove that, at a former trial between the same litigants involving the same subject matter, in the presence of the party, testimony was given tending to establish a bargain with him of a particular character, and that, at that time, though offering himself as a witness in his own behalf, he did not contradict such testimony.

ON EXCEPTIONS.

Reference is made to the opinion for the facts bearing upon the issues determined in this case, which is brought here upon exceptions by the defendants.

Brown & Simpson, for the defendants.

It should have been made to appear that Mr. Hodgkins heard the testimony against him, fully understood, and did not deny it. 1 Greenl. on Ev., §§ 193, 196, 197; *Ware v. Ware*, 8 Maine, 42; *Com. v. Kinney*, 12 Metc., 237.

John Varney, for the plaintiff.

BARROWS, J. The plaintiff sued in assumpsit upon an account annexed for the price of certain logs cut by him, under permits which he had assigned to defendants to secure them for supplies and money furnished to him in the progress of the operations, and upon an award of arbitrators upon the same subject matter. The award had been rejected by this court, as insufficient to be the foundation of a judgment under R. S., c. 108, on account of some irregularity in the submission, as to one of the parties. In the trial before the jury, the defendants claimed upon an account in set-off to recover commissions for selling the logs, and that it was part of the original agreement that they should have such commissions. The plaintiff resisted this claim, and offered evidence tending to show that he sold a portion of the logs to the defendants at a certain net price, and that the rest were not sold by the defendants. Both parties offered testimony upon these points—*pro* and *con.*; and the plaintiff in reply to questions, put by his own counsel, leading in form and objected to by the defendants, was allowed to testify in substance that the defendant Hodgkins was present at the hearing before the referees, and that then and there, in the presence of Hodgkins, witnesses for the plaintiff testified that the bargain between the parties, was that Hodgkins bought the spruce logs of Blanchard at $13.50 net cash; and the plaintiff further testified that he was pretty sure Hodgkins was a witness before the referees in his own behalf, and that he (the plaintiff) did not recollect that he, in any way, contradicted the statements of the witnesses with regard to the bargain. The defendant excepts to the admission of this testimony. But we think the exception not tenable.

The judge presiding at the trial, may in his discretion, permit counsel to put leading questions to witnesses called by them, when in his opinion the examination may be thus made more brief and pertinent, and no perjury, mistake or injustice is apprehended. His refusal to entertain an objection on that score, is not the subject of exceptions.

We think the testimony was competent as tending to show an

implied admission on the part of the defendant, that the bargain was as stated by the witnesses before the referees. Its force in that direction, and its value, were for the jury. It was subject to rebuttal, explanation and comment, if an inference prejudicial to the defendant, and not well founded in fact were likely to be drawn.

If the defendant did not hear the testimony before the referees, or did not comprehend it, or failed to contradict it then through forgetfulness or mistake, he could have said so now before the jury. If he did hear and understand it (as might fairly be inferred from the plaintiff's testimony) and allowed it to pass as true, unchallenged on his part at that time, the fact was one which the jury might properly weigh now.

The cases cited by defendants' counsel, which hold that a failure to contradict testimony given, or assertions made in the progress of judicial proceedings imports no admission of the truth of such testimony or assertions, all arose before the passage of the statutes allowing parties to be witnesses, and are inapplicable here.

Before the change in the law of evidence, the remarks of Shaw, C. J., in *Commonwealth v. Kenney*, 12 Metc., 237, were manifestly sound and pertinent on the question of the admissibility of such testimony as was given in the present case. But the ground on which these remarks rested was taken away by the change in the law. *Exceptions overruled.*

APPLETON, C. J., CUTTING, WALTON, DANFORTH and PETERS, JJ., concurred.

REUBEN BURNETT, Admr. *vs.* GEORGE PAINE.

Divorce. Alimony—adjustment of, by the parties, permitted.

Notes of hand given by a libellee to a libellant, during the pendency of proceedings for divorce, in settlement of the claim for alimony, deposited before, to be delivered after a decree of divorce, should one be granted, are valid, if there be no collusion to procure the divorce.

ON EXCEPTIONS.

ASSUMPSIT on five notes dated January 17, 1871, given by the defendant to Margaret Paine, formerly his wife, the plaintiff's intestate. In November, 1870, she libelled her husband for divorce on the ground of cruelty and entered her libel at the January term, 1871, of this court for this county. Upon the twelfth day of the return term, which was January 21, 1871, the defendant was defaulted and the decree of divorce granted as prayed for in the libel. These notes were executed on the day of their date, at the office of the libellants' attorney; at the same time and place, and as part of the same transaction, she joined her husband in a deed of his real estate to a third person, in order to release her dower; the deed and notes were all left in the hands of her attorney, only to be delivered in case a divorce was obtained; otherwise, both to be cancelled. The attorney testified: "I understood this arrangement to be in contemplation of a divorce, and that the defendant was not to appear in court to oppose such decree. The deed and notes were given to settle property questions. I do not know that the notes were given in consideration that he should not appear to defend, though I understood he was not to appear."

After the decree was entered the notes were delivered to the payee and the deed to the grantee, who immediately re-conveyed to the defendant in accordance with the original agreement of the parties.

The presiding judge ruled that, upon this evidence, the plaintiff was entitled to judgment, and the defendant excepted.

T. W. Vose, for the defendant.

R. S., c. 60, § 18, says where there is collusion no divorce shall be granted. Section 7 of that chapter provides for the wife divorced for her husband's fault. Would the defendant voluntarily have allowed the deceased more than she could have obtained under § 7, except for the purpose of inducing her to procure a divorce? Would she voluntarily have taken less, if she did not fear his opposition? If she was to have neither more nor less, nothing was gained by the arrangement, and it was objectless, unless made to induce consent to a groundless divorce.

J. F. Godfrey, for the plaintiff.

PETERS, J. It does not appear that the notes in suit were given to the plaintiff's intestate as a consideration for her procuring a divorce from the defendant, nor that her deed was given to him to induce him not to defend against her libel. The case seems to amount to this. The libellant having a cause of divorce, the libellee desired to defend against it only so far as the claim for alimony was concerned. That claim was adjusted by the parties upon terms to be carried into effect provided a divorce was decreed. We can see no impropriety in their doing so. The same thing is often done under the eye of the court. Such questions may well be left for settlement with the parties interested, where they can agree. Of course, the court may exercise a supervision of such adjustments, so far as to see that no wrong is perpetrated, whenever there seems to be a necessity for its interposition.

Exceptions overruled.

APPLETON, C. J., CUTTING, WALTON, BARROWS and DANFORTH, JJ., concurred.

THEOPHILUS COTA *vs.* JOHN MISHOW and trustees.

Trustee process. R. S., c. 86, § 64. Set off and recoupment.

In a process of foreign attachment, when the amount attached arises from a contract which has been broken by the principal defendant, the trustees, if liable at all, are only liable for the sum due under the contract after deducting the amount of damages suffered in consequence of the breach of it, by way of recoupment.

The provision of R. S., c. 86, § 64, excepting from the right of set-off by trustees, claims for "unliquidated damages for wrongs and injuries," refers to independent claims and not to those accruing from the contract itself, which are, technically, matters of recoupment only.

ON EXCEPTIONS.

The trustees in this case disclosed that Mishow engaged to work a year for them, from May 1, 1872, to May 1, 1873; that on the eighth day of October, 1872, he abandoned his work and contract, without their consent, and to their great injury; that there was then due him, for labor up to that time, $612.37, of which they subsequently paid $300 upon previous attachments, and claimed that the other $312.37 remaining, would not fully compensate them for the damages suffered by Mishow's breach of his contract, and to retain it for that purpose. The presiding justice charged the trustees for $312.37, and they excepted.

If the exceptions were sustained, the action was to stand for trial upon allegations filed by the plaintiff.

N. Wilson, for the plaintiff.

Sewall & Blanchard, for the trustees.

DANFORTH, J. Exceptions upon the disclosure of the trustees, by which it appears that the only foundation for their liability arises from a written contract between them and the principal defendant, and the only question involved is the amount due, if

any thing, upon that contract. It is admitted that there was a breach of the contract by the principal defendant, and the trustees willing to allow him what he had earned under it, claim to have deducted from that amount the damages they have actually suffered in consequence of the breach by way of recoupment. In an action against them by the principal defendant, they would unquestionably be entitled to have this claim allowed. They can legally be placed in no worse condition as trustees. In either process they can be liable only for what is actually due under the contract, and this must be, if there is any liability on the part of the trustees, the amount earned by the principal defendant less the damages caused by his breach, deducted not by way of set-off, but by recoupment.

This does not violate the provisions of R. S., c. 86, § 64, excepting from the privilege of deduction by way of set-off claims for "unliquidated damages for wrongs and injuries." This refers to independent claims, and not to such as arise out of the contract itself, upon which the debt is founded. The trustees are liable for only such sums as shall be found due upon the contract, less what they have legally paid upon prior attachments. To ascertain this amount, by the agreement of the parties, the action is to stand for trial. *Exceptions sustained.*

APPLETON, C. J., WALTON, DICKERSON, BARROWS and PETERS, JJ., concurred.

JOHN A. EAMES *vs.* JOHN TRICKEY and another.

Sale. Trover.

Trickey bought lumber of Eames who agreed to have it surveyed by Wm. Lunt, to be paid for according to his survey, which was done; and Trickey immediately re-sold the lumber, without seeing it, by the same survey:—*Held*, that Eames could not maintain trover against Trickey, even if one car-load of the lumber was accidentally omitted from the survey.

ON MOTION FOR A NEW TRIAL.

TROVER against John Trickey and Gilman Cram for 2373 feet of hard wood plank alleged in one count to have been taken July 3, and in the other Nov. 25, 1872, the writ bearing date Nov. 26, 1872. By the plaintiff's testimony it appeared that he contracted with Given & Co. to saw some hard wood logs for him, part of which he had sold to Thurston and Co. for $22 per M., and all the rest ("random stuff") he sold to Mr. Trickey, the defendant, on the second day of July, 1872, at $15 per M., Eames agreeing to procure a survey of the logs sold Trickey by William Lunt, and Trickey promising to pay for them, at the stipulated price, according to such survey, and take Eames' contract with Given & Co. for the sawing, off his hands. July 8, 1872, Mr. Lunt made his survey and Mr. Trickey gave his notes to Eames for the amount found due at the contract price, according to this survey, and immediately re-sold the lumber, upon the same day, to Mr. Cram, the other defendant, according to the same survey, which was made in Mr. Trickey's absence, and he never saw the lumber after it was surveyed. He also said that he originally purchased the lumber for Mr. Cram, and that the plaintiff knew this fact; and that he never heard of any trouble until two months afterwards; that he merely turned the trade over to Mr. Cram, upon that gentleman's undertaking to take care of the notes to Eames, and the contract for sawing with Given & Co.

Subsequently the plaintiff claimed to have discovered that a car-

load of lumber, not included in Lunt's survey, was delivered with that which was surveyed to Trickey; that it was his (Eames') lumber, in excess of his contract with Thurston & Co., and therefore should have been taken by Trickey according to the terms of the arrangement between them. After considerable dispute about the propriety of the charge, and whether it belonged to him or to Thurston & Co. to pay, Mr. Cram, in his general settlement with the European and No. American Railway Co., paid the freight on this car-load of lumber; but swore that he did so to effect such settlement, and because, situated as he was, he did not want to quarrel with the Railway Company.

The jury found for the plaintiff and the defendants move to set aside this verdict as contrary to law and evidence.

J. F. Godfrey, for the plaintiff.

H. L. Mitchell, for the defendants.

Rescript.

Upon the plaintiff's own version of this matter he bargained all the lumber he had, except what was to go to Thurston & Co., to Trickey, one of the defendants, to be surveyed by a person agreed upon and paid for according to the survey. The car of lumber in controversy Thurston refused to receive. It was the plaintiff's duty to procure the survey. He did it when Trickey was not present, and Trickey paid according to the contract. The plaintiff now claims that the contents of this car by mistake was not included in the survey, and brings this action of trover therefor against Trickey and his vendee. There is no evidence that Trickey ever saw the lumber after it was surveyed, or had anything to do with it, except to re-sell it on the same day, at the same survey, to the other defendant.

There is no proof that Trickey had any of the avails of the lumber in controversy, or that there was any co-partnership between him and his co-defendant. Under such a state of facts a vendor cannot maintain trover against his vendee.

Motion sustained.

INHABITANTS OF ENFIELD *vs.* LEONARD L. BUSWELL and others.

New Trial.

Where the evidence is conflicting upon points vital to the result, the conclusion of the jury will not be reversed unless the preponderance against the verdict is such as to amount to a moral certainty that the jury erred.

MOTION FOR NEW TRIAL by plaintiffs on the ground that the verdict for the defendants was against evidence.

W. H. McCrillis, for the plaintiffs.

Wilson & Woodward, for the defendants.

RESCRIPT.

To sustain a motion for a new trial where the question presented to the jury was purely one of fact, it is not sufficient to present a case which induces the court to believe that the verdict was erroneous. The court will not interfere unless it seems certain that injustice has been done by reason of some bias on the part of the jury, or a total misapprehension of the case upon which they have found.

Where the evidence is conflicting upon points vital to the result the conclusion of the jury will not be reversed, unless the preponderance against the verdict, is such as to amount to a moral certainty, that the jury erred.

This cannot be the case where the testimony of the party prevailing before the jury, is corroborated to some extent by contemporaneous written evidence, as that of the defendants in the present case is by the treasurer's receipts.

Motion overruled.

State of Maine *vs.* Elbridge W. Reed.

Exceptions. Evidence. Indictment. Jury—instructions to. Practice. Reasonable doubt. Witness.

Whether a general exception to all the rulings and charge of the judge in any trial can be considered as a summary bill of exceptions to any opinions, directions, or judgments by which a party may be aggrieved, as required by the statutes, *quære ?*

Comments upon the testimony in the charge by the presiding judge, do not furnish any ground for exceptions. Nor will they be considered as depriving the respondent of an impartial trial, when, as in this case, the jury are so instructed that they must necessarily understand that they are the judges of the facts proved, and responsible for the inferences drawn from them.

In this case, a fair construction of the charge does not authorize the inference that the jury were instructed imperatively and as matter of law as to the force, effect and weight of the evidence, what the proof was, or that certain facts were in evidence; but the judge directing attention to certain suggestions developed by the testimony, left those matters to their consideration.

When omissions, whether of law or fact, are made in the charge, the proper remedy is, to call the attention of the judge to such omissions at the time, and not by exceptions.

A presiding judge may give requested instructions in his own language, or embody several requests in one instruction when the law is susceptible of being so stated, and the party has no valid ground of exceptions, unless an instruction which is law, is refused.

An explanation of a reasonable doubt that, "It is a doubt which a reasonable man of sound judgment, without bias, prejudice or interest, after calmly, conscientiously and deliberately weighing all the testimony, would entertain as to the guilt of the prisoner," is not erroneous; if inadequate, because it does not contain the element of moral certainty necessary to convict, (which is not admitted) the counsel should have asked at the time, such additional instruction as he desired.

Silence under a charge or suspicion of crime made to or expressed in the presence of a person, is legal testimony for the consideration of the jury as evidence of guilt.

Falsehood, evasion or silence under and in relation to crime, of which one knows himself to be suspected, is evidence tending to show guilt.

When a witness is impeached by proof of a prior statement made by him in conflict with his testimony upon the stand, it is competent for such witness upon re-examination, to give the circumstances and influences, under which the first statement was made.

State *v.* Reed.

On exceptions.

Indictment for the murder of John Ray, who left his house in Medway Plantation about six o'clock in the afternoon of the twentieth day of September, 1870, to search for a missing cow that was pastured near Reed's premises, and never returned alive.

On Wednesday, the twenty-eighth day of September, 1870, his body was found buried in a hole in a secluded spot, upon a little island in the Penobscot River, the corpse covered with rotten wood and brush, and bearing marks of cruel and brutal violence; so severe a wound upon the left temple that the eye protruded two-thirds of the ball from its socket; the neck dislocated; evidence of blows upon the head, (raising a bunch the size of a hen's egg,) behind the ear, on the back between the shoulders, and on various other parts of his person; indicating terrible and fearful violence inflicted upon him by somebody.

Reed was a cousin to Mrs. Ray, and the acquaintance and intimacy between them had been such as to occasion gossip. When spoken to about it, at one time, and told that Ray "would give him fits," if he did not keep away from there; he replied, "Ray! G—d d—n him! If he ever says a word directly to me, I will wring his G—d d—d neck!" He made a similar threat to another witness, and told a third that if "Ray gave him any of his lip, he would kick hell out of him." For the two years preceding Ray's death, he and Reed were not upon speaking terms; and during most of the summer of 1870, Ray and his wife lived apart; separating early in March, and becoming reconciled and living together again in August. When Reed heard that Mrs. Ray was going back to live with her husband, he told her brother that "he would rather die than have her go back," adding that "he loved Mrs Ray, and could not help it;" that he "intended she should be nearer to him," and requested the brother to board her, which he declined to do.

Upon the morning of the twenty-first day of September, 1870, at about six o'clock, Reed went to a neighbor's, where it was noticed that his right hand was much injured, swollen and dis-

colored, and that his boots were wet, water spurting out of them, though the road between his house and his neighbor's was very dry.

He explained the injury to his hand, by saying he stumbled over some bars, while carrying a bunch of shingles the night before; but those of whom he obtained the shingles swore that he passed the bars without accident; and that all but the lower bar were pushed back.

This was the third trial of the case, the verdict rendered at the first having been set aside on account of the admission of improper testimony as to what a witness for the defence had previously said Reed had stated with reference to this injury to his hand; as appears by the report in 60 Maine, 550. At the second trial the jury were unable to agree; and this time the result was a verdict of murder in the second degree. The theory of the government was, that Reed wet his boots in conveying Ray's body across the east branch of the river to the island, where it was found.

Suspicion pointing to Reed as the guilty person, several of those who found the body, went directly from the burial-place in which it was discovered, to Reed's house, and one of them told him they had found Ray, and his reply was: "It is a sad affair;" nothing having been told him of the circumstances, nor whether Ray had been found dead or alive.

At the former trials Mrs. Ray had denied all knowledge of how her husband had come to his death, but she was now called as a witness by the prosecution, and stated that the prisoner came to her door in the evening of the twentieth of September, 1870, and said to her, "I have committed a horrible deed to-night;" and, on her asking what he had done, said he had got into a fight with her husband, and had killed him; and that if she told, the body would be put where it would cause the murder to be laid to her; that he was driving their cow out of his field, when he met Ray coming after her, upon the flat down under the hill; that they had some words, and then got into a smart fight, and he (Reed) struck him (Ray) with a club, and killed him.

The defence introduced her testimony given at the first trial,

when she swore to her husband's passing Tuesday night (the twentieth) in the house, and her knowing nothing of him after he went out early Wednesday morning, the twenty-first day of September, 1870. The government recalled her, and against the objection of the defendant, she was allowed to explain her conduct by saying that she was afraid to testify to the truth at the first trial, and was advised not to do so by a gentleman then acting as counsel for Reed; the State's attorney also proposed to show the advice given and a threat that, if she stated the truth, Reed would turn State's evidence against her; and that she was persuaded to go blueberrying at the time of the second trial, so as to avoid being summoned by the State; but the court would not admit this testimony. Another witness, a boy, who testified to seeing Reed down on the shore, under the bank opposite Ray's house, on the Tuesday night that Ray disappeared, was contradicted by the minutes of his statement at the first trial, that it was another night; he was allowed to explain by saying that the prisoner's sister told him that he did not see Elbridge down there that night, and if he said he did, she would get right up and stave his story all to pieces.

The prisoner was called as a witness by his counsel. In the course of his cross-examination he said that he "did not suppose he (Ray) had been killed; thought he had gone away as he usually did; gone off hunting or fishing." Later in the cross-examination, he said he did not know Ray's body was found when he met the finders; adding, in response to further query, that he "thought they had come to arrest him;" and when asked for what, replied, "For the murder of John Ray." The testimony was very voluminous, and there were many other facts and circumstances relied upon as tending to prove the guilt of the prisoner, but it is believed that the foregoing is a summary of those especially adverted to in the charge to the jury, the exceptions and the opinion.

The entire bill of exceptions was in these three lines: "And now in court, before the adjournment thereof, the respondent comes and excepts to all the rulings of the court, and to the charge of the court to the jury, and prays that his exceptions may be

allowed." Several of the witnesses testified to the existence of a foot print near the hole in which Ray was found, its measurement by Benjamin York, and its near correspondence with the length of Reed's boots; but York himself was not a witness upon this trial. The prisoner's counsel called the magistrate before whom Reed's preliminary examination was had, and asked if York, who testified there, said anything about tracks; but this question he was not permitted to answer. The judge, in his charge to the jury, after reminding them of the responsibility that rested upon them, spoke of the disappearance of Reed, the discovery of his mangled body, the threats of the prisoner, indicating his relations and feelings toward the deceased, the fact that there was nobody but Reed and Mrs. Ray to whom the slightest suspicion attached, and then remarked: "The question is whether the crime threatened was done by the person threatening, or by the wife who had just been reconciled, and had been living with him, or by some unknown being, toward whom no finger of suspicion has been pointed, of whose agency no acts have been shown, and from whose lips no threats are known to have been uttered."

He then stated the nature of the offence charged, reading the statutory definitions of it; defined malice and reasonable doubt; the difference between direct and circumstantial evidence, and the weight to be given each; spoke of the burden of proof and of the presumption of innocence; of the order of the proceedings from their initiation; of the credit to be given witnesses; the motives affecting the testimony of those for the State and for the defence; incidentally to this, remarking that "perjury to convict an innocent man of an offence never committed, and perjury to procure the acquittal of guilt, imply very different degrees of moral atrocity;" of the natural discrepancies as to hours and phraseology; and those relating to graver matters, that are inexplicable; then, reverting to the threats and Reed's alleged avowal of his love for his cousin, as connected with the subject of motive, he said that if this testimony was false, "it is not merely to be disregarded, but it throws doubt and suspicion upon the case for

the government. If true, then how stand the parties? Elbridge Reed loving the wife—intensely loving her; he had rather die than she should live with her husband; hating the husband—he would break his d–d neck—he would kick hell out of him! Love for the wife, hate for the husband;—motives potential for evil, potential for crime; elements in their nature to be kindled into a consuming fire—the possible elements of a fearful tragedy."

"Threats are significant. Out of the abundance of the heart the mouth speaketh. Threats unexecuted amount to nothing; but when the thing threatened is done, and is done as it was threatened, then the fact of the threat becomes an article of circumstantial evidence, tending to inculpate the person threatening, the force and effect of which you must judge. I will break his d—d neck. The dislocated neck of this victim of wrath and violence, his beaten and bruised body, show that what was threatened was done. The question is, was it done by the prisoner thus threatening, or by some one else from whose lips no threats proceeded.

Love, hate, threats! In what direction do they point? That is for you to say.

The prisoner has been a witness. He is either innocent or guilty. If innocent, the truth is his only protection. Truth is one, and eternal, and indivisible. All true facts are consistent with each other. There is no reason, if he is innocent, in withholding a single truth. There is every reason for uttering it, if innocent.

If guilty,—if he does not confess—the resort in all cases is and must ever be to falsehood, evasion, or silence. Falsehood, evasion, or silence, is evidence of crime. An innocent man does not resort to falsehood, for falsehood is evidence tending to show guilt. Each falsehood uttered by way of exculpation, becomes an article of circumstantial evidence of greater or less inculpatory force,—the force and effect of which you must determine."

This last clause is quoted in the opinion, but it was thought best to state more fully the connection in which it was used; the other passages especially objected to, also appear in the opinion.

The line of argument pursued is indicated by the opinion.

Wm. H. McCrillis and *Jno. F. Robinson*, for the respondent.

H. M. Plaisted, Attorney General, and *Jasper Hutchings*, County Attorney, for the State.

DANFORTH, J. The exceptions in this case are made up in accordance with a custom somewhat modern in its origin, and of increasing frequency, which has nothing to recommend, but very much to condemn it. We have a full report of the testimony, a large part of which is immaterial; also the entire charge, while the exceptions are of the briefest and most general character, without specification of the points to be raised, or the grounds of objection.

This practice would ordinarily seem to serve no other purpose than that of a drag-net thrown over all the proceedings of a trial, with an apparently desperate hope that something, material or immaterial, might be brought to light and made use of as a valid cause of complaint. While this course very materially increases the expense to the parties, as well as the labor of the court and counsel, it admits at least of a very grave doubt whether it is such a presentation in a summary manner of written exceptions to any opinions, directions or judgments of the presiding justice, as is contemplated by the statute, so as to require any action on the part of the court. But without farther allusion to objections which will be apparent to every one who gives any thought to the subject, as this case is one of so much importance, involving such serious consequences to the respondent, we proceed to examine it upon its merits.

A very large part of the very able and ingenious argument of the respondent's counsel, is based upon the facts as developed by the testimony, and its purpose seems to have been to show that the verdict of the jury has no valid foundation in fact, upon which to rest, and would properly have been addressed to the court upon a motion to set aside the verdict as against the evidence. It is now

settled that this court, sitting as a Law Court, has no jurisdiction of such a motion. *State v. Hill*, 48 Maine, 241. Nevertheless, we have carefully examined the report of the testimony and considered the suggestions of the counsel, and the result is that, in our opinion, if the verdict is erroneous it is only because it should have been for murder in the first degree, instead of the second. The single exception to the charge is made to cover many grounds of complaint in the argument. It will not be necessary to consider them all in detail, as those relating to the treatment of the testimony may be reduced to two classes.

I. It is claimed that the "charge to the jury was not impartial, and by reason thereof the prisoner had not an impartial trial, to his prejudice."

The prisoner is certainly entitled to a fair and impartial trial, and in case of failure, would have a legal remedy, but whether by exception or otherwise we have now no occasion to inquire. If, in this case, the charge was partial we do not perceive in what way it could have been "to the prejudice of the prisoner," inasmuch, as already stated, the only error apparent in the verdict is that it is more favorable to the prisoner than the testimony would seem to authorize. We do not, however, see the evidence of any such want of impartiality as is claimed. The ground alleged for such complaint is that, "The court unduly called the attention of the jury to the evidence on the part of the State, and unduly instructed the jury as to the force and effect of such evidence and the inferences to be drawn from it, and unduly omitted to call the attention of the jury to the evidence on the part of the prisoner, and the theory of the defence." We find here no allegation of the misstatement of any evidence, but simply an alleged undue instruction as to its force and effect and the inferences to be drawn from it. This must mean either that the comments of the presiding justice were calculated to give the testimony a force and effect to which it was not entitled, and to suggest inferences not authorized, or to give greater prominence to the government testimony than to that introduced in behalf of the prisoner. In either case it fur-

nishes no ground for exceptions. The law of 1874, c. 212, was not in force at the time of the trial before the jury in this case, and whatever may be the proper construction of that statute, the previous decisions in this State and in Massachusetts holding that comments upon the testimony, and even opinions as to its weight decidedly expressed, though erroneous, form no valid ground of exception, are so numerous and uniform in result that it is unnecessary to cite them. But the test of impartiality is not the presen tation of the testimony upon the one side and the other as having equal force and effect, or as entitled to the same weight, but rather the presentation of it as it is, with such suggestions arising from it, as may, in the estimation of the judge, be proper for the consideration of the jury. If the facts bear decidedly one way or the other, a fair presentation of them must show it. If the tower leans, it would hardly be excusable to give the impression, either directly or indirectly, that it stood upright.

The charge undoubtedly bears somewhat strongly against the prisoner, but an examination of the testimony as reported, shows that it is no less decided in its bearing the same way. That this is so, is the fault or misfortune of the prisoner, and not that of the court, and until it shall become the policy of the law that the guilty shall go unpunished, it surely cannot be the duty of the presiding judge to suppress suggestions, arising out of the evidence, which may operate against him, or magnify such as may be in his favor.

It can hardly be expected that a judge in his charge shall allude to all the testimony developed during a long trial, or all the circumstances growing out of it, nor is it necessary after a full and careful analysis of it by able counsel. But if any material omission or misstatement occur, it is the privilege and the duty of counsel to call the attention of the court to it at the time, otherwise all grounds of complaint are waived. This duty does not appear to have been neglected in this case, nor the enjoyment of the privilege to its fullest extent denied or abridged.

II. The next objection to the charge we are called upon to con-

sider relates also to the treatment of the facts, and is in most respects like the first. It is in the counsel's brief stated as applicable to many parts of the testimony, but the substance of the complaint may be found in the last two items; that "the court instructed the jury as to the force, effect and weight of the evidence, * * * and instructed the jury what the proof was, to the prejudice of the prisoner" and that "the Court instructed the jury erroneously that certain facts were in evidence."

The ground of this objection, as we learn from the argument, is that the court as matter of law, instructed the jury as to the force, effect and weight of the testimony, as well as that certain facts were in proof, instead of leaving it to their judgment and the inferences to be drawn by them. If this were so, undoubtedly exceptions would lie. To sustain this complaint the counsel has directed our attention to numerous passages in the charge as illustrating his view. It will not be necessary to notice them in detail, as all are substantially the same in principle, and the same suggestions will apply to, and illustrate each.

One of these passages is a repetition of certain testimony of the prisoner and comments upon it as follows: "Certain questions are proposed to which answers are given. What did you suppose their business was? I thought they came to arrest me. You thought they came to arrest you for what? For the murder of John Ray. Does he not stand convicted out of his own mouth? Did he expect to be arrested for the murder of a man whom he thought was alive and absent, hunting or fishing? or was it the irresistible impulse of conscience—the guilty knowledge of crime?" The question first asked by the judge, "Does he not stand convicted out of his own mouth?" standing alone, or in connection with the testimony of the prisoner in relation to his own thoughts, might possibly be taken as an assertion that he was convicted out of his own mouth. But even then it could not be understood by the jury as the statement of a legal proposition. At most, it is a correct statement of so much of the testimony as is repeated, with a calling of the attention of the jury to the inference which might

fairly be drawn from it. The allusion might strike the jury as somewhat emphatic, but not more so than the testimony itself, for that must be considered as most terrible in its emphasis, as bearing upon the guilt of the prisoner. But taking the whole sentence together and, though it loses no force as a suggestion, its force as an assertion, if any it has, entirely disappears. It then becomes a simple proposition to the jury, calling upon them to consider, whether the prisoner was honest in his statement, or whether he had betrayed a knowledge of the crime which was consistent only with his guilt; and it is hardly conceivable that they could have received any other impression than that the inference was to be their own. In this connection we should not forget that the prisoner had previously denied all knowledge of the murder, and had testified that he did not suppose that Ray had been killed but "had gone away, as he usually did, fishing or hunting." This testimony, certainly, revealed a state of mind on the part of the prisoner, which truth and justice required should not be overlooked, the probative force of which was left with the jury, within whose province it was.

The objection that, "the court erred in instructing the jury that certain facts were proved of which there was no evidence," does not appear to be sustained by an examination of the case as reported. Take for example the specification under this head as follows: "The prisoner did not haul goods for Hamilton until winter and that, according to the prisoner's statements, he did not neglect to search for Ray, because he had engaged to haul goods for Hamilton." It had been alleged and proved, as a suspicious circumstance against the prisoner, that while Ray was missing and many of the neighbors were looking for him, the prisoner himself took no part in the search. This would seem to be a matter of some consequence and as such called for an explanation on the part of the defence. It was in alluding to this that the presiding judge made the remarks to which exception is taken. On cross-examination the prisoner does say he hauled goods for Hamilton all the winter and that the arrangements for hauling were made at

Mattawamkeag on the day, but after the search began. This agreement to haul goods for Hamilton, he also testified, was one of the reasons why he did not assist in the search. Thus we find in the testimony of the prisoner sufficient foundation for the statement of the judge. On examination of the charge we find too, that it is not made to the jury as a statement of fact, but as the prisoner's explanation of his absence from the search. His words are: "He thus explains his absence;" and adds, "Is the explanation true?" a proper calling of their attention to a circumstance relied upon by the government as tending to show guilt, with the respondent's explanation, leaving it for the jury to draw their own inference. Take another specification under the same head: "That Ray and his wife were living together, in harmony, at the time of the murder." It is claimed that this was stated as a "fact proved of which there was no evidence." We find in the case considerable testimony tending to show the manner in which Ray and his wife were then living together, and what the judge did say upon this point is thus reported: "The wife had in August before, been reconciled to her husband. Is there any evidence of hostility, of ill-will, of threats on her part? Ray and his wife had become reconciled and were living together in harmony. Are not these the true relations of the parties, as disclosed by the evidence? It is for you to judge." Whatever might be the effect of the first part of this passage, taken by itself, it is quite certain that from the last part the jury must have understood that they alone were the judges of what the testimony proved, as well as the force to be given to the facts.

But without considering in further detail the several objections properly classed under the head we have been discussing, it is sufficient to say that, so far as we can see, in the light of the very able argument of the counsel, the remainder rest upon principles similar to those already examined. And it will be found that the several passages of the charge thus objected to, when taken in connection with the modifying or qualifying sentences with which they stand, not only have a foundation in the testimony upon which they may

rest, but are not and could not have been understood by the jury as instructions which they were to obey as to the facts proved, or the force and effect to be given to such facts as they might find proved; but simply comments upon the testimony and such suggestions growing out of it as may have been thought worthy of consideration. More especially when we remember that near the beginning of the charge, alluding to the province of the jury in relation to the testimony, they are reminded that because a fact or circumstance on either side is omitted they are not to forget it, and are told that "What is proved; what is not proved; what witnesses are reliable; what are not reliable; the force and effect of the testimony; the inferences to be drawn therefrom; I leave entirely to you. Amid this mass of conflicting testimony, I mean to give neither opinion nor the intimation of an opinion as to what the truth may be; what each witness may have said, and the necessary and inevitable inferences to be drawn therefrom, I submit to your calm, deliberate and conscientious judgment, acting as you are, under the solemn sanction of the oaths you have taken, and in the discharge of a high public trust;" that this, in substance, was repeated during the charge, as applicable to particular portions of the testimony, and in some of the passages specially objected to, and near the close they are again reminded that they must determine "whether the facts on the one side or the other are proved," that for the "inferences from those facts" they are responsible, we must come to the conclusion that there is no possible ground for supposing that the jury did not fully understand their rights and responsibilities in relation to the testimony, or were in that respect misled by the charge.

III. The next objection is mainly, if not entirely, one of law, and in the brief is stated in these words: "The court erred * * * in instructing the jury that the words of Hayford to the prisoner: 'Every body suspects you, I suspect you,' was a charge of murder against the prisoner, and erred in instructing the jury that the prisoner remained silent under the charge, and erred in instructing the jury that by the law, the inference to be drawn from

the charge and the silence, was that the charge was true." So far as the facts are concerned there appears to be a sufficient foundation for the instruction in the testimony. No doubt as to the fact that he was told that he was suspected, is suggested. His silence is not denied. A suspicion of crime conveyed to the prisoner is so nearly similar to a charge of having committed the crime that the jury would not be misled, especially when their attention is directed to the testimony upon which the remark is predicated; and whether it was a suspicion or charge, the same law would be applicable. The probative force of the fact would be the same in either case; or, if different, it would differ in degree only. The law given was correct, and the jury would judge for themselves as to the weight to be given to it. The instruction as given differs somewhat from the statement in the objection. It is introduced by the remark of the presiding judge that "It is not merely what the prisoner says or does, but what he omits to do or say that may become facts evidentiary of guilt." Then, after alluding to the facts as shown by the testimony, he says further: "What is the law? A statement is made either to a man, or within his hearing, that he was concerned in the commission of a crime, to which he makes no reply; the natural inference is that the imputation is well founded, or he would have repelled it." This is a quotation from Best on Presumptions, § 241, affirmed in *State v. Cleaves*, 59 Maine, 300-1, and its justice and propriety are there so fully illustrated that we deem it unnecessary to add any thing to what is there said.

IV. It is further objected that the court erred in the instruction as to "what constituted a reasonable doubt." The explanations of the meaning of this phrase have been almost innumerable, and the best jurists have found it difficult to convey to their own satisfaction the idea in their own minds expressed by its use. Not that there is any considerable difficulty in understanding its meaning, but rather in not conveying it. It may indeed admit of grave doubt whether the proposition is in itself so simple and the words so well calculated to express a state of mind so easily felt, though difficult to describe, that in most cases it is sufficient to use the

expression alone without any attempt at explanation. All such attempts must result in simply stating the same proposition in a different form of words, and words which are, perhaps, no more easily understood.

There is no exact mathematical test by which we may certainly know whether a doubt, entertained in any given case, is reasonable or otherwise. What would be reasonable to one person might be far otherwise to another. Therefore, no certain line, as upon a plan, can be drawn, that shall be recognized by every one, as the dividing line between the mere skeptical doubt and that which has the sanction of reason. Hence, whatever explanations may be given to the phrase, its meaning practically must depend very largely upon the character of the mind of the person acting. Lexicographers tell us that reasonable is that which is "agreeable or conformable to reason." The doubt, therefore, which conforms to the reason of the person examining, is to him a reasonable doubt. If it does not so conform, to him it is unreasonable, and will not be entertained. We must assume that the jurors are reasonable men, and as such they must be addressed. When told that, in order to convict, the proof must remove every reasonable doubt of guilt from their minds, whatever the form of words used, if any heed is given to the instruction the result must be that each individual juror will understand it and act according to the dictates of his own reason; and if, tried by that test, the doubt is reasonable, conviction must fail; otherwise it would follow.

In this case the objection is made, not so much to the inaccuracy of the definition as to its incompetency; not that it gives erroneous instruction to the jury, but that it leaves out an important element necessary to give the jury a full understanding of their duties in this respect; namely, the moral certainty of the truth of the charge to authorize conviction. It is true that this form of words is often used, and it may be conceded that the phrase itself contains this element, and any explanation without it would be inadequate. In *Commonwealth v. Webster*, 5 Cush., 320, Shaw, C. J., says: "It is that state of the case which, after the entire comparison and con-

sideration of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." Again, in the same case, he says: "But the evidence must establish the truth of the fact to a reasonable and moral certainty." A writer in No. Am. Review for January, 1851, p. 201, reviewing Webster's trial, thinks a reasonable doubt may perhaps be better described by saying, that all reasonable hesitation in the minds of the triers, respecting the truth of the hypothesis attempted to be sustained, must be removed by the proof." Other definitions almost without number might be cited but all, though different in words, are to the same effect, and all describe an absence of reasonable doubt, as a state of mind existing in the jurors amounting to a reasonable and moral certainty, in distinction from an absolute certainty. The certainty need only be reasonable though it must be moral, and as reasonable it must and can only conform to the reason as it exists in each particular juror.

Is, then, the explanation of a reasonable doubt in the case at bar open to the objection made? Is the element of reasonable and moral certainty absent? If the foregoing views are correct, how must the jury have understood it? They were in the first instance plainly told that "the guilt of the prisoner must be established beyond a reasonable doubt." The presiding justice then proceeds: "The question at once arises, what is a reasonable doubt? It is a doubt which a reasonable man of sound judgment, without bias, prejudice, or interest, after calmly, conscientiously and deliberately weighing all the testimony, would entertain as to the guilt of the prisoner." To make it more clear, the jury are then fully cautioned against a mere "possibility of a doubt," as also "fanciful suppositions and remote conjectures, that facts may exist where there is no proof whatever."

Assuming, as we have already seen that we must, that the jurors are reasonable men, and that as the instruction requires, they have, without bias, prejudice or interest, calmly, conscientiously and deliberately weighed all the testimony, and found no doubt which

they could or "would entertain," what can be more satisfactory evidence that their minds are in that state of "reasonable and moral certainty" descriptive of a conviction "beyond a reasonable doubt."

But if this were not so, the prisoner would have no reason to complain, for if the explanation is faulty, it is too favorable for him. It is very clear that any doubt which a reasonable man would refuse to entertain after having examined the case with the thoroughness, care, and freedom from prejudice, required by the instruction, could not be a reasonable one; while on the other hand, such a man under such circumstances, might entertain a doubt which would not be reasonable, and if so, the instruction would give the prisoner the benefit of that. It would in fact give the prisoner the benefit of every doubt which a jury under such circumstances might entertain, which would in that respect give him certainly all he was entitled to, with a possibility, perhaps not very remote, of much more than he could legally ask.

There is still another answer to this objection, which is conclusive. The complaint is of an omission, a leaving out, of an element which should have been put in. If that were true, the counsel should at the time have requested the additional instruction desired.

V. Complaint is made that the jury were instructed "that an innocent man does not resort to falsehood." Precisely how the prisoner could be prejudiced by this remark does not appear. As a general rule it is true, though it may be liable to exceptions. But the objection, as it stands in the brief of the counsel, sets out only a part of the sentence as used by the judge, and when the remainder of the sentence and the connection in which it is used, is added, it will clearly appear, not only that no injustice could come to the prisoner from it, but that it is simply an expression of well settled law, that a resort to falsehood in relation to a crime with which a man stands charged, is to be taken as proof of guilt. The passage in the charge reads as follows: "There is no reason if he is innocent, for withholding a single truth; there is every

reason for uttering it, if innocent. If guilty, if he does not confess, the resort in all cases is, or must ever be, to falsehood, evasion or silence. Falsehood, evasion or silence is evidence of crime. An innocent man does not resort to falsehood, for falsehood is evidence tending to show guilt. Each falsehood uttered by way of exculpation becomes an article of circumstantial evidence, of greater or less inculpatory force, the effect of which you must determine."

VI. The refusal to give the requested instructions. This objection is not founded upon a refusal to give the law as requested, but that the law was given in a general statement, and not in detail as required by the request. When the same law is applicable to several different facts, as in this case, when the counsel had stated in different requests, different facts claimed by the government to have been proved, and then a request in each case, that such fact cannot be considered by the jury, unless it is so proved beyond a reasonable doubt, it is a sufficient compliance to instruct the jury that every circumstance relied upon to prove the guilt of the prisoner, "before it can be taken into account must be established beyond a reasonable doubt." Such instruction was given with the remark, after reading the requests, that "with regard to those, I give you a general rule of law." As the prisoner actually obtained all he asked, we see no cause for exception.

VII. It is objected that Mrs. Ray and John R. Boynton were permitted "to testify what their reasons were for committing perjury on a former trial of the prisoner." It seems that for the purpose of impeaching these two witnesses, the defence had put in their testimony given on a former trial of the respondent, which was somewhat contradictory to that now given. To meet this phase of the case, the witnesses were permitted to explain the circumstances under which their former testimony was given. A statement contradictory to that given by the witness upon the stand, may of course be shown as impeaching testimony. But its force must depend very materially upon the circumstances under which it was made, and the influences at the time bearing upon the wit-

ness. It would therefore seem to be self-evident that witnesses so situated, should be permitted to make such explanation as might be in their power. The first impulse of the mind in such case, is to enquire how this happened; what reason can be given, and more especially what can the party implicated say in excuse or extenuation. To refuse the opportunity to explain, would be in effect to condemn a party without a hearing, and without that information, which in many cases, would be material to a correct judgment. So clear is this proposition that we do not find any case in which the question seems to have been raised, but many in which it is assumed as an undeniable proposition. 1 Greenl. on Ev., § 462; *Commonwealth v. Hawkins*, 3 Gray, 465; *Gould v. Norfolk Lead Co.*, 9 Cush., 347.

VIII. Mrs. Ray was permitted to testify that she told the counsel for the prisoner that she "had no hand in the deed; no hand in the act of killing;" subject to objection. This as the case shows, was a part of the explanation referred to under the last objection, and as such, was clearly admissible. It is true, a part of this explanation was excluded, which if admitted, as it should have been, would have rendered the whole more intelligible and useful for the purpose intended. But as the part was excluded in consequence of the persistent objection of respondent's counsel, it gives him no cause of complaint.

Upon another ground, independent of its connection with the explanation, it is admissible. The testimony now objected to, is an affirmation of that given upon the stand at this trial. After the attempt to impeach her, on re-examination she gives the answer objected to, showing that at or about the time of the homicide her statement as to her own participation in the affair, was the same as at the trial. This brings it within the decision in *Commonwealth v. Wilson*, 1 Gray, 340.

IX. Elder French, a witness, and also the magistrate before whom the prisoner's preliminary examination was had, was asked by counsel for defence whether Benjamin York, a witness at that examination, stated "anything about tracks there." On objection

the question was excluded. As Benjamin York does not appear to have been a witness at this trial, we are unable to see any ground on which his statements, or want of statements, then become material here. The case shows that all the other testimony in relation to the tracks, given at that examination, and offered at this trial, was admitted, and not excluded, as suggested by the counsel's brief.

We have examined and carefully considered all the points made in the counsel's argument, whether herein particularly specified or not, and can find no ground on which exceptions can be sustained. *Exceptions overruled.*

APPLETON, C. J., CUTTING, BARROWS and PETERS, JJ., concurred.

BELFAST & MOOSEHEAD LAKE RAILWAY CO. *vs.*
INHABITANTS OF UNITY.

Contract—unconditional assent required. Special Laws of 1869, *c.* 206.

April 23, 1867, the inhabitants of Unity voted to take stock in the plaintiff company, *provided* its railroad should be located through that town. June 29, 1868, the directors so established the line of the road as not to pass through that town, and March 15, 1869, the inhabitants rescinded their vote to take the stock: *Held*, that there never was any such proposition by one party, accepted unconditionally by the other, as to constitute a completed contract,

Where the law requires the assent of a town to be indicated by a two-thirds vote, a majority of the voters may recall such assent before it has become binding by acceptance of the town's proposal by the party to whom it is made. If there is any doubtful question under such a provision, it is whether a minority even, comprising more than one third of the legal voters present, cannot withdraw or rescind the former vote.

The Special Law of 1869, c. 206, merely purports to afford a remedy when the "terms and conditions of the subscription have been complied with;" it does not propose to make a contract for the parties where none had previously existed, nor would it have been competent for the legislature to have done so had such been its object.

B. & M. L. Ry. Co. *v.* Unity.

On report.

Assumpsit on an alleged promise by the defendants to take three hundred shares of the non-preferred stock of the Railroad Company, and to pay for them at their par value of one hundred dollars per share, made at Unity, February 19, 1868, in consideration of the plaintiffs' promise to sell such shares for said sum of $30,000, to the defendants.

By Special Laws of 1867, c. 380, (incorporating the plaintiff company) § 19, it was provided: "That the corporation shall be authorized to issue non-preferred and preferred stock upon such terms and conditions, and to such persons and corporations, and with such limitations and restrictions as may be deemed for the interests of the subscribers, the success of the corporation and the completion of the road; and cities and towns interested in the construction of the road, or to be benefitted thereby, may subscribe at par value for any amount of either class of said stock by a vote of two-thirds of the legal voters of any such city or town present at any meeting legally called therefor, not to exceed 20 per cent of the amount of the valuation of such city or town; and such vote shall be obligatory on said city or town for the payment of the amount so subscribed; and said cities and towns may issue their bonds for such stock," &c., &c.

This act was approved, February 28, 1867, and the company accepted it, and organized under it July 6, of the same year. Books were then opened for the reception of subscription to the capital stock, and remained open for that purpose till June 29, 1868. Upon these books there was the following entry: "We the undersigned, being a majority of the selectmen of the town of Unity, do hereby, in our official capacity, for, and in behalf of said town, subscribe for three hundred shares of the non-preferred stock of the Belfast and Moosehead Lake Railway, at the par value of one hundred dollars each, amounting to thirty thousand dollars, in accordance with the vote of said town, and the rules and regulations of the directors as herein recorded. Selectmen not personally liable.

James Fowler, Jr., } Selectmen of
Reuel Mussey. } Unity.

Unity, February 19, 1868.

This subscription was professedly made under a vote of the defendants, passed at a town meeting holden April 23, 1867. The warrant calling this meeting stated the subject to be acted upon: "Article 2. To see if the town of Unity will vote * * * * to subscribe at par value for an amount of non-preferred stock of Belfast and Moosehead Lake Railway Company, to the amount of twenty per cent of the valuation of said town, in case said Railway Company build said road through the town of Unity, and construct a depot for the accommodation of the citizens of said Unity and the travelling public, at some place within a half mile of the centre of Unity Village (so called,) and also with the express understanding and agreement that any amount so subscribed for by said Unity shall not be paid * * * * * until enough from responsible parties has been subscribed to defray the expense of constructing said road from Belfast to Newport *via* Unity," * * * * * *.

"Article 3. To see if the town will instruct and empower the selectmen of said town to make such subscription in the books of said company, conditioned that the road and depot shall be so located and built," * * * * *.

"Article 4. To see what amount of the stock of said Railway Company, in case said railroad shall be located through said town, and a depot * * built as aforesaid * * * * said Unity, in its corporate capacity, shall subscribe for in the books of said company," * * * * *.

Under the fourth article of the warrant, Charles Taylor, a voter of the town moved "that we, the citizens of Unity, authorize our selectmen to subscribe for the non-preferred stock of the Belfast and Moosehead Lake Railway Company, to aid in the construction of said railroad from Belfast to Newport, or some other point on the Maine Central Railroad, to the amount of thirty thousand dollars, providing said road runs through Unity, and the full amount of money be raised to build said road according to the specifications in the town warrant calling this meeting;" which motion was carried by a vote of one hundred and thirty-three in its favor, to

sixty opposed to it. The amount proposed to be subscribed did not exceed one-fifth of the town's valuation.

At a meeting of the directors of the Belfast and Moosehead Lake Railway Company, held June 29, 1868, it was voted to adopt a certain specified location which would not pass through Unity. Subsequently the route was changed so as to pass through this town, but the depot was never built at the place designated therefor, and the junction of the road with the Maine Central Railroad was established where it now is, at Clinton Gore instead of at Newport.

On the fourth day of March, 1869, a meeting of the defendants was called to be holden on the fifteenth day of the same month, "to see if the town will vote to rescind the vote, whereby the town voted to take thirty thousand dollars of non-preferred stock in the Belfast and Moosehead Lake Railway Company."

At this meeting, upon a yea and nay vote, seventy-eight voted in favor of rescinding, and sixty-three against it, the moderator refusing to declare the result.

March 3, 1869, the governor approved the Special Law of that year, c. 206, which took effect upon approval, providing: "That the Belfast and Moosehead Lake Railroad Company in addition to the remedy already provided for the collection of the subscriptions to its capital stock and assessments made by said company shall have the right to maintain an action of special assumpsit in the name of said company, to enforce payment of such subscription or assessment. And such action shall be maintained if the terms and conditions of the subscription to the capital stock of said company and the assessments upon it have been substantially complied with, and shall not be defeated by any mere informality in organizing said company, or in electing its officers, or other merely informal acts of the company, or of any of its officers."

On the twenty-first day of February, 1870, the plaintiffs tendered the municipal officers of Unity a certificate of three thousand shares of the capital stock of the Railway Company, and demanded payment therefor, which was refused and the certificate

declined; and on the sixteenth day of March, 1870, this suit was instituted to compel the town to pay for these shares; if upon the facts reported the action is maintainable, it is to stand for trial; otherwise the plaintiffs are to be nonsuit.

A. G. Jewett and *W. H. McLellan*, for the plaintiffs.

The act of incorporation authorized the town to subscribe and made it obligatory to pay the amount subscribed; an obligation from which the defendants could not release themselves by a majority vote to reconsider, passed two years after they voted to subscribe, and after the company had acted upon their subscription, made two assessments, and were prosecuting the work of building the road. Certainly, there could be no revocation except by a majority as large as that which passed the vote, i. e., two-thirds of the voters present, nor without notice to the plaintiffs of the rescission. The terms of the subscription were substantially complied with; all comprised in the only article voted upon (the fourth) were completely fulfilled.

A. Libbey, for the defendants.

The road was not built upon the line which the town made a condition of its subscription. *Middlesex v. Locke*, 8 Mass., 268; *Middlesex v. Swan*, 10 Mass., 390. The conditions annexed to their vote were unauthorized by the directors, and no contract could exist till they were assented to by the plaintiffs, and the defendants notified of it. *Essex v. Collins*, 8 Mass., 292; *Troy v. Newton*, 8 Gray, 576. The directors voted, virtually, to reject the proposal of the town, June 29, 1868, which left nothing to be done by the town; yet the defendants did vote to rescind, March 15, 1869.

DANFORTH, J. This is an action to recover the assessments upon three hundred shares of the capital stock of the plaintiff company, of which it is alleged the defendants became owners by virtue of their original subscription therefor.

The first question raised is whether or not the defendants ever became the owners of such, or any number of shares. It is not claimed that they were in any other way than by virtue of a contract. Such contract, like any other, if it exist at all, must do so by reason of an assent of each party to every proposition of the other without any modification. "Wherever there is not an assent, express or implied, to the terms of the proposed contract by both parties, there is no mutuality and no contract. Smith on Contracts, (third edition), 171, note; *Jenness v. Mt. Hope Iron Co.*, 53 Maine, 20.

The case finds that books for subscriptions were opened by persons duly authorized therefor, as prescribed by the charter. In these books were certain rules and regulations adopted by the directors, and proposed as terms of the contract by which subscribers were to become owners of the shares subscribed for. The defendants, by their selectmen, subscribed said books for three hundred shares, but in so doing, added other and different conditions than those recorded therein. Those in possession of the books were authorized to sell the shares only upon the terms therein recorded. Before the contract could be completed, the company must in some legal manner assent to the additional propositions of the defendants. This was never formally done. No action in regard to these propositions appears to have been taken by the company until June 29, 1868. At that time the directors voted to locate their road upon a route which did not lead through Unity. As one of the defendants' propositions was that the road should be located through Unity, this was, on the part of the directors, a virtual, if not a direct refusal of their assent to the terms offered by the defendants. Whatever, then, might have been the condition of the parties in relation to the supposed contract up to this time, this rejection of it by the plaintiffs would seem to put an end to it, and no further action would be required on the part of the defendants, unless for the purpose of renewing the negotiations. But these negotiations never were renewed, and the parties not only had not met, but the proposal of the one had

been rejected by the other. But the defendants were not satisfied with this state of things. On the fifteenth day of March, 1869, and before any further action by the plaintiffs, they rescinded their former vote authorizing the subscription, thereby withdrawing their offer. This it was certainly competent for them to do at any time before the offer had been accepted, if not at any time before notice of acceptance had been communicated to them, as held in *Jenness v. Mt. Hope Iron Co.*, before cited. But it is contended that this vote could be rescinded only by the same majority required to pass it. If there is any doubt upon this point, it would seem to be whether or not a minority even, larger than one-third of the voters, could not withdraw or rescind the former vote. The law required a two-thirds vote to authorize a subscription. No binding contract could be made between these parties for the sale of stock, except by the assent of the plaintiffs and "two-thirds of the voters of the town, present at a legal meeting." Clearly, after the meeting of March 15, 1869, no such contract could be made. After that date, there was no assent of a majority, much less of two-thirds, of the voters; and before that time the testimony shows no contract, assented to by both parties. *Essex Turnpike Corporation v. Collins*, 8 Mass., 292, is a case like this in principle and decisive of it.

As, therefore, the contract upon which the action rests fails, it is unnecessary to examine the other points raised in the defence.

It is, however, claimed that the plaintiffs may recover under the provisions of the Special Laws of 1869, c. 206. But the only purport of that act is to afford a remedy where the "terms and conditions of the subscription have been substantially complied with." It does not propose to make a contract for the parties where none had previously existed, nor would it have been competent for the legislature to have done so, if such had been the object. *Plaintiffs nonsuit.*

APPLETON, C. J., WALTON, BARROWS and VIRGIN, JJ., concurred.

DICKERSON, J., dissented.

HARRISON SMALL *vs.* JANE F. CLEWLEY, Executrix.

Burden of proof as to consideration of promissory note is on the plaintiff.

In an action on a promissory note between the original parties thereto, where a want of consideration is relied upon as a defence. and evidence is given on the one side in the affirmative, and on the other in the negative, of the fact of consideration, the burden of proof is on the plaintiff to satisfy the jury upon the whole evidence, of that fact.

ON EXCEPTIONS.

ASSUMPSIT for money had and received, brought under R. S., c. 66, § 13, upon a claim disallowed by the commissioners of insolvency upon the estate of the late William Clewley, deceased, of whose will the defendant is executrix. By a specification annexed to his writ, the plaintiff set up as the foundation of this action two promissory notes, alleged to have been made by the testator, one for $200, dated June 7, 1864, payable to the order of P. Warren in one year from that time with interest, and by said Warren indorsed; and the other for $500, dated April 14, 1868, running to Harrison Small or bearer, payable in one year from date with interest. The defence set up to both notes was forgery; as evidence of which it was said there were never any dealings between the parties to afford a consideration for such notes.

The only exception to the charge which received the attention of the court was the instruction as to the burden of proof, the bill of exceptions being to the whole charge. The ruling of the court as to the *onus probandi* is stated in the opinion. It may be proper to remark that the rescript prepared by the justice delivering the opinion has been used as the head note of this case, because it is in the identical language of that of *Delano v. Bartlett*, 6 Cush., 364, indicating the full concurrence of our court in the principles there enunciated. The verdict in the cause at bar was for the plaintiff for the amount of the larger note and the defendant excepted.

A. G. Jewett, *F. Nickerson* and *N. H. Hubbard*, for the defendant.

N. Abbott, for the plaintiff.

PETERS, J. The plaintiff, as payee, sues the executrix of the maker of two promissory notes. The grounds of defence, taken by the defendant, seem to have been that the notes were forged; or, if genuine, that they were obtained without a valuable consideration therefor. The parties did not testify; no witnesses to the original transactions were called; the evidence is mostly circumstantial and somewhat indefinite, and was introduced by both sides upon the issues involved.

The judge presiding said to the jury, "if you find that the signature is genuine, the burden is upon the defendant to show he should not pay it;"—"if you are satisfied that those signatures are genuine, then the presumption of law is, that the notes were given at the time they purport to have been given, and for a valid consideration, and the plaintiff is entitled to judgment for the amount and interest on the notes, unless the defendant taking the burden upon herself, has satisfied you that there is some legal reason why she should not pay them. It is incumbent upon the defendant to satisfy you by a balance of testimony, if you find that the signatures are genuine, that she has some ground for being discharged from liability."

The effect of the instruction was to impose the burden of proof upon the defendant, to show that there was a want of consideration for the notes; and in this respect the instruction was erroneous. In one sense a burden of proof would be upon the defendant; a particular burden, to rebut the *prima facie* case made by the production of a genuine note, but the general burden of proof was upon the plaintiff to show a consideration for the notes, and that burden does not shift. The weight of evidence may preponderate on the one side or the other, but the burden of proof remains on the plaintiff, unless the defendant sets up a new and

distinct issue, as payment, for instance, confessing the original contract, and seeking to avoid it. Here the plaintiff declares, in his writ, that the notes were given for value. If not so given, they were not contracts upon which the defendant could be legally held. The plaintiff is required to prove this essential allegation. He can rely on the presumption which arises from the note itself. But there being other evidence on both sides, which has a bearing upon the question of consideration, the burden remains upon the plaintiff upon all the evidence produced, including the note itself and the presumption that arises from it, to establish what he, in the declaration in his writ, has necessarily alleged.

The same question arose in *Delano v. Bartlett*, 6 Cush., 367, where it is said, "It was incumbent on the plaintiff to prove a consideration for the note, which was the foundation of the suit. That was a part of her case, and the burden was on her to establish that fact. But the note itself was *prima facie* evidence of a consideration, so that, by producing the note, the plaintiff made a *prima facie* case. That evidence, if not rebutted, would be sufficient to maintain the plaintiff's case. But it was competent for the defendants to rebut the evidence on the part of the plaintiff, and thus to avoid the *prima facie* case made by her. Accordingly the defendants did offer evidence to rebut the evidence on the part of the plaintiff, and to show that there was no consideration. The evidence on both sides applied to the affirmative or negative of the same issue or proposition of fact, a consideration for the note, and the plaintiff's case requiring her to show that fact, the burden of proof was all along on her to satisfy the jury upon the whole evidence in the case, of the fact of a consideration of the note."

In *Powers v. Russell*, 13 Pick., 76, Chief Justice Shaw says, "where a party having the burden of proof establishes a *prima facie* case, and no proof to the contrary is offered, he will prevail. Therefore the other party if he would avoid the effect of such *prima facie* case, must produce evidence of equal or greater weight to balance and control it, or he will fail. Still the proof

upon both sides, applies to the affirmative or negative of one and the same issue, or proposition of fact; and the party whose case requires the proof of that fact, has all along the burden of proof. It does not shift, though the weight in either scale may at times preponderate."

In a note to the case of *Commonwealth v. McKie*, 1 Leading Criminal Cases, by Bennett & Heard, the editors clearly express the legal proposition in this way: "The production of a note written by the defendant, containing the words 'value received' is equivalent to proving an admission of his, that there was an original consideration for the note, and nothing more. It is a *prima facie* evidence of a consideration, sufficient, if not rebutted, to maintain the plaintiff's case. But to hold that such an admission in the note of a consideration therefor, changes the burden of proof, and compels the defendant to assume it, would be to hold that such an admission, when made orally, and when not contained in the instrument, would have the same effect."

Other authorities are to the same effect. *Noxon v. De Wolf*, 10 Gray, 343; *Estabrook v. Boyle*, 1 Allen, 412; *Crowninshield v. Crowninshield*, 2 Gray, 529; *Burnham v. Allen*, 1 Gray, 496; *Smith v. Edgeworth*, 3 Allen, 233; *State v. Flye*, 26 Maine, 312; *Tarbox v. Eastern Steamboat Co.*, 50 Maine, 339; *Bourne v. Ward*, 51 Maine, 191.

In *Sawyer v. Vaughan*, 25 Maine, 336, it is stated that the burden of proof would be upon the defendant to prove a failure of consideration of a note. In *Delano v. Bartlett*, 6 Cush., 368, before cited, a distinction is made in respect to the burden of proof, between a want of original consideration and a failure of it; while in *Burnham v. Allen, ubi supra*, no such distinction is taken by Chief Justice Shaw. If no distinction exists, the statement by Shepley, J., in *Sawyer v. Vaughan*, if he intended to convey the idea that the defendant would be required to show more than enough to control the *prima facie* case made by the note, which he probably did not, would be erroneous. A later case in this State, *Quimby v. Morrill*, 47 Maine, 470, evidently

received very little consideration, so far as this question was concerned, and so far as contradictory to the construction established in the present opinion, is, both upon principle and the precedents, unsustained.

It might be regarded that the instruction in this case was not given in the strict and technical sense of the meaning of *onus probandi*; and that the burden alluded to was merely a requirement to nullify the effect of the plaintiff's *prima facie* case, were it not that the defendant was required to show the grounds of her discharge from liability by a balance of testimony; which would seem to imply, and might be so regarded, as requiring more rebutting evidence by the defendant than sufficient to nullify the value of all that the plaintiff had produced, and so that the defendant would be held, even if, upon all the testimony of both sides, upon the disputed proposition, it was left uncertain whether there was any consideration for the notes or not. The defendant would thus be held even if the scales of evidence were *in equilibrio*. He would be required to produce evidence not only equal to, but greater than the weight of all presented by the plaintiff. He would have to satisfy the jury not only that upon the whole evidence no consideration for the note was proved, but that none existed. He was required not only to control and overturn the presumption created by the note, but to proceed further, and prove the negative of a proposition, the affirmative of which was upon the other side. In *Burnham v. Allen*, 1 Gray, 501, *ubi. supra*, the court say: "As the burden is on the plaintiff to prove a good consideration (for the note), if the whole evidence, offered on both sides, leaves it in doubt whether there was a good consideration or not, the plaintiff fails of making out his case, and the defendant will be entitled to a verdict."

Although it might not be incorrect, ordinarily, to say, in general terms, that a production of a note would cast the burden of proof upon the maker of it to show some defence to it, a somewhat common but inaccurate use of the phrase—meaning no more than that it would be incumbent on a defendant to offer evidence to

impeach and overcome a *prima facie* case;—still the rule given in the terms and under the aspects of the case as presented here, must be regarded as erroneous. The notes were surrounded with suspicion. Next to no evidence of a direct character was produced, throwing any light or explanation upon the transactions. It was peculiarly a case where an accurate and exact statement of the rule as to the burden of proof would have been valuable to the defendant, and she was entitled to it. *Exceptions sustained.*

APPLETON, C. J., CUTTING, WALTON and BARROWS, JJ., concurred.

EDMUND P. STRINGER and others *vs.* ROBERT H. COOMBS.

Damages. Execution. R. S., c. 81, § 1. Writ.

The defendant agreed to pay the plaintiffs a commission of five per cent. on the charter of a vessel hired for thirty-three thousand three hundred dollars in hard Spanish dollars, i. e., $1665; *held* that, Spanish dollars being equivalent to ours, the brokerage should be paid in the coin of the United States with interest from the day it was payable; and that execution should issue specifically for the coin.

An execution is a writ the form of which the justices of this court are authorized to change as occasion may require, under R. S., c. 81, § 1.

ON FACTS AGREED, presented under R. S., c. 77, § 14.

The plaintiffs, at London, Eng., procured the defendant's vessel to be chartered for a round voyage at $33,300 to be paid in hard Spanish dollars, for which it is conceded that they are entitled to a commission of five per cent. on that amount, the only question being whether this $1665 should be paid in currency or in hard Spanish dollars, or their equivalent.

Boyle & Johnson, for the plaintiffs.

Wm. G. Crosby, for the defendant, cited *Adams v. Cordis*, 8 Pick., 260; *Lodge v. Spooner*, 8 Gray, 166.

APPLETON, C. J. The plaintiffs procured a charter-party on the Live Oak, a vessel of which the defendant was master and part owner. The vessel at the time was lying in the port of Cardiff. The defendant executed and delivered the plaintiffs on the 15th of April, 1866, the following agreement:

"London, 15 April, 1866.

Messrs. Stringer, Pembroke & Co.,
8 Austin Friars, London.

Gentlemen:

In consideration of your having procured a charter for the ship "Live Oak" from the Chincha Islands to Spain, hereby undertake to pay you a brokerage of five per cent. on the estimated amount of chartered freight—ship lost or not lost; such brokerage being due on the signing of the charter-party, but if not then paid, may under your order be deducted by the consignee from the freight upon settlement.

Gentlemen, yours respectfully,

R. H. COOMBS."

By the charter-party the freight was to be paid at the rate of eighteen hard Spanish dollars per ton of 2240 lbs. English, &c.

The English currency is in pounds, shillings and pence. The amount due was to be ascertained by reference to the value of hard Spanish dollars. Neither German, Mexican or American dollars can be referred to as the measure of value. They may differ in value from the hard Spanish dollar, which was agreed upon and which alone would satisfy the terms of the charter.

The contract was made in London and the parties must be governed by the law of the place. The plaintiffs were there entitled to five per cent. of the freight computed at the rate specified in the charter-party. Their claim could only be satisfied by the payment of one-twentieth of the freight reckoned according to the terms of the charter and payable in London. If the debt is paid here, the plaintiffs should receive what their five per cent. was worth at the time when, and the place where, it was payable, in the currency of this country and interest. Nothing less would be just

or would be a full compensation. In the case of a debt contracted in England in the absence of any understanding to the contrary, the debt is held due and payable there. "This being so," observes Thompson, C. J., in *Benners v. Clemens*, 58 Penn., 24, "it was payable in the legal currency of the country denominated pounds, shillings and pence, and the representative of gold. Of course, as any payment here would be in legal tender notes, the value of the gold in legal tenders with interest would be what in amount the judgment should be. The *lex loci contractus* must control in interpreting the contract. *Allshouse v. Ramsey*, 6 Wharton, 331; *Watson v. Brewer*, 1 Barr, 58." These views were fully sustained by Mr. Justice Cochrane in *Marburg v. Marburg*, 26 Maryland, 8, where this question is very fully and ably discussed. In *Nickerson v. Soesman*, 98 Mass., 364, the suit was brought to recover damages for the non-performance of a contract to be performed in a foreign jurisdiction. In that case, the defendants refused to surrender to the plaintiffs' agent money, notes and goods, &c., in Surinam, on demand, as by their contract they were bound to do. In reference to the rule of damages, Bigelow, C. J., says: "They had a right to demand and receive them then and there; and for the failure of the defendants to fulfill their duty, they are entitled to such sum as will put them in the same situation as they would have been, if the property had been then given up and received by them at Surinam. Clearly such indemnity would not be had, if the plaintiffs could recover only such sum in the currency of this country as is nominally equivalent to the sum which they would have been entitled to recover in the currency of Surinam. It would fall just so far short of full compensation for the injury sustained, as that sum in the current money of the United States is worth less than the same sum estimated in the currency of Surinam. The only just rule is, that in such cases the party who has suffered a loss or injury through the fault of another shall be allowed such sum, in the currency of the place where the suit is brought, as most nearly approximates to that which he would be entitled to recover in the country where the injury or loss

happened and the damage was sustained." It is true the court qualify the above by the remark that "the cases in which actions have been brought on a contract to pay a sum of money in a foreign country, depend on different principles and are not applicable to transactions like that out of which the present action has arisen." But it is not readily perceived why justice should not be done as much in one case as another. All contracts when enforced by legal process are ultimately payable in money. Whether the contract be to pay a given sum of money in a foreign country or to do certain acts, for non-performance of which the injured party may recover damages in such country, cannot logically affect the compensation in way of damages to which he is entitled when seeking redress in another tribunal. Nor is it very easy to see why, if one contracts to pay a thousand dollars in a country where by the law the contract is payable in coin, the measure of damages should be other or different from those where as a common carrier he agrees to deliver a thousand dollars in gold coin. *Cushing v. Wells*, 98 Mass., 550. In each case the loss is the same if the contract is not performed, and no sound reason can be imagined why the damages for non-performance should differ.

"The proper rule," remarks Story in his Conflict of Laws, § 309, "would seem to be, in all cases, to allow that sum in the currency of the country where the suit is brought, which should approximate most nearly to the amount to which the party is entitled in the country where the debt is payable, calculated by the real par, and not by the nominal par, of exchange." If the currency of the country has become depreciated, then depreciation ought to be allowed for. Without that is done, justice is not done. The party to whom the debt is due fails to receive the amount which is his due. If the contract were for specific articles, the measures of which though nominally the same were really different, would any doubt that the measure in use in the country where the contract was to be performed, would be the one which is to govern in that where it is sought to be enforced? But the principle must be the same whether it applies to a measure of quantity or one of value.

As the contract was made and was to be performed in England, the legal tender acts of the United States are inapplicable. The plaintiffs, if they were to be paid in currency, would therefore be entitled to a sum equivalent in value to the debt due at the time and place when and where it was payable.

The case of *Wood v. Watson*, 53 Maine, 300, does not apply. That related to the damage where a foreign bill of exchange had been protested. As the damages in such case had been settled by a long continued series of decisions based upon such usage, which formed a part of the law of the State equally as if determined by statute, at ten per cent., it was held, and correctly, that the rule could not be changed by reason of any monetary crisis, and that such change would be a legislative rather than a judicial act.

It is apparent, therefore, that the plaintiffs are entitled to recover the value of one-twentieth of the freight, earned and payable in London.

By the agreement of the parties "the estimated amount of chartered freight was thirty-three thousand and three hundred dollars, ($33,300) hard Spanish dollars. Upon this sum it is agreed that the plaintiffs were in London, on the fifteenth day of April, 1866, entitled to five per cent. from the defendant, and that said five per cent. remains wholly unpaid, to recover which, this action is brought."

"Five per cent. of the estimated amount of chartered freight" to which the plaintiffs are entitled for brokerage, is five per cent. of thirty-three thousand three hundred hard Spanish dollars. It is neither more nor less than that amount. It is what the plaintiffs would have received had the defendant performed his contract. It has relation to the sum from which it is to be deducted, and is necessarily a portion of that sum. It would not be five per cent. "of the estimated amount" if paid in a depreciated currency, or in dollars of less value than "hard Spanish dollars." Five per cent. then, would be sixteen hundred and sixty-five hard Spanish dollars, for it was to be from the freight earned, and in the hard Spanish dollars, in which the freight was payable. The

defendant was indebted to the plaintiffs for that sum in hard Spanish dollars, or in coin of equivalent value. Payment in dollars of an inferior standard of value, would not be a performance of the contract.

By the statutes of the United States, the Spanish dollar is equivalent in value to our silver dollar, and it is made a legal tender for the payment of all debts and demands, at that rate by Act of Congress passed April 10, 1806, § 1, 2 U. S. Stats. at Large, 374, c. 22.

It is well known that legal tender notes are of variable and fluctuating value. The plaintiffs are entitled to payment in coin, or in currency equivalent in value to the coin when and where the debt was payable. The value of legal tender notes may change between the date of a writ and the rendition of judgment—between the date of an execution and any service thereon. If judgment were to be rendered for the amount due in the currency of the country, the plaintiffs might receive more or less than was due as the currency should oscillate in value. Accordingly, the courts of the United States have recognized the fact that there are two descriptions of lawful money under the Acts of Congress. *Bronson v. Rodes*, 7 Wallace, 229, *Butler v. Horwitz*, 7 Wallace, 258. To avoid the fluctuations in value of legal tender notes as compared with gold and silver coin, they have ordered, when the contract is payable in gold and silver coin or specie, that executions should issue payable in gold and silver. *Trebilcock v. Wilson*, 12 Wallace, 687. The courts of various States following the principles adopted and acted upon by those of the United States, have ordered similar judgments and executions. *Phillips v. Dugan*, 1 Ohio St. R., 466, *Independent Ins. Co. v. Thomas*, 104 Mass. 192.

By R. S. 1871, c. 81, § 1, the Supreme Judicial Court is authorized to make, by general rules, such alterations in the forms of writs "as changes in the law or other causes require." An execution is a writ. Authority to change a writ implies authority to change an execution issued upon a judgment rendered in a suit commenced by such writ.

The contract in the present case was to pay the freight at a certain specified rate. It can only be exactly performed by a payment according to its terms. Equivalent value will do justice.

To this end, judgment should be entered specifically for the current coin of the United States, and execution should so issue for the debt. The judgment for costs should be general as that may be satisfied by payment of either kind of lawful money. In this way alone the payment of what is due, neither more nor less, will be enforced. *Judgment accordingly.*

CUTTING, WALTON, DICKERSON, DANFORTH and PETERS, JJ., concurred.

ASA THURLOUGH, Judge of Probate,
vs.
SHARON W. KENDALL and others.

Estoppel—how waived.

While in an action on an administrator's bond, to recover the amount of a judgment obtained by default against the intestate's estate in the hands of such administrator, the defendants might be estopped to rely upon the insolvency of the estate as a defence thereto; it would be otherwise where the insolvency is admitted by the agreed statement of facts in the case. Such admission is a waiver of the estoppel created by the default.

ON FACTS AGREED.

DEBT on an administration bond, brought for the benefit of Ansel Lathrop, who recovered judgment by default against Sharon W. Kendall, as adminstrator of the estate of the late Waterman B. Kendall. Payment of the execution issued upon that judgment was demanded and refused, and the officer made his return of *nulla bona* thereon. It was admitted that none of the conditions of the administration bond have been performed; and, on the other hand, that no property of the intestate came into the hands of the administrator.

Jos. Williamson, for the plaintiff.

W. H. Fogler, for the defendants.

PETERS, J. The plaintiff in this case makes out a *prima facie* case by the production of a judgment in his favor against the principal defendant as administrator, together with an execution duly demanded, and a return of *nulla bona* thereon.

The defence set up by the administrator is, that no assets have come to his hands wherewith to pay the claim, and that for that reason he and his sureties are exonerated therefrom. It appears that the estate was utterly worthless; that no inventory was returned; that no representation of insolvency was made, and that no account was ever rendered to the probate court. Nor were such steps necessary, no assets whatever being found. R. S., c. 66, § 2. *Walker v. Hall*, 1 Pick., 20.

The plaintiff contends that by R. S., c. 72, §§ 9 and 12, he is entitled to recover upon the administrator's bond notwithstanding such insolvency, that the administrator is estopped by the judgment in the original action to deny that he has assets; or to assert that the estate which he represents, is so far as the plaintiff is concerned, an insolvent one; that the presumption of law is that he either has assets, or that there was some good reason why he did not plead a want of assets in the original action, and that, not having done so then he cannot be permitted to do it now. Our own cases seem strongly in the direction of this legal proposition, and the general principle is well established in leading authorities elsewhere. *Sturgis v. Reed*, 2 Maine, 109; *Hapgood v. Fisher*, 30 Maine, 502; *Thompson v. Dyer*, 55 Maine, 99; *Wyman v. Fox*, 59 Maine, 100; *Erving v. Peters*, 3 T. R., 685; *Leonard v. Simpson*, 2 Bing. N. C., 176; *Gookin v. Hoit*, 3 N. H., 392; *Platt v. Robbins*, 1 Johns. Cas., 278; *Ruggles v. Sherman*, 14 Johns., 446; *Heard v. Lodge*, 20 Pick., 53; *Newcomb v. Goss*, 1 Metc., 333; *Cushing v. Field*, 9 Metc., 180. There is no difference in this regard between an insolvent estate with some assets and one with none. *U. S. v. Hoar*, 2 Mason, 317; *Ludwig v. Blackington*, 24 Maine, 25.

But we are not required to decide whether the judgment exhibited here would operate as an estoppel or not. The parties have expressly agreed as a part of the record of this case that there are no assets. Agreeing to a fact in a case stated, which the other party would have been estopped to assert, is a waiver of the estoppel. The following authorities establish the point conclusively, that under such circumstances the defence set up in this action is as efficacious here as it would have been if presented in the original suit. *Hayes v. Seaver*, 7 Maine, 240; *Smith v. Tilton*, 10 Maine, 350; *Dane v. Gilmore*, 51 Maine, 544; *Wolcott v. Ely*, 2 Allen, 338; *Wheelock v. Henshaw*, 19 Pick., 341.

Plaintiff nonsuit.

APPLETON, C. J., CUTTING, WALTON, DICKERSON, and BARROWS, JJ., concurred.

THOMAS BAILEY *vs.* BENJAMIN W. BLANCHARD.

Arbitration. Evidence—admissibility and effect of determination of one agreed upon to settle a question arising between the parties to a contract.

A written contract between the parties relating to the subject-matters of the suit is admissible in evidence, though one of the parties contends, and offers testimony tending to prove, that it has been rescinded. It is for the jury under the instructions of the court to determine whether it has been rescinded, or is still obligatory to any extent, or has been superseded by subsequent agreements.

The scale-bill made by the person agreed upon by the parties to do the scaling under contract relating to logs or lumber, and delivered at the time of the operation to the party to be charged thereby, and made known at the time to both parties is competent evidence without producing the testimony of the scaler himself under oath.

Such scale is admissible although part of the logs were measured and reckoned up and a memorandum of them left with one of the parties on Sunday, and although the scaler ceased to scale before all the logs were hauled.

In the absence of fraud, such scale-bill is conclusive between the parties, so far as it goes.

Bailey *v.* Blanchard.

ON EXCEPTIONS AND MOTION FOR A NEW TRIAL.

ASSUMPSIT upon an account annexed for cutting and hauling logs, the number and measurements of which were the matters in dispute; the defendant conceding an indebtedness and offering to be defaulted for $775, and the plaintiff claiming $1,174.61. The work was commenced under a written contract, dated Nov. 23, 1870, which was offered in evidence by the defendant, objected to by the plaintiff on the ground of an alleged rescission of it, but admitted by the court. The defendant conceded that it had been changed as to price and mode of payment, but asserted that in all other respects it continued in force, while the plaintiff said it was entirely superseded by the parol agreement between them.

The writing stipulated that the logs were "to be scaled by Joseph Treat," whose certificate of the scaling was offered by the defendant and received under objection from the plaintiff that Treat was not a certifying officer, and that the paper was not verified by his oath. Mr. Treat died before this cause was tried. He did not scale all the logs cut and hauled by Mr. Bailey for Mr. Blanchard, and the last lot he did scale was about 67,000 feet, measured upon the Lord's day, March 5, 1871, in the presence of the defendant and absence of the plaintiff. Fifty-three logs were subsequently hauled by plaintiff, which the defendant averaged according to the last scale made by Treat. The plaintiff desired to have the jury instructed, that if the last scale by Treat was made on the Lord's day, it was unlawful and void; and that if Treat made a legal scale of only part of the logs, his scale must be entirely disregarded; the first request the presiding justice refused to give, holding that a scaling by Treat on Sunday would not affect these parties; as to the other, he told the jury that if Mr. Treat by mistake or otherwise, except by fraud, omitted to scale any of these logs, yet his scale so far as it went would be binding and conclusive upon the parties unless vitiated by fraud; and that they might arrive at the quantity of feet contained in the logs not measured by Treat by reference to the scale of other persons, or as they best could from all the evidence in the case. The plaintiff claimed

that Treat measured twelve hundred feet of spruce logs and fifteen hundred feet of pine to a thousand, giving as his (Treat's) reason, that otherwise the logs would not hold out when they got down river; and requested to have the jury instructed that the scale, if so made, was fraudulent and void; but the judge told them that if Mr. Treat, without fraud, honestly scaled the logs according to the usage and custom of that locality at that time, such method of scaling being within the contemplation of the parties in making their contract, his scale-bill would be binding and conclusive upon the parties.

The plaintiff argued that he was entitled to be paid for the logs actually hauled by him to the designated point upon the Baskahegan stream, without reference to the number of them reaching the mills below; which the court told the jury was true with the qualification that the quantity was to be established at the place of deposit, according to the custom or usage then prevailing there, and contemplated by the parties in their contract, as before stated.

The plaintiff having obtained a verdict for only $719.81, excepted to the foregoing instructions and refusals to instruct, and moved to set aside the verdict as against law and the weight of evidence.

J. & G. F. Granger, for the plaintiff.

Treat's scaling on Sunday was done by defendant's procurement, and in his presence, and is void. Long on Sales, 133-4, 145; *Towle v. Larrabee*, 26 Maine, 464; *State v. Suhur*, 33 Maine, 539; *Nason v. Dinsmore*, 34 Maine, 391; *Hilton v. Houghton*, 35 Maine, 143; *True v. Plumley*, 36 Maine, 466; *Hinckley v. Penobscot*, 42 Maine, 89; *Tillock v. Webb*, 56 Maine, 100; *Parker v. Latner*, 60 Maine, 528; *Fox v. Abel*, 2 Conn., 541; *Way v. Foster*, 1 Allen, 408; *Day v. McAllister*, 15 Gray, 433; *Story v. Eliot*, 8 Cowen, 27.

There was no evidence of usage whatever; hence, the allusion to it in the charge is erroneous. The certificate was inadmissible because not official. It was an unsworn written statement of a fact; only this, and nothing more. *Oakes v. Hill*, 14 Pick., 448.

In *Robinson v. Fiske*, 25 Maine, 401, the scalers were introduced as witnesses. In *Berry v. Reed*, 53 Maine, 487, it appears that the scaler was a sworn surveyor.

E. B. Harvey and C. A. Cushman, for the defendant.

BARROWS, J. The plaintiff's objection to the admission of the written contract between himself and the defendant for the cutting and hauling of the logs, for which he was claiming to recover on a general *indebitatus assumpsit* is untenable. The exceptions show that while he claimed it was rescinded, the defendant claimed that it was in force, except so far as it had been modified by a subsequent parol agreement, increasing the price and changing the mode of payment. Whichever party was right on the disputed point, the question was one which it became necessary for the jury to pass upon, and the contract was necessarily admissible. The whole course of proceedings between the parties, as exhibited by the evidence, shows that the defendant's position in relation to it, was the correct one. The plaintiff's counsel prudently avoids dwelling at much length on the exception. But he insists strenuously upon his objection to the admission of the scale-bill made and signed by the person agreed upon in the contract, to scale the logs—Joseph Treat, who is dead—contending that the scaler's survey and conclusions upon the matter submitted to him by the parties, can only be proved by his testimony under oath, in order that the party who deems himself aggrieved may have an opportunity of cross-examining him.

The scale made by the person agreed upon by the parties to scale the logs, in a contract for the hauling or sale of them, is binding and conclusive upon the parties in the absence of fraud. *Robinson v. Fiske*, 25 Maine, 401; *Berry v. Reed*, 53 Maine, 487. Neither party is at liberty to set aside or impeach it, except upon such evidence as would avoid the award of an arbitrator mutually chosen—evidence which will satisfy the jury that the scaler acted corruptly, or that injustice is done by reason of some bias,

prejudice, or foul practice in the procurement of it. It is easy to see that the party who seeks to sustain an award or a scale-bill might be at a disadvantage when he could not have the testimony of the arbitrator or scaler to explain any apparent discrepancies between the result reached and that indicated as correct by the testimony offered to impeach it. But if the award or the scale-bill will sustain itself against all attacks without the testimony of the maker, we do not think that he who relies upon it should be deprived of the benefit of it. If a scale-bill made and delivered to the parties at the time, as this was, can be relied on as competent evidence only so long as the scaler is living within reach of process and his testimony can be had to support it, the beneficial effect which such agreements have in preventing disputes about matters that can never be so well ascertained as by those who examine them forthwith, before any movement has taken place, or any controversy has arisen, will be greatly circumscribed. When the scaler dies, or goes away, suits similar to this would often arise. We think the scale-bill was properly received in evidence, subject to be controlled or impeached only as the award of an arbitrator mutually chosen *post litem motam*, might be.

It was competent for the plaintiff to show that a part of the logs referred to in his account were not included in the scale-bill of Treat, and he was allowed by the presiding judge to establish, if he could, the existence of such a discrepancy between the scale-bill and the actual amount of logs hauled, as would lead the jury to infer some corrupt or fraudulent practice, and he seems to have had the full benefit of his attempts in this direction, so far as the rulings and instructions of the presiding judge related thereto.

The jury were duly directed to ascertain the quantity of any logs not scaled by Treat, from the other evidence in the case; but that Treat's scale, as far as it went, "if not tainted by fraud," was to be taken as the true scale. The plaintiff's requested instructions upon that branch of the case received only such limitations and qualifications as were necessary to relieve the court from assuming to decide those questions of fact which properly belonged to the

jury. The instructions given were in full and accurate conformity with the leading case of *Robinson v. Fiske*, above cited, where the reasons and application of the rule are thoroughly discussed.

The remark is as true and applicable in this case as in that, that "the parties in making their contract have not intimated an intention that the surveyor agreed upon, should proceed otherwise in reference to the timber, than had been customary in other cases."

It was to this general course of the business there—not to any such imaginary rule, or improved usage, as the ingenuity of counsel conjures up—that the presiding judge referred in the instruction of which the plaintiff complains, which was appended to his third and fifth requests. It is simply impossible that the jury could have been misled by such a reference to the usual course of the business. The plaintiff's counsel himself says in argument, that no such point was made by defendant's counsel; and we think it equally plain that no such applications of the reference made by the court to the customary mode of scaling, could have entered the minds of either judge or jury. The jury were directly instructed that if Treat's scale was made, giving twelve and fifteen hundred feet to a thousand, in order to make them hold out below, it would be fraudulent and void.

The plaintiff lays much stress upon the refusal of the presiding judge to rule in accordance with his first and second requests, that if the last scaling done by Treat was on the Lord's Day, it was in violation of law, and void, and that as there was no legal scale by Treat of the whole of the logs, his scale must be set aside and disregarded.

In support of his first request he cites a familiar line of cases respecting the effect of a breach of the law for the better observance of the Lord's Day committed by parties litigant, upon their rights in controversy.

That which bears the closest analogy to the case at bar, is the case of *True v. Plumley*, 36 Maine, 466, and the conclusion there reached is not favorable to the plaintiff's view. The verdict of a jury upon a case respecting which they had consulted, agreed, and

sealed up their verdict on the Lord's Day, was held not invalidated thereby. And the cases cited with approval in the opinion of the court, hold that if it had been returned, affirmed, and recorded on that day, it would have made no difference, so long as final judgment was not then rendered.

The measuring and casting up of some of these logs by Treat, and leaving a memorandum of them at the plaintiff's camp on Sunday, cannot be held to vitiate his scale. So far as the scaling of those particular logs even was concerned, the act of the scaler was not complete until the scale-bill was delivered to the defendant, who was the party to be charged thereby, and that does not appear to have been done on Sunday.

The case falls within that line of cases in which some portion of the proceedings may have taken place on Sunday, but the transaction not being completed on that day, so as to become effective, is held not to be vitiated by the illegal, and perhaps punishable, acts of those concerned in it. See *Hilton v. Houghton*, 35 Maine, 143, where the settlement of accounts between the plaintiff and principal promissor on the note in suit was made on the Lord's Day, at the request of the plaintiff, and the note was then written and signed by the principal and his sureties, but not being delivered to the plaintiff until a secular day, was held not avoided by the illegality of the incipient acts of the parties.

The position that the acts of Treat, done under the contract, so far as they were completed, are not receivable and binding, because he ceased to scale before the hauling of the logs was entirely completed, or that his scale should be set aside upon evidence of error in his count or estimate of those which he did scale, cannot be maintained. He was the scaler agreed upon by the parties. Mere mistakes of his are not to be revised here upon the strength of testimony equally liable to mistake. So far as he went under the contract, his doings are conclusive upon the parties in the absence of fraud. There is no controversy as to the number of logs hauled after Treat stopped scaling. The plaintiff's count of them is accepted; and if, as the plaintiff's counsel supposes, the

jury averaged them by Treat's last scale, it was, doubtless, because they believed his average nearer right than the average of the plaintiff's scalers.

Upon a careful review of the whole testimony, we see no great cause to question the substantial correctness of the verdict. Juries seldom err in the direction here suggested. Their sympathies are commonly with the party who has done the work, and they rarely fail to give him the benefit of as favorable a construction of the testimony as fair dealing will permit.

Motion and exceptions overruled.

APPLETON, C. J., WALTON, DICKERSON and PETERS, JJ., concurred.

DANIEL K. CHASE *vs.* MICHAEL SILVERSTONE.

Damnum absque injuria. Case. Subterranean water—course diverted by well.

The defendant having dug his well on his own land, in good faith, for the obtaining of water for his own domestic uses, is not liable for any damage which incidentally resulted to the plaintiff by reason of thereby diverting the water which had been accustomed to percolate or flow, in an unknown subterranean current, into the plaintiff's spring.

ON REPORT.

CASE against the defendant for digging a well on his own land whereby the waters of a living spring upon that of the plaintiff were diverted. Neither party supposed the well would have that effect when it was dug. The plaintiff supplied his house and barn by pipes from his spring, the water flowing naturally into tanks. In sinking his well the defendant's workmen struck a vein of water that filled the well and overflowed the yard; to dispose of the water, a drain was made a foot or two below the top of the well so as to carry the overflow to the street gutter, ineffectual attempts having been made, in various ways, to check the flow. The result

was that the plaintiff's natural supply was cut off and he had to put a pump into his spring. This spring was shown to have existed there for thirty or forty years, at least.

The court were to enter such judgment as the law upon the facts required.

F. A. Pike for the plaintiff cited *Dickinson v. Grand Junction Canal Co.*, 9 Eng. L. & Eq., 513; *Dexter v. Providence Acq. Co.*, 1 Story Cir. C., 387; *Smith v. Adams*, 6 Paige, 435; *Bassett v. Salisbury*, 43 N. H., 569; *Swett v. Cutts*, 50 N. H., 439. In the cases of *Acton v. Bell*, 12 Mees. & W., 324, and *Greenleaf v. Francis*, 18 Pick., 117, the wells injured had not existed twenty years and were not natural streams coming to the surface.

J. & G. F. Granger, for the defendant.

VIRGIN, J. This court has had frequent occasion to enunciate the rules regulating the relative rights and liabilities of riparian proprietors and apply the principle of "reasonable use" to the peculiar circumstances of each particular case; and in two cases—*Lansil v. Bangor*, 51 Maine, 521, and *Greely v. Maine Cen. R. R. Co.*, 53 Maine, 200—have determined the rights and liabilities of landowners in relation to mere surface water. But this is the first case which has called upon us to declare the law which governs proprietors of adjacent lands in relation to sub-surface waters not gathered into a fixed, known channel.

Is a landowner, who, by digging a well in his own land for his own domestic purposes, thereby diverts underground waters and thus prevents them from percolating into a coterminous proprietor's spring to the owner's damage, liable for such damage; or, does such a diversion fall within one of those large and distinct classes of cases cropping out over the whole domain of "wrongs independent of contract," in which appreciable damage and loss are incidentally occasioned to an individual by the act of another, and yet no redress is given him by the law, and to which the law applies the phrase—"*damnum absque injuria?*"

We feel compelled by the vastly preponderating weight of authority to place the decision upon the latter alternative; and shall content ourselves with briefly alluding to a few of the principal adjudicated cases without any extended discussion of the principles upon which they are based.

An eminent jurist has well said that the doctrine of the civil law—"*cum eo qui in sua fodiens, vicini fontem avertit, nihil posse agi; nec de dolo: Et sane actionem non debet habere; si non animo vicino nocendi, sed suum agrum meliorem faciendi id fecit,*" or, (as translated by Maule, J., in *Acton v. Blundel*, 12 Mees & W., 335,) "if a man digs a well in his own field, and thereby drains his neighbor's, he may do so unless he does it maliciously,"—contains the germ of the present English and American law upon the subject, so far as that may be regarded as settled.

Such was the view of the court in *Greenleaf v. Francis*, 18 Pick., 117, as expressed by Putnam, J.,—"By the common law the owner of the soil may lawfully occupy the space above as well as below the surface, to any extent which he pleases, in the absence of any grant, agreement, or statute or police regulation to the contrary. * * These rights should not be exercised from mere malice. * * He may obstruct the light and air above and cut off the springs of water below the surface. * * The defendant dug his well in that part of his own ground where it would be most convenient for him. It was a lawful act, and although it may have been prejudicial to the plaintiff, it is *damnum absque injuria.*"

So, in *Parker v. B. & M. Railroad*, 3 Cush., 107, in discussing the relative rights of owners of lands, C. J. Shaw, on page 114, said: "Each owner of land has a right to make a proper use of his own estate, and sinking a well upon it is such proper use; and if water, by its natural current, flows from one to the other, and a loss ensues, it is *damnum absque injuria.*"

The first leading and most frequently cited English case wherein the rules regulating riparian rights were held inapplicable to percolating waters, is that of *Acton v. Blundel*, 12 Mees. & W.,

335, decided in 1843, in the Exchequer chamber. The plaintiff's cotton-mill was carried by water raised from a well in his own land. Subsequently the defendant sunk a coal-pit in his own land, one-half mile from the plaintiff's well, whereby the latter's supply of water was destroyed. Tindall, C. J., after discussing the known state and condition of water in surface-channels and the well settled rules governing riparian rights, says: "But in the case of a well sunk by a proprietor in his own land, the water which feeds it from a neighboring soil does not flow openly in the sight of the neighboring proprietor, but through the hidden veins of the earth beneath its surface; no man can tell what changes these underground sources have undergone in the progress of time; it may be, that it is only yesterday's date that they first took the course and direction which enabled them to supply the well; again no proprietor knows what portion of water is taken from beneath his own soil; how much he gives originally, or how much he transmits only, or how much he receives; on the contrary, until the well is sunk, and the water collected by draining into it, there cannot properly be said, with reference to the well, to be any flow of water at all. * * If the man who sinks the well in his own land can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbor from making any use of the spring in his own soil which shall interfere with the enjoyment of the well. He has the power still further of debarring the owner of the land in which the spring is first found, or through which it is transmitted, from draining his land for the proper cultivation of his soil. * * The advantage on one side, and the detriment to the other, may bear no proportion. The well may be sunk to supply a cottage, or a drinking place for cattle, whilst the owner of the adjoining land may be prevented from mining metals and minerals of inestimable value. And, lastly, there is no limit of space within which the claim of right to an underground spring can be confined." The opinion concludes as follows: "We think this case for the reasons given, is not to be governed by the law which applies to rivers and flowing streams, but that it rather

falls within the principle which gives the owner of the soil all that lies beneath the surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water, that the person who owns the soil may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts and drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of action."

In 1852, the Court of Exchequer, in *Dickinson v. Grand Junc. Canal Co.*, 7 Exch., 282, held, that at common law, the defendants, by sinking a well upon their own premises and thereby preventing water from percolating in its natural course into the river on which the plaintiff's mill was situated, to his damage, were liable in an action therefor. But the same court, four years later, in *Broadbent v. Ramsbotham*, 11 Exch., 602, held that where the plaintiff's mill had, for more than fifty years, been worked by the stream of a brook supplied by the water of a pond filled by rain, a shallow well supplied by subterranean waters, a swamp and a well formed by a stream springing out of the side of a hill, the waters of all which occasionally overflowed and ran down the defendant's land in no definite channel into the brook—the plaintiff had no right as against the defendant, to the natural flow of any of the waters. Alderson, B., in the opinion of the court, on page 614, says: "No doubt all the water falling from heaven and shed upon the surface of a hill, at the foot of which a brook runs, must by the natural force of gravity, find its way to the bottom and so into the brook; but this does not prevent the owner of the land on which this water falls from dealing with it as he may please and appropriating it. He cannot, it is true, do so if the water has arrived at, and is flowing in, some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such a channel."

But the English case which received the most consideration is *Chasemore v. Richards*, Clerk to Croydon Local Board of Health,

2 H. &. N., 168; S. C., 7 H. L. Cas., 349. The plaintiff's mill had been propelled more than sixty years by the river Wandle having its rise in Croydon and being fed largely by the rainfall on a large territory including the town. The rainfall percolated through the ground to the river. The defendants sunk a deep well in their land a quarter of a mile from the rise of the river, and by pumping the water for supplying the town, thereby abstracted and diverted so much of the underground water which would otherwise have found its way into the river as appreciably retarded the mill. In an action for the diversion, the court of Exchequer, in 1856, gave judgment to the defendants, upon the authority of *Broadbent v. Ramsbotham*, *supra*. The case then went to the Exchequer Chamber, where, in 1857, the judgment below was affirmed, all the judges concurring in the opinion pronounced by Creswell J., with the exception of Coleridge, J., who delivered a dissenting opinion, basing it upon the maxim—*sic utere*, etc. The case then went to the House of Lords, where, in 1859, after solemn argument, the former judgment was re-affirmed by the unanimous opinion of all the judges summoned, and by the House of Lords, with the exception of Lord Wensleydale, who hesitated to sustain in its full extent, the doctrine of the judges.

Wightman, J., speaking for the judges in relation to the right contended for by the plaintiff, says: "It is impossible to reconcile such a right with the natural and ordinary rights of landowners, or to fix any reasonable limits to the exercise of such a right. * * Such a right would interfere with, if not prevent, the draining of land by the owner. Suppose a man sunk a well upon his own land, and the amount of percolating water which found its way into it had no sensible effect upon the quantity of water in the river, no action would be maintainable; but if many landowners sank wells upon their own lands, and thereby absorbed so much of the percolating water by the united effect of all the wells as would sensibly and injuriously diminish the quantity of water in the river, could an action be maintained against any one of them; and if any, which; for no action could be maintained against them joint-

ly? * * The defendant's well is only a quarter of a mile from the river; but the question would have been the same if the distance had been twenty miles, provided the effect had been the same." The opinion cites approvingly *Broadbent v. Ramsbotham*, and *Acton v. Blundel*, and overrules *Dickinson v. Grand Junc. Can. Co.* Lord Chelmsford held the opinion—"the principles which apply to flowing water in streams or rivers * * wholly inapplicable to water percolating through underground strata which has no certain course, no defined limits, but which oozes through the soil in every direction in which the rain penetrates. There is no difficulty in determining the rights of the different proprietors to the usufruct of the water in a running stream. Whether it has been increased by floods or diminished by drought, it flows on in the same ascertained course. * * But the right to percolating underground water is necessarily of a very uncertain description. When does this right commence? Before or after the rain has found its way to the ground? If the owner of land through which the water filters cannot intercept it in its progress, can he prevent its descending to the earth at all, by catching it in tank or cistern? And how far will the right to this water supply extend?" Lord Cranworth said if the doctrine contended for by the plaintiff should prevail, "it would always require the evidence of scientific men to state whether or not there had been interruption. * * It is a process of nature not apparent; and therefore such percolating water has not received the protection which water running in a natural channel on the surface has always received. If the argument of the plaintiff was adopted, the consequence would be that every well that ever was sunk would have given rise or might give rise to an action."

So, in 1860, in *New River Co. v. Johnson*, 2 E. & E., Q. B., 434, (105 E. C. L.) in an action by the respondent to recover damages (1) for preventing water from percolating underground into her well; and (2), for abstracting from the well, water which had already so percolated into or which was in it. Cockburn, C. J., said: "As to the first ground of complaint, *Chasemore v. Rich-*

ards is an express authority that it would not constitute any cause; and as to the second ground, *Acton v. Blundel* is as plain an authority that no action would have lain in respect of that cause." Wightman, J., expressed similar views, adding that he thought *Chasemore v. Richards*, decisive of both grounds, while Crompton, J., said: "There may be some distinction between a case of water running in a defined stream, and the present case of water merely percolating, as to which *Acton v. Blundel* shows conclusively that no action will lie; and that the only remedy of the owner of a well from which such water has been abstracted, is to sink the well deeper."

Again in 1863, the subject came before the Queen's Bench, in *Regina v. Metropolitan Board of Works*, 3 B. & S., 708 (113 E. C. L.) A part of the prosecutor's estate was situate upon a deep bed of gravel, imbedded in a basin of clay. In the gravel bed on the lower part of the premises, there had existed from time immemorial, a pond fed by several powerful springs at its bottom; the water overflowing one edge of the clay-basin, formed a rivulet which ran through the grounds and supplied ornamental ponds therein, and which was used for the cattle and for supplying the garden. The defendants, in constructing a sewer along and under a highway, cut through the gravel bed and basin of clay, at a distance from the prosecutor's premises varying from seventeen to one hundred and fifty-three yards, the immediate effect of which was to prevent the springs there from finding their way into the pond, so that it, together with the rivulet and other ponds, became dry. The judges unanimously held that the case was "in principle not to be distinguished from that of *Chasemore v. Richards*," quoting the paragraph from Justice Wightman's opinion which we have transcribed above, and adding—"we entirely concur in this view of the law, and consider it to be strictly applicable to the circumstances of the present case."

Chasemore v. Richards was also recognized as sound law by Cockburn, C. J., and the other judges of the Queen's Bench, in *Hodgkinson v. Ennor*, 4 B. & S., 229, (116 E. C. L.,) decided in 1863.

Again, in 1869, in *Popplewell v. Hodgkinson*, Cockburn, C. J., speaking for all the court, said: "Although there is no doubt that a man has no right to withdraw from his neighbor the support of adjacent soil, there is nothing at common law to prevent his draining that soil, if for any reason it becomes necessary or convenient for him to do so." 4 L. R. Exch. Cas. 251.

This subject has been thoroughly examined in several of the States of this Union, and the doctrine of the English courts adopted. *Frazier v. Brown*, 12 Ohio St. R., 294; *Routh v. Driscoll*, 20 Conn., 533; *Brown v. Illius*, 25 Conn., 593; *Ellis v. Duncan*, 21 Barb., 230; *Wheatley v. Baugh*, 25 Penn. St. R., 528; *Haldeman v. Bruckhardt*, 45 Penn. St. R., 518; *Chatfield v. Wilson*, 28 Vt., 49; *Clark v. Conroe*, 38 Vt., 469.

We are aware that a contrary doctrine has been held by a few of the most learned courts in this country, and among them that of New Hampshire. In *Bassett v. Salisbury Manf. Co.*, 43 N. H., 569, and again in *Swett v. Cutts*, 50 N. H., 439, the subject was most elaborately and candidly discussed, and the cases reviewed. But we feel better satisfied with the reasoning in the cases from which we have made such liberal extracts, and the American cases, which we have simply cited, than with the views expressed by the courts holding the other doctrine; and we see less difficulties in applying the rule of *cujus solum*, etc., than that of *sic utere*, etc., to cases of this character.

The tendency of all the authorities is against the acquisition of a prescriptive right in cases of this nature, and the plaintiff's counsel has abandoned that point.

There is no satisfactory evidence in this case that the injury to the plaintiff's spring was caused otherwise than by a diversion of the underground percolating water, caused by the digging of the defendant's well. There is no evidence of malice on the part of the defendant in the digging or otherwise constructing of his well. Whether or not malice on his part would make any difference in the decision of the case, it is unnecessary for us to consider.

Our conclusion, therefore, is, that the defendant having dug his

well in good faith, for the purpose of obtaining water for domestic uses, is not liable for any damage which incidentally resulted to the plaintiff, by reason of thereby diverting the water which had been accustomed to percolate, or flow in an unknown subterranean current, into the plaintiff's spring.

Judgment for the defendant.

APPLETON, C. J., WALTON, DICKERSON, BARROWS and PETERS, JJ., concurred.

CHARLES WAITE and another *vs.* THOMAS B. VOSE.

Contract—rescission of. Exceptions. Payment absolute and conditional.

If a creditor takes unconditionally a cash order drawn upon him, in satisfaction of his debt, the debt is thereby paid; if the order be taken conditionally the debt will be paid so soon as the condition is performed. Thus, where the condition is that the amount of the order is due one on account of whose labor it is drawn, and that sum is in fact then due him, performance of the condition and payment of the debt are simultaneous and instantaneous, although the fact that the amount was then due the laborer is not ascertained till some time after. It is the fact and not the ascertainment of it that constitutes performance of the condition and makes the payment absolute.

Exceptions will not lie for a refusal to give instructions so abstract as not to plainly indicate their applicability to the circumstances of the case, and which, therefore, would afford no aid to the jury in coming to a correct conclusion.

After a refusal by the plaintiffs to carry out an alleged agreement to allow upon the account in suit an order drawn upon them, the defendant took the order from them and carried it to an attorney for advice; *held*, that an instruction that this constituted a rescission of the agreement was properly refused.

ON EXCEPTIONS.

There was also a motion for a new trial but no question of law arose upon it. Charles Waite & Co. were, in 1870, shipbuilders

and storekeepers in Calais, to whom the defendant was then indebted upon the account upon which this action is founded, the amount not being in dispute. That firm were then constructing a vessel upon contract, part of the job being under-let to Orlo Dow, who hired John Maloney to do some of the work. Maloney was owing Mr. Vose, and in payment delivered to him an order drawn by Mr. Dow, in favor of Vose, (or endorsed to him by Maloney) upon the firm of Charles Waite & Co., the consideration of which was Maloney's labor upon the vessel under Dow. The controversy was whether or not B. F. Waite, a member of the firm of Charles Waite & Co., agreed that they would accept this order upon a condition that was performed; and whether or not such agreement, if made, was subsequently rescinded by the parties. It was admitted that the order, if accepted when presented, would cancel the claim in suit. Mr. B. F. Waite testified positively that he "would not accept it upon any condition, because Dow kept drawing clear up all the time, and a little more:" but that Vose wanted him to see if they could not save something for him, so the order was left at the Waites' store; that Dow was then owing them, continued in their debt, and owed them $77 at the time of trial; that at the date of the order and subsequently, they did not owe Maloney, who was hired by Dow, Dow being the only one they knew in the business. The defendant testified that B. F. Waite promised that the order should be accepted if the amount of the order was due Maloney. It was admitted that the sum was then due to him from Dow, for work on the vessel. A witness, called by the defendant, swore that he heard B. F. Waite tell Dow that he had "accepted of Tom Vose's order, because it was a lien claim;" and Mr. Waite, when re-called, admitted that he paid two orders for larger sums drawn by Dow in favor of Maloney subsequently to the presentation of this one. The defence contended that the fact of Maloney's labor being a lien upon the vessel was the inducement for Mr. Waite's agreement to accept the order if anything was due Maloney, irrespective of the state of the accounts between them and Dow; and that Mr. Waite never repudiated his

contract with the defendant to allow it, till after that lien was barred by lapse of time. Upon Waite's refusal to give Vose credit for the order, the latter took it from their store and carried it to the office of an attorney to obtain advice and have it collected, if practicable, where it was afterwards accidentally burned.

After the counsel for Mr. Vose had stated in his opening the nature of the defence, the plaintiffs asked to have the jury instructed that, assuming the truth of all that the defendant alleged, it would constitute no defence to the action, but the judge declined so to rule at that stage of the proceedings. Several instructions were asked for at the time the charge was given, the first and third of which were, substantially, that the legal positions assumed by the defendant, and the facts contended for by him, constituted no defence to the plaintiffs' claim; but the judge refused to give these, remarking that they were too general. The second instruction prayed for, was that, if the payment was not actually consummated, any agreements made by B. F. Waite, which he afterward refused to carry out, would not constitute any defence to this action. This also was refused. The fourth request was to have the jury told that "Mr. Vose, taking back the order of Dow, not accepted, and leaving it with a lawyer for collection, will authorize the jury to infer that Vose gave up all claim against the Waites for the amount of the order." The judge, in reference to this matter, said: "On that, I say to you that there might have been this agreement, that it should be credited in this way, yet if the defendant afterward took it back, and consented to abandon or relinquish all right to have it allowed, then it would be a rescission of any former agreement; but if it was merely handed back to him, the plaintiffs refusing to carry out the former agreement, and so declaring to the defendant, who did not assent to any rescission, but took it when so returned, and afterward left it with a lawyer for collection, or for him to see about it, that would not be a rescission."

The verdict was for the defendant, and the plaintiffs had their exceptions allowed, and filed their motion for a new trial.

J. & G. F. Granger, for the plaintiffs.

There was no payment of the sum due from the defendant upon the account of the plaintiffs against him; only, at most, an unexecuted agreement to take a certain order in lieu of it. The defendant's remedy, if any, is for the non-performance of this agreement. *Jewett v. Cornforth*, 3 Maine, 107; *Mansur v. Keaton*, 46 Maine, 346; *Cushing v. Wyman*, 44 Maine, 121; *Bragg v. Pierce*, 53 Maine, 65; *Perkins v. Cushman*, 44 Maine, 484; *Clark v. Donovan*, 5 N. H., 136; *Bump v. Phœnix*, 6 Hill, 310; *Daniels v. Hollenbeck*, 19 Wend., 408; *Hawley v. Foster*, 19 Wend., 516; *Weddigen v. Boston Co.*, 100 Mass., 422; *Clifton v. Littlefield*, 106 Mass., 34; 1 Bouv. Law Dic., 18, Tit., Accord.

F. A. Pike, for the defendant.

WALTON, J. If a creditor takes a cash order, drawn on himself, in satisfaction of his debt, the debt is thereby paid. The effect is the same as if he had first paid the money to the holder of the order, and the latter had then paid it back to him. Such a transaction is not strictly an accord and satisfaction, which is the acceptance of some "collateral thing" in satisfaction of a debt, or claim for damages; it more nearly resembles a cash payment. The idle ceremony of first handing the money to the holder of the order, and then taking it back again, is avoided; but the effect is the same. It is a payment upon the same principle that a vast amount of indebtedness is daily extinguished in the great commercial centers, through the medium of clearing-houses, without a dollar of money passing. One debt is made to offset and pay another, till only a few small balances remain to be satisfied in cash.

Such payment may be absolute or conditional. If absolute, the debt is instantly extinguished. If conditional, the debt will be extinguished when the condition is performed. If the condition is that the amount named in the order is due the drawer, or due the one in consideration of whose services it is drawn, and there

is in fact that amount then due him, performance of the condition and payment of the debt are simultaneous and instantaneous, although the fact that the amount was then due the drawer, is not ascertained till some time after; for it is the fact, and not the ascertainment of it, that constitutes performance of the condition, and makes the payment absolute.

In this case the presiding judge instructed the jury, that if Waite, one of the plaintiffs, "agreed the order should be in payment, if it was due Maloney, and it was in fact due Maloney, it would be a present credit at that amount." We think this instruction was correct. And such being the law, the evidence of what the agreement was, was of course properly admitted.

We are also of opinion that the requested instructions,—first, that the positions taken by the defendant in his defence constituted no defence; second, that if the jury found that the payment was not actually consummated, any agreements made by Waite, which he declined to carry out, did not constitute any defence; third, that the facts contended for by the defendant, if true, failed to support the defence,—were all properly refused. The first and third were obviously wrong. The second was too abstract, and not sufficiently applicable to the circumstances brought out in evidence, to be of service. It would be more likely to confuse than enlighten the jury. We are therefore of opinion that it was properly withheld.

We are also of opinion that the fourth requested instruction, as to the effect of the defendant's taking back the order, was properly withheld. The instructions which were given upon that point were correct, and in our judgment, were all that were needed.

The evidence in the case was conflicting, as it usually is, where the parties are witnesses. If there had been no dispute between them, there would have been no occasion for a lawsuit. There being a dispute, it of course manifested itself in their testimony. It was for the jury to determine which told the truth. The defendant's evidence, if believed, was sufficient to justify a verdict

in his favor. The jury seem to have believed it, for they returned a verdict in his favor. We think the verdict must stand.

Motion and exceptions overruled.

APPLETON, C. J., CUTTING, DICKERSON, BARROWS and PETERS, JJ., concurred.

SETH M. TODD, petitioner for review, *vs.* ZACHARIAH CHIPMAN.

Review—when it will not be granted to let in new evidence.

A review will not be granted to enable a party to put in testimony which either was, or might with reasonable diligence have been, within his knowledge and reach, at the trial of the original suit, and was either wilfully suppressed or negligently omitted.

A review will never be granted to let in additional testimony when such testimony would not be likely to change the result, nor when upon the whole case made by the petition, the court perceive no probability that injustice was done.

ON EXCEPTIONS.

PETITION FOR REVIEW of the action of *Zachariah Chipman v. Seth M. Todd*, in which the then plaintiff recovered judgment at the October term, 1872, of this court for Washington County, upon a promissory note for one thousand dollars, dated October 18, 1869, payable in sixty days after its date to the order of Mr. Chipman, signed by James M. Hall, and endorsed first by Rufus Ham and then by Seth M. Todd. The suit upon this note, in which that judgment was recovered, though brought in the name of Mr. Chipman, was instituted by and for the benefit of Sawyer & Kelley, who bought the note of the original payee, or of Albert H. Sawyer, of that firm, who ultimately paid for it. Mr. Chipman testified in that case that, after the maturity of the note, Mr. Todd came and asked for the note for the purpose of suing Mr. Ham upon it and took it for that purpose, without paying anything on it. Afterward Mr. Sawyer came and bought the note of Chip-

man, for the firm of Sawyer & Kelly, of which he was then a member, taking an order for it on Mr. Granger, with whom it had been left by Todd, who told Mr. Granger that Chipman wanted Ham sued upon it, which was done accordingly and personal property attached, sufficient to secure it. After Sawyer obtained the order for it he paid the attorney's bill for the suit against Ham, discontinued that action, and released the attached property, without Mr. Todd's consent. Messrs. Ham and Todd were both accomodation endorsers, or sureties, for Hall, signing before delivery of note to the payee. They, as well as Sawyer and Chipman, were witnesses in the case in which judgment was obtained, which is reported in 60 Maine, 282. The present petition was based upon allegations that Ham and Chipman will now make statements qualifying, or additional to, their former testimony, namely : that Ham will testify that it was agreed that he should pay this note and that Todd should pay another one on which they were sureties for Hall, which was in fact so paid by Todd ; that the property attached on the first suit instituted against Ham was receipted for by the firm of Kelly and Wadsworth, was sold by them, and they retained the proceeds to secure themselves ; that they paid this note for Ham, charged it to him, and told him at the time of the settlement of their account that they paid it for him ; that Kelly would swear that they accounted for the proceeds of this property to Ham, having credited him therewith ; that Chipman would produce an agreement by Todd to indemnify him (Chipman) from Granger's costs, at the time Chipman gave Todd permission to commence the first suit against Ham ; which paper was inadvertently omitted at the former trial ; it being therein stated that that action was for Todd's benefit ; and would testify that the note was not bought of him but was paid by Sawyer & Kelly for Ham, and that Albert H. Sawyer, of that firm, charged Ham for half the amount of the note, so paid for him.

The presiding justice ruled, as matter of law, that the review prayed for could not be granted, and the petitioner excepted.

A. McNichol and *C. B. Rounds,* for the petitioner.

J. Granger and *F. A. Pike*, for the respondent.

BARROWS, J. Ham and Todd, as sureties for one Hall, were liable jointly and severally with him upon a note to Chipman. Todd without paying anything for the note procured a suit against Ham to be commenced upon it in Chipman's name, giving Chipman a guaranty against any liability for costs. Ham's property was attached and Kelly & Wadsworth receipted for it, took it into their possession, sold it, and credited the proceeds to Ham.

Sawyer & Kelly gave their note to Chipman in exchange for that note, took an order for it from him upon the attorney who commenced the suit against Ham, discontinued that suit without the consent of Todd, and instituted a suit in Chipman's name against Todd. That suit was defended and Chipman and Ham and Todd all testified as witnesses for Todd. Chipman prevailed: see case reported 60 Maine, 282. Todd now petitions for a review alleging that Chipman will now testify that the note was not bought from him, but was paid by Sawyer & Kelly for Ham, and that Ham will now testify that Kelly & Wadsworth paid this note for him, and so told him, and charged the note to him, and that through inadvertence the agreement of Todd to hold Chipman harmless from costs at the first suit was not put into the case at the former trial.

The petitioner's exceptions now before us state that upon the presentation of this petition the presiding judge ruled, as matter of law, that the review could not be granted. Apparently he did so upon one of two grounds either of which would be tenable.

I. A review will not be granted to enable a party to put in testimony which either was or might with reasonable diligence have been within his knowledge and reach at the trial of the original cause, and was either wilfully suppressed or negligently omitted. All that the petitioner proposes to add to his case was either known to himself personally at the time of the former trial, or was as much within the knowledge of his witnesses, Chipman and Ham, then as now, and might have been had for the asking.

II. A review will not be granted to let in additional testimony when such testimony would not be likely to change the result.

The paper said to have been omitted adds nothing to the effect of the admissions and uncontradicted testimony at the former trial with regard to the commencemeut of the suit against Ham in Chipman's name, by Todd. Should Chipman now testify that the note was paid by Sawyer & Kelly for Ham and not bought by them, his story would hardly gain credence when confronted with his former version of the transaction and the probabilities of the case. Ham's testimony at this late day, that it was paid for him by Wadsworth & Kelly, besides being inconsistent with Chipman's proposed testimony, is equally improbable. No reasonable motive can be urged for their doing that which would defeat the very object they apparently had in view, which was the securing of their own claims against Ham.

Finally, we do not see that injustice was done. There was a contest for precedence among Ham's creditors. Todd started first but failed in the end because he neglected to secure the irrevocable control of the note by paying for it in the outset. He must abide the result. *Exceptions overruled.*

APPLETON, C. J., CUTTING, WALTON, DANFORTH and PETERS, JJ., concurred.

ALBERT COOPER *vs.* DAVID T. PAGE.

Deed. Pleading. Real Action.

A deed signed in blank may be avoided when the blanks are filled by one not duly authorized, as against a grantee with full knowledge of the facts.

In a real action, the plea of the general issue admits the tenant to be in possession of the premises demanded.

ON REPORT.

WRIT OF ENTRY for a lot of land in Hallowell. The tenant did

not disclaim, but set up a title derived by deed from the demandant, as stated in the opinion. It is, perhaps, proper to add that the plaintiff's name was inserted by Mr. Stinchfield in the covenants of warranty, as well as in the other blank spaces; and that Mr. Page never took actual possession of the premises, nor exercised any control over them, but claimed to hold the title for his security, and was ready to re-convey on payment of the sum due him.

A. Libbey, for the demandant, cited *Chase v. Palmer*, 29 Ill., 306; *Burns v. Lynde*, 6 Allen, 305; *Basford v. Pearson*, 9 Allen, 387.

L. Clay, for the tenant.

APPLETON, C. J. This is a writ of entry to which the general issue was pleaded.

The plaintiff residing in Callao, South America, having the title to the demanded premises, sent the deed, under which the tenant claims, to his mother, with a blank for the name of the grantee, authorizing her by letter, to insert the name of a grantee, if she should have occasion to use said deed to enable her and her husband to provide a home for themselves and family. The defendant being employed by Henry Cooper, the father of the plaintiff, to furnish materials and make repairs on the dwelling occupied by the family, the blank in the deed was filled up by A. G. Stinchfield, in the presence of the defendant, and the deed was delivered to him by said Henry Cooper, who represented that he was authorized so to do by the plaintiff. The question presented is, whether defendant has acquired a title to the premises described in this deed.

There is no evidence whatever that Stinchfield had any authority to insert the name of any one as grantee—or that Henry Cooper was authorized to deliver the same. There is no proof of knowledge of, or assent to, what was done, on the part of Mrs. Cooper, to whom the deed was sent by her son, and who, if any one, was alone empowered by him to fill the blanks therein. The

blanks were filled in the presence of the tenant, by the insertion of his name. He took the deed with notice of its infirmity. If the person filling the blanks, or the one making the delivery, had any authority so to do, it should have been shown. Nothing in the case indicates precedent authority, or ratification on the part of the demandant. The case is not, therefore, within the rule laid down in *South Berwick v. Huntress*, 53 Maine, 89, and there is no defence.

The defendant instead of disclaiming, has filed the general issue which admits him to be tenant of the freehold. He cannot, therefore, under the pleadings, controvert that fact.

Judgment for the demandant.

CUTTING, WALTON, DICKERSON, DANFORTH and VIRGIN, JJ., concurred.

JAMES ABBOTT *vs.* HARRISON ROSE.

Promissory note fraudulently issued—evidence relative thereto. Forgery. Negligence.

A party to a negotiable note is a competent witness to prove that he was induced to sign it by fraudulent representations that it was another and different instrument, even though such note is in the hands of an innocent holder.

An instrument having no validity upon its face is not a subject of forgery.

A person delivering to another a paper bearing his signature with blanks unfilled therein, which he must necessarily expect will be filled to make it a completed instrument, gives implied authority to the person receiving it to fill the blanks ; and if they are filled fraudulently the maker will be liable thereon to a *bona fide* purchaser for value without notice.

Thus, a person who negligently delivers to another a blank note, having the name of the payee and the words "or order" therein, intending that it shall be used for a specified purpose, will be liable thereon if the blanks are wrongfully filled, and the note then transferred to a *bona fide* holder for value, without notice of the fraud.

Abbott *v.* Rose.

On exceptions.

Assumpsit on a promissory note purporting to be signed by the defendant, dated March 26, 1869, for fifty dollars. At the trial, Mr. Rose admitted writing his name, on the day mentioned, upon the paper on which the note aforesaid now appears, and stated the circumstances under which he did so, as follows:—On the twenty-sixth day of March, A. D., 1869, a man calling himself O. F. Persons, a total stranger to Mr. Rose, called at that gentleman's house in Greene, and said he was round introducing a labor-saving machine, "one of the best in the world;" that he wanted to get up a club of eight persons in each town to introduce it, and had already obtained four in Greene, being the only ones he had spoken to on the subject, who were well known to Mr. Rose as reliable and responsible men. Persons exhibited to Rose a model, and by it explained to Rose what the machine would do; "it would load hay and manure, dig potatoes, and ditch." At first Rose refused to negotiate, and the man left the house, but returned in a short time and renewed his solicitations, representing to Rose that he "ran no risk; had nothing to fear, and nothing to pay;" "all he asked of the club was to give him the profit on one machine, which he sold for $75." "He said he would give a writing if I (Rose) would sign to be one of his agents, that I should not be liable to give him anything until I had sold a machine for $75, and then I was to give him the profit on one machine, which he called $50. Finally, after talking and being assured in every form that I was safe, nothing wrong about it, nothing to fear or to pay, I told him I would be one of his agents." The defendant testified that Persons then gave him what purported to be a certificate of membership of the club, and "wrote that upon the back, which was to make me secure and safe, that I had nothing to pay." The certificate and endorsement were as follows:

[2 cent stamp.]

"*Receipt of Membership.*

Received of Harrison Rose one hundred dollars which entitles him to one share in the right of Wm. H. Elliott's improved Hay Loader, patented July 3, 1866, for the township of Greene and

county of Androscoggin, for the payment of which this is a full and sufficient receipt. LOWELL JOHNSON.

Dated March 25, 1869.

[2 cent stamp.]

(Endorsed.) I hereby agree with Harrison Rose that he need not pay for the within share until he sells one machine at seventy-five dollars for said machine. O. F. PERSONS."

The witness continued his narrative:—"After I had consented to be one of his agents, he said he wanted me to sign the club-book. It was a small account-book. He required me to sign it, and I did. While I was writing my name in the book, Persons stepped back to the opposite side of the table, and slipped a paper across the table, and said in order to complete this organization, he wanted me to sign the paper that he slipped across. There was some printing on that paper. It was a blank form; I mean not filled out with pen and ink. There were open spaces between and among the printed words. They were rather large. There was no writing on the paper before I wrote my name. I wrote my name on the paper that he passed across when he told me what the object was. I had the pen in my hand then. The instant I took my hand from the paper he caught it up, saying, 'this is nothing but an order, it don't require a stamp.' I wrote on the lower part of the paper, which was about the size of the note in suit. I signed no other paper than what I have stated; wrote my name that day on no other paper than what I have stated. I did not at any other time sign a paper of the purport of this note in suit, which I first saw when shown to me in Lewiston by Mr. Whitmore, a week ago last Saturday." On cross-examination he added: "I am sure there was no other paper to be signed to complete the transaction between us, besides the book and this agreement. When he slipped this paper across the table for me to sign, I never read a word on it. I asked him no questions about it at all. All I can say is, I was to blame for not asking him what it was for. I can read very well. I had no idea what

I was signing, only what I have said. He caught it up as soon as it was signed, and said it was only an order, and did not need a stamp. I did not ask him what the order was for. He made that expression, and put it in his book. I acknowledge I was a fool. I did not ask him to let me look at it and read it, when he said it was an order. I did not think anything particular about it till a few days afterward."

The defendant's sister testified that she was present at the interview, and corroborated his statement of the transaction.

This note was sold with others by Persons to Carr & Williams, of whom he had hired teams; they sold them all to N. M. Whitmore, who again sold the whole lot, before maturity, to the plaintiff. Carr & Williams guaranteed them to Whitmore, and he to Abbott. The note declared upon was of the following tenor, the words italicized being printed in the original, and the rest in writing.

"$50. Greene, March 26, 1869.
One year *after date* I *promise to pay O. F. Persons, or order*, fifty *dollars, value received.* HARRISON ROSE."

Endorsed, "O. F. PERSONS, without recourse." "Waiving demand and notice, N. M. WHITMORE."

The plaintiff objected to the defendant's testifying to anything tending to impeach the note which he had signed, and permitted to be put into circulation. Among other directions, the presiding justice instructed the jury that if the testimony of the defendant and his sister in respect to it is true, then this instrument was a forgery, and this action cannot be maintained."

To the admission of the defendant's testimony, and the effect accorded to it, by the above instruction, the plaintiff excepted, the verdict being against him.

A. Libbey, for the plaintiff.

The defendant should not have been permitted to show fraud, until he had first affected the plaintiff with notice of it, the burden

being on him (Rose) to do so. *Baxter v. Ellis*, 57 Maine, 178; *Lake v. Reed*, 29 Iowa, 258 and 4 Am. R., 209.

The instruction as to forgery was too general, and misled the jury. The true rule, stated most favorably for the defendant, is this; if he was induced to sign the blank note by reason of the fraudulent representations of the payee, fully credited and relied upon by Rose, that it was another paper, and not a note, and in so doing was not guilty of any laches, negligence, or misplaced confidence, by reason of which he enabled the payee to fill up the blanks, and put the note into circulation,—then he was not liable.

The instructions given exclude the element of negligence altogether, and were therefore erroneous. *Putnam v. Sullivan*, 4 Mass., 45; *Fearing v. Clark*, 16 Gray, 74; *Cranston v. Gross*, 107 Mass., 439; *Douglass v. Matting*, 29 Iowa, 498, and 4 Am. R., 238; *Kitchen v. Place*, 41 Barb., 465; *Whitney v. Snyder*, 2 Lans., 477; *Gibbs v. Linabury*, 22 Mich., 479 and 7 Am. R., 675; *Garrard v. Hadden*, 67 Penn. St. R., 82, and 5 Am. R., 412; *State Bank v. McCoy*, 69 Penn. St. R., 204; *Chapman v. Rose*, Alb. Law Jour. for March 8, 1873.

Baker & Baker, and W. Gilbert, for defendant.

The instruction as to fraud and the burden of proof was correct. *Aldrich v. Warren*, 16 Maine, 465; *Perrin v. Noyes*, 39 Maine, 384; *Gould v. Stevens*, 43 Verm., 125, and 5 Am. R., 255.

No instruction was requested as to negligence, and it is too late to raise objection now. The necessity for this direction was not so obvious and imperative as to require it to be given unasked. *Harpswell v. Phipsburg*, 29 Maine, 313; *State v. Conley*, 39 Maine, 78.

A party is only liable, on the ground of negligence, upon a paper in the shape in which it leaves his hands, and not as criminally altered by another. *Holmes v. Trumper*, 22 Mich., 427, and 7 Am. R., 664. Here was a combination of fraud and forgery. No agency created, because no consent to what was really done. *Gibbs v. Linabury*, 7 Am. R., 675.

Defendant, even if negligent, is responsible only for those consequences fairly within his contemplation when he did the negligent act. *Sexton v. Bacon*, 31 Verm., 540; *McDonald v. Snelling*, 14 Allen, 290; *Swan v. N. B. Australasian Co.*, 2 Hurls. & Colt., 188.

DANFORTH, J. This is an action upon a promissory note in the name of an indorsee, who claims as a *bona fide* holder for value, without notice of any infirmity in the note, and for aught that appears, is such. One of the defences set up is that the note was procured by fraud. Under these circumstances it is contended that the defendant who is the maker, is not a competent witness to prove the fraud, until he has first shown that the plaintiff had notice of it. In *Walton v Shelley*, 1 T. R., 296, it was decided that a party to a contract, not interested in the result of the suit, was on the ground of public policy, inadmissible as a witness to prove fraud in its inception. Subsequently in *Bent v. Baker*, 3 T. R., 27, the rule was held applicable to negotiable paper only, and in a still later case, *Jordan v. Lashbrooke*, 7 T. R., 601, *Walton v. Shelley* was overruled, and since that, in England, a party to negotiable paper has in no case been excluded as a witness for the reason of his being a party.

In this country the law has been differently settled in different States. In Massachusetts the question came before the courts in the early case of *Churchill v. Suter*, 4 Mass., 156, and has been discussed in many cases in that Commonwealth, and in our own State since that time. *Manning v. Wheatland*, 10 Mass., 505; *Pickard v. Richardson*, 17 Mass., 122; *Deering v. Sawtelle*, 4 Maine, 191; *Chandler v. Morton*, 5 Maine, 374; *Clapp v. Hanson*, 15 Maine, 345; *Lincoln v. Fitch*, 42 Maine, 456; *Baxter v. Ellis*, 57 Maine, 178; and perhaps some others. In all these cases, however, it will be found that the rule has not been carried beyond that of *Churchill v. Suter*, and in all the party was excluded, because the consideration of the note was illegal, or the note void in its inception, and the witness offered was not only a

party to the note but also to its illegality, or a partaker in the wrong which rendered it void.

In *Thayer v. Crossman*, 1 Metc., 416, after a review of the authorities, Shaw, C. J., remarks, on page 421-2 : "From this view of the authorities, and assuming that the rule, as laid down in *Churchill v. Suter*, is the true rule of law in this Commonwealth, we think it will appear to be confined to negotiable bills and notes, actually indorsed and put into circulation by the witness, with a view to give them currency as negotiable securities."

In *Buck v. Appleton*, 14 Maine, 289, Weston, C. J., speaking of the case of *Churchill v. Suter*, says: "It is well known, that the principle, upon which that case was based, has been repudiated in the country from which it was derived, and that neither this court, nor the courts in Massachusetts, have been disposed to extend it."

Does, then, the testimony of the defendant come within the rule as established by the cases referred to ? We think it does not. He was not certainly, a willing party to any wrong in the consideration, or want of consideration, of the note. His testimony now is not inconsistent with any purpose he then had in view, or any intentional act then performed. He did not, according to the testimony, sign the note for the purpose of giving it currency as a negotiable security ; he did not sign it as a note, but only as a different paper, and for an entirely different purpose. The question is not, whether under his statement he is liable, but whether the facts are such that he cannot legally testify to them. As they do not proclaim any turpitude on his part, as they tend to show, not that the paper, as originally signed, was void for the purpose for which it was signed, but that it was not then, and was not intended for a note, we see no reason, grounded upon public policy or otherwise, why the testimony should be excluded. The testimony would certainly be admissible from other witnesses, and under our present statutes, and the rule established by the cases already referred to, and which we do not intend to subvert, is equally admissible from the party, unless by some previous act,

inconsistent therewith, he has disqualified himself. Such previous act we do not perceive.

Another defence set up in this case is that of forgery. Upon this the instruction to the jury, to which exception is taken, was: "If the testimony of the defendant and his sister in respect to it, is true, then this instrument was a forgery, and this action cannot be maintained."

If this instrument was a forgery it was so by virtue of an alteration and not of its original execution. It is true the defendant testifies, substantially, that he signed it under a misapprehension, into which he was led by the acts and statements of the payee. He further testifies that, "there was some printing on that paper; it was a blank form. * * * There was no writing on that paper before I wrote my name." The only conclusion to be drawn from this testimony is that the paper was an unfinished one, to which something more was to be added to complete it. The paper at that time, then, had no validity for any purpose whatever. The case of *State v. Shurtliff*, 18 Maine, 368, differs materially from this. That was a criminal proceeding, the purpose of which was to punish the wrong-doer. This is a civil action upon a negotiable instrument, and involves the rights of an innocent holder. If a forgery, it became so only by the alterations made subsequently to its delivery. These changes or additions were certainly sufficiently material to make it such. But whether so or not, might depend upon the relations existing between the parties. If the paper was delivered as a completed instrument, without authority express or implied to fill any blanks or make any changes, the subsequent additions would clearly be a forgery. If, on the other hand, it was delivered as an incomplete instrument with blanks to be filled, then, even if the blanks were fraudulently filled, and the instrument made different from what the signer authorized or intended, according to the case of *Putnam v. Sullivan*, 4 Mass., 45, it would not be forgery, but a breach of trust.

It becomes, then, material to know the object or purpose for which this instrument was delivered to the payee; not what the defend-

ant might suppose the instrument itself to be; but did he deliver it with blanks which he expected to be filled? His own testimony may be entirely true and yet the inference may be drawn, if not from that alone, certainly from that and other testimony in the case, that the instrument which now turns out to be a negotiable note, was executed and delivered as an unfinished paper with blanks to be filled. The possession of such a paper, with a genuine signature, would be, at least, *prima facie* evidence of authority to fill it up. *So. Berwick v. Huntress*, 53 Maine, 89; Story on Promissory Notes, § 37; *Fearing v. Clark*, 16 Gray, 74. By the instruction complained of, the question, whether the paper was delivered as an incomplete paper with blanks to be filled, was taken from the jury, and they were required, if they believed the defendant's testimony, to consider it, when delivered, as complete, and all subsequent filling of blanks,—for it does not appear that there were any other changes—as not only without authority, but such as would render the note void even in the hands of an innocent holder. In this there was error. It is however said, that if the defendant is believed, whatever the condition of the paper when delivered and the authority which might be inferred from that delivery and condition, it was not delivered as a note, or for the purpose, or expectation, of having it made into a note. This may be true, but how does it affect the case? If the instrument was delivered for any purpose as unfinished, to be perfected by the person to whom it was delivered, then for such purpose such person becomes the defendant's agent, and having furnished him the means with which he has committed a fraud, however unfaithful to his trust the agent may be, the principal must suffer rather than an innocent person.

But assuming that the payee of this note has been guilty of forgery in filling up the blanks, as he is claimed to have done, it does not follow that the defendant is free from all responsibility in the matter. By his statement, he voluntarily signed the blank out of which this note was made, supposing, it is true, that it was for a different purpose. The blank passed from his hands by his con-

sent; a consent, perhaps, fraudulently obtained, but nevertheless a consent. That blank was such as could only be converted into a negotiable note. In it was the name of the payee, and the words "or order." When he signed it, there was nothing to prevent his reading it if he had so chosen, and it is difficult to understand how he could have observed it sufficiently to give the description he has, without knowing what it was. Under such circumstances the law presumes his knowledge of its contents. The note, then, owed its existence to some instrumentality on his part. The perfected note was the result of his putting his name to the blank; a result which might have been contemplated as the natural and even probable effect of such an act. The signature contributed to that end very materially, and that end was reached by the confidence, misplaced though it was, which he had in the payee. If, then, this act resulted from negligence, or a want of due care on the part of the defendant, however innocent he might be, he would be responsible to any person equally innocent with himself who is injured by that act. This results not only when the person committing the fraud is the appointed agent of the defendant, but where no such relation exists. In the former case the liability would attach where no negligence is imputable, and in the latter only where it is.

In *Somes v. Brewer*, 2 Pick., 184, a case which has some significance in its bearing upon this, Parker, C. J., on page 202, states the rule with great clearness and force. He says: "It is a general and just rule, that when a loss has happened which must fall on one of two innocent persons, it shall be borne by him who is the occasion of the loss, even without any positive fault committed by him, but more especially if there has been any carelessness on his part which caused or contributed to the misfortune."

In *Gibbs v. Linabury*, 22 Mich., 479, which was an action upon a note delivered by the signer in ignorance of its true character and by means of fraud, it was held, that the note was void even in the hands of a *bona fide* purchaser. But it was found, and made an element in the decision, that the maker signed it "under circumstances devoid of any negligence on his part."

In *Washington Savings Bank v. Ekey & als.*, lately decided in Missouri and reported in the American Law Register for October, 1873, it was held that an alteration of a note after its execution by filling a blank so as to make it draw interest when by the agreement of parties it was to bear no interest, would avoid the note in the hands of an innocent holder. But this is inconsistent with other cases in the same State as is shown in a note to that case in the Law Register. In *Trigg v. Taylor*, 27 Misso. R., 245, the note was held void, but the court says: "If, however, a bill, note or check is so negligently drawn, with blank spaces left for the addition of other words or figures, that alterations can be so made as not to excite suspicion, the loss ought to fall upon the person in fault, according to the familiar rule, that when one of two persons must suffer by the act of a third, the one who affords the means to the wrong-doer must suffer the loss." The rule is again recognized in *Ivory v. Michael*, 33 Misso., 398. Upon this question of negligence it can make no difference that the party did not intend to deliver a note. If the delivery itself was through a want of care the effect is equally injurious, as if the delivery was intentional but with blanks carelessly left unfilled. This doctrine is consistent with that held in a numerous class of cases in which it has been decided that a material alteration of a note after its execution without the consent of the maker, avoids it even in the hands of a *bona fide* holder, such as *Waterman v. Vose*, 43 Maine, 504; *Agawam Bank v. Sears*, 4 Gray, 95; *Wade v. Worthington*, 1 Allen, 561; *Belknap v. National Bank of North America*, 100 Mass., 376, and many others. In these cases the note was delivered in the course of business as a completed instrument with no blank spaces unfilled and no question of a want of care in the delivery, or the form of the paper. The connection of the maker with the note, so far as any act pertaining to its validity is concerned, had entirely ended, and the confidence in and opportunities for fraud to the third party were furnished as much by the one as the other. The two parties were equally innocent, and therefore the only question raised was whether the contract set up

was the one into which the party had entered. In the case at bar the liability, if any, rests upon an entirely different ground. It is not claimed that the defendant entered into the contract sued, but that if he delivered the note as an undertaking on his part not finished, but to be afterwards completed, he so far made Persons his agent as to be bound by his acts to an innocent purchaser; or if he carelessly delivered the paper with his signature attached, he thus furnished Persons the means of fraud and so would be estopped from denying his liability to a *bona fide* holder for the legitimate results of his negligent acts, and we think the jury should have been instructed in accordance with these views.

Exceptions sustained.

APPLETON, C. J., CUTTING, VIRGIN, and PETERS, JJ., concurred.

HENRY K. BAKER and others in equity *vs.* JOHN ATKINS and others.

Banks—insolvent. Equity pleading. R. S. c. 47, § 74.

A bill in equity brought under R. S., c. 47, § 74, may be inserted in a writ of attachment.

Where neither discovery nor an injunction is sought, the bill need not be signed nor verified by the complainant's oath.

A bill is not demurrable for want of parties, which states good reasons for not joining those, the omission of whom is assigned as a ground of demurrer.

A stockholder in an insolvent bank, made respondent to a bill in equity brought under R. S., c. 47, § 74, to enforce payment of a fixed sum assessed upon each share of stock, is not injured by the non-joinder of any other stockholder; and, therefore, cannot sustain a demurrer to the bill for that cause.

When the total sum to be raised by an assessment upon the stockholders of an insolvent bank has been determined by an adjudication of court, no errors in the computation of that sum can be taken advantage of upon a demurrer to a bill in equity brought to enforce payment of the assessment.

If such a bill does not state that the notice mentioned in R. S., c. 47, § 45, has been given, a respondent cannot, by demurrer, avail himself of the limitation mentioned in that section.

Baker *v.* Atkins.

BILL IN EQUITY brought by the receivers of the American Bank of Hallowell, in behalf of those holding the bills of that institution, against those who were holders of its stock upon the twelfth day of September, 1865, when an injunction against it was made perpetual, and these receivers were appointed, on account of its insolvency. From the report of the receivers made to this court, at its October term, 1870, and then accepted, stating all their receipts and expenditures, and the outstanding liabilities, it appeared that there was a deficiency of assets of $31,290, for the payment of bill-holders; and accordingly a judgment of the court was entered, ordering that sum to be assessed upon the seven hundred and forty-five shares held by stockholders on the twelfth day of September, 1865, being forty-two dollars per share and the receivers were directed to enforce payment of the assessment by this bill which was inserted in a writ of attachment dated January 14, 1871, returnable to the March term, 1871, of this court.

Several persons who were stockholders Sept. 12, 1865, died before this bill was brought "and their legal representatives were not made parties because their estates have been fully settled and closed up, and all claims against them are barred by the statute of limitations, or they died insolvent and no administration was ever granted on their estates." Others were omitted because they either resided or had died out of the State, having no property in Maine; two because they had been discharged under the bankrupt act; and a number because they had paid the assessment aforesaid upon the shares of stock held by them Sept. 12, 1865. The bill was not signed nor sworn to by either of the complainants, nor by their solicitors. A demurrer was filed to the bill, and nine causes assigned, to wit: (1) that the bill was neither signed nor verified; (2) that it was improperly inserted in a writ of attachment, instead of being filed; (3) that it did not appear that the deficiency might not have been collected of the officers of the bank, or that any attempt had been made so to collect it; (4) that it does not appear that due diligence was used, or that all the assets were reduced to money, or that they were exhausted before this bill was

brought; (5) that the complainants have been guilty of negligence and laches; (6) that their expenditures have not been shown and adjudged to be reasonable and proper; (7) that the liability of the defendants for contribution expired by lapse of time, long prior to the bringing of this bill; (8) that the officers of the bank are not made defendants, nor all the stockholders or persons liable, but part of them have been illegally released and discharged; (9) that it does not appear that the complainants have not an adequate remedy at law.

E. F. Pillsbury and *A. G. Stinchfield*, for the respondents, in support of the demurrer.

A. Libbey and *Baker & Baker*, for the complainants.

APPLETON, C. J. This is a bill in equity brought by the receivers of the American Bank by order of this court under the provisions of R. S. of 1857, c. 47, § 73, against the defendants as stockholders of the same to compel them to contribute to the payment of its debts, the assets of the bank having been found and adjudged insufficient to pay the claims against the bank.

The defendants have demurred to the bill and assigned various causes of demurrer. As the demurrer admits all facts duly set forth in the bill, the only question now to be considered is whether it states any cause of action against the respondents.

(1) The bill is properly inserted in a writ of attachment, and it is not required to be verified by oath, inasmuch as no discovery is sought and there is no prayer for an injunction.

(2) This bill is against the holders of the stock of the bank when the injunction previously granted was made perpetual. The bill by § 73 is to be filed against such stockholders and not against the directors as such.

(3) It seems that certain persons deceased were owners of shares, whose representatives are not made parties to the bill. But it is alleged that they are not made parties to this bill "because their estates have been settled and closed up and all claims against

them are barred by the statute of limitations, or they died insolvent and no administration was granted on their estates." Then there were other stockholders, who died out of the State having no property in it, and some who have been discharged under the bankrupt act of the United States, passed March 2, 1867.

It is objected that these several classes were not included in the bill as parties. But the bill gives good reasons for not so including them. The demurrer admits the truth of the several facts stated on account of the existence of which the parties were omitted, to whose omission exception is taken.

But the defendants cannot be harmed in any way, as the assessment made by the court was upon all the shares, and it is of no consequence whatever to them whether the other stockholders are joined or not, inasmuch as the amount of their liability has been fixed and will not be increased nor diminished, whether the parties whose names are not included in the bill were inserted or not.

(4) The plaintiffs in their bill allege that they stated in their reports all the assets that came into their hands, and that there was, and now is a deficiency, after applying the assets in payment of the claims of the bank, of $31,290; that their report was accepted by the court; that it appearing to the court that the assets were insufficient to pay the bills of the bank duly proved and allowed by the sum of $31,290, a judgment of the court was entered up accordingly and that sum was ordered to be assessed on all the shares of the bank held by stockholders, amounting to forty-two dollars on each share, and that they were ordered by said court to bring this bill in equity against said stockholders to enforce the collection of the same.

The costs, expenses and deductions were all presented to and adjudicated upon by the court. The judgment of the court shows the actual deficiency, which remained to be apportioned among the several stockholders. If there was any mistake or error in that adjudication, it cannot be reached by demurrer.

All the previous proceedings we must assume to be correct in the entire absence of anything indicating the reverse. The bill

therefore is strictly within the provisions of the section (73) under which it is sought to be maintained.

(5) The liability of holders of stock under R. S. of 1857, § 46, continues only two years after notice of the expiration of the charter of the bank has been given in the State paper. The bill does not allege that any notice has been given under this section. It does not therefore appear that the limitation provided for in this section has commenced running. How far the liability of the defendants is affected by this limitation in the present proceedings is not now before us for our consideration or determination.

The remedy adopted is that provided by statute, and the allegations in the bill show a compliance with the provisions of the statute, requisite to its maintenance. *Demurrer overruled.*

CUTTING, DICKERSON, DANFORTH, VIRGIN and PETERS, JJ., concurred.

JOHN C. BARTLETT *vs.* WESTERN UNION TELEGRAPH COMPANY.

Telegraph Company—an exemption from liability declared void. Damages.

A rule adopted by a telegraph company, that it will receive and send messages by night at half its usual rates "on condition that the company shall not be liable for errors or delay in the transmission or delivery, or for the non-delivery of such messages, from whatever cause occurring, and shall only be bound in such case to return the amount paid by the sender," is against public policy;—and is, therefore, void, even when assented to by the sender.

It is void also, because its terms are repugnant, assuming to impose an obligation, and, by the same act, to release from all obligation.

In an action to recover damages of a telegraph company for an error in the transmission of a message, in the absence of any rule or contract fixing the measure of liability, the plaintiff makes out a *prima facie* case by proof of the undertaking, error and damage, and throws the burden upon the company, to show that the error was caused by some agency for which it is not liable.

On report.

Case submitted to the determination of the court, as the law and facts might require, and to award the damages, if any, to which the plaintiffs might be found entitled.

July 12, 1870, Bartlett & Wood of Gardiner, Maine, (the plaintiffs) telegraphed to their correspondents at Chicago, Ill., Hobbs & Co., to buy corn of a certain quality for them. As written, the dispatch directed the purchase of *ten* thousand bushels; as delivered to Hobbs & Co., it read "one thousand bushels," &c., which quantity they bought on account of Bartlett & Wood, on the day succeeding the reception of the order, for eighty-five cents a bushel. On the twelfth day of July, 1870, Bartlett & Wood wrote to Hobbs & Co., stating the purport of their telegram of the same date. The reception of this letter led to the discovery of the error in the transmission of the message, and under new instructions, on the eighteenth or twentieth day of July, 1870, Hobbs & Co., bought the other nine thousand bushels of corn needed to fill the original order, but had to pay ten cents more per bushel for it, the price having risen in the market to that extent in the meantime. The additional $900 which they were thus compelled to pay, the plaintiffs demanded of the defendant corporation, July 28, 1870, but payment was refused, and this suit brought to recover it. The defence was that the dispatch was written and delivered to the company upon a blank of this tenor, and upon the conditions therein specified, to wit:—

"No. 45.

HALF RATE MESSAGES.

The Western Union Telegraph Company will receive messages for all stations in the United States east of the Mississippi River, to be sent during the night at one half the usual rates, on condition that the Company shall not be liable for errors or delay in the transmission or delivery, or for non-delivery of such messages, from whatever cause occurring, and shall only be bound in such case to return the amount paid by the sender.

No claim for refunding will be allowed, unless presented in writing within twenty days.

O. H. Palmer, Secretary. William Orton, President.

GARDINER, ME., July 12, 1870.

Send the following message subject to the above terms, which are agreed to.

To J. B. HOBBS & Co., Chicago.

Ship us ten thousand bushels choice No. 2 (two) high-mixed corn. BARTLETT & WOOD."

11 pd. 126, E. D. & A. 7-15 P. M."

Baker & Baker, for the plaintiffs.

The stipulations upon the defendants' night-message blanks are unreasonable and void. *True v. Int. Tel. Co.*, 60 Maine, 9.

The measure of damages is the difference between what the corn cost on the day the first thousand bushels were bought, and its cost when the rest of the order was filled, after discovery of the error. 60 Maine, 9. *Squire v. W. U. Tel. Co.*, 98 Mass., 232; *Rittenhouse v. Ind. Tel. Co.*, 1 Daly, 474.

Bradbury & Bradbury, for the defendants.

The paper upon which the plaintiffs wrote their message, and signed it, contained a contract, and the fact that it was partly in print, is immaterial. *Lewis v. G. W. Railway*, 5 Hurl. & Nor., 867; *Breese v. U. S. Tel. Co.*, 45 Barb., 274; *French v. Buffalo*, 4 Keyes, (N. Y.,) 108; *Rice v. Dwight Co.*, 2 Cush., 80; *W. U. Tel. Co. v. Carew*, 15 Mich., 524; *Squire v. N. Y. Cent. R. R. Co.*, 98 Mass., 239; *Grace v. Adams*, 100 Mass., 505; *Camp v. W. U. Tel. Co.*, 1 Metc., (Ky.) 164; *Wolf v. W. U. Tel. Co.*, 62 Penn. St. R., 83.

The defendants' liability is purely matter of contract. *Playford v. U. K. Tel. Co.*, 10 Best & Sm., 759.

They are not common carriers. See cases cited *supra*. *Ellis v. Am. Tel. Co.*, 13 Allen, 226; *Leonard v. N. Y. Tel. Co.*, 41 N. Y., 571; *Birney v. N. Y. Tel. Co.*, 18 Md., 341.

If they were, they could limit their liability. *York Co. v. Cent. R. R. Co.*, 3 Wallace, 107; *Bissell v. N. Y. Cent. R. R. Co.*, 24 N. Y., 442; *Dove v. N. J. Steam Co.*, 1 Kernan, (N. Y.) 483.

The limitations upon this blank are reasonable and proper. See cases cited *supra*. *McAndrew v. Tel. Co.*, 33 Eng. L. & Eq., 180; *Mann. v. W. U. Tel. Co.*, 37 Missouri, 261; *U. S. Tel. Co. v. Gildersleeve*, 29 Md., 232; *Ames v. N. Y. Union Ins. Co.*, 14 N. Y., 256; *Ripley v. Ætna Ins. Co.*, 30 N. Y., 136; *Roach v. N. Y. & E. R. R. Co.*, 30 N. Y., 548.

DANFORTH, J. On the twelfth day of July, 1870, the plaintiffs left with the defendants a message to be sent from Gardiner to Chicago, by night, directing the purchase of ten thousand bushels choice No. 2 high-mixed corn. As received by the persons to whom it was addressed, it read one thousand instead of ten thousand bushels.

In consequence of this error a loss ensued, which the plaintiffs claim the defendants are legally liable to make up to them.

Upon the blank used we find printed a provision as follows: "The Western Union Telegraph Company will receive messages for all stations east of the Mississippi River, to be sent during the night at one-half the usual rates, on condition that the company shall not be liable for errors or delay in the transmission or delivery, or for non-delivery of such messages, from whatever cause occurring, and shall only be bound in such case to return the amount paid by the sender.

No claim for refunding will be allowed, unless presented in writing within twenty days."

Then follows next above the written message, the words: "Send the following message subject to the above terms, which are agreed to."

It is now contended that this provision either as a rule established by the company, or as a contract entered into by the parties relieves the defendants from all liability in this action. If the condition is of binding force, either as a regulation or contract, such clearly would be its effect. The signature of the plaintiffs obtained without fraud, would be conclusive proof of their knowledge of it as a rule, whatever it might be in regard to their assent to it as a contract.

That a telegraph company may make all proper and needful rules to enable it with convenience and despatch to do the business of its customers, is now unquestioned. This may be done even without the consent of those doing business with it. Knowledge alone being sufficient to bind them. With a contract it is entirely different; that can be binding only upon those who assent to its terms.

It has been held in many cases, that a company may make rules limiting its liability in certain cases, and perhaps it is now too late to deny this proposition, though it seems to be materially enlarging the meaning of the term, when a power given to a corporation or an individual to regulate the manner or method of doing business with the public, is converted into a means of limiting the liability which by law is attached to that business. But however that may be, all courts agree that a rule to be of binding force must be reasonable, whether its purpose is to facilitate business or limit liability. There may be a wide disagreement as to whether any given rule is reasonable, but none, it is believed, as to its want of validity, when its unreasonableness is once conceded.

In *True v. International Telegraph Company*, 60 Maine, 9, a rule similar to the one now in question, was held to be unreasonable and therefore void. After a careful re-examination of that case, and the reasoning upon which it is founded, we see no reason for changing the conclusion there reached. It is claimed that this case differs somewhat from that. This is true as to some of the facts, but not as to the principle of law applicable. So far as the rule goes, it is in effect the same, or if in any thing different, the one now before us, is more clearly unreasonable. While it was possible to construe the former so as not to include exemption from damages, arising from the neglect of the company, or want of skill or care on the part of the employees, the language of the latter will admit of no such meaning.

To prevent any possibility of such an interpretation, we find inserted the words "from whatever cause occurring." Then as to the facts, in the former case there was no delivery of the message,

and no reason given for its non-delivery, while in this case, an effort seems to have been made to transmit the message, and one was delivered though materially different from that sent. It is claimed that in this respect, there is such a difference between the cases, that the two cannot rest upon the same principle. Some of the cases seem to countenance this view on the ground that a neglect or refusal to perform or to enter upon a performance, presents a question very materially differing from any that can arise on an error or mistake in performing. But the rule itself makes no such distinction. The error in transmission and non-delivery are put upon the same ground, and absolute exemption from liability in each case provided for, whatever may be the cause producing it. Now it is very clear, that negligence may be quite as injurious in the one case as in the other. It may often be that an erroneous message delivered, will cause more damage than non-delivery, and if the company, for any reason, choose to suppress the information sent, it is quite as easy to do it by forwarding a different message, as by suppressing it. It is because of its broad provisions covering every case of non-fulfilment of duty, under the law, that we declare the rule unreasonable.

In a case like this, where a party has assumed a public or *quasi* public employment, one which has become a commercial necessity, and to which business people must necessarily, more or less resort, and in which they must trust entirely to servants, in the selection of whom they have no voice whatever, it would seem that there could hardly be a difference of opinion, as to the unreasonableness of a rule which opens so wide a door for the immunity of negligence, if not of fraud. Though it may admit of serious doubt, whether public policy would permit persons or companies occupying the relation to the business community which the defendants in this case do, to limit in any degree the liability imposed upon them by law, in view of the many decisions from courts of the highest respectability allowing it, we do not wish to be understood as denying it, nor indeed have we any occasion to do so in this case.

We are not unmindful that many cases have been cited, and

relied upon, as supporting the binding force of the rule invoked by the defendants in this case, and some of them apparently, (perhaps really) do so, while quite as many of them may be explained consistently with, if not directly sustaining, the view which we have taken. They all so construe the rule passed upon, as not exempting from, or limiting, the liability imposed by law, arising from a want of the requisite skill or care, and in most or all of the cases such a construction flows naturally enough from the language used, while no such meaning can be given to the one now under consideration. It is true it might be held applicable to such cases as come within the authority of the company to limit their responsibility, and inapplicable to damages arising from negligence or fraud. But in so doing, we must necessarily expunge a portion of the words used, and thereby establish for the company a rule materially different from that ordained by themselves. We can only construe rules and contracts, and not make them.

It will be noticed that the rule of these defendants in relation to night messages, that which we are now considering, has no provision for repeating the message, a provision upon which many of the cases rest. Such are the cases of *Camp v. W. U. Tel. Co.*, 1 Metc., (Ky.) 164, (Allen on Telegraphs, 85 ;) *McAndrew v. The Electric Tel. Co.*, 17 C. B., 3; (Allen, 38 ;) *Breese v. U. S. Tel. Co.*, 45 Barb., 274, (Allen, 663.) Hence in these cases and others of the like kind, the precise question now before us was not raised.

The same provision is found in *Ellis v. American Telegraph Company*, 13 Allen, 226, and also the further provision pledging the company to good faith in their endeavors "to send messages correctly and promptly," thereby authorizing, and even requiring the construction put upon the rule that it did not provide against want of skill or care, and while in that view the rule is held to be reasonable, it is said in the opinion: "Of course, a party cannot in such way protect himself against the consequences of his own fraud or gross negligence, or the fraud or gross negligence of his servants or agents. Nor can he escape all liability or responsi-

bility in the performance of the service or duty which he undertakes."

Warren v. Western Union Telegraph Company, 14 Missouri, 472, is founded upon the same provision requiring the message to be repeated, and holds also, that the rule does not and can not exempt the company from the consequences of gross negligence.

Sweatland v. Ill. & Misso. Tel. Co., 27 Iowa, 432, is to the same purport. In this last case, Dillon, C. J., remarks: "The considerations mentioned by the appellants are quite sufficient to justify the court in holding reasonable the condition as to repeating messages, and exempting it from liability for mistakes in unrepeated messages, occasioned by unavoidable or uncontrollable causes, provided proper instruments have been used, and proper care and skill exercised by the company's employees to avoid or prevent mistake."

Again, he says: "But I deny that companies can adopt general printed rules, exacting as a condition of sending messages, that the sender shall exonerate or release the company from damages caused by defective instruments, or by the want of proper skill in the operators, or by their failure to use due care."

To the same effect is Redfield on Railways, (3d ed.,) 244. In Shearman & Redfield on Negligence, § 565, near the end, it is said: "We certainly think that such rules should be held void; and being illegal in their terms and plain import, they ought not to be given effect, even in those cases which might lawfully be provided for, and which are covered by their terms."

Thus most, if not all, the cases upon this subject refer to rules requiring the repeating of messages to insure accuracy, and seem to be justified in their conclusion on the ground that owing to the liability to error, from causes beyond the skill and care of the operator, it is but a matter of common care and prudence to have the messages repeated; the neglect of which in messages of importance, after being warned of the danger, is a want of care on the part of the sender, and as the person sending the message is presumed to be the best judge of its importance, he must on his

own responsibility make his election whether to have it repeated. These cases also hold with great, if not entire, unanimity, that even under such circumstances, the company can only limit, but not take away their entire liability. If the doctrine of these cases be sound, the rule invoked in the case at bar must necessarily, as a rule, be void. In its very terms it relieves the company from all liability for any errors, delays, or omissions, "from whatever cause occurring."

But it is elaborately, as well as ably, argued in the defence that here is a contract, fairly and intelligently entered into by the parties, and by the terms of that contract their rights and liabilities must be governed. While we concede that a party may sometimes limit his liability by special contract beyond what he can by a rule or regulation, yet it is settled on a foundation too firm to be shaken, that even contracts in violation of good faith and public policy cannot be sustained. The interests of the public must be protected, even though they clash with those of private individuals.

These defendants are holding at least a *quasi* public employment. As such they will not be permitted to compel individuals to assent to contracts inconsistent with the public interest, or which tend to excuse the want of entire fidelity in the exercise of such employment. If, then, the objection to the rule is that it relieves the defendants from obligations imposed by law for the purpose of securing fidelity to the public, the same objection would lie against it as the foundation of a contract. If this be a contract it authorizes the grossest negligence, or fraud even, with entire impunity. The courts might, perhaps, have some latitude in applying rules, but a contract must abide the terms assented to by the parties. Courts can only enforce contracts, not make them.

When we consider that, under present methods of transacting business, the telegraph has become a commercial, if not a social necessity, and that parties having occasion to employ it can have their rights preserved only by having their messages promptly and faithfully delivered, it would seem to be self-evident that the contract invoked in the defence is utterly void.

But it is difficult to conceive on what grounds it can be called a contract. While we concede that the forms of one have an existence, the substance is wanting. The parties are not in a condition to contract upon equal terms. The company holds itself out to the public as in readiness to transmit all such dispatches as may be presented for that purpose. The telegraph has created a necessity for its use. Business can be transacted without it only at a very great disadvantage. In most places there is no choice as to lines, and where there is, it is so limited that a virtual monopoly exists. On the other hand the occasion for sending a message often comes suddenly, or with so short notice as to leave no time for deliberation, or to examine and consider the terms offered. Under such circumstances the sender seldom, if ever, reads what is printed upon the blank or gives any intelligent assent thereto.

These suggestions may, however, be considered as applicable to the proof offered to show the existence of a contract, rather than as bearing upon its validity; and admitting that it is competent for the parties to make a contract limiting the defendants' liability for errors arising from causes other than a want of proper care and skill on their own part or that of their employees, and that the alleged contract in this case is sufficient in form and sustained by sufficient proof, we do not admit the existence of any special contract in any proper sense of the term, limiting the defendants' liability. There can be no contract unless the contracting party assumes some responsibility, or undertakes to do or perform some act. In this case, the terms of the alleged agreement impose no duty whatever upon the defendants, or if they do, by the same instrument they are absolved from all such duty and relieved from all responsibility in regard to it. To be sure they agree or propose to receive the message and send it by night, but on condition that they may send that or another, or none whatever. The same act by which they undertake to do, releases them from all obligation to perform. Interpreting the several parts of the contract as one whole, it imposes no undertaking to send the message, or if sent, that it shall go correctly.

But if it is said that there is a contract to send the message on the part of the company and a release for error, delay or failure in performance, by the sender, the case stands no better for the defence. For such a release there is no consideration, and therefore it is of no binding force. Upon this point the remarks of the court in *Candee v. Western Union Telegraph Company*, reported in 8 American Law Review, 374, in discussing the same rule now under consideration, are so forcible and conclusive, we cannot forbear quoting: "The supposed exemption is broad and sweeping, and calculated, no doubt, to relieve the company from all responsibility for the improper or insufficient performance, or attempted performance of the contract, or for the entire failure to perform it, from whatever cause occurring. Aside from the objections resting on grounds of public policy, and which forbid the company from stipulating for immunity from the consequences of its own wrongful acts, it seems very clear to us that there can be no consideration for such stipulation on the part of the sender of the message, and that, so far as he is concerned, it is void for that reason, although exacted by the company, and fully assented to by him. Either the company enters into a contract with him, and takes upon itself the burden of some sort of legal obligation to send the message, or it does not. It would be manifestly against reason, and what all must assume to be the intention of the parties, to say that no contract whatever is made between them, and nobody, not even the officers, or representatives of the company, assert such a doctrine."

"It would seem utterly absurd to assert it. Holding itself out as ready and willing and able to perform the service for whomsoever comes and pays the consideration itself has fixed and declared to be sufficient, and actually receiving such consideration, it cannot be denied, we think, that a legal obligation arises and duty exists, on the part of the company to transmit the message with reasonable care and diligence, according to the request of the sender. Such being the attitude of the company and the obligation it assumes by accepting the payment, the question arising is, whether

it can at the same time, and as part of the very act of creating the obligation, exact and receive from the other party to the contract a release from it. The regulations under consideration, if looked upon as reasonable and valid, completely nullify the contract by absolving the company from all obligation to perform it, and the party delivering the message gets nothing in return for the price of transmission paid by him. Is it possible for the company, or for any other party entering into a contract for a valuable consideration received, to promise and not to promise, or to create and not to create an obligation or duty, at one and the same moment, and by one and the same act? The inconsistency and impossibility of such things are obvious. But if there were no such difficulties, or if the occasion or circumstances were such that a valid release might be executed and it be regarded in that light, still the objection exists that there is no consideration whatever to support it, and it must be held void on that ground. If it be urged that the sender receives his consideration in the reduced price of transmission, or because the company undertakes to send the message at one-half of the usual rates for sending day messages, that argument ends in proving that the company does not undertake to send the message at all, and that no contract or agreement, on its part, is made or entered into for that purpose. If the company promises or binds itself at all for the rate or consideration named, and which it is willing to and does accept, then the smallness of such consideration cannot operate to relieve from the promise, or to destroy the obligation thus created."

We find, then, the provision under consideration equally invalid whether as a regulation of the company or as the foundation of a special contract between the parties, and we must look to the implied contract arising from the company's undertaking to transmit the message, to ascertain its duties and liabilities.

That the liabilities of a common carrier do not attach to business of this kind may now be considered as well settled. That messages of the highest importance are often sent requiring a proportionate degree of care, may be considered equally certain.

To require a degree of care and skill commensurate with the importance of the trust reposed, is in accordance with the principles of law applicable to all undertakings of whatever kind, whether professional, mechanical, or that of the common laborer. There is no reason why the business of sending messages by telegraph should be made an exception to the general rule. This requires skill as well as care. If the work is difficult, greater skill is required. It is often necessary to entrust to this mode of communication, matters of great moment, and therefore the law requires great care. It is necessary to use instruments of a somewhat delicate nature, and accurate adjustment, and therefore they must be so made as to be reasonably sufficient for the purpose. The company holding itself out to the public, as ready and willing to transmit messages by this means, pledges to that public the use of instruments proper for the purpose, and that degree of skill and care adequate to accomplish the object proposed. In case of failure in any of these respects the company would undoubtedly be liable for the damage resulting. This would not impose any liability for want of skill or knowledge not reasonably attainable in the present state of the art, nor for errors resulting from the peculiar and unknown condition of the atmosphere, or any agency from whatever source, which the degree of skill and care spoken of, is insufficient to guard against or avoid.

The question now arises as to whether the plaintiffs have made out their case. They have proved that the message was not correctly transmitted, and from that error damage has resulted. The company undertook to send the message, and of course to send it correctly. The present state of the art is not such as to render error the rule, but rather the exception. We may with great confidence expect that with the ordinary degree of skill and care, mistakes will be avoided. Besides, the company undertook to perform the work, and have failed to do so. Under these circumstances it is sufficient for the plaintiffs to prove the failure. After that, if the defendants would excuse themselves, the burden is upon them to show that the failure was caused by some agency

for which they were not responsible. This is in accordance with well settled principles of law as applicable to contracts generally, nor does any hardship result from this rule. The means of proof are almost entirely within the power of the defendants, and equally beyond the reach of the plaintiffs. Shearman & Redfield on Neg., § 559; *Rittenhouse v. The Ind. Line of Tel.*, 44 N. Y., 263; *DeRutte v. Tel. Co.*, Allen's Tel. Cases, 284.

In excuse for their non-performance the defendants offered to show "the nature of this business; how it is carried on, and its liability to error and mistake," and other testimony to the same effect. This testimony was rejected, and in this we see no error. It is all consistent with the plaintiffs' theory that there was a want of skill or care, which caused the mistake. The difficulties of the business, its liability to error, or to be affected by the condition of the atmosphere, or that the characters used were such as might easily be mistaken one for the other, or on account of the electrical condition of the atmosphere liable to run into each other, may be suggestions tending to show the necessity of greater care or skill, but the proof, if admitted, would not show, or tend to show, that this error was caused by any of these difficulties, or by any cause for which the company is not liable. There is no suggestion even that it was caused by any of these agencies. In accordance with these views is the well considered case of *Tyler v. Western Union Telegraph Company*, decided in Illinois, and reported in the Albany Law Journal, vol. 8, pp. 181 and 337. The rule of damages is settled in *True v. International Telegraph Company*, before cited, in accordance with all the authorities.

The message was delivered in Chicago, July 13, 1870. It then directed the purchase of one thousand bushels of corn. On the sixteenth day of July, the error was discovered in Chicago, and the plaintiffs were notified by telegraph. On the same day, which was Saturday, they telegraphed to their agents to purchase the balance of the ten thousand bushels. What time this telegram arrived does not appear, but from the testimony, it is fair to presume, not in season to enable the purchase to be made before

Monday. It was made as soon as Monday or Tuesday. We cannot say there was any unnecessary delay, but the conclusion is, that in this respect the plaintiffs used due diligence to save themselves from loss.

The first corn was purchased for eighty-five cents per bushel; for the last was paid ninety-five, and the plaintiffs have introduced testimony tending to show that the fair market price was paid each time. The defendants have also introduced testimony tending to show that the price paid was too high in each case. This testimony is somewhat indefinite, and relates mainly to a different kind of corn, and that of a lower grade, while that of the plaintiffs is of actual purchases, and definite proof that the price was in accordance with the then market rates. Besides the most reliable testimony of the defendants, that of Benj. T. Howard, whose business it was to make a daily report of the market, shows an advance in the lower grade of corn from the fourteenth to the eighteenth day of July, 1870, equal or nearly so, to that claimed by the plaintiffs. The result is, that for the nine thousand bushels of corn last purchased by the plaintiffs, they paid ten cents per bushel more than they could have bought for, when their telegram first reached Chicago, and for this difference the defendants are liable with interest from the date of the demand, July 28, 1870.

Judgment for plaintiffs for $900, *and interest from July* 28, 1870.

WALTON, DICKERSON, BARROWS and VIRGIN, JJ., concurred.

JAMES W. BRADBURY and others *vs.* GEORGE CONY.

Jury. Verdict set aside for improper influences used.

A verdict will be set aside if it be shown that the jury have been approached during the pendency of the cause, and information volunteered upon the matters in issue therein, by a friend or relative of him in whose favor the verdict was rendered, although such improper influence was not exerted at the request, or with the knowledge of the party prevailing before the jury.

Bradbury *v.* Cony.

MOTION FOR A NEW TRIAL by the demandants on the ground that the verdict against them was obtained by the effect of improper influences, brought to bear upon the minds of the jurors rendering it. The issue between the parties was as to the true location of the line dividing their conterminous estates, and the testimony as to an alleged set-off in the wall between their respective buildings was conflicting. On the day the cause was argued, and before it was committed to the jury, three of the panel were upon the platform of the railroad depot in Augusta, opposite to the *locus in quo*, and accepted the invitation of the tenant's son to go across the street and examine the premises of the parties and the partition wall between their buildings, and, at his suggestion, made measurements as they went along. The foundation of the wall and the set-off were shown them, and statements relative to material facts were made by their guide, George A. Cony. The jurors testified that they were influenced by what they there saw and heard, and that it tended to induce the rendition of their verdict in favor of the defendant. There was no evidence tending to connect the tenant (George Cony) with this improper conduct of his son. The latter, while conducting the jurors from one estate to the other, said he supposed it would not do for him to be seen with them.

The controversy between these parties has been previously before this court. See 59 Maine, 494. Since the present opinion was promulgated a third trial has been had and a final judgment rendered for the demandants.

A. Libbey and *J. W. Bradbury, Jr.*, for the demandants.

Baker & Baker, and *S. Titcomb*, for the tenant.

APPLETON, C. J. Every party litigant is entitled to a fair and impartial trial, without bias or prejudice on the part of jurymen and without any interference by the opposite party, or his relatives or friends, creating or tending to create a bias, exciting or tending to excite a prejudice in the minds of those before whom the cause is

tried, in favor of the party by whom, or by whose relatives or friends, such interference is had. It is immaterial whether such interference is the result of design, or of ignorance. The effect in either case is the same.

The controversy between these parties relates to the boundary line between the block of stores erected by the demandants and the Cony House built by the tenant. While the cause was on trial the son of the defendant, the occupant of the Cony House, requested some of the jury before whom the case was pending to view the premises. They proceeded under his guidance to examine the demandants' block of stores and the Cony House, making admeasurements as they proceeded, at the suggestion of their self-appointed guide. The examination had, and the measurements taken, were without knowledge of the court, or of the demandants or their counsel. This was done stealthily, the tenant's son remarking as they were going from the demandant's premises to the Cony House, "that it would not do for him to be seen with them." The jurymen testified that this examination, and the measurements made, had an influence on their verdict.

The general principles applicable to interference by a party with jurymen while a cause is pending, are equally applicable to similar interference by the friends or relatives of the party in whose aid such interference is had. It was not necessary to show that the verdict was influenced by the improper conduct of the defendant's son. It is enough, that what was done by him was for the purpose and with the intention of influencing their verdict. Whenever a given course of conduct by the party litigant would induce a court to set aside a verdict, the like action on the part of his friends and relatives would be equally efficacious in producing the same result, for their interference would be more likely to influence the minds of the jury than the more obvious and apparent interest of the party. In the trial of a cause, the appearance of evil should be as much avoided as evil itself. It is important that jurymen should be devoid of prejudice. It is hardly less so, that they should be free from the suspicion of prejudice.

In *Perkins v. Knight*, 2 N. H., 474, it was held where one of the parties, after a cause had been opened, made to a juror out of court statements favorable to his side of the cause, and the jury afterwards returned a verdict in his favor, that this was sufficient cause for setting it aside. In *State v. Hascall*, 6 N. H., 353, it appeared that certain papers prejudicial to the respondent were exhibited by the prosecutor in several public places in Portsmouth, where the court was holden, during the term and before the trial, and that some of the jury boarded at those places. "We are not disposed observed Parker, J., to give any countenance to such a procedure in this or in any other case. It is of much more importance that the community should feel assured of the purity of the trial by jury, without bias according to law, than it is that John Hascall be now sentenced even if he be guilty."

In *Nesmith v. The Clinton Fire Insurance Company*, 8 Abbott Practice Rep., N. Y., 141, it was proved that during the trial of an action in which there was much conflicting evidence, a juror listened to the statements of a third party, attacking the credibility of the defendants' witnesses. The court held that when it appears that the jury have been approached in such a manner as *might* have influenced the verdict, it should be set aside without reference to the source or the motive of the interference.

In *Reynolds v. Champlain Transportation Company*, 9 Howard Pr. Cases, (N. Y.) 7, it appeared that on the morning of the second day of the trial, and after the plaintiff had rested his case, and before the going in of the court three of the jurors were together in a bar room with other persons. The plaintiff in their presence and hearing, said that the defendants were "a cut throat corporation"—had swindled the public—that he had paid them a great deal of money—that they had defrauded him by not carrying the fruit, &c. There was a conflict of testimony as to whether the plaintiff knew they were jurymen or not. In delivering the opinion of the court, Allen, C. J., says, "no impropriety can be charged upon either of the jurors. They maintained a strict silence during the time the plaintiff was speaking, and left as soon

as the idea of such impropriety was suggested to their minds. * * * * It is said the plaintiff said no more than had been proved in court. * * * * * He charged the defendants with the grossest crimes, and in a manner calculated to prejudice the minds of the jurors. * * * * * * * Besides, if it were strictly true that he did no more than detail the evidence, it was improper to sum up his cause out of court * * * * * to the jury or any of them." The verdict was accordingly set aside.

These views are most fully affirmed in *Cilley v. Bartlett*, 19 N. H., 312. "The case finds," observes Gilchrist, C. J., in delivering the opinion of the court, "that the defendant in the presence and hearing of one or more of the jury, asserted in the most positive terms, that the testimony of one of the most material witnesses for the demandant was utterly and absolutely false. The tenant swears that he did not know any one of the jury was present at the time."

"Whether he knew this fact or not is not a matter that can be readily proved. But there will be no security for the proper administration of justice, if a party while his case is on trial can be permitted to make statements denouncing his opponent's witnesses, during the adjournment, after the jury have separated, whether he is aware of the presence of a juror or not. If he will conduct in this manner he must take the risk of consequences upon himself. The presumption is, that where jurors hear such statements they are more or less affected by them. *State v. Hascall*, 6 N. H., 352. And as it is necessary that such conduct should be discountenanced, the judgment of the court is, that for this, as well as the other causes we have stated, the demandant is entitled to a new trial."

It is urged that the defendant did not know of and is not responsible for the illegal acts of his son. The effect on the jury is the same whether the tampering is by the party or his friends and relatives—whether with his knowledge or without it. In *Coster v. Merest*, 3 Brod. & Bing., 272, where it was proved that hand bills reflecting on the plaintiff's character had been distributed in

court and shown to the jury on the day of trial, the court refused to receive affidavits of the jury in contradiction and granted a new trial against the defendant, though he denied all knowledge of the hand bills. In *McDaniels v. McDaniels*, 40 Vermont, 364, conversations had with jurors about the case on trial by the friends of the prevailing party, intended and calculated to influence the verdict, were *held* to constitute a sufficient cause to warrant the court in granting a new trial, even though not shown to have influenced the verdict in point of fact, and though they were had without the procurement or knowledge of the prevailing party and listened to by the jurors without understanding that they were guilty of misconduct in so doing. "The friends of the plaintiff," remarks Steele, J., "who thus approached the jury were guilty of a flagrant violation of the law, and the jurors who suffered themselves to be so approached, though they may have meant no wrong, were guilty not only of a violation of the law, but also of the oath they had taken, to say nothing to any person about the business and matter in their charge but to their fellow jurors, and to suffer no one to speak to them about the same but in court. Both were liable to severe and summary punishment. The plaintiff as he was unaware of their transactions is not liable to punishment, but it does not follow from this that he can hold a verdict which is the result of a trial corrupted, though without his fault by a shameful disregard of the familiar rules which are necessary to a decent administration of justice." *Motion sustained.*

WALTON, DICKERSON, DANFORTH and VIRGIN, JJ., concurred.

Inhabitants of Fayette *vs.* Inhabitants of Livermore.

Pauper. R. S., c. 24, § 1. *Settlement.*

Bodily presence must concur with intention to enable a single woman to establish a home, the continuance of which for five years will give her a settlement under the sixth mode prescribed in R. S., c. 24, § 1.

Even when she has long been a member of the family of a brother who has supported her, and designs with his knowledge and consent to remove with him to another town, but is delayed upon the road by bodily ailments, and he with his family arrives at such town some weeks before she does, she cannot be said to have her home in such town, within the meaning of the pauper law, until she actually comes there.

If the brother, being under no legal obligation, by contract or otherwise, to support her, before the lapse of five years calls upon one of the overseers of the poor of such town and informs him when the five years will expire, and refuses to support her any longer without compensation from the town, and her pecuniary circumstances and bodily condition are such as to make her stand in need of immediate relief when such support is withdrawn, and thereupon the overseer directs the brother to supply her and he will see to it, and upon the same day communicates these facts to another overseer who assents thereto, and they forthwith make a notice to the town where she has her settlement in the ordinary form that she has become chargeable, &c., such notice is not invalid as being premature, although no bargain is made with the brother as to the price of her board per week, until some days later, and it does not appear at the time of making the notice that the pauper has consumed or received any supplies under the order thus given.

The fact that these things were done but a few days before the completion of five years from the time the pauper came to the plaintiff town, and proof that the brother declared to the overseers of both towns his intention to cast her support upon the town from which they removed, and carried the notice from the overseers of the plaintiff town to those of the defendants, in pursuance of an arrangement made when he first called upon the overseers of the plaintiffs, are not such conclusive evidence of bad faith on the part of the overseers of the plaintiffs as to justify setting aside a verdict in their favor.

It is not necessary that a majority of the overseers should make a personal examination as to the necessity for supplies. One may act upon information derived from one of his fellows, and if he ratify an order previously given for supplies by his associate, it is sufficient to constitute a furnishing by the town.

Fayette *v.* Livermore.

ON EXCEPTIONS AND MOTION FOR A NEW TRIAL by the defendants to set aside a verdict rendered in favor of the plaintiffs for $120.17 for supplies furnished by contract to a pauper with whose support the defendants were chargeable. The facts and the law as stated at the trial sufficiently appear in the opinion.

Baker & Baker and *R. Washburn*, for the defendants.

A. Libbey, for the plaintiffs.

BARROWS, J. The alleged pauper, Julia A. White, is a woman sixty-two years old, an invalid since she was fifteen, usually confined to a dark room on account of an affection of the eyes, mostly dependent upon her father (with whom she lived in Livermore, for sixteen or seventeen years prior to 1843,) until his death in 1846, since which she has lived with her brother, George W. White, and been supported by him up to December, 1870, as one of his family. The family removed from Livermore to Dead River Plantation in 1843, prior to which time her father had conveyed to her brother what property he had in consideration of a life maintenance for himself. The father and brother with the rest of the family, except the pauper, went to Dead River in July, 1843. She, being too feeble to go then, was removed the next winter on a bed in a sleigh. They lived in that Plantation until the fall of 1865, when the brother bought a farm in Fayette, and moved there with his family in November. Respecting the removal of his sister from Dead River to Fayette, he testifies in substance as follows: "She left a day or two before I did when we broke up at Dead River. We put a bed into a wagon and brought her out twelve miles to the house of one Hutchings, in Plantation No. 2, not to visit but to stop, because we did not consider her able to ride from there in a wagon. She thought it would be easier to stop there till sleighing, and did so. I went for her then and brought her to Fayette December 27, 1865. She had always been a member of my family. I suppose she intended to go to Fayette with me as soon as she was able; I think likely she would have gone then if she

had been able." She had no property at that time but the wearing apparel and a bed which she had with her. After coming to Fayette she continued to make one of her brother's family, and was supported by him. About the 16th of December, 1870, he informed one of the overseers of Livermore, that he had kept her off the town almost forty years, and could not keep her longer without pay. Some conversation was had about the amount he would charge for keeping her, but no contract was made, and on the morning of the 24th of December, her brother made application to Jones, one of the overseers of Fayette, and claimed that he must have something for taking care of her, and the overseer told him to take care of her and he would see to it. But no price was agreed upon until some ten days later, when he made a contract with another of the overseers of Fayette to keep her for $3 per week, under which she has ever since been supported. But in the afternoon of December 24, Jones conferred with Watson, another overseer of the plaintiff town, and reported the case and that he had engaged her brother to support her, and Watson agreed to the arrangement, and they made the notice to Livermore that afternoon, and sent it a day or two afterward by the brother, who seems to have agreed, at the time of the first application to Jones, to transmit the notice to the defendants. The brother seems throughout to have been determined that the pauper should be supported by Livermore, as the place of her original settlement, and to have timed his application to the overseers with this in view, informing the overseers of both towns when five years would have elapsed from the time she arrived in Fayette, and declaring that he did not feel justified in carrying her to another town and keeping her there till she gained a residence. Hereupon, the defendants, the verdict being against them, complain that it is against law and evidence, and that there was error in the refusal of the presiding judge to instruct in conformity with their requests—in substance, that the action cannot be maintained unless it is proved that prior to making the notice some supplies had been furnished by the plaintiffs to the pauper for which they had a right of action against defendants,

and that the pauper gained a settlement by five years' residence in Fayette, if she was a member of her brother's family in November, 1865, and with his consent intended to make her home with him in Fayette, and would have gone with him in that month if she had been able to bear the journey, and did subsequently go in pursuance of her original intention and make her home there—in other words, that her home and residence in Fayette commenced upon the arrival of her brother's family there, if she was, and expected to continue to be a member of his family with his consent, but was prevented from pursuing her journey thither with them by her feeble condition.

There would be not a little force in the latter proposition if there could be such a thing as having a constructive home in a place, by virtue of an intention to go and live there before any actual arrival and bodily presence. Doubtless the wife or one of the minor children of George W. White, thus detained on the way would have had a settlement in Fayette in November, 1870. But it would not be by reason of their intention unaccompanied by bodily presence, but because they would follow the settlement of the husband and father. But we cannot hold that a sister thus dependent upon fraternal charity would have the home of her brother by reason of her intention and his consent, prior to her actual arrival. If intention of the pauper to establish a home in a particular place is necessary, bodily presence is equally so to effect such establishment. A home once established may be maintained without the concurring bodily presence, if the intention continues unchanged through all temporary absences. But in the outset one cannot make a home in a place by merely intending to do so. Whensoever the intention is conceived the home does not exist until the intention is executed by an actual concurring bodily presence.

Nor is there anything in the case of *Hampden v. Levant*, 59 Maine, 557, that militates against this. That case simply holds that a home may be abandoned by one who is absent bodily, if he forms, while thus absent, an intention thereafterwards to make his home elsewhere. It does not follow that his home from that time is in

the place where he intends to go to reside. One settlement remains until another is gained. But the same rule does not obtain with respect to homes. A home may be abandoned, and a person may have for years only a succession of temporary homes, or none at all; and almost always a greater or less interval of time intervenes between the abandonment of one home and the establishment of another. In *Hampden v. Levant*, it is held that the bodily absence and intention to abandon showed that the pauper then ceased to have a home in Hampden; but not that the intention when he returned to make his home in Winterport, made Winterport his home from the time the intention was formed.

In the case at bar the pauper began to have a home in Fayette, on her arrival there, December 27, 1865, and the requested instruction was rightly refused.

It is urged that the notice was premature; but we think not. It was given when two of the overseers of Fayette had had information that the brother refused to support the sister longer without compensation from the town, and when the second overseer who received the information from his associate had assented to the temporary arrangement made by the one to whom the brother applied, for her maintenance by the brother. She was then chargeable to the town, and a majority of the overseers had assented to the furnishing of supplies. It was not necessary to the validity of the notice that a specific bargain should have been concluded with the brother as to the amount of compensation with which he would be content, nor that she should have actually received and consumed any supplies for which Fayette could at that moment have maintained an action against Livermore. Without this, enough had been done to constitute a furnishing of supplies by Fayette.

The object of the statute requiring notice from the town furnishing the supplies to the town where the pauper has his settlement, is to prevent the accumulation of a bill, and give the town, which is ultimately responsible, an opportunity to remove the pauper to the place of settlement, where the presumption is that he may be supported with greater convenience and less expense.

When the town where the pauper falls into distress has become chargeable and has directed the furnishing of supplies effectively, having made a contract therefor which is in process of fulfilment and is thereafterwards fulfilled—the need of relief being established—the sooner the notice is given to the party ultimately responsible, the more perfectly it fulfills its purpose. If peculiar circumstances, prompt notice and immediate vicinity, enable the town where the pauper has his settlement to remove him before a bill of any amount has actually been run up, such town has no cause of complaint. It is the fact that the person has fallen into distress and has become chargeable to the town where he is found, which is essential in the notice, and this occurs when the overseers of the poor have found him in need of relief and assumed his support. If, as is more commonly the fact in ordinary cases of distress, provisions, fuel or clothing have been furnished in good faith, it is not necessary to prove also that they have been consumed, in order to entitle the town which furnishes to recover for them. In a case like this where a person without means has been thrown upon the town by a party who, though under no legal obligation to support her, had previously furnished the support, the notice might well be given as soon as the town had assumed the burden and recognized the case as one of actual need, and arranged generally for a continuance of necessary supplies at the expense of the town. The recovery for any supplies furnished more than three months before the giving of notice, is prohibited, but it is allowed for all such sums as accrue after the giving of the notice up to the time of the commencement of the action, even though no actual payment had then been made.

The difficulty in the way of the plaintiffs in *Verona v. Penobscot*, 56 Maine, 11, was not that no supplies had been furnished by the plaintiff town when the notice was given, but that, as the law stood when the supplies were furnished and the notice was given, and for two months afterwards, the persons to whom they were furnished, could not be made chargeable as paupers by receiving aid from the town. The case supposed, *arguendo*, by the learned

judge who drew the opinion in *Verona v. Penobscot*, is not the case at bar. We are not to be understood as holding that a notice given by overseers only *quia timent*, and before any actual distress existed, would be valid or well-timed. Here the order for supplies had been given by one of the overseers and assented to by another, and the pauper was thus actually chargeable, albeit nothing which could be the subject of a suit against the town where she had her settlement, might have been furnished or consumed by her. It was a case of actual existing necessity, so deemed by the overseers, and provided for by the general order to White for suitable supplies, before the notice was given.

Any *dicta* in the charge of the presiding judge, implying that the giving of this notice to the overseers of Fayette by the brother, was all that was necessary, without any assumption by them of the support of the pauper were purely immaterial, and could not have harmed the defendants, because the uncontradicted testimony in the case showed the assent of two of the overseers, before the notice was made, to the direction given by Jones to the brother, respecting the furnishing of support. Upon the question of good faith, the defendants complain of both the verdict and the instructions; but we do not see that they are justly aggrieved by either. There is no evidence that the brother was under any legal obligation or contract to support the sister, nor was he bound to relieve the town from which they both removed, and where she had her settlement, at the expense of the town where he had his home. There seems to be no reason to doubt the utter and complete destitution and helplessness of the sister, the moment the brother declined to support her longer. The instructions required the jury to find good faith on the part of the overseers of the plaintiff town in furnishing the supplies. They allude to the familiar fact that bad faith in matters of this kind consists, for the most part, in furnishing supplies where there is no destitution; but they do not ignore the possibility that bad faith may be shown in other ways. If the defendants' counsel wished instructions more specific, he should have requested them.

Bad faith is not to be presumed. The presumption is the other way; and we see no evidence in the case that rebuts the presumption. *Motion and exceptions overruled.*

CUTTING, DICKERSON, DANFORTH and PETERS, JJ., concurred.

CHARLES HEWINS *vs.* RUFUS O. CURRIER and another.

Bail bond—what is. Debt does not lie upon it.

An action of debt will not lie on a statute bail bond in this State; *scire facias* being the only remedy.

A bail bond is not inefficacious as a statute bond, in which the condition is that the debtor shall "abide, do and perform the judgment;" these words meaning no more than that he shall "abide" the judgment obtained.

ON EXCEPTIONS.

DEBT on a bond given to the plaintiff, as sheriff of the county, in order to obtain the release of Currier from arrest upon a writ in favor of Silas Burbank. Submitted to the presiding justice with leave to except. A nonsuit was ordered upon the ground that this was a bail bond and *scire facias* the exclusive remedy upon it. The plaintiff excepted. He contended that debt in the name of the officer, and *scire facias* by the creditor were concurrent remedies; also that this was not a statute bail bond because it was conditioned that "Rufus O. Currier shall appear and answer unto said writ or process, and shall abide, do and perform the judgment of the said Supreme Judicial Court or the judgment of any other court before whom the said process shall in due course of law be finally determined, and shall not avoid, then the above obligation to be void: otherwise to remain in full force."

E. Kempton, for the plaintiff.

E. F. Pillsbury, for the defendants.

PETERS, J. The plaintiff contends that an action of debt in the name of the sheriff will lie on a bail bond, and that *scire facias* in the creditor's name, as provided by statute, is not an exclusive but concurrent remedy only.

It is correctly asserted that this question has not been directly settled in any reported case in this State. In the opinion, in *Hale v. Russ*, 1 Maine, 336, argued in 1821, Chief Justice Mellen alludes to *scire facias* as the proper remedy, and this position was regarded of some importance, though not at all conclusive in the decision of that case. The statement of that eminent jurist is valuable, at least, as indicating what the general practice and opinion were at that early period. In *Packard v. Brewster*, 59 Maine, 404, it is stated that *scire facias*, and not debt, is the proper remedy upon a bail bond, although the point was not by counsel urged, or by the court regarded as indispensable to the decision of the case. *Longley v. Adams*, 40 Maine, 125, relied on by the plaintiff, as an indirect authority in his favor, was an action of debt upon a bail bond, where the question, whether debt would lie in such a case, does not appear to have arisen; nor was there need of it, as the case was settled upon a point which would put an end to the plaintiff's claim in that or any other form of action.

The point in issue has been decided in Massachusetts and New Hampshire, adversely to the plaintiff, in carefully considered opinions in cases arising upon statutes, in all material respects substantially, if not precisely, like our own. *Crane v. Keating*, 13 Pick., 339; *Niles v. Drake*, 17 Pick., 516; *Gale v. Boyle*, 6 Cush., 138; *Pierce v. Reed*, 2 N. H., 359.

It seems that the old English bail system was never fully adopted in this State, in which respect our legislation is a copy of the statutes of Massachusetts. While in the common law practice there were two sorts of bail, one to the officer to appear at court, and one to the party there after appearing, a system of bail below and bail above imposing complications and burdens; the legislature in this State, following the practice in Massachusetts, established a single bail bond, running to the officer for the benefit of

the creditor, which combines the properties of both kinds of bail at common law; a proceeding more comprehensive and less complicated than that of the common law, and designed to be more beneficial to all concerned. In the statutes regulating the subject, it is provided that a creditor shall be entitled to a writ of *scire facias* against bail, and it is apparent enough that the design was that there should be no other remedy.

It is provided by statute that a writ of *scire facias* must be sued out against bail within a year from the rendition of judgment against the principal. This limitation is imposed upon that form of remedy, upon the supposition that there is no other. If debt lies, the debtor would lose the exact benefits designed by the statute to be conferred, as it could be brought any time within six years after the cause of action accrued.

It is further provided, that the bail may discharge themselves by a surrender of the principal before final judgment on the *scire facias;* while no such provision is made to apply in an action of debt. This omission creates the strongest implication that the latter remedy does not exist. It is impossible that such a boon would be allowed to bail in one, and not in another form of remedy. In fact, the remedy by *scire facias* was exclusively adopted for the reason, that it was exactly suited to make practicable those improvements upon the common law practice sought to be attained. The plaintiff argues that the remedy by debt is inferentially established or admitted, by the clause in the statute which provides that the bail, under the plea in *scire facias* that they never became bail, may avail themselves of any defence which would avail them in an action of debt on the bond, on a plea that it is not their bond. But this is to ensure the bail, who are now required to answer only in *scire facias*, all the latitude of defence in that form of proceeding which they could possibly have in any other.

But, if a statute bond cannot be sued in an action of debt by an officer, it is contended that the action may be maintained upon the ground that this is not a statute, but a common law bond, because more onerous conditions are undertaken by the bail than

the statute imposes upon them; and, that the extra obligations consist in the words "do and perform" contained in the condition that the principal shall "abide, do and perform the judgment &c. and not avoid;" and in the undertaking to abide the judgment "of any other court before whom the said process shall in due course of law be finally determined."

The instrument upon inspection appears to be strictly the copy of a form which was used for bail bond on mesne process for many years in this State, during the existence of the Common Pleas and District Courts, and found also in books of precedents and practice. The counsel for plaintiff argues that to "do and perform" means to pay. It is unreasonable to suppose that the defendants were aware of their making such a covenant as that. The words mean rather "to submit to," "to stand to" or "to abide." They are evidently an useless iteration, and at most perhaps an inaccuracy of language, employed to add force and expression to the idea conveyed by the words "to abide." "To abide, do and perform and not avoid" are no more than to "abide and not avoid." The contract of bail is in effect, that the debtor shall pay the judgment, or surrender his body to be taken, or that the bail shall pay the debt. If the debtor gives the creditor the means of taking his body in execution, he does "abide, do and perform the judgment and not avoid" in the meaning of those words in the covenant of his bond. It is not an illegal condition to agree to abide the judgment of any court other than this, before which in due course of law the original action might be finally determined, although in the present arrangement of our judicial administration a perfectly harmless and insensible one.

Our consideration of any other questions, presented in the arguments, is unnecessary. *Exceptions overruled.*

APPLETON, C. J., CUTTING, DICKERSON, DANFORTH and VIRGIN, JJ., concurred.

JOHN D. LAKE *vs.* CHARLES MILLIKEN and others.

Case. Negligence. Nonsuit. Proximate and concurring cause.

Where the evidence tended to show that the defendants negligently piled their boards in the travelled path of a public highway;—that a wagon loaded with barrels was driven over these boards causing a rattling noise which frightened the plaintiff's well broken and carefully driven horse;—that the horse being frightened by the noise, suddenly started and threw the plaintiff, while carefully driving, out of his wagon, whereby he was seriously injured;—it was held that a nonsuit could not properly be ordered—and that it was for the jury to determine whether or not the defendants' acts were the proximate cause of the plaintiff's injury.

Every wrong-doer is at least responsible for all the mischievous consequences that might be reasonably expected under the circumstances to result from his misconduct.

Where an injury is the result of two concurring causes, the party responsible for one of these causes is not exempt from liability because the person who is responsible for the other cause may be equally culpable.

ON EXCEPTIONS.

CASE for so negligently placing boards in the highway, that the plaintiff, passing along the same in the exercise of the requisite degree of care, had his horse frightened by a rattling noise occasioned by a load of barrels being driven over these boards, whereby he was thrown out and severely injured; as is more fully stated in the opinion.

The presiding judge ordered a nonsuit and the plaintiff excepted.

Baker & Baker, for the plaintiff.

Unnecessary that the defendants' negligence should be the sole cause of the injury. *Bigelow v. Reed*, 51 Maine, 325; *Salisbury v. Herchenroder*, 106 Mass., 458; *Brehm v. G. W. R. R.*, 34 Barb., 256; Shear. & Redf. on Neg., §§ 10, 27, 46; *Powell v. Deveny*, 3 Cush., 300; *Illidge v. Goodwin*, 5 C. & P., 190; *Dixon v. Bell*, 5 M. & S., 198; *Burrows v. March*, 5 Exch., 198; *Lynch v. Nurdin*, 1 Ad. & El., 35; *McCahill v. Kipp*, 3 E. D.

Smith, 413; *Peck v. Neil*, 3 McLean, 22; *Ricker v. Freeman*, 50 N. H., 420.

It was the proximate cause. *McDonald v. Snelling*, 14 Allen, 296; *Scott v. Hunter*, 46 Penn. St. R., 192; *Vandenburg v. Truax*, 4 Denio, 464; 50 N. H., *ubi supra*; *Cole v. Fisher*, 11 Mass., 137; *Saxton v. Bacon*, 31 Verm., 540; *Mott v. Hudson*, 8 Bosw., 345.

This should have been left to the jury. *Lane v. Atlantic Works*, 107 Mass., 108.

It might not be expected that injury would happen in the particular manner it did; but this makes no difference. *Scott v. Shepard*, 2 W. Blackstone, 892; *Higgins v. Dewey*, 107 Mass., 494.

A. Libbey and W. P. Whitehouse, for the defendants.

The barrels did the mischief, or were the proximate cause of it. *Mott v. Hudson*, 1 Robertson, 585; *Ryan v. N. Y. Cent. R. R. Co.*, 35 N. Y., 210; *Marble v. Worcester*, 4 Gray, 395; *Bigelow v. Reed*, 51 Maine, 325.

Appleton, C. J. This is an action on the case against the defendants, to recover damages sustained by the plaintiff in consequence of a pile of boards wrongfully placed by them in a public highway in the city of Augusta.

The case comes before us upon a nonsuit, ordered by the justice presiding on the plaintiff's evidence. In determining whether the nonsuit was rightly ordered or not, we must assume the truth of the proof offered, and regard it in the light most favorable to him; for the jury might have so regarded it.

It appears from the evidence that the defendants had piled their boards in a street thirty-eight feet wide; that the space from the side-walk to the nearest boards was fifteen feet and three inches; that twenty-two feet and nine inches were covered more or less with boards; that the pile was two and a half feet high and tapering; that the boards were thrown off loosely, the defendants intending to pile them elsewhere; that they were piled in the middle of the street; that a wagon preceding the plaintiff, loaded with

barrels, passing along, went over the boards, causing the boards and the barrels to rattle; that the plaintiff was following in his wagon with a horse well-broken and under his control, and at a moderate pace; that his horse, frightened by the rattling of the boards and barrels, started suddenly and too quick for him to stop him, and jumped sidewise against the lamp-post, throwing him out of the wagon, breaking his right arm and wrist, and otherwise injuring him so that he was for a long time unable to labor.

The defendants were guilty of a nuisance in thus incumbering the highway. The plaintiff was proceeding with due care. He was in no fault. A stranger passing along with a team loaded with barrels ran over the defendants' boards, piled in the middle of the street. The rattling of the boards and the barrels frightened the plaintiff's horse, which, jumping sidewise, threw the plaintiff out and severely injured him. If the boards had not been wrongfully left in the street they would not have rattled or caused the rattling of the barrels; and had there been no rattling of boards and barrels, the plaintiff's horse would not have been frightened nor the plaintiff injured.

The nonsuit was wrongly ordered. It was for the jury to determine whether the defendants did not have their lumber in such a situation that they might reasonably anticipate the very consequences which ensued. It was said in *Morrison v. Davis*, 8 Harris, 171, that the general rule is that a man is not answerable for the consequences of a fault, only so far as the same are natural and proximate, and as may on this account be foreseen by ordinary forecast, and not for those which arise from a conjunction of his fault with other circumstances that are of an extraordinary nature. But here the very thing happened, which not unreasonably might have been expected; that persons driving along might pass over a pile of boards in the middle of the street, and that a rattling noise would be the result. In *Ricker v. Freeman*, 50 N. H., 420, Foster, J., says: "We think the principle is clearly established, that negligence may be regarded as the proximate cause of an injury, of which it may not be the sole and immediate cause. If the defendant's negligent, inconsiderate and wanton, though not

malicious act, concurred with any other thing, person or event, other than the plaintiff's own fault, to produce the injury so that it clearly appears, that, but for such negligent, wrongful act, the injury would not have happened, and both circumstances are closely connected with the injury in the order of events, the defendant is responsible even though his negligent, wrongful act may not have been the nearest cause in the chain of events or the order of time." Shearman & Redfield on Neg., § 10. "When we are engaged in an act," say the court in *Fairbanks v. Kerr*, 70 Penn., 90, "which the surrounding circumstances indicate may be dangerous to others and their interests, and when the event whose concurrence is necessary to make an act injurious, is one we may readily see may occur under the circumstances and unite with the act to inflict an injury, we are culpable if we do not take all the care which prudent circumspection would suggest to avoid the injury."

In *Greenland v. Chaplin*, 5 Exch., 243, Pollock, C. B., says: "Of this I am quite clear, that every person who does wrong is at least responsible for all the mischievous consequences, that may reasonably be expected to result under ordinary circumstances, from such misconduct." This rule was affirmed and applied in *Cranch v. Great Northern Railway*, 11 Exch., 472, and in *Mullet v. Mason*, L. R., 1 C. P., 559.

In *Fairbanks v. Kerr*, the facts were these: a man mounted a pile of flagstones in a street to make a public speech; a crowd gathered about him, some of whom got on the stones and broke them. It was held to be a question for the jury whether the defendant's making the speech in the street was the proximate or remote cause of the injury. The same principle is applicable in the case at bar.

When the injury is the result of two concurring causes, one party is not exempt from full liability, although another party was equally culpable. *Chapman v. New Haven R. R. Co.*, 19 N. Y., 341; *Ricker v. Freeman*, 50 N. H., 420. *Exceptions sustained*

Cutting, Dickerson, Danforth, Virgin, and Peters, JJ., concurred.

William Rollins *vs.* Hannah E. Crocker.

Contract of a married woman prior to Laws of 1866, *c.* 52, *void. Statute of Frauds.*

In 1865 the plaintiff agreed with Isaac Crocker, the defendant's husband, to build a barn upon land owned by her for $125, of which said Isaac paid him $25 at that time. The defendant subsequently promised the plaintiff (as he says) to see him paid for the barn; *held*, that a verdict for the plaintiff could not be sustained, because such promise, if made as testified to, was within the Statute of Frauds; also, because it did not affirmatively appear that it was made subsequently to the passage of the Public Laws of 1866, c. 52, empowering married women to contract generally, and the promise did not relate to any business carried on by the defendant within the meaning of Public Laws of 1862, c. 148.

On exceptions and motion for a new trial.

In August, 1865, William Rollins, the plaintiff, agreed with Isaac Crocker, then the husband of the defendant, but since deceased, to put up a barn upon land belonging to Mrs. Crocker, for $125, the house in which Mr. and Mrs. Crocker lived, being upon a neighboring lot owned by Mr. Rollins. Twenty-five dollars were paid Rollins in advance by Isaac Crocker. Rollins testified that he "afterward learned that she owned the property, and went to see if she acquiesced in the bargain;" that upon being asked if she knew her husband had made this bargain with Rollins, she said she did, and that she owned the land where the barn was to set; or, to use the witness' language, "where I was to set the barn;" and "she said she would see me paid for it, and that any bargain or agreement Mr. Crocker made, would be all right." The date of this conversation was not given by the plaintiff, and the defendant utterly denied that she ever had any such talk with Mr. Rollins, or ever promised to pay for the barn.

The plaintiff said that he was prevented from laying the whole floor in 1865, by reason of hay being piled on one side of the barn, and that he did not complete the work till September, 1870,

and brought this action on the twenty-eighth day of the following month, claiming a lien upon the barn and on the land on which it stood, which Mrs. Crocker had conveyed, May 31, 1869, to a Mr. Goud, making no mention of the building. In 1865, the Public Laws of 1862, c. 148, were in force, authorizing a married woman engaged in any trade or business to contract with relation thereto; but it was not till the Laws of 1866, c. 52, were enacted, that authority to contract generally was given.

The justice presiding instructed the jury, that though Mrs. Crocker was a married woman at the time, yet "being the owner of the property, she had a right to make a contract; and, therefore, if she did make one, would be bound by it." The verdict was for the plaintiff and the defendant filed exceptions to this instruction, and a motion to set the verdict aside as against law and evidence.

A. C. Stilphen, for the defendant, claimed that the alleged promise if made—and the balance of testimony was against this assumption—was void under the Statute of Frauds, and the laws then in force relating to the contracts of married women, citing the decisions in this State upon this subject, especially *Lee v. Lannahan*, 59 Maine, 478.

W. Benjamin, for the plaintiff, contended that there was nothing in the case to show that the defendant's promise was in 1865, and some testimony indicating that it was made in 1868; and that the legal presumption would be in favor of a verdict and the equity of the cause, that it was made when she was competent to contract; and that, if her husband acted for her, as her agent, the Statute of Frauds would not apply.

Rescript.

From the plaintiff's own testimony, it appears that he first made a contract with the defendant's husband, and that subsequently she promised to see him paid; which promise is not in writing, and is, therefore, within the Statute of Frauds.

The defendant was also a married woman, and there is no proof that her promise was subsequent to the Public Laws of 1866, c. 52, but the inference is, that it was before that, and for this reason it is void. *Lee v. Lannahan*, 59 Maine, 478.

Motion and exceptions sustained.

INHABITANTS OF WEST GARDINER *vs.* INHABITANTS OF HARTLAND.

Pauper. Statute of Limitations.

The cause of action originates when the expenses incurred at the Insane Hospital by a town, for the support of an insane pauper, who is not an inhabitant, are paid to the Hospital, and the Statute of Limitations then commences running.

A notice given before such payment would seem to be premature.

ON REPORT.

ASSUMPSIT for support in the Insane Hospital, furnished by West Gardiner, to a person whose settlement was asserted to be in Hartland, on the twenty-first day of April, 1869, when the writ alleged that she fell into distress, and was committed to the Hospital. She was in fact committed there July 20, 1868, but the first board paid by the plaintiffs was from April 21, 1869, which was paid Sept. 27, 1869. May 15, 1869, a notice that she had fallen into distress was sent by the overseers of the poor of West Gardiner, to those of Hartland, who replied, denying liability, on the twentieth day of the same month. The writ was dated Sept. 6, 1871. Judgment, upon the facts reported, was to be entered according to the law of the case.

A. Libbey, for the plaintiffs.

Notice may be given after liability incurred and before payment. *Worcester v. Milford*, 18 Pick., 379; *Cooper v. Alexander*, 33 Maine, 453.

D. D. Stewart, for the defendants.

APPLETON, C. J. This is an action to recover money paid by the plaintiff at the Insane Hospital, Augusta, for the support of Eliza A. Gray, an insane pauper, whose settlement is claimed to be in the defendant town.

The notice given the defendant town is dated May 15, 1869. The first payment made to the Hospital by the plaintiffs was on Sept. 27, 1869. The notice preceded the payment by more than four months.

The cause of action originates when the expenses incurred by the plaintiffs for the support of the pauper, were paid. *Eastport v. East Machias*, 40 Maine, 280; *Bangor v. Fairfield*, 46 Maine, 558. The notice given was premature and of no effect.

If the cause of action were to be regarded as accruing when the plaintiff first incurred a liability at the Hospital, and notice was given the defendant town, then the statute limitation of two years constitutes a bar. R. S. c. 24, § 24. The notice to the defendant town is dated May 15, 1869, and the reply, denying liability, is dated May 20, 1869.

The writ bears the date of Sept. 6, 1871. When an answer denying liability is returned, the cause of action is deemed to accrue at the time the answer is received by the plaintiff town. *Veazie v. Howland*, 53 Maine, 39. More than two years and three months elapsed after the answer was received by the plaintiffs, so that upon the hypothesis last suggested, the action is barred by lapse of time. *Robbinston v. Lisbon*, 40 Maine, 288.

If the right of action accrues when the expense is incurred, then this action is not seasonably commenced; if it accrues when the payment is made, then notice was given before any right of action accrued; in either contingency, this suit is not maintainable.

Plaintiffs nonsuit.

CUTTING, WALTON, DICKERSON, BARROWS and PETERS, JJ., concurred.

WILLIAM B. BONNEY *vs.* LORING FOSS.

Accession. Estoppel of tenant to deny landlord's title. Ownership of building wrongfully placed on another's land. Rent.

A tenant remaining in possession after the termination of his lease, and who has not surrendered the premises, nor been evicted by paramount title, is liable for rent.

Where one voluntarily erects a building upon the land of another, without any contract with the owner of the soil, and against his consent, the building becomes a part of the realty and belongs to the owner of the land.

ON REPORT.

In a real action brought by the present plaintiff against Samuel Morrill, the demandant recovered a small strip of land in Winthrop Village, as appears by the statement of that case and the plan in 52 Maine, 252, where the initial of Mr. Bonney's middle name is erroneously printed H. The two feet claimed in that action were occupied by the underpinning of a building afterward erected by Loring Foss, with the pecuniary assistance of his wife, under authority from Morrill, which when built covered a little more of Bonney's land. When it was determined by the result of the real action that Bonney had the better title, a compromise was effected, as stated in 57 Maine, 369, whereby Foss and his wife took a lease of so much of Bonney's land as was covered by Foss' building for a term of three years from Dec. 1, 1864, paying six dollars and twenty-five cents per quarter, with a proviso "that the said Foss and his said wife may at any time while they continue to pay me the rent as aforesaid, remove so much of said building as now stands on my land at their own expense, and for their own use and benefit at any time during the three years aforesaid, and not afterwards without my consent." This lease commenced with an acknowledgment of the receipt of the stipulated sum for one quarter's rent of the land "and also for rent of so much of said building as is my [Bonney's] property and standing on my land." It was executed by Bonney

alone and left with the late F. E. Webb, Esq., for the benefit of both parties, the rent being paid to Mr. Webb, and by him passed over to Mr. Bonney. From the expiration of the lease Foss refused to pay any more rent, claiming that he notified Mr. Webb, at the time of paying it for the quarter ending Dec. 1, 1867, that he should make no more payments; and this action upon an account annexed, for money had and received, and for use and occupation of the premises was instituted to compel the payment of the subsequently accruing rent, at the same rate as previously paid.

All other facts essential to an understanding of the matter are given in the opinion of the court.

E. Kempton, for the plaintiff.

Loring Foss, though he had not then the record title, was the party in interest to the former litigation, directed it, and is bound thereby. See Mr. Libbey's testimony, 57 Maine, 370. *Pease v. Whitten*, 31 Maine, 117; *Footman v. Stetson*, 32 Maine, 17. Mr. Morrill has since quitclaimed the premises up to Bonney's line, to Foss; but that does not give him the legal title to so much of this block as is upon Bonney's land; this still remains Morrill's, unless it has become Bonney's property by accession, and operation of law. In any event it does not belong to Foss.

The defendant never having surrendered the premises nor been evicted therefrom, but continuing in the undisturbed occupancy of them cannot dispute our title. *Longfellow v. Longfellow*, 54 Maine, 240, and 61 Maine, 590.

Baker & Baker, for the defendant.

Though the result of the former litigation precludes us from claiming the strip of land then in dispute, we are not estopped to set up ownership of the building, the easterly end of which was in good faith, and under an honest belief that Morrill's title covered this spot, placed a few feet over Bonney's line. If put there by a willful trespasser, or with intent to defraud Bonney of his land, the building would become parcel of the realty; on the con-

trary, if put there by consent of the land-owner it would remain the property of Foss. This is neither extreme, but between them; an honest supposition of title to the *locus in quo* and yet no actual right to it, the dispute arising from the plaintiff's neglect to record his deed. *Bonney v. Morrill*, 52 Maine, 252. We can find no adjudicated case identical with this; those most nearly analogous are *Ryder v. Hathaway*, 21 Pick., 298, and *Smith v. Sanborn*, 6 Gray, 134.

If, as counsel say, this end of the building is still Morrill's, Foss is not bound to pay rent because of Morrill's store being on Bonney's land. There is no express promise to pay it, and no proof that anybody has actually occupied this segment of the building; and Mr. Webb, who received the rents of Foss for Bonney, was explicitly notified that the defendant would pay no more, which operated as a determination of the tenancy at the expiration of the lease.

Appleton, C. J. This is an action of assumpsit to recover the rent of a strip of land three feet and two and a half inches wide in front, three feet eight inches in the rear, and fifty feet deep, with a segment of a building of the same dimensions standing on it, two stories high with no partition between this segment and the other portions of the building.

It seems that the plaintiff and one Morrill were adjacent owners; that a dispute as to boundaries arose between them; that the plaintiff brought a writ of entry in which he recovered the strip of land above described; that the defendant, who claims title under Morrill, commenced digging a cellar upon this strip; that the plaintiff notified him that the digging was upon his land; that the defendant refused to desist; that thereupon the plaintiff commenced the suit before referred to; that the defendant proceeded and erected his building while the suit was pending; that after recovery of judgment the plaintiff commenced an action for mesne profits in which he was not successful, for the reasons stated in 57 Maine, 369; that after the opinion of the court in the first named suit

was announced, the plaintiff and defendant and wife entered into an agreement, by which rent was to be paid for three years for the land and so much of said building as was the plaintiff's property and was standing on his land, with the right of the defendant and wife to remove so much of the building as stood on the plaintiff's land at their own expense, and for their own use and benefit at any time during the three years, and not afterward without the plaintiff's consent. *Bonney v. Morrill*, 52 Maine, 252, and 57 Maine, 369.

The defendant occupied the premises for the term specified and paid the stipulated rent. This action is for rent accruing since the expiration of the term.

The tenant has remained in occupation of the building after the termination of the lease as he was before. He has given no notice to the plaintiff that he intended to terminate such occupation. He has not surrendered the premises nor has he been evicted by a paramount title. Remaining in possession as heretofore, his tenancy must be regarded as continuing and he is liable for rent. *Longfellow v. Longfellow*, 54 Maine, 240, and 61 Maine, 590; *Towne v. Butterfield*, 97 Mass., 105. The tenant is estopped to deny the title of his landlord.

The tenant objects to the payment of any rent for the portion of his store erected by him, and standing upon the plaintiff's land. The defendant was seasonably notified of the plaintiff's title. He refused to yield to the claim, well knowing its existence. He persisted, notwithstanding this notice, in proceeding to erect his store. He has acquired no rights by adverse possession, nor by permission of the plaintiff. The erection of the building under the circumstances, was a plain violation of the plaintiff's rights, and the tenant must abide the legal consequences of his tortious acts.

If one builds with his own materials on the land of another, without and against the consent of the latter, the house belongs to the owner of the soil; for in this case, the builder is presumed intentionally to have transferred his property in the materials to the owner of the soil. Broom's Legal Maxims, 296. Buildings

erected on the land of another, voluntarily, and without any contract with the owner, become part of the real estate and belong to the owner of the soil. *Washburn v. Sproat*, 16 Mass., 449; *Pierce v. Goddard*, 22 Pick., 559; *First Parish in Sudbury v. Jones*, 8 Cush., 189. The general rule is that whatever is affixed to the realty is thereby made parcel thereof, and belongs to the owner of the soil. The tenant brings himself within none of the exceptions to the general rule. Such is the rule of the civil law as stated by Gaius in his commentaries, Lib. 11, § 73; "*Praeterea, id quod in solo nostro ab aliquo aedificatum est, quamvis ille suo nomine aedificaverit, jure naturali nostrum fit, quia superficies solo cedit.*" Again, a building erected on my soil, though in the name and for the use of the builder, belongs to me; for the ownership of a superstructure follows the ownership of the soil.

The tenant has no right to the building, as a fixture which is removable. He was a trespasser in its erection. He has no betterment rights. He has acknowledged the title of the plaintiff. He has neglected to remove the building in accordance with the license given him. It has become the property of the plaintiff, and its value must be considered in estimating the plaintiff's rent.

The plaintiff having recovered judgment against Morrill, whose title the defendant has subsequently acquired, the latter can be in no better situation than his grantor. As Morrill would, by the judgment against him, be precluded from asserting any property in the building, so equally is his grantee. *Dock v. Wiswell*, 33 Maine, 355.

Judgment for the plaintiff.
Damages to be assessed at Nisi Prius.

CUTTING, DICKERSON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

JOHN F. BOYNTON *vs.* WILLIAM H. LIBBY.

R. S., c. 111, § 5. *Conditional sale—where note is given for price.*

The plaintiff sold a wagon, for which he was partly paid at the time of sale, with an agreement that it was to remain his property till the price was fully paid. He subsequently asked for and received his vendee's unconditional note, in ordinary form, for the unpaid balance of the purchase-money : *held*, under R. S., c. 111, § 5, that the vendor no longer had any title to the wagon.

ON REPORT.

REPLEVIN of a wagon, which was sold by the plaintiff to Denham Campbell March 28, 1872, for ninety dollars, of which $25 were paid at the time the trade was made, and it was verbally agreed that the wagon should remain the property of Boynton, till the rest of the price was paid. The bargain and the $25 payment were made in the road at a distance from the place where the wagon was. The next morning, under express permission of the seller, Campbell went over to Boynton's shed, and took the wagon and rode in it to Augusta, where he met Mr. Boynton, who then said to him that there should be some writing given, to show that sixty-five dollars were still due for the wagon. Accordingly, they went into a neighboring store, where a note for that amount was written at Boynton's request, executed and delivered by Campbell to the plaintiff. Thereafterward the wagon remained in Campbell's possession, and was used by him, till April 24, 1872, when it was attached by the defendant, as a deputy-sheriff, upon writs in favor of Gardiner and Moody against Campbell. The defendant admitted the taking, and justified under those precepts. The court were to render such judgment as the law upon these facts requires.

L. Clay, for the plaintiff.

The note was not given for the wagon ; nor was it any part of the original agreement at the time of the sale and delivery. It was merely taken as a convenient mode of verifying the fact that

$65 of the price remained unpaid. It was not given, or taken, as payment of that sum; nor will this be presumed when it is apparent, as here, that the creditor had better security, and took the note in ignorance that it could injuriously affect his legal rights.

S. Lancaster, for the defendant.

APPLETON, C. J. This is replevin for a wagon. March 28, 1872, the plaintiff sold the wagon in dispute to one Campbell for ninety dollars. He received twenty-five dollars in part payment, and was to hold the wagon until the residue was paid.

It has been held in repeated decisions of this court, that when the sale is conditional, the title to remain in the seller until the price is paid, that no title passes to the purchaser until payment.

In the present case, the plaintiff, not being satisfied with this condition of things, met Campbell and informed him that he wanted something to show that sixty-five dollars was due. Accordingly, Campbell gave him his note for that amount. Campbell then had the wagon. The plaintiff had his note for the balance due.

By R. S., c. 111, § 5, it is provided that "no agreement that personal property bargained and delivered to another, for which a note is given, shall remain the property of the payee till the note is paid, is valid, unless it is made and signed as a part of the note; nor when it is so made and signed in a note for more than thirty dollars, unless it is recorded like mortgages of personal property."

The note of sixty-five dollars was for the amount due for the wagon. It was evidence of indebtedness. It was given for the same purpose for which notes are usually given. It has since been paid.

Whatever might be the rights of the plaintiff as a conditional vendor, without any note or other evidence of indebtedness, those rights have ceased, for he no longer holds that relation to his vendee. The plaintiff has sold his wagon. He has the cash payment and a note therefor. The note does not refer to the wagon. The

verbal agreement, that it should remain the property of the plaintiff until paid, is not made a part of the note. The agreement, that it should so remain, by the express terms of the statute, is not valid. To sanction the claim made by the plaintiff, would be practically to repeal the statute. *Plaintiff nonsuit.*
Return ordered.

CUTTING, DICKERSON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

GEORGE CLARK *vs.* HENRY CLARK and trustee.

Trustee process. Juror's fees not "goods, effects, or credits" within R. S., c. 86.

The fees for the services of one as a juror are not "goods, effects or credits," within the meaning of R. S., c. 86; nor liable to be attached upon trustee process.

Neither the county itself, nor its treasurer, is chargeable on a trustee process for the fees of a juror ordered by the Supreme Judicial Court to be paid from the county treasury.

ON EXCEPTIONS.

DEBT, in which the county of Kennebec is summoned as the trustee of the principal defendant, who served at the October term, 1873, of said court for this county, as a juror fifty-four days and travelled thirty-two miles; for which he was found entitled to receive, under R. S., c. 116, § 11, (according to the report of the case) $112.52; and, on the nineteenth day of December, 1873, the last day of that term, the court ordered that sum to be paid Mr. Henry Clark for such service and travel, and directed the county treasurer to pay it out of the county treasury, which he did the next day, though the writ in this suit had been previously served upon him. Upon his disclosure, stating the foregoing facts, the presiding justice discharged the trustee, and the plaintiff excepted.

G. C. Vose, for the plaintiff.

A. Libbey, for the defendants.

APPLETON, C. J. By R. S., c. 86, § 8, "all corporations except counties, towns, school districts and parishes," may be summoned as trustees. By Public Laws of 1873, c. 131, these exceptions were stricken out and "all corporations" were made liable to the trustee process. But this change of the statute in no way affected the principles in accordance with which corporations were to be adjudged trustees or to be discharged as such.

In the present case the treasurer of Kennebec county is summoned as a trustee by reason of his having in his hands, as such treasurer, fees ordered by this court to be paid the defendant as a juror. These fees are to be paid in accordance with a judgment of the court. The juror served the State in obedience to its laws. There was no contract, express or implied, between him and the county. The fees of a juror are not "goods, effects or credits" of the debtor within the meaning of the statute. He has never deposited them in the treasury of the county or entrusted them to the care of its treasurer. The county treasurer by R. S., c. 8, § 7, can only pay his fees in accordance with the written order of the court, The judgment and orders of the court are not to be contravened by the issuing of a trustee process. R. S., c. 86, § 55, clause 5; *Williams v. Boardman*, 9 Allen, 570; *Burnham v. Beale*, 14 Allen, 217. *Exceptions overruled.*

CUTTING, DICKERSON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

Simon Guptill and others *vs.* Halsey H. Richardson.

Intoxicating liquors. Officer justified only in executing warrant issued by competent authority. Pleading.

It is only a precept which appears upon its face to have been issued by competent authority that affords a justification to the officer who executes it.

The clerk of the Municipal Court of the city of Lewiston is authorized, by Special Laws of 1872, *c.* 177, § 1, item *sixth*, to perform all the duties and exercise all the powers of the judge in the transaction of criminal business, only when the judge is engaged in civil business, or absent from the court-room; therefore, a precept issued by such clerk, directing the seizure of liquors, is a sufficient justification to the proper officer serving it, only when it recites the fact of the absence of the judge from the court room, or that he is engaged in the transaction of civil business.

It is not enough to say merely that the judge is "busy in court."

The R. S., c. 27, § 22, as amended by Public Laws of 1872, c. 63, declare that cider is intoxicating within the meaning of that chapter. It is only when sold or kept for sale, in an unadulterated state, by the maker, that its sale is permitted by the twenty-fifth section of that chapter, as amended. It is not necessary, therefore, to justify the taking of cider, that the precept directing its seizure should aver that it was adulterated, or that it was kept for sale by some person other than the manufacturer; but it is for the defendant to show that it was lawfully kept, if intended for sale.

Only those liquors are brought within the jurisdiction of the court for condemnation, which are originally seized in a lawful manner. Hence, an officer cannot defend himself against a suit for illegally taking liquors, upon an insufficient warrant, by showing that they were subsequently libelled and the forfeiture of them declared, if these proceedings were initiated by such defective warrant.

If the complaint and warrant are upon one piece of paper, and it is stated in the former that the judge of that court is absent from the court room, it is not necessary to repeat that averment in the warrant, which refers to the complaint, in order to have the authority of the clerk to issue the warrant sufficiently apparent to justify an officer in executing it.

It is the duty of the magistrate with whom the libel is filed, to cause notices thereof to be posted, as provided by law. No neglect of this duty by the magistrate can render the officer who files the libel, liable as a trespasser *ab initio*. The latter has performed his duty in this respect when he has seasonably filed the libel.

Such libel can not properly be filed with the clerk of the Municipal Court of the city of Lewiston, unless the judge is either absent from the court room, or is engaged in the transaction of civil business; and unless one of these facts appear in the libel, it will be fatally defective, and will afford no protection to the officer filing it.

Guptill *v.* Richardson.

On report.

Trespass for taking and carrying away sixteen casks of cider, a pitcher, tunnel, jar, gallon measure, tumblers, faucets and strainer. The defendant admitted the taking, and justified as city marshal and a constable of Lewiston, acting under five warrants, purporting to issue out of the Municipal Court of the city of Lewiston, upon which he seized the above named articles, on the ground that they were the same specified in the complaints upon which these warrants issued; and that he proceeded in libelling these articles, before that court, in the manner provided by law, and they were adjudged forfeit by said court under the provisions of the twenty-seventh chapter of the Revised Statutes of this State. In these processes the cider was described as the property of George H. Ward, who was called as a witness by the plaintiffs, and testified that it was in fact their property which he was hired by the day to sell for them, having no interest in it himself, and his compensation in no wise depending upon the amount sold, but being absolutely fixed at two dollars a day and expenses, whether he sold more or less.

The plaintiffs, testifying in their own behalf, made the same statement, and said that the cider was unadulterated, was made by them from apples gathered in their own orchards, was owned by them jointly, and was worth eighty cents a gallon when taken. The casks were forwarded on four different days, the last and largest lot (nine casks) being shipped from Belgrade on the twentieth day of July, 1872, and seized the same day in Lewiston, on their arrival at the depot there, upon a warrant dated the nineteenth day of July, 1872.

The Municipal Court of the city of Lewiston was established by Special Laws of 1871, c. 636. By the thirteenth section of that act, the judge was authorized to appoint a recorder to be paid by him, and act for him in the discharge of judicial functions "in case of absence from the court room, or sickness of the judge, or when the office of judge shall be vacant," * * * * "and the signature of the recorder as such, shall be sufficient evidence of his

right to act instead of the judge." The next year this act was amended in many particulars by Special Laws of 1872, c. 177; among others, by striking out section thirteen, as it originally stood, and substituting a new section, providing for a clerk instead of a recorder, as follows: "Sect. 13. Said clerk shall record the doings of said court, may administer oaths, and shall have such powers and perform such duties as are possessed and performed by the clerks of the Supreme Judicial Court. Whenever said judge shall be engaged in the transaction of civil business, or be absent from the court room, said clerk shall have and exercise the same powers, and perform the same duties which said judge possesses, and is authorized to perform in the transaction of criminal business. All processes issued by said clerk in criminal matters, shall bear the seal of said court, and be signed by said clerk, and have the same authority as if issued and signed by said judge."

The first of the five warrants under which the defendant justified, was issued July 10, 1872, by the clerk of said court, saying, "the judge being busy in court;" but the libel of the casks and keg of cider taken upon this warrant was filed the same day with the judge.

Upon the following day, July 11, 1872, the second warrant was issued by the judge, on complaint made to him; but the two barrels of cider seized by virtue of this precept were, upon the same day, libelled before Everett A. Nash, clerk of said court, "the judge being occupied in court."

The third complaint was made to the judge, and the warrant issued by him July 17, 1872, and the two barrels of cider, tumblers, jar and other articles before mentioned, seized thereon, were all libelled before the judge on the same day.

The fourth complaint, made July 18, 1872, to the clerk, recited that the judge was absent from the court room, but this statement was not repeated in the warrant which was printed upon the same paper with and below the complaint, in the customary form, and it was "expressly referred to as a part of this warrant." The two barrels of cider taken under this precept, were libelled the same day before the judge.

The fifth and last of this series of complaints was made July 19, 1872, to the judge, who issued the warrant of that date upon which nine casks of cider were seized on the following day, (July 20, 1872,) they having left Belgrade that day, and being in that town, in the county of Kennebec, at the time the warrant on which they were taken, was issued. July 22, 1872, these nine barrels were libelled before the clerk, "the judge of said court being busy in court."

At the return day of these several libels a forfeiture of the property named in them respectively, was decreed, no claimant appearing.

The complaints (except the second, which issued specifically against the cider already seized without warrant,) all contained simply the ordinary averment, that "intoxicating liquors" were unlawfully kept and deposited for illegal sale in the places designated, the kind of liquor not being stated; and the libels merely described it as cider, without saying it was adulterated or kept for sale by some person other than the maker.

Baker & Baker, for the plaintiffs.

Upon the facts as proved, this cider was clearly exempt from seizure under the existing statutes. R. S., c. 27, § 25, as amended by Public Laws of 1872, c. 63, § 2. The warrants on which it was taken can not protect the officer unless they show the jurisdictional facts necessary to sustain them, since they issue from an inferior court. *The Marshalsea*, 10 Coke, 76; *Peacock v. Bell*, 1 Saunders, 75; *Piper v. Pearson*, 2 Gray, 120; *Hardcastle v. State*, 3 Dutch, (N. J.,) 552; *Carrett v. Morley*, 1 Q. B., 18; *Gurney v. Tufts*, 37 Maine, 133.

The first complaint and the second and fifth libels were to the clerk for the alleged reason that the judge was "busy in court;" but what court, and how engaged therein, does not appear. This is not sufficient to justify the action of the officer under these precepts. *Brooks v. Adams*, 11 Pick., 442; *State v. McGrath*, 31 Maine, 469. And even this statement does not appear in the warrants themselves.

Only those liquors can be libelled that are held upon sufficient warrants. 1 Greenlf. on Ev., § 541; *State v. Robinson*, 33 Maine, 564; *Rose v. Himely*, 4 Cranch, 241; *Sawyer v. Ins. Co.*, 12 Mass., 291; *Fisher v. McGerr*, 1 Gray, 47; *Ewings v. Walker*, 9 Gray, 97.

The monitions were not seasonably posted, nor are the municipal court room and the city marshal's office "public places" within the meaning and intent of the law.

The first libel was filed with the judge though the clerk issued the warrant. *State v. Miller*, 48 Maine, 581. The second warrant, issued against cider already seized, does not show that it is so situated as to be liable to forfeiture; i. e., that it is adulterated, or kept for sale by some person other than the maker. The fifth warrant was issued July nineteenth on complaint then made that, on that day, "intoxicating liquors were and still are" kept and deposited by Geo. H. Ward, "in the Maine Central R. R. Co.'s depot" in Lewiston. These nine barrels were then in Belgrade, and did not leave there till the next day. Hence, they could not contain the liquors mentioned in the warrant. *Arthur v. Flanders*, 10 Gray, 107. They were libelled before the clerk simply because the judge "was busy in court."

A. D. Cornish, for the defendant.

The warrants are the officer's protection. *Gray v. Kimball*, 42 Maine, 269; *Seekins v. Goodale*, 61 Maine, 400; *Nowell v. Tripp*, *Id.*, 426.

All this property was libelled and a forfeiture decreed. That decree is a bar to this suit. *State v. Bartlett*, 47 Maine, 396.

DANFORTH, J. This is an action of trespass to recover the value of a quantity of cider, and the vessels in which it was contained, alleged to have been illegally seized by the defendant, as marshal and constable of the city of Lewiston. It comes before us upon a report of the testimony, from which we learn that the cider was the property of the plaintiffs, of their own manufacture, unadul-

terated, intended for sale by themselves, and at the time of taking was in the possession of one George H. Ward, who was selling the same as their servant. There are in the writ five counts setting out as many distinct and separate trespasses; all of which were in the month of July, 1872. As the law then was, cider under these circumstances was not liable to forfeiture, though it was, as a general rule, classed among intoxicating liquors, and as such, forbidden. By the R. S., c. 27, § 22, amended by the act of 1872, c. 63, § 2, cider is declared to be "intoxicating" within the meaning of that chapter. By the same act, as amended by said c. 63, § 3, "The provisions of this chapter shall not extend to the manufacture and sale of unadulterated cider by the manufacturer." The taking, as alleged, is not denied, but justified under and by virtue of five different warrants, issued from the Municipal Court of the city of Lewiston, or the clerk thereof, and a decree of forfeiture passed by said court.

Copies of the different warrants under which the defendant and his servants or deputies acted, with copies of the several libels filed in pursuance of said warrants, are in evidence, and it is conceded that in each case a decree of forfeiture was passed by the court, no one appearing as claimant.

Upon these facts the only question raised is whether these several processes were sufficient to justify the officer in making the seizures.

The first objection is a general one and lies to all of them equally. All the warrants with one exception, not material to be noticed, were issued upon complaints against "intoxicating liquors" deposited in certain places therein described, "for the purpose of sale * * * in this State contrary to law." Such a complaint and warrant it is said does not authorize the seizure of cider situated as this was, because by the statute referred to, it was not intoxicating liquor and was not subject to forfeiture. If under the law it were not to be considered as intoxicating liquor, the objection would be well founded. But that it was not liable to forfeiture would not excuse the officer for disobedience to his precept.

Whether it was or was not thus liable, must depend upon the testimony introduced in the subsequent judicial investigation and the judgment of the court thereon, and was not a matter upon which the officer would have any authority to adjudicate. Was it then to be considered as "intoxicating liquors" as described in the warrants? The statute in the enacting clause so says, without any qualification or modification whatever. It is only in a subsequent and distinct clause that it is excepted from or taken out of the provision of the law. It is not cider as such or any modification of it, that is exempted, but it is only cider that is manufactured and sold by the same person. It is not a difference that can be ascertained by an examination of the article itself, which is the only means within the province of the officer, but must depend upon extrinsic testimony which is for the court alone. In all cases under the law it is to be considered an "intoxicating liquor," and the prohibition is removed from it not on account of any inherent change in its nature, but by a change of external circumstances.

Perhaps this will appear more clearly by stating the objection in another form. If valid, it would be necessary to negative the exception made by the statute in the complaint. But the rules of pleading either in civil or criminal cases, do not require this. When the exception is in the enacting clause, it must be negatived in the complaint, because it then modifies the prohibited act, or in other words it is a part of, and necessary to, a full description of the offence; but when the exception is in a subsequent clause, it is not descriptive of the offence; it in no way modifies or changes the nature of the act prohibited, but under certain circumstances excuses that which is otherwise forbidden. In the latter case the exception need not be negatived but is a matter of pleading and proof on the part of the defendant. The rule in many of the books is thus stated, viz: "If there is an exception in the enacting clause, the party pleading must show that his adversary is not within the exception; but if there be an exception in a subsequent clause, or a subsequent statute, that is a matter of defence; and is to be shown by the other party.

This principle is more fully illustrated in *Commonwealth v. Hart*, 11 Cush., 130, a case very much in point. *State v. Gurney*, 37 Maine, 149; *Commonwealth v. Edwards*, 12 Cush., 187; *Commonwealth v. Fitchburg Railroad Co.*, 10 Allen, 189; *State v. Robinson*, 33 Maine, 564; *State v. Keene*, 34 Maine, 500.

In *Commonwealth v. Edwards*, the objection to the complaint was substantially the same as that we are now considering. Shaw, C. J., there says: "It was objected, that the complaint does not aver that the liquors kept and intended to be sold, were not cider or wine kept for special purposes, which were authorized and excepted by the statute. But this is a matter of exception, not part of the description of the offence, but matter of defence and therefore need not be negatived." It is clear then that the form of the complaints in the warrants under consideration was sufficient to hold the cider to answer; it must, therefore, necessarily be sufficient, to authorize the officer to make the seizures.

Many objections are however raised to each of these warrants and the proceedings under them, which it is necessary to examine, as they cannot be a justification to the officer unless issued by a court or magistrate of competent jurisdiction, which must appear upon the face of the process. No presumption can be made in favor of a precept coming from a tribunal of limited jurisdiction.

I. The warrant of July 10, was signed by Everett A. Nash, clerk, and issued upon a complaint on oath made before him as clerk of the Municipal Court for the city of Lewiston. By R. S., c. 27, § 35, such complaints may be made on oath or affirmation "before any judge of any municipal or police court or trial justice." By this act all complaints in the Municipal Court of Lewiston must be made before the judge and the oath must be administered and warrant signed by him. The only law transferring this or any of the duties of the judge to the clerk is found in the Special Laws of 1872, c. 177. By the sixth clause of section 1 of that chapter, the act establishing the Municipal Court in the city of Lewiston is amended so as to transfer the duties of the judge in relation to criminal business to the clerk "whenever the said judge

shall be engaged in the transaction of civil business, or be absent from the court room." It does not appear that in relation to this complaint or warrant either of these contingencies had occurred. The only allegation tending to show the authority of the clerk to act in this respect is that in the complaint viz. "the judge being busy in court." This asserts neither of the conditions under which the clerk may act, and it results that this warrant was unauthorized and void, and can afford no excuse for the acts of the officer under it.

But it is claimed that the subsequent decree of forfeiture remedies this error. This might be true if the court making the decree had acquired jurisdiction and the judgment had been valid. The very foundation of the judgment of forfeiture is a legal seizure, until this is had no further proceedings are authorized. The same officer who takes the intoxicating liquor, is required immediately to file his libel. But until it is taken under a legal warrant he cannot proceed. Both the seizure and the libel were illegal and no subsequent proceeding of the court can relieve the officer from his liablity therefor.

II. The second warrant, that of July 11, was issued to cover a seizure of liquors made the day previous. No objection is made of unreasonable delay in procuring the warrant or to the jurisdiction of the court. The objection to its form, that it does not negative the exception in the statute as to cider, is untenable as we have seen. It would therefore seem to be sufficient. It was served and the subsequent libel filed by E. R. Noble, a constable of Lewiston. It is, however, admitted that whatever was done in this respect, was under the direction of the defendant and for the purposes of this trial, as is conceded, the responsibility rests upon him. Upon the service of a legal warrant and the seizure of liquors thereby, the statute, § 36, makes it the duty of the officer immediately "to libel the liquors and vessels so seized by him, by filing with the magistrate before whom such warrant is returnable a libel against such liquors and vessels, &c." This duty, thus imposed, seems to have been neglected. True, a libel was filed, but instead of being filed with the court or magistrate before whom the war-

rant was returnable, it was filed with the clerk, with nothing whatever to show his authority for receiving it, except the allegation, "the judge being occupied in court." This, as already seen, was insufficient and the act is therefore void. An omission to perform an act imposed by a legal process, is often just as fatal as a wrong doing of it. An abuse of legal process will take from the officer all protection which it might otherwise afford him. "An officer who seizes property by authority of law, must show that he has done all that is required of him, in order to complete and fulfil the duty imposed on him, by virtue of which he was authorized to act; otherwise he becomes a trespasser *ab initio*." *Kent v. Willey*, 11 Gray, 373; *Russell v. Hanscomb*, 15 Gray, 166.

III. The warrant of July 17, so far as appears is sufficient and the libel required seems to have been duly filed before the proper magistrate. The only objection, not already held invalid, is as to the sufficiency of the notice upon the libel. Whether the notice was, or was not, posted in two places sufficiently public to answer the requirements of the law we do not deem it necessary now to decide. This action is against the officer for a wrong in seizing the liquors. His duty, except to keep them till the final decree, ceased upon filing the libel. It then became the duty of the magistrate to give the proper notice "by causing a true and attested copy of said libel and monition to be posted in two public and conspicuous places," &c. If there is a failure in this respect, the defendant does not appear in any way to be responsible therefor. He seems to have done all that was incumbent upon him in respect to this seizure to have had a valid warrant for what was done by him in relation to the liquors and the vessels containing them. Some other things were seized as appears by the testimony, which were not covered by the warrant. But for these he is not liable in this action as they were taken from the possession of Ward and it does not appear from any testimony in the case that they were the property of the plaintiffs.

IV. The complaint of July 18, was received by the clerk and the warrant issued by him. In this complaint we find the allega-

tion, "the judge being absent from the court room." This being in the language of the statute is sufficient authority for the action of the clerk in this matter. It is, however, claimed that the same allegation should appear in the warrant. We do not deem this necessary. The warrant refers to the complaint, whereby they become one and the same instrument. The whole must be considered as one transaction and founded upon the allegation of the judge's absence from court, and therefore a valid and sufficient process.

In addition to other objections to the libel already considered, it is claimed that it was not filed with the magistrate before whom the warrant was returnable. This objection seems to have no foundation in fact. It is true, as suggested, that the warrant was issued by the clerk, but it was returnable before the court, where the libel was filed. We therefore hold this a sufficient justification for the acts done under it.

V. The warrant of July 19, seems to have been properly issued and sufficient in form, but it is claimed that the testimony shows that the liquor taken under it was not in the place therein described, till the day after it was issued, and therefore the liquor taken cannot be the same as that against which the process was issued. This objection seems to be well founded in fact, but we are hardly prepared to say it would take from the officer all protection for acts innocently done by virtue of it. He was commanded to search the place described, and seize such intoxicating liquors as he might find there. In the honest execution of his duty, it would seem a little hard to require him at his peril, to settle the question as to whether the liquors came there before or after the warrant was issued. We do not however find it necessary to decide this question. The libel is fatally defective, as it was filed with the clerk, and no sufficient authority shown for him to receive it. Therefore for reasons already given, this omission of the officer to file the libel before the proper magistrate, withdraws such protection from him, as the warrant might otherwise have afforded.

The result is, that for the alleged trespass of the defendant in the service of the third and fourth warrants, respectively dated July 17 and 18, he is not liable; for the seizures under the first, second and fifth, dated respectively July 10, 11 and 19, the defendant is liable. The testimony shows that under these warrants, were wrongfully taken, and for which the defendant is liable, twelve casks, in all containing four hundred and ninety-seven gallons of cider, the value of which at the time it was taken, as we gather from the testimony, was two hundred and ninety dollars. For this amount, and for such further sums as shall be equal to interest thereon from July 20, 1872, the plaintiffs are entitled to judgment.

Judgment for the plaintiffs for $290, *and interest from July* 20, 1872, *to the time of the rendition of judgment.*

APPLETON, C. J., DICKERSON, BARROWS and VIRGIN, JJ., concurred.

LEWIS B. HAMLEN *vs.* JOHN MCGILLICUDDY and wife.

Bill in equity to subject property conveyed by debtor to his wife to the payment of his debt—under R. S., c. 61, § 1.

A demurrer to a bill in equity brought by a judgment creditor under R. S., c. 61, § 1, to obtain payment of his debt from property conveyed to the debtor's wife by direction of her husband (who paid the consideration therefor) in order to keep it from his creditors, will not be sustained, even though the bill contain no direct allegation of fraud.

It is sufficient if the allegations of the bill meet the requirements of R. S., c. 61, § 1, last clause; setting forth the fact that payment was made for the property conveyed to her from the property of her husband, and that the creditor's claim accrued before such conveyance.

If an officer return upon the creditor's execution that he could find no money, goods or chattels, wherewith to satisfy it, and therefore returns it wholly unsatisfied, this will be a sufficient return of *nulla bona*, without any statement that no real estate could be found upon which to extend it, or that the debtor was arrested thereon to obtain a disclosure.

Hamlen *v.* McGillicuddy.

In case of land paid for by the husband, but the title taken by the wife, a creditor of the former, desiring to take the land in satisfaction of his debt, can resort to equity, even though he has a remedy at law; and is not obliged to levy his execution, if the husband never held the legal title to the estate.

Where such a bill, which is not a bill of discovery, is inserted in a writ of attachment, the summons served on the respondents, is to be considered as a general interrogatory under our rules; and the respondents are entitled to answer all the material allegations of the bill.

BILL IN EQUITY; to which the respondents demurred.

The complainant alleged that he was a judgment creditor of John McGillicuddy, and that his execution had been put into the hands of an officer for service, and return made that money or property had been demanded of the defendant therein, wherewith to satisfy it, and he had answered that he had neither, and that the officer could find no money, goods or chattels, of said John, and therefore returned the execution wholly unsatisfied; that since the complainant's debt accrued, said John had purchased several parcels of land, particularly described, "paid the consideration himself, and to keep the same from his creditors, had the deeds made running to his wife, Ellen McGillicuddy. Then followed the prayer for relief, as follows: "Plaintiff prays the court will decree a conveyance of a portion of the land purchased as above, or payment of the debt, or such other relief as he is entitled to in equity." This was the conclusion of the bill, which contained no prayer for process nor any general interrogatory, but was inserted in a writ of attachment, and served by leaving a summons with each respondent. The respondents showed as cause of demurrer that the complainant did not show that he had used due diligence to collect his debt, or that he could not have levied his execution upon real estate, or obtained a disclosure of property by an arrest of his debtor; or that the payment by the husband for the property conveyed to his wife, was from his own property; or that the wife ever knew of the existence of Mr. Hamlen's claim, or that she took the deeds to aid her husband in concealing his property from his creditors; and that the bill contains no interrogatories for the respondents to answer.

S. Lancaster, for the complainant.

Record & Hutchinson, for the respondents.

APPLETON, C. J. The complainant in his bill alleges that at the March term, 1855, of this court, holden at Augusta, in and for the county of Kennebec, he recovered judgment against the defendant, John McGillicuddy, for one hundred and eighteen dollars and sixty cents, debt or damage, and nine dollars and fifty-four cents, costs of suit; that he sued this judgment at the August term, 1872, of the court for Kennebec County, and recovered a new judgment thereon against said McGillicuddy, for two hundred and fifty-two dollars and nine cents, debt or damage, and eleven dollars and fifty-seven cents, costs of suit; that execution issued on said judgment, and was placed in the hands of Thomas Littlefield, sheriff of the county of Androscoggin, of which county these defendants are residents, who made return, that with the execution he demanded of the debtor money or property, to satisfy the same, who replied that he had neither money nor property of any kind; whereupon, on the twenty-fourth day of November, 1872, said sheriff made his return on said execution, that he could find no money, nor any goods or chattels of said McGillicuddy, to satisfy said execution, and returned the same in no part satisfied; that since said first judgment "said McGillicuddy has purchased the following parcels of land, and paid the consideration in each case himself, and to keep the same from his creditors, had the deeds made running to his wife," the other defendant—said parcels being particularly described. Then follows a general prayer for relief.

To this bill the defendants file a general demurrer, and specify numerous grounds of objections upon which they insist it can be sustained.

I. The return of the sheriff on the execution that "he could find no money, nor any goods or chattels of the said John McGillicuddy to satisfy the same," and that he "returned the said execution in no part satisfied" is sufficient to authorize the institution of this bill. It is the return of *nulla bona* and nothing else.

II. The allegations in the bill that the husband purchased the land and paid the consideration himself, and had the deeds made

running to the wife to keep the land conveyed from his creditors, bring the case within R. S., c. 61, § 1, which provides that "when payment was made for property conveyed to her (the wife) from the property of her husband, or it was conveyed to her without a valuable consideration made therefor, it may be taken as the property of her husband, to pay his debts contracted before such purchase." The natural meaning of the language of the bill is that the purchase was made with the property of the husband.

III. It is enough if the allegations in the bill contain all the requirements of the statute. It is sufficient that the property conveyed to the wife, was paid for from the property of the husband, and that the debt was contracted before such purchase. This is alleged. It is not required that there should be the allegations of any fraudulent design or purpose on the part of the wife. It is sufficient that the wife has received a conveyance of property purchased with the means of the husband to authorize its being taken for antecedent debts, the wife having paid no valuable consideration therefor.

IV. Though the plaintiff may have a remedy at law, it does not prevent his resort to equity. The complainant was not required to resort to a levy, as the title was never in the husband. *Howe v. Bishop*, 3 Metc., 26; *Low v. Marco*, 53 Maine, 45; *Des Brisay v. Hogan*, 53 Maine, 554.

V. This is not a bill for a discovery. It is included in a writ in which the respondents are summoned to answer to this complainant in a bill in equity. The defendants have a right to answer each and all the material allegations in the bill. The summons to answer may be regarded, on demurrer, as a sufficient general interrogatory under our rules, the bill itself showing a good ground of action. This is a bill for relief and its allegations being admitted, show the complainant is entitled to the relief for which he prays.

Demurrer overruled.
Decree for relief as prayed for in the bill.

CUTTING, DICKERSON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

DANIEL LANCASTER, petitioner,

vs.

KENNEBEC LOG DRIVING COMPANY.

Taking of land for public use—must be written evidence of it.

The vote of the defendant corporation that "the directors be authorized to build the Brown Island boom this season" is not a taking of land for that purpose within the Special Laws of 1859, c. 352, § 1, by which said corporation is empowered to take and use shores, flats and lands adjacent to and necessary for the erection and occupation of its boom, under certain terms and conditions specified in said act.

The taking of real estate by attachment, levy, or by statutory process must be by writing describing the real estate so taken.

Where the petitioner failed to establish his petition, and it is dismissed on his own motion, the respondent can take no valid exception to such dismissal.

ON EXCEPTIONS.

The whole river front of the petitioner's estate was more or less used and occupied, for a longer or shorter period, by the respondent corporation for the purposes for which it was chartered by Special Laws of 1859, c. 352, which are sufficiently apparent from its name. The petition, filed at the August term, 1870, of this court, represented that the company had, on the tenth day of March, 1868, taken and used the shore, flats and land adjacent of the petitioner for the erection of their boom which they had ever since maintained, and continued to use the shore, &c., as aforesaid: that he could not agree with the company as to the damages that should be paid and asked for a committee to determine the amount, &c. At the August term, 1872, such committee were appointed and met the parties on the third day of September, 1873, when, according to their report made to the October term, 1873, it appearing by the records of the Kennebec Log Driving Company, the defendants, and being admitted by them, that there had been no vote of the corporation, or its directors, to take any portion of the shore,

flats or lands of the complainant for the purpose specified in the charter of the corporation, but the company's servants had merely entered upon and used the same to some not certain and defined extent for these purposes; we are, therefore, of the opinion that we have no jurisdiction to appraise the damages and therefore return this commission to the court issuing it, and respectfully decline to serve further on said committee." The defendants moved to have the report recommitted, alleging that at a meeting of the corporation held March 7, 1867, it was "voted, that the directors be authorized to build the Brown's Island boom the present season," which was accordingly done; and, as a necessary consequence, when the logs filled the boom they rested upon and covered the petitioner's shore so far as high water mark; and such occupation has ever since continued; which is a sufficient taking within the meaning of the charter. The petitioner claimed to have his petition dismissed, and it was dismissed accordingly; and the respondents excepted.

Baker & Webster, for the respondents.

A. Libbey, for the petitioner.

Appleton, C. J. The defendant corporation was authorized by a private act approved April 4, 1859, c. 352, § 1, to erect and maintain on the Kennebec river, in the town of Farmingdale, a boom with piers, and all the necessary fixtures, for the purpose of taking and securing any logs, masts, spars or other timber floating down said river; * * * provided the same shall be so constructed as not to obstruct in any manner the free navigation of the said river; and for the purpose aforesaid, said company may take and use, any shore, flats or land adjacent, which may be necessary for the erection and occupation of said boom; provided, however, said company shall pay the owners of said property so taken "a reasonable compensation therefor."

By § 2, "if any person shall suffer damage by the exercise of these powers herein granted to said company, and the amount cannot be agreed upon by the parties, then the Supreme Judicial

Court, for the county of Kennebec, upon application of the party aggrieved, shall cause said damage to be ascertained by a committee of three disinterested persons, whose award shall be returned to said court," &c.

The statute contemplates both the taking and the using of shores, flats, &c. The defendants may take what they do not use. They may use what they do not take.

The taking of real estate is by attachment, or levy, or by virtue of some statutory proceedings. In all cases, the taking is to be evidenced by some writing describing the real estate so taken by definite and specific boundaries.

The vote of the defendant corporation is in these words: "Voted, the directors be authorized to build the Brown's Island boom this season."

But this is no taking of land. It neither describes what has been, or was to be taken or used.

The evidence offered by the defendants was to show what shores and flats, &c., have been occupied and used by them and nothing else. The only written evidence of taking was the above vote, which amounts to nothing.

There is, then, no taking evidenced by vote of the defendant corporation, by the report of their committee, or in any other way by any written document whatsoever.

Now the committee are to assess damages for "the property so taken." It is manifestly impossible to attempt their assessment without knowing to what property the injury has been done. The statute contemplates a taking within definite bounds. The owner of the land cannot otherwise know whether the action of the defendants is within or without the land, &c., taken, if there are no ascertained nor ascertainable limits. Neither can the committee proceed to assess damages upon an indefinite and undetermined tract. It is not for them to ascertain the shores, flats, &c., which are taken by resorting to the uncertainties of conflicting testimony. There must be written evidence of the territory the defendants may elect to take and use.

The petitioner having failed to make out any case might well desire to escape out of court without additional expense. He makes no claim on the defendants. The defendants had no right to require that he should remain there any longer, when the only possible effect would be to enlarge their bill of costs. The petition was properly dismissed, and the exceptions must be overruled.

Exceptions overruled.

DICKERSON, DANFORTH and VIRGIN, JJ., concurred.

BARROWS, J., concurred in the result.

CHARLES LAWRENCE, Jr., and others

vs.

MERRILL S. BUCK and others.

Lost goods—finder's title.

Lost goods, as against all persons but the original owner and those deriving title from him, belong to the first finder who does such acts as indicate an intention to take possession of them.

ON REPORT.

REPLEVIN of a chain cable, to which both parties claimed the title by having found it in the Kennebec river, near the dam, in July, 1870. When the plaintiffs discovered it, the chain lay coiled up in a little pile near a place which is dry when the dam is out, as it then was, the end of the cable running off toward the dam, in water about a foot or eighteen inches deep. They hauled out about sixty feet of the chain upon some logs that were grounded and out of water there, the end being fast under water. As it was then growing dark they left for the night, and when they returned for it the next morning it had been removed by the defendants, who claimed that they found the chain and coiled it up, in the manner before described, having dragged it into shoal water

for that purpose, and unfastened the end that was round a cedar buoy in the dam, several days before the plaintiffs saw it; that while the defendants were trying to remove the gravel in which a portion of the chain was embedded, they were called away to their work on the railroad bridge. Soon after, they borrowed a rope and blocks at the railroad shop and went to draw out the chain. They found that in the meantime, somebody had taken out of the water the end they had coiled up, and drawn it out upon the logs. The defendants attached their tackle, drew out the chain, and carried it to the railroad shop, where it was when replevied.

A. Libbey, for the plaintiffs.

E. F. Pillsbury, for the defendants.

Danforth, J. This action is replevin of a chain cable which the evidence shows to have been lost by the original owners. Such property belongs to the first finder as against all persons but the loser. The testimony in this case clearly shows that the defendants were the first finders, and (if it were necessary) that, before the finding of the plaintiffs, they had taken possession by such acts of ownership as the nature and condition of the property, under the circumstances, allowed; and further, that from the first they had no intention to abandon. It further appears that the first complete possession by entire removal from the place where the property was found was in the defendants.

There is no testimony in the case upon which to base a judgment for damages occasioned by its detention, and only nominal damages can be awarded, and an order that the cable be restored to the defendants. *Judgment for a return.*

Appleton, C. J., Cutting, Dickerson, Barrows and Virgin, JJ., concurred.

WILLIAM PRESCOTT, Administrator, *vs.* HEBRON KNOWLES.

Action. Trespass under R. S., c. 30, § 1, survives.

An action of trespass for double damages, under R. S., c. 30, § 1, for injury done by a dog, survives the plaintiff's death during its pendency.

ON EXCEPTIONS.

TRESPASS under R. S., c. 30, § 1, for injuries to the person of the plaintiff's intestate by the defendant's dog. The writ was sued out August 5, 1871, returnable to and entered at the ensuing October term of this court for this county. During the pendency of the action the original plaintiff died, January 23, 1873, and his death and the appearance of his administrator were suggested upon the docket of the March term, 1873, whereupon, at the motion of the defendant, the presiding justice dismissed the action, ruling that it did not survive. The plaintiff excepted.

E. F. Pillsbury, for the plaintiff.

R. S., c. 30, § 1, provides that the remedy for injuries done by dogs shall be trespass; and R. S., c. 87, § 8, declares that this form of action shall survive, dropping the qualifying clauses of the corresponding section of the preceding revision. *Hooper v. Gorham*, 45 Maine, 209. The legislative intent that suits for such causes, carrying double damages by every revision since the original enactment of 1821, c. 174, should survive, is evident.

R. S., c. 87, § 9, provides that where a defendant dies, *pendente lite*, only single damages shall be recovered; showing that, in such instances, it survives; *a fortiori*, it ought to do so to the representative of one whose death may have been—as we claim was the fact here—caused by the dog. Though the estate of a wrong-doer is not to be diminished by double damages, at the expense of the creditors or heirs, yet that of the plaintiff is entitled to receive from the original defendant the full statutory measure of damages.

A. Libbey, for the defendant.

I. This is a personal action founded upon a tort, and would not survive at common law, and can survive only by express provision of statute. 1 Saunders R. 216, n. 1.

II. Trespass as used in R. S., c. 87, § 8, must be taken to refer only to those actions of trespass upon property, known to the common law. If taken to include all actions of trespass, it would include actions of trespass for assault and battery, but these are excepted in the statute, and are therefore not included in trespass.

III. Where a statute gives a right of action in a case where none is given at common law, and provides a certain form of action the court will not be concluded by the form, but will look to the nature of the action in determining whether or not it survives. *Smith v. Sherman*, 4 Cush., 412.

IV. This is an action for the recovery of a forfeiture. R. S., c. 30, § 1, under which this action is brought, provides that the "owner, keeper," &c., of the dog, "shall forfeit to the injured person;" and a forfeiture will not survive either by statute or common law.

V. "The provisions of the statutes allowing actions of tort to survive, have been strictly construed so as not to extend the exceptions beyond the clear intent of the legislature." *Cutting v. Tower*, 14 Gray, 183.

Dickerson, J. This is an action of trespass to recover damages for personal injuries done to the plaintiff's intestate by the defendant's dog. The presiding justice sustained the motion of the defendant to dismiss the action, on the ground that it does not survive, and the plaintiff excepted to this ruling.

There is no question but that the action does not survive at common law. Does it survive under our statutes? The provision for the recovery of double damages by an action of trespass for injuries to person or property by a dog, has been retained without material change in all the revisions of the statutes since 1841, while the restrictions upon the survivorship of actions of trespass,

and trespass on the case provided in that revision, were omitted in both of the revisions of 1857 and 1871.

It was held in *Hooper v. Gorham*, 45 Maine, 215, that the purpose of this omission was to remove the restrictions imposed by the statutes of 1841 upon the survivorship of actions of trespass and trespass on the case. This omission, however, would not make such actions survive, without some statute to invest them with the character of survivorship.

By our statutes, trespass lies for this class of injuries, and actions of trespass and certain other actions survive in addition to those that survive at common law. R. S., c. 30, § 1, and c. 87, § 8. These provisions of the statutes make no distinction in respect to survivorship, between actions of trespass upon the person and upon property; or between actions of trespass at common law and actions of trespass created by statute; all these several kinds of actions of trespass are included in the term "actions of trespass." The same section of the chapter that provides for the survivorship of actions of trespass, also provides that such actions may be commenced by or against an executor or administrator, or when the deceased was a party to them, may be prosecuted or defended by them.

Section 9 of the same chapter expressly contemplates the survivorship of this class of actions, in the provision it makes for the recovery of actual or single damages only, when an action of trespass or trespass on the case is commenced or prosecuted against an executor or administrator. The obvious construction of this provision is, that while, in this class of actions, punitive, penal or double damages may be recovered of a living defendant, only actual damages are recoverable against the estate of a deceased party in the hands of his representative.

In the language of the court in *Hooper v. Gorham*, *ante*, "we see nothing inequitable or unjust in such a construction of the statute as will tend to secure to the heirs or creditors of a person deceased, through the agency of his executor or administrator, a suitable compensation for the injuries received by the testator or

intestate when in life, whether such injuries were directly to his property or his person. Such construction does no injustice to the tort feasor. It may tend to prevent wrong doing."

Exceptions sustained.

APPLETON, C. J., BARROWS, DANFORTH and VIRGIN, JJ., concurred.

CHARLOTTE H. RICHARDSON *vs.* WILLIAM WYMAN.

Dower—widow's claim not barred by a deed set aside as fraudulent.

The dower of a surviving wife is not barred by a conveyance executed by the husband and wife which is set aside as fraudulent as against the creditors of the husband.

Where a creditor avoids a deed from the husband to his wife on the ground that it is fraudulent and void as to him, the wife is nevertheless entitled to dower.

ON REPORT.

Action to recover demandant's dower in certain real estate of her former husband, Amos Wyman, deceased, submitted to the full court upon report to enter the proper judgment therein. Amos Wyman conveyed this real estate to his wife May 13, 1856, (William Wyman then and long before being a creditor of Amos) and on the fifteenth day of June, 1858, Amos and his wife conveyed the property to Henry L. Fox. Subsequently William Wyman brought suit upon Amos' bond to him, recovered judgment, levied his execution upon the land, instituted equity proceedings to remove the cloud which these deeds cast upon his title and obtained a decree that both deeds were fraudulent and void as to him, and the grantees were ordered to release all their apparent interest to him except the dower of Mrs. Wyman. *Wyman v. Fox*, 59 Maine, 100, 103.

A. Libbey and *Samuel Titcomb*, for the demandant.

The deed to Fox being void he acquired thereby no interest to the land nor to Mrs. Richardson's dower therein. It was simply a nullity. All things remained as they were before its delivery. And the same is true of Amos Wyman's deed to his wife. The tenant having defeated all operation of these deeds by his levy, and subsequent proceedings, cannot now set them up to bar the claimant's dower. *Stinson v. Sumner*, 9 Mass., 143; *Robinson v. Bates*, 3 Metc., 40.

A merger of a wife's interest is looked upon with special disfavor. *Gibson v. Crehore*, 3 Pick., 482; *Simonton v. Gray*, 34 Maine, 51; *Earle v. Washburn*, 7 Allen, 95; 4 Kent's Com., 101; 2 Washburn R. P., 480; *Evans v. Kimball*, 1 Allen, 242; *Loud v. Lane*, 8 Metc., 518.

It is only the lesser of two vested estates that is merged in the greater. 3 Greenleaf's Cruise, 55; 3 Preston on Conveyances, 50.

Baker & Baker, for the tenant.

The defendant contends, 1st. That the demandant's dower merged in the greater estate conveyed to her by her husband, and by both to Fox. 2. If not technically merged, it was extinguished by those deeds. 3. At any rate it passed to Fox by estoppel, and she is estopped as to the tenant who is Fox's grantee, under the deed made in compliance with the decree in equity.

According to Mr. Preston, as quoted in Greenleaf's Cruise, at the place cited by the demandant's counsel, it is necessary that the larger estate should be vested, or there will be no merger; the smaller estate need not be vested. If her dower once merged, the cancellation of those deeds will not resuscitate the drowned right.

Although those deeds were fraudulent and void as to creditors, they were not absolutely null, but were good between the parties and did operate to convey to Fox a title liable to be defeated only by Amos Wyman's creditors.

Mrs. Wyman's release of dower was no fraud upon anybody's

rights but her own; was her own free, unimpeachable act; and she should abide its consequences.

APPLETON, C. J. This is an action in which the demandant, the wife of the late Amos Wyman, deceased, seeks to recover dower in certain premises of which her husband was seized during coverture.

It is in evidence that on the thirteenth of May, 1856, Amos Wyman, by deed of release, conveyed the premises in which dower is demanded to his wife, the present demandant, and that on the fifteenth of June, 1858, said Wyman and wife, by deed of warranty of that date, conveyed the same to Henry L. Fox.

It further appears that the tenant, being a creditor of Amos Wyman, by virtue of a bond bearing date July 22, 1840, commenced a suit thereon, in which the premises, in which dower is demanded, were attached as the property of the debtor. The tenant recovered judgment, and the execution issued thereon was fully satisfied by a levy on the premises in controversy, and the possession thereof given the tenant. The deed from Amos Wyman to his wife, and from them to Fox being fraudulent and void as to creditors, the tenant thereby became seized of the estate, upon which the levy was made, in fee.

Subsequently for the purpose of removing any claim upon his title thus acquired, the tenant commenced a suit in equity against Henry L. Fox and the demandant, in which the deed of Amos Wyman to the demandant and that of said Wyman and wife to said Fox were declared fraudulent and void, and the defendants in that suit were decreed to release their interest in the premises levied upon to the tenant, except the dower of Mrs. Wyman, whose rights as dowress were not thereby to be affected. *Wyman v. Fox*, 59 Maine, 100.

Amos Wyman having been seized of the premises in which dower is sought to be recovered, during the coverture of the demandant, and having deceased, she having made due demand is entitled to recover her dower, unless it has in some way been released, discharged, or merged in some greater estate.

The tenant relies upon the deed of release of Amos Wyman to the demandant dated May 13, 1856, as a bar to her claim for dower, on the ground that her right to dower is merged in the fee then conveyed to her.

The wife has only an inchoate right of dower. Her future estate is contingent upon the precedent death of her husband. The possible estate may never ripen into an actual one. The deed to the demandant, upon which the tenant relies to defeat her dower, was fraudulent and void as to creditors and he, being a creditor, has avoided it. The deed to the demandant releasing to her the fee being avoided for fraud, the tenant would set it up as an existent estate to bar the dower to which she would otherwise be entitled. If no conveyance had been made by Amos Wyman to his wife, her right to dower would have been unquestioned. Reduced to its ultimate elements, the proposition is that a deed fraudulent and void as to the tenant, and which has been avoided by him, may, after such avoidance, be set up by him as a valid and existent deed, for the purpose of defeating and destroying a right to which the demandant would unquestionably have been entitled, had no such deed been executed. When a lesser estate is merged in a greater, the greater estate must be assumed as valid and continuing. There can be no merger when the estates are successive and not concurrent, nor where the greater estate is void and has been avoided. In *Mallory v. Horan*, 12 Abbott, (N. Y.) Pr. Rep., (N. S.) 289, where a husband by a deed in which his wife joined to release dower conveyed to a third person, who conveyed back to the wife, and subsequently both deeds were set aside as being fraudulent as to creditors, it was held that the wife's inchoate right of dower was not merged in the fee conveyed to her, so as to prevent her from claiming it after the deed to her was set aside. So, in the case at bar, the tenant cannot set up one and the same deed as both valid and invalid. It having been avoided at his instance and for his benefit, it must so remain.

Neither is the demandant barred of dower in consequence of the deed of her husband and herself to Henry L. Fox of the date

of June 15, 1858, which was declared void as against the tenant. The dower of a surviving wife is not barred by a fraudulent deed in which she released dower, if the deed is set aside by the judgment of the court at the instance of creditors of the husband. *Dugan v. Hussey*, 5 Bush. (Ky.) 83; *Lockett v. James*, 8 Bush. (Ky.) 28. Where a wife joins with her husband in a deed conveying land, and thereby relinquishes dower, and a creditor of the husband afterward levies an execution upon the land, during the life of the husband, and recovers it in a real action against the grantee, on the ground that the conveyance was fraudulent and void as against creditors, the wife is restored to her rights, and may recover dower of such creditor, or of his assigns. *Robinson v. Bates*, 3 Metc., 40.

The tenant acquired the fee by his levy. The decree in the case of *Wyman v. Fox*, 59 Maine, 100, specially excepted the dower of the demandant. *Judgment for the demandant, that she recover her dower.*

CUTTING, DICKERSON, BARROWS, DANFORTH, and VIRGIN, JJ., concurred.

STATE OF MAINE *vs.* JOHN STEVENS.

Pleading. Indictment. What is a sufficient description of stolen bank-bills.

Where an indictment avers the denomination and value of a bank-note that has been stolen, it is not necessary to allege that the bill is genuine, nor to state the name of the bank issuing it.

A count charging a larceny of bank-bills, each of a denomination and value stated, and of a pocket-book and knife, "of the goods, chattels and money of J. S. K.," &c., contains a sufficient description of the property, and is not bad for duplicity.

ON EXCEPTIONS.

INDICTMENT alleging that John Stevens of Augusta, &c., on the twenty-third day of August, A. D., 1873, at Gardiner, &c,

"seven national bank-bills, each of the denomination of twenty dollars and of the value of twenty dollars, of the lawful currency of the United States; six national bank-bills each of the denomination of ten dollars and of the value of ten dollars, of the lawful money of the United States; one pocket book of the value of one dollar, and one shoe-knife of the value of twenty-five cents, of the goods, chattels and money of John S. Kelley of said Gardiner," &c., &c., "feloniously did steal," &c., &c.

The prisoner was convicted and moved in arrest of judgment, because,

I. The bank bills said to have been stolen are not alleged to have been genuine, or issued by any national bank.

II. The name of the bank issuing the bills is not stated.

III. The description of the goods and chattels stolen is uncertain and insufficient, and gives the respondent no information of what he is to meet on his trial.

This motion was overruled and the defendant excepted.

E. Kempton, for the respondent.

The indictment is bad for duplicity. *State v. Nelson*, 8 N. H., 163; *People v. Wright*, 9 Wend., 193.

H. M. Plaisted, Attorney General for the State, cited *Commonwealth v. Richards*, 1 Mass., 337; *Eastman v. Commonwealth*, 4 Gray, 416, and cases there cited.

Barrows, J. It would commonly be difficult if not impossible for those who lose bank bills by theft to designate the banks by which the various bills were issued, and we do not think the constitutional requirements which the defendant's counsel invokes, call upon us to facilitate the escape of thieves in the manner proposed. The indictment upon which the defendant was convicted, describes the number and denomination of the bank bills stolen and alleges the value of each. It was not necessary to set forth the names of the banks by which they are issued, nor to assert their genuineness more distinctly than it is done in the allegation

of their value. Even the description of them as "lawful currency" &c., may well be rejected as surplusage. That which is made punishable as a crime by the statute is distinctly charged with as much particularity as the nature of the case will ordinarily permit. *Commonwealth v. Richards*, 1 Mass., 337; *Eastman v. Commonwealth*, 4 Gray, 416.

Nor does the fact that the defendant stole a pocket-book and shoe-knife, at the same time and place, from the same person, and is charged therewith in the same count, better his case. The spoils of a single larcenous act may all be included in one count, and the indictment is not thereby vitiated on the ground of duplicity.

The defendant is charged with but one crime.

Exceptions overruled.

APPLETON, C. J., DICKERSON, DANFORTH and VIRGIN, JJ., concurred.

ARABELLA F. STRATTON, Administratrix,

vs.

CHARLES W. HUSSEY.

Judgment—attorney's lien upon.

The lien of the attorney upon a judgment recovered extends to the fees and disbursements made in its prosecution.

It matters not, though the suit be commenced by one attorney, and prosecuted to final judgment by another, the lien exists to the extent of all fees and disbursements.

ON EXCEPTIONS.

DEBT upon a judgment in favor of the plaintiff's intestate, H. Stratton, against Charles W. Hussey, recovered at the October term, 1868, of this court, for this county, for $109.43 debt, and $23.68 costs, with fifteen cents for the execution, entered up De-

cember 23, 1868. In the taxation of costs, $3.54 were allowed for the writ, and $5.25 for the service of it. The rest of these costs were for entry and continuance, travel and attendance. The defendant introduced a general release of all accounts and demands dated April 10, 1871, given him by H. Stratton. This action was instituted and prosecuted by E. F. Webb, the only attorney of record in the original suit, to enforce his lien on the judgment for his costs, services and disbursements, the execution having always remained in his possession, unsatisfied, unless by the $75, received by Mr. Stratton, April 10, 1871. The writ was made by Crosby Hinds, Esq., with the understanding that Mr. Webb would take charge of the case in court. Mr. Hinds, since this suit was brought, gave Mr. Webb written authority to collect and receive whatever was due him (Hinds) for his services aforesaid. The presiding justice ruled that Mr. Webb had a lien only for costs and disbursements from the entry of the original action in court to the rendition of judgment, and assessed damages at $15.12, with interest from December 23, 1868. Mr. Webb excepted.

E. F. Webb, pro se.

A. Libbey, for the defendant.

Appleton, C. J. This is an action of debt on a judgment recovered by the plaintiff's intestate, and prosecuted by E. F. Webb, to enforce the attorney's lien on the same.

The writ in this case was made by C. Hinds, an attorney of this court, with the understanding on his part, and on that of the original plaintiff, that it should go into the hands of Mr. Webb, who was to enter and take charge of the action, and make all subsequent disbursements. Mr. Webb, accordingly, entered the action, recovered judgment, and took out execution. Mr. Hinds has never been paid, and has authorized Mr. Webb to collect the amount due him for writ and service.

The defendant procured a discharge and release from the original plaintiff from all accounts and demands, bearing date since the recovery of the judgment.

It has been repeatedly settled that the lien of an attorney is not defeated by payment of the execution to the judgment creditor by the debtor, without the consent of the attorney. *Hobson v. Watson*, 34 Maine, 20; *McKenzie v. Wardwell*, 61 Maine, 136.

Had the writ been made by Webb, his lien for the taxable bill of cost, as claimed by him, would have been unquestioned. If the writ was made by Hinds for Webb, and on his account, it is not perceived but that his lien on the judgment would have been to the same extent as if made by himself.

If Hinds is to be regarded as acting for himself, he is none the less entitled to his lien to the extent of the services by him rendered. The debtor, when settling, knew that the attorney had a lien for his fees and disbursements in the suit. The lien was to the extent of such fees and disbursements, and it was a matter immaterial to him, who was to receive the same. This suit, the case shows, is prosecuted for Hinds' benefit, and by his direction.

The attorney need not notify the debtor of his lien. *Young v. Dearborn*, 27 N. H., 328. The right of lien is paramount to that of the parties to a set-off of mutual demands. *Currier v. Boston & Maine R. R.*, 37 N. H., 223. It cannot be defeated by a discharge of the client. *Gammon v. Chandler*, 30 Maine, 152. It is of the highest equity, and is entitled to the fullest protection.

The lien exists equally whether the services are rendered by one attorney or more, for the amount justly due for fees and disbursements. *Exceptions sustained.*

CUTTING, DICKERSON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

JOHN S. STURGIS *vs.* JOSHUA E. ROBBINS.

Action. Burden of proof is on plaintiff to prove case under R. S., c. 26, § 21. Intention.

In an action on the case, under R. S., c. 26, § 21, for negligently setting, keeping and maintaining a fire, set by the defendant for a lawful purpose upon his own land, so that it spread to the woodland of the plaintiff, the burden of proof is upon the plaintiff to prove such negligence.

It was charged in the declaration that the fire was set with an intent to injure the plaintiff; *held*, proper to ask the defendant whether or not, when he set the fire, he thought it a suitable time to burn; even though the plaintiff offered to strike out the allegation as to intent, but did not do so.

Where, upon cross-examination, an irrelevant question is asked, to which no objection is made, and it is answered, the judge presiding at the trial may, in his discretion, refuse to permit the witness to be further interrogated as to this irrelative matter upon the re-direct examination of the party calling him.

ON EXCEPTIONS AND MOTION FOR NEW TRIAL.

CASE, alleging that the defendant carelessly set fire to a pile of brush on his own land and so negligently managed and kept the same that it escaped upon the contiguous wood lot of the plaintiff and did him great damage. The declaration contained, in one count, an averment that the acts of the defendant were done with an intent thereby to injure the plaintiff.

The judge instructed the jury that they must be satisfied that the defendant did not use ordinary care in setting his fire, or in managing it after it was set, before they could render a verdict against him; that the burden of proving the want of such care was upon the plaintiff, to entitle him to maintain his action. The defendant while testifying in his own behalf, was asked if he thought that forenoon, upon which he set the fire, that it was a proper time to burn. To this inquiry the plaintiff's counsel objected, at the same time offering to strike from his writ the charge of an intent to injure the plaintiff; but the court admitted the question and it was answered affirmatively. Objection was also made and over-

ruled to an inquiry put to George A. Robbins, as is fully stated in the opinion. The verdict was for the defendant and the plaintiff alleged exceptions.

Bradbury & Bradbury, for the plaintiff.

When one sets a fire which destroys a large amount of his neighbor's property, the utmost indulgence he can ask is the privilege of proving that it occurred without fault on his part; the burden of justification falls upon him. So held in *Johnson v. Barber*, 5 Gilman, 425; *Fletcher v. Rylands*, 12 Jur., (N. S.) 603.

It is in the nature of a negative averment, to be disproved by defendant. 1 Greenl. on Ev., § 79; *Commonwealth v. Thurlow*, 24 Pick., 374.

A. Libbey, for the defendant.

The instruction as to the burden of proof was correct. *Bachelder v. Heagan*, 18 Maine, 32; *Hewey v. Nourse*, 54 Maine, 256.

Appleton, C. J. By R. S., c. 26, § 21, it is provided that "whoever for a lawful purpose kindles a fire on his own land, shall do so at a suitable time and in a careful and prudent manner; and shall be liable, in an action on the case, to any person injured by his failure to comply with this provision.

It is not questioned that the fire in the present case was set for a lawful purpose.

The presiding judge instructed the jury that to entitle the plaintiff to recover, they must be satisfied from the evidence that the defendant did not use ordinary care in setting, managing and keeping his fire, and that in both these points the burden of proof was on the plaintiff.

The defendant in setting the fire was in the exercise of his legal rights. It was for a lawful purpose. The burden in all cases is upon a party alleging a wrong done to him to establish it. It is not to be presumed that an act lawful in itself was not done "at a suitable time and in a careful and prudent manner." Unless

such is the legal presumption, the party injured is bound to show the act of which he complains to be the result of negligence or intentional wrong-doing. It is not for the defendant to show, in the first instance, that he complied with the statute, but for the plaintiff to show that he did not. The instruction was in accordance with the repeated decisions of this court, and was correct. *Bachelder v. Heagan*, 18 Maine, 32; *Hewey v. Nourse*, 54 Maine, 257. So in Massachusetts; *Tourtellot v. Rosebrook*, 11 Metc., 461. The plaintiff in his writ charged the defendant with an intent to injure him. The counsel for the defendant put this question to him: "If when you set your fire that forenoon you thought it a proper time to burn?" The question was proper, to negative the intent to injure set forth in the plaintiff's declaration. It was none the less proper because the plaintiff offered to strike out that allegation in his writ but did not. The allegation remains, and remaining, the objection to the question cannot be sustained.

"A proprietor setting fire on his own land is not an insurer that no injury shall happen to his neighbor but is responsible only for negligence." *Dean v. McArthur*, 2 Up. Canada, 448; *Gilson v. No. Gray R. Co.*, 33 Up. Canada, 129.

George A. Robbins, called by the plaintiff, stated on cross-examination, that he set fire on his own land the same day the fire was set by the defendant, and certain precautions were adopted by him to prevent its spreading. On re-direct examination, after stating the condition of his land, and describing its situation, and the precautions he used, the plaintiff's counsel continued the inquiry by this question, "what other precautions did you use?" He answered notwithstanding the defendant's objections: "I took a bucket with me." The plaintiff then offered to show that the witness remained by his fire with buckets and water the day it was set, and that he did not leave it until it was all burned down; but the court excluded the testimony.

This exclusion affords no legal ground for exception. The mode and manner in which this witness set, or managed his fire when set, were immaterial to the issue. The conditions under which

his fire was set, may have been entirely different from those attendant upon that set by the defendant. The issue was upon the defendant's compliance, or failure to comply with the requirements of the statute. Whether the witness, Robbins, did or did not so comply, was a matter utterly immaterial to the issue presented and could not properly affect the verdict. The plaintiff might have objected to the inquiry for irrelevancy, but he did not.

The objection here presented is not that the defendant was permitted to ask an immaterial question, but the question being answered, that the plaintiff was restricted in the re-examination of his own witness in relation to the new and immaterial matter thus introduced. In *Smith v. Dreer*, 3 Wharton, 155, this precise question was determined. It was there held that a witness could not be interrogated by the party calling him as to irrelative matter, although in previous cross-examination he had been questioned as to such matter and given testimony. The defendant in that case (here the plaintiff) might have excluded the testimony, and by his omission to do so, cannot be permitted to draw the inquiry still further from its course.

The rejection of immaterial and irrelevant testimony is one thing. Its admission, another and very different thing. The admission may injuriously prejudice the rights of parties. Its rejection can harm no one. The extent to which cross-examination is allowable in relation to what is irrelevant, is a matter of discretion. The limitations imposed upon such cross-examination can harm no one. Without such limitation, the time of the court is wasted in hearing what is useless and uninstructive; the attention of the jury is distracted from the consideration of the issue to be tried. "On all matters not relevant to the issue, the extent of cross-examination," observes Bigelow, J., in *Prescott v. Ward*, 10 Allen, 203, "is to be regulated by the judicial discretion of the judge at the trial." Such too, was the ruling in *Wroe v. the State*, 20 Ohio St. R., 460.

When the examination or cross-examination of a witness extends to immaterial matter, it is no matter of just exception that the

presiding judge limits the inquiries of counsel, as to what is immaterial. Because one inquiry of that character has been made and admitted, it is no ground of complaint that a second one of the same character was not allowed. There is more foundation for just exception in the admission, rather than in the exclusion of testimony of this description.

The cause was submitted to the jury under instructions clearly and accurately presenting and defining the legal rights of the parties. There was evidence on both sides. The tribunal which the law has established for the determination of controverted facts has found that the defendant has in no respect failed in his duty to the plaintiff. The weight of the evidence introduced was for the consideration of the jury, and we perceive no sufficient reason for interfering with their judgment.

Motion and exceptions overruled.

DICKERSON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

WILLIAM WYMAN *vs.* CHARLOTTE H. RICHARDSON.

Dowress—rights of. Levy of execution—effect of. Pleading.

By a levy upon the real estate of his debtor, which has been fraudulently conveyed, a judgment creditor acquires the legal title to it, and can then maintain a bill in equity to remove the cloud which the fraudulent deed casts upon his title.

A widow is entitled to a third of the rents and profits of real estate prior to the assignment of her dower therein, under R. S., c. 103, § 4, only when her husband died seized.

Though entitled to dower, she has no claim to occupy any portion of the estate until it has been duly assigned.

The plea of *nul disseizin* admits possession of the premises to be in the tenant, claiming a freehold therein.

ON EXCEPTIONS.

The late Amos Wyman was indebted to William Wyman, who obtained judgment upon his debt and levied the execution upon

certain parcels of land which the said Amos had conveyed to his wife, who is now the present defendant, and which they had jointly conveyed to her brother, Henry L. Fox, as appears by the report of the bill and proceedings in equity brought and prosecuted by said William against said Fox and this defendant, then Mrs. Wyman, in 55 Maine, 523, and 59 Maine, 100, the object of which was to compel them to release to him, and thus remove the cloud upon his title, which was accomplished. 59 Maine, 100. Mrs. Wyman's right of dower was excepted from the operation of this release, and in an action already reported in this volume, page 280, she was held entitled to have it set out to her.

She occupied the demanded premises, being the same conveyed to her by her husband, and by them to Mr. Fox, and levied upon by the plaintiff, for more than six years prior to the bringing of this action to recover them. The demandant introduced his levy, the several deeds referred to, and the record of this equity proceeding; and, against the tenant's objection, was allowed to introduce testimony as to the value of the rents and profits of the demanded premises for the six years prior to the date of his writ. Her counsel asked to have the jury instructed that she was entitled to dower in the premises, and that the demandant's title was subject thereto; that if the acts of disseisin named in the declaration were done by her husband, or by him jointly with her, this action could not be maintained against her alone; that, as she was entitled to one-third of the net rents and profits of the lands of which her late husband died seized, that fraction should be deducted in estimating what the demandant ought to recover; that the demandant's title to the property accrued September 23, 1871, when the deed from Fox to him was delivered, and the rents and profits to which he is entitled are to be estimated from that time; all of which instructions the presiding justice declined to give, and the tenant excepted, the verdict being in favor of the demandant for the premises, and $400 as the rents and profits.

A. Libbey and *S. Titcomb*, for the tenant.

Baker & Baker, for the demandant.

APPLETON, C. J. The case comes before us upon exceptions to the refusals of the justice presiding to give certain requested instructions.

A fraudulent conveyance is no transfer of the title as against creditors. The demandant, therefore by his levy, acquired a legal title to the estate of Amos Wyman upon which he had levied. *Wyman v. Fox*, 55 Maine, 523. The bill in equity by Wyman against Fox and another was for the purpose of removing any possible cloud resting upon the title thus acquired. *Wyman v. Fox*, 59 Maine, 100.

By R. S., c. 103, § 4. "The widow shall be entitled to receive one undivided net third part of the rents and profits of the estate of which her husband died seized, until her dower is assigned either by the heirs, the judge of probate or judgment of court." There is no evidence that the husband died seized of the premises described in the demandant's writ. On the contrary he had long previously conveyed the premises by a deed valid as against him, though voidable as to his creditors. The tenant therefore is not entitled to receive one net third of the rents and profits,—and though entitled to dower she cannot claim to occupy any part of the estate until it has been assigned. *Bolster v. Cushman*, 34 Maine, 428.

The tenant by the plea of *nul disseizin* admits that she is in possession and claims a freehold in the demanded premises. *Colburn v. Grover*, 44 Maine, 47. There is no disclaimer or plea of non-tenure, nor does the tenant claim title under or as the tenant of any one who has a better title.

The demandant did not acquire his title by virtue of the deed of release of Fox to him of September 13, 1871. The object and the effect of that deed was to remove the cloud upon the title of the demandant, existing only in consequence of fraudulent conveyances of Amos Wyman, upon whose estate the levy under which he claims title was made. *Exceptions overruled.*

CUTTING, DICKERSON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

MOSES W. FARWELL *vs.* CITY OF ROCKLAND.

Assumpsit. Contract. Salary of a municipal judge may be diminished.

There is no contract, express or implied, between a public judicial officer and the government whose agent he is.

A public officer has no proprietary interest in his office, nor property in the future compensation attached to it.

The authority which establishes the compensation may increase or diminish it, unless there be constitutional prohibition to the contrary.

When the salary of a public officer is diminished during his official term, such diminution is prospective only.

When there is a legal duty enjoined by competent authority upon a municipal corporation, assumpsit may be maintained to enforce its performance.

ON FACTS AGREED.

ASSUMPSIT to recover a balance alleged to be due Mr. Farwell upon his salary as judge of the police court of Rockland, for the term of four years from March 7, 1866. This power to fix the annual salary of this office was given by the act creating the court (Special Laws of 1861, c. 78, § 13) to the mayor and board of aldermen of Rockland, who on the twenty-fifth day of July, 1865, established it at $500 per annum, instead of its previous rate of $300. The plaintiff was elected March 5, 1866, qualified the seventh day of that month, and served his full constitutional term. May 22, 1866, an order passed the board of aldermen to reduce the salary to its former rate of $300 a year. At the end of each and every quarter during his term the plaintiff demanded his compensation at the rate of $500 per annum, but was paid only at the rate of $300, being $75 per quarter instead of $125, which he declined to receive in full, but took it upon account and under protest.

This suit was brought to recover the two hundred dollars claimed to be in arrears, with interest from the time each quarterly instalment became payable.

Gould & Moore, for the plaintiff.

The agreed statement sets forth that the salary of the judge of the police court was fixed at five hundred dollars a year; and, being so established, an order passed the board of aldermen to reduce it to three hundred dollars; but it does not appear that this order ever received the approval of the mayor, which was essential to give it any force whatever.

The salary, when fixed, is fixed for the term of the judge. He accepts the office with the established compensation, and it cannot be diminished without his consent. He is to be paid by the city; and the vote fixing the salary at the time of his entering upon the duties of the position, creates a contract between him and the city. *Chase v. Lowell*, 7 Gray, 33.

The mayor and aldermen determined the amount to be paid by their action of July 25, 1865, and thus exhausted their powers under the act creating the court, so that the action of the aldermen of May 22, 1866, was unauthorized and void.

They were to fix "the annual salary" of the judge; therefore they could not diminish it during the year then commenced. At any rate it will hardly be contended that they could give the attempted retroactive effect to their order, so as to reduce the compensation of the plaintiff for the two and a half months he had served before the order was passed.

D. N. Mortland, for the defendants.

There is no contract between the parties to this suit to sustain an assumpsit. 1 Bouv. Law Dict., 135, 305; 2 Black. Com., 442; *Jewett v. Somerset*, 1 Maine, 125; *Simpson v. Bowden*, 33 Maine, 549; *Chandler v. State*, 5 Harris & J., 284; *State v. Chase*, *Id.*, 297; *Hatten v. Witherold*, 5 Harrington, 38.

Mr. Farwell could not have been liable to the city for any neglect to perform his duties as police judge. *M'Millan v. Eastman*, 4 Mass., 378; *Bailey v. Butterfield*, 14 Maine, 112; *Charleston v. Stacy*, 10 Verm., 562.

The mayor and aldermen had the right to fix the salary annu-

ally; and May 22, 1866, they did fix it for the current political year, commencing in March previous. There being no constitutional prohibition, the plaintiff's salary could be reduced by the power establishing it, since "the salary and tenure of an office do not constitute a contract." 3 Pars. on Con., 529, 530; *West River Co. v. Dix*, 6 Howard, 548; *Butler v. Pennsylvania*, 10 Howard, 402; *Warner v. The People*, 2 Denio, 272; *Conner v. New York*, 2 Sandf., 355, and 1 Selden, 285; *Knoop v. Piqua Bank*, 1 Ohio St. R., 616; *Toledo Bank v. Bond*, *Id.*, 656; *Commonwealth v. Bacon*, 6 Serg. & R., 322.

APPLETON, C. J. The act of 1861, c. 78, establishing "a police court in the city of Rockland," approved March 14, 1861, provides in the thirteenth section, that "the judge of said court shall receive from said city, in quarter yearly payments, at the close of each quarter, an annual salary of such amount as the mayor and aldermen shall determine, which shall be in full for all fees pertaining to said office."

On the twenty-fifth day of July, 1865, the following vote or order was passed:

"In board of aldermen, July 25, 1865. Alderman Wise presented the following order which was passed; ORDERED, that the salary of the police judge of the city of Rockland, be and hereby is established at five hundred dollars a year instead of three hundred as heretofore."

On the fifth day of March, 1866, the plaintiff was duly elected judge of the police court for the city of Rockland, for the term of four years next following, and was duly qualified, entered upon and continued in the discharge of his official duties during the term for which he was elected.

Shortly after the plaintiff entered upon his official duties, the following vote was passed; viz:

"In board of aldermen, May 22, 1866, the following order was presented by alderman Hall, and was read and passed: ORDERED, that the salary of the judge of the police court be, and hereby is

established at three hundred dollars per annum from the first Monday in March, 1866."

The plaintiff having served during the term for which he was elected, claims compensation at the rate of five hundred dollars per annum. He has taken under protest the annual salary of three hundred dollars. The question presented for determination is, whether he is entitled, during the whole or any part of his official term, to the salary as established when he accepted the office to which he had been chosen, and entered upon the discharge of its duties.

Public offices established by the legislature are mere agencies for the benefit of the people, not contracts on their part with the office-holder for his benefit. They may be accepted or refused. If accepted, they may be resigned at any moment, and no action is maintainable for such resignation. As offices are created for the public good, the cause for their creation may, in process of time, become a sufficient one for their abolition. The term of official existence may be made longer or shorter, or the office itself may be abolished, as the public necessities may demand. As an office may be abolished, so its emoluments may be increased or diminished, except in the special cases where it is forbidden so to be done by the constitution. In this State it is so forbidden, in reference to the justices of the Supreme Judicial Court, who by its provisions are "to receive a stated compensation, which shall not be diminished during their continuance in office." Except in this special case, the necessary inference is that the legislature have absolute power over the compensation of public officers.

These views have repeatedly received the sanction of judicial tribunals, whose opinions are entitled to the highest consideration. In *Taft v. Adams*, 3 Gray, 126, it was decided that the legislature had the power to shorten the term of any officer, the tenure of whose office is not fixed by the constitution. In *Commonwealth v. Bacon*, 6 S. & R., 322, the salary of the mayor was reduced by the city government of Philadelphia, after his acceptance of the office. It was claimed that the reduction was unconstitutional,

upon the ground that there was a contract between the city and its mayor after his acceptance, which could not be changed or modified, but the court thought otherwise. "These services," observed Duncan, J., "rendered by public officers, do not in this particular partake of the nature of contracts, nor have they the remotest affinity thereto. As to a stipulated allowance, that allowance, whether annual, *per diem*, or particular fees for particular services, depends on the will of the law-makers; and this whether it be the legislature of the State or a municipal body empowered to make laws for the government of a corporation." In the case of *Commonwealth v. Mann*, 5 W. & S., 418, the court say "that if the salaries of judges, and their title to office could be put on the ground of a contract, then a most grievous wrong has been done them by the people, by the reduction of a tenure during good behavior to a tenure for a term of years."

In *Barker v. Pittsburg*, 4 Burr, 51, the court says, "that there is no contract, express or implied, for the permanence of a salary, is shown by the constitutional provision for the permanence of the salaries of the governor and judges as exceptions." In *Conner v. the City of New York*, 2 Sandf., 370, Sandford, J., uses the following language: "We think it must be assumed that there is no contract, express or implied, between a public officer and the government whose agent he is. The latter enters into no agreement, that he shall receive any particular compensation for the time he shall hold office; nor in the case of a statutory office, that the office itself shall continue any definite period." These views were fully sustained by the Court of Appeals in a very able opinion in the same case, by Ruggles, C. J., in 1 Selden, 291. In *Augusta v. Sweeny*, 44 Geo., 463, McCay, J., says: "If the office be created by legislative enactment, the legislature may abolish it; and if it be created by municipal authority, that same authority may abolish it." In *Butler v. Pennsylvania*, 10 How. (U. S.,) 403, the court held that the tenure and salaries of all public officers, except when otherwise provided by the constitution, are dependent upon legislative discretion. Indeed, the act creating

the court, of which the plaintiff was elected judge, is an illustration of the principles heretofore advanced, for the court came into existence by the abolition of a preceding one, with substantially the same powers, but with a changed name.

The right to fix the salary of a police judge, which is given by statute to the defendants, involves the right to change, by increasing or diminishing it. The vote of July 25, 1865, was an alteration of a previously existing rate of compensation during the official existence of the plaintiff's predecessor.

If, as is argued, the vote of May 22, 1866, is invalid because it does not distinctly appear that the mayor was present, the vote of July 25, 1865, must be regarded as of no effect for the same reason, for the fact of his presence is no more apparent in the last vote than in the first. If both are void for this cause, then there is no salary shown to have been established, and the plaintiff must entirely fail; for while the report states the salary was established at a certain sum, it further sets forth the vote by which it was so established, and if that was void, then there was no salary established.

But when the vote of May 22, 1866, was passed, fixing the salary of the police judge thereafter, the plaintiff had been performing judicial services from the day he was qualified up to that time at a stipulated rate of compensation. For those services at that rate, he could not be deprived of compensation. The vote prospectively is binding. Retrospectively it is void. If the plaintiff was not satisfied with the salary then established, he might have resigned.

It is urged that assumpsit is not maintainable. But it was the duty of the defendant corporation to pay the plaintiff the salary which they had voted to pay as long as that vote remained in full force. It may be that the plaintiff might successfully have resorted to mandamus. But however that may be, we have no doubt he can maintain assumpsit. The same question arose in *The People v. Mayor, &c., of New York*, 23 Wend., 685, in which Nelson, C. J., says: "Here is a legal duty enjoined by competent author-

ity, which the corporation is bound to discharge. It is as binding upon them as if entered into under their corporate seal. Full consideration has been rendered in the services of the officer for the liability thus imposed. An action on the case or assumpsit will lie for a neglect of corporate duty."

The plaintiff is entitled to receive compensation at the rate of $500 per annum, from March 7, 1866, up to May 22, 1866, deducting therefrom whatever has been received, with interest upon the sum thus ascertained from the expiration of his first quarter to the date of judgment. *Defendants defaulted.*

DICKERSON, BARROWS, VIRGIN and PETERS, JJ., concurred.

ANSON B. BOWLER *vs.* INHABITANTS OF WASHINGTON.

New trial for misconduct of juror.

While an action against a town to recover damages for an injury occasioned by a defect in a highway is on trial, it is gross misconduct for one of the jurymen engaged in trying the case to visit the place where the accident occurred; to hold conversations with the inhabitants as to the condition of the road, where such injury was received, and of the changes since made in it, and with their aid to make measurements of the same.

When the juryman so misconducting testifies that what he then and there saw and heard had great influence upon him in forming his opinion, it is good cause for setting the verdict aside.

So, if he communicated to members of his panel what he saw and heard, who testify that they were influenced by what was thus communicated in forming their opinion of the merits of the cause.

So, when the inhabitants, while the cause is on trial, hold conversations with one of the panel trying it, in relation to the merits of the case and calculated to influence his judgment, well knowing him to be one of such panel.

MOTION FOR A NEW TRIAL on the ground of the misconduct of a juror. This was an action to recover for injuries sustained by the plaintiff being thrown from his wagon by its striking a rock which

he claimed projected into and so obstructed a way, which the defendants were bound to keep in repair, as to make it defective. The juror visited the *locus in quo* and what there transpired is fully stated in the opinion of the court.

The defendants had a verdict and the plaintiff filed this motion to set it aside.

Gould & Moore, and *H. Bliss, jr.*, for the plaintiff.

A. G. Jewett and *L. M. Staples*, for the defendants. *Brown v. Moran*, 42 Maine, 144.

APPLETON, C. J. This is an action to recover damages for an injury sustained by the plaintiff through a defect in a highway of the defendant town. A verdict was rendered against him, which he moves to set aside for the misconduct of one of the jury.

Washington Robbins, the juryman in question, testifies that while the cause was on trial and during an adjournment, he went to the defendant town, distant some twenty miles from the place of trial; that he was at the place where the accident was said to have happened; that after he got there two inhabitants of the defendant town came along and stopped; that he was standing looking at the premises; that they spoke to him, making talk about the rock and road; that he inquired of them if this was the place where the accident happened; that they said it was; that they were talking about the rock and the road all the time he was there; that the substance of the conversation was that the road was wide enough and passable for anybody at the time of the accident; that they showed him where the rock, that was taken out, lay at the time of the accident; that if it laid where they said it did, no part of it was any obstruction to the road; that he could not tell at that time from the appearance of the face of the earth how far the innermost point of the rock projected into the road; that he with the assistance of these men, made admeasurements; that they told him they were familiar with the road before the accident;

and that after making his examination and admeasurements he went home with one of them and dined with him; that he was influenced in the decision of the cause by what he there saw and heard; and that he stated the same, before the argument, to one of his fellows, as well as in the jury room. George F. Ayers, to whom these statements were made, testifies that they had great influence over his mind in the decision of the case.

The jury were sworn in all causes betwixt party and party committed to them to give a true verdict therein, according to the law and the evidence given them. R. S., c. 82, § 68. It is apparent that two of the jury did not give a verdict according to the evidence given, but that their judgment was based upon evidence not given them; upon the unsworn statements of two of the citizens of Washington, and upon hearsay statements. "The court," observes Steele, J., in *McDaniels v. McDaniels*, 40 Vermont, 363, "set the verdict aside, not as a punishment to any one, but in justice to themselves as well as to the defendant, that the trial may be conducted fairly so that the verdict, when finally rendered, may be entitled to the respect of both parties and the confidence of the court, as the result of a trial substantially according to law, and upon the evidence in court." *Bradbury v. Cony, ante*, page 223. It would be difficult to imagine a case of greater misconduct than the juryman details in his testimony of what he saw, heard and did, and for which he is justly amenable to punishment. One of the men, Hibbert, who had the conversation with the juryman, knew that he was a member of the panel before which the cause was being tried. If one inhabitant can be allowed to hold conversations with a juryman, making statements material and relevant to the cause, so may others, and there will be no limit to such interference. The town must be held responsible for the wrong doing of its citizens as a party is for his own misconduct. *Heffron v. Gallupe*, 55 Maine, 563.

It is admitted that neither the plaintiff nor his counsel had any knowledge of the facts proved till after the trial.

There was no occasion for the report of the whole evidence.

The question is not whether the jury erred in weighing evidence. The ground of objection is the gross misconduct of one of the jury, and the effect which such misconduct did have, or might have had, on the verdict. *Motion sustained.*

CUTTING, DICKERSON, DANFORTH, VIRGIN and PETERS, JJ., concurred.

BRADFORD S. KIMBALL and others,

vs.

MAYNARD SUMNER, and others.

Pleading. Rents of the real estate of a deceased insolvent, before sale, belong to his heirs.

The rents and profits of the real estate of a deceased insolvent debtor, until it is sold for the payment of debts, belong to his heirs at law.

An administrator, who, without any agreement or understanding with the heirs, has collected such rents, may be sued for them by the heirs, jointly or severally, upon a count for money had and received.

In an action so brought the administrator cannot deduct from the rents collected by him, sums paid by him for insurance, or to discharge mechanics' liens, since these are charges upon the real estate itself, and not on the rents and profits. Nor, for the same reason, can he deduct any part of annuities paid by him.

Though the heirs may sue severally, or all may join, two or more cannot sue jointly, if there be other heirs not joined in such action.

ON REPORT.

ASSUMPSIT upon a count for money had and received, with a count in case, charging the defendants as bailiffs and receivers of the plaintiffs.

The defendants are administrators of the estate of the late Alfred H. Kimball, who died insolvent, and this action was instituted, by three out of four of his children and heirs at law, to recover the rents and profits of the real estate of the intestate, accruing between the day of his death (Jan. 12, 1866,) and the date of the writ (Feb. 26, 1872,) and received by the defendants in their said

capacity, amounting to $10,545.40, exclusive of interest, no part of which has been paid to the heirs, who were minors having no guardians, at the time of their father's death.

The administrators paid for repairs, taxes, insurance, and to the widow of the deceased for her one-third of the rents and profits, to the widow of the late Iddo Kimball an annuity charged upon the real estate, and for their own commissions, $8,866.79 ; also, to discharge five lien claims upon the homestead the further sum of $2,395.69. No portion of the rents and profits was derived from the homestead, which was occupied by the widow till her death, Oct. 4, 1869, and after that by the plaintiffs until it was sold May 7, 1870, for $7,000, to pay debts. One-third of an annuity of $400, was by will of the late Iddo Kimball, father of the deceased, charged upon certain of the real estate, which the intestate inherited from his father, but the rents and profits received from the land upon which the annuity was charged, largely exceeded the amount of such annuity, about one-half of the intestate's real estate not being subject to this charge at all. The repairs made were necessary, the taxes a lien upon the property, and the commissions were reasonable. The whole real estate sold for about $60,000

Rice & Hall, for the plaintiffs.

Under the common law, which our statutes have not changed in this respect, rents and profits issuing out of real estate belong to the heirs, and not to the administrator or executor of the deceased, whether the estate be solvent or insolvent. *Cole v. Patterson*, 25 Wend., 456 ; *Duppa v. Mayo*, 1 Saunders, 287 ; *O'Brannon v. Roberts*, 2 Dana, 54 ; *Dixon v. Nichols*, 39 Ill., 372 ; *Dean v. Dean*, 3 Mass., 260 ; *Drinkwater v. Drinkwater*, 4 Mass., 357 ; *Willard v. Nason*, 5 Mass., 240 ; *Hays v. Jackson*, 6 Mass., 154 ; *Hathaway v. Valentine*, 14 Mass., 501 ; *Gibson v. Farley*, 16 Mass., 280 ; *Stearns v. Stearns*, 1 Pick., 158 ; *Newcomb v. Stebbins*, 9 Metc., 544 ; *Boynton v. P. & S. R. R.*, 4 Cush., 467 ; *Lobdell v. Hayes*, 12 Gray, 236 ; *Palmer v. Palmer*, 13 Gray,

326; *Almy v. Crapo*, 100 Mass., 220; *Towle v. Swasey*, 106 Mass., 100; *Heald v. Heald*, 5 Maine, 387; *Fuller v. Young*, 10 Maine, 371; *Stinson v. Stinson*, 38 Maine, 593; *Mills v. Merryman*, 49 Maine, 65. The mechanics' liens were claims payable primarily out of the personalty. *Plimpton v. Fuller*, 11 Allen, 139; *Hewes v. Dehon*, 3 Gray, 205.

Gould & Moore, for the defendants.

The common law was changed by the Act of 1835, c. 191, and R. S. of 1841, c. 109, which by implication give the possession of the real estate of a deceased insolvent to the administrator. And he is to account in the probate court for the rents, &c. R. S., c. 64, § 54.

If the heirs are entitled, they must resort to the probate court for a decree of distribution. A part of the heirs cannot join to recover their shares of such rents.

PETERS, J. The main question in this case is, whether the rents and profits of the real estate of a deceased insolvent debtor, until it is sold for the payment of debts, belong to the heirs at law of such deceased person, or to his creditors.

It was early decided in the case of *Gibson v. Farley*, 16 Mass., 280, that the heirs were entitled to them. That has been the law in that Commonwealth ever since. *Stearns v. Stearns*, 1 Pick., 158; *Newcomb v. Stebbins*, 9 Metc., 544; *Boynton v. P. & S. R. R. Co.*, 4 Cush., 467; *Lobdell v. Hayes*, 12 Gray, 236; *Towle v. Swasey*, 106 Mass., 100.

The decisions in this State have been to the same effect, although perhaps the precise point, as now presented, has never before been directly and necessarily passed upon by our court. It seems to have been assumed that the doctrine was a settled one. Mellen, C. J., in the opinion in *Fuller v. Young*, 10 Maine, 371, after stating the question decided in *Gibson v. Farley*, *supra*, and approving that case, says: "these principles are firmly settled." And so it was regarded in other cases. *Heald v. Heald*, 5 Maine,

387; *Stinson v. Stinson*, 38 Maine, 593; *Mills v. Merryman*, 49 Maine, 65. We are clearly of the opinion that the conclusion, established in these numerous and unopposed authorities of both the States, is sustained by familiar common law principles, which cannot be disregarded by us, until we are required to do so by some legislative act.

But the defendants contend that the law, as declared in the foregoing cases, has already been abrogated by certain statutory provisions alleged to be inconsistent therewith. This position is not tenable, as an examination of the acts referred to, will show. By R. S., c. 64, § 19, one condition of an administrator's bond is that, in case of insolvency, he shall account for treble the amount of injury done by him, or with his consent, upon the real estate of the deceased, by any "waste or trespass" committed thereon; and for such damages as he recovers for like waste or trespass committed by others. This refers to an injury to the freehold, such as will lessen its value when sold for debts, and not to its use and occupation. The liability is only for an "injury done to the real estate." This section not only does not deprive the heirs of a right of possession until the land is sold, but it provides to some extent for the necessities of such a possession, by exempting from liability to trespass, the cutting down of any trees that may be required "for repairs or fuel for the family of the deceased."

The defendants regard section 54 of the same chapter as having an important bearing upon this point, wherein it is provided that every administrator shall be chargeable in his account "with all the interest, profit and income, that in any way come to his hands in his said capacity from any estate of the deceased;" and our attention is called to the fact that the Massachusetts statute, otherwise similar to ours, reads "from any personal estate of the deceased." But it must be noticed that the liability is only to account for whatever may come to his hands "in his said capacity" as administrator. Rents and profits do not come to him as an administrator, but as an agent of the heirs to whom they belong. By consent or agreement of the heirs they may be used as assets,

in which case the administrator should account for them accordingly. *Palmer v. Palmer*, 13 Gray, 328. By the next section (55) it is provided that, if the administrator himself occupies, he shall account for the rents to the heirs; and it is not to be supposed that any different liability would be established where he collects the rents of another.

Section 20, c. 66, is also cited by the defendants to show that, in case of an insolvent estate, an administrator may recover damages even against "an heir or devisee" for waste or trespass committed upon the real estate. This is where such trespass subtracts from the permanent value of the estate, as explained before.

It is argued that by a necessary implication these different provisions confer upon an administrator the right of possession; that the possession necessarily gives the right to take the rents; and that, in such cases, they must be accounted for as assets. But the use and occupation of the real estate by the heirs, is not to be regarded as at all inconsistent with any of the obligations imposed upon executors and administrators. Each party may sustain an action of trespass for an injury to the interests respectively represented by them. Trespass *quare clausum* may be maintained by the owner of land for an injury to the freehold, though it be in the occupation of a tenant at will; and so can the tenant maintain such an action even against the owner of the freehold for an invasion of his rightful possession. *Bartlett v. Perkins*, 13 Maine, 87; *Davis v. Nash*, 32 Maine, 411; *Brock v. Berry*, 31 Maine, 293.

A further point taken in defence is, that the heirs cannot maintain an action at law for the rents, but that the remedy is by an adjustment in the probate court. This objection is answered by the fact that the probate court does not necessarily have any jurisdiction over the rents. The administrator neither has the right against the consent of the heirs, nor is he required, to occupy the estate or collect rents therefrom. He may receive the income of real estate by the request of the heirs or with their acquiescence. He would not be regarded as a trespasser in so doing, unless done

in opposition to their interests, or in defiance of their wishes. It is often convenient, and sometimes of decided advantage, for him to do so; as where the heirs are minors without guardians; or are abroad; or unacquainted with the management of affairs; and where the administrator may be himself an heir, or having intimate business or family relations with the estate, and in other cases. In many cases there is an understanding or agreement, that the administrator shall take the rents and account for them as assets for the benefit of the estate, where such a course may save a sale of the real estate for debts, or where the heirs get the advantage of them in the general distribution. In such case the administrator, as before intimated, would account in the probate court for such rents with the general assets according to such agreement, but not necessarily by force of any requirements of the statute. Such we believe to be a somewhat common practice. Nothing appears here, however, to warrant a supposition that any arrangement exists which would bar these plaintiffs of the usual remedy at law. *Palmer v. Palmer*, 13 Gray, 328, *supra; Almy v. Crapo*, 100 Mass., 218. See also the other Massachusetts cases, cited before.

It is further objected that three of the heirs, there being four living, cannot properly be joined as plaintiffs in the same suit. Whether tenants in common, situated as these are, have an election of suing either jointly or severally; or whether the remedy must be joint and not several, or *vice versa*, are questions attended with some difficulty. It was a familiar rule of the common law, that in real actions, tenants in common should sever because their estates are several; and must join in actions for an injury to their real estate because the damages are common to both estates, and belong to them jointly;—these rules are now somewhat modified by statute;—and that in actions *ex contractu* they must join or sever according to the terms of the contract sued. If the demise is a joint one, and an entirety of rent is reserved, the action should be joint, but if reserved separately should be several. It is easy to see that tenants in common can make leases jointly or

severally as they please. But the difficulty is, to decide what the contract is, in this respect, when made purely by an implication of law, unaffected by any act whatever, of the parties themselves. But as the heirs could make either a joint contract or several contracts, in leasing their real estate, when the contract is made by themselves, it seems to us entirely reasonable to allow them to elect how it shall be considered in that respect, when the contract is made for them by operation of law. If justice is done between parties by permitting several actions, the defendants have no ground of complaint; if on the other hand, the remedy pursued against them should be joint, we think such a rule is founded upon principle and good sense, and may be fairly deducible from the authorities, although all the cases do not agree.

Sherman v. Ballou, 8 Cowan, 309; *Marshall v. Mosely*, 21 N. Y., 287; 2 Dane's Ab., 228, 449; *Martin v. Crompe*, 1 Ld. R., 340; 1 Chitty's Pl., 9; Taylor's Land. & Ten., § 114, *et seq.*; Washburn's Real Law, Title,—Actions by Tenants in Common.

We are satisfied, however, from the rule in all analagous cases, that the action must be either joint or several; and as it is neither in this case, that for that reason the present action cannot be maintained.

We think it results from the principles established in the Maine and Massachusetts cases, already approved in this opinion, that no deductions should be made from the rents collected, for the mechanics' liens, or the insurances paid, or for the annuities paid of $815.55. These were a charge upon the real estate rather than upon the rents and profits thereof, as long as there were no judgments to enforce or any possession taken or claimed to be taken on account of any of them. No other items are in dispute.

Plaintiffs nonsuit.

APPLETON, C. J., CUTTING, DICKERSON, DANFORTH and VIRGIN, JJ., concurred.

JOHN MCINTIRE *vs.* NATHANIEL T. TALBOT and others.

Evidence relative to way by prescription.

The issue in this case was as to the existence of a right of way by prescription, claimed by the plaintiff over the defendants land. A witness called by the defence was permitted to testify that when (several years before the dispute between the present parties arose) he had occasion to use this way, he did so by license of one Thorndike, paying him for the privilege; *held*, that this testimony was improperly admitted, it not appearing that there was any privity between the plaintiff or his grantors and the witness, or that they had any connection with the transaction; nor that Thorndike then owned the land over which the way passes.

Evidence of Thorndike's efforts to interrupt the user of the way was not properly admissible, unless he was the owner of the servient estate at the time of making them, by some title which has since come to the defendants.

It is for the jury to determine, as matter of fact, under which of two conflicting titles a person is in possession of land.

ON EXCEPTIONS.

CASE, in which the plaintiff alleged himself to be the owner of real estate in Camden, and that he is entitled by prescription to have access thereto by a way across the adjoining land of the defendants; but that the defendants, on the fifth day of October, 1871, for the purpose of depriving him of its use, stopped up said way with posts and beams. The defendants denied the existence of the right claimed. The defendants obtained a verdict in their favor, which the plaintiff moved to set aside as against the weight of evidence, and upon newly discovered evidence; and also filed numerous exceptions to the rulings, instructions and refusals of the judge; but the only two points upon which his exceptions were sustained are so apparent from the opinion that no detailed statement of the facts is necessary. There was a conflict as to whether the use of the way and the building of the lime kilns to which it afforded access, were commenced in 1832 or in 1836; and there was testimony tending to show that it was originally used

by license of Ebenezer Thorndike, senior, whose son (Ebenezer, junior) was a witness for the defendants, and testified to this fact. By direction of Ebenezer, junior, the way was obstructed by timber for a while in 1854.

Jos. Baker and *Geo. H. M. Barrett*, for the plaintiff.

Gould & Moore for the defendants.

DANFORTH, J. David Talbot, a witness for the defendants testified in substance that "as an owner of the schooner Ceylon, he repaired it in 1848–9; that, before commencing the repairs, he had an arrangement with Mr. Ebenezer Thorndike, senior, with respect to crossing his land; that he obtained his consent and paid him money therefor." This was objected to and "excluded unless it applies to this other road." It was then admitted as applicable to "this other road," which we understand to be the way in question. The matter in issue is whether the plaintiff is, by prescription, entitled to a private way across the defendants' land. It does not appear that the plaintiff or his grantors is or were in privity with the witness. They do not claim by, through, or under him. Nor does it appear that they were connected with, or had any knowledge of, the transaction referred to.

The acts therefore of Mr. Talbot, or his arrangements with Mr. Thorndike, would have no tendency to prove or disprove the matter in issue, but would be very likely to have an unfavorable effect upon the plaintiff's case and should have been excluded.

Much more should the testimony have been excluded if, at the time referred to, Mr. Thorndike was not the owner of the land over which the alleged way passes.

The admissibility of the testimony of N. T. Talbot, one of the defendants, in relation to the efforts of Mr. E. Thorndike, senior, to interrupt the user of the way in 1854, depends upon whether Thorndike at that time had a title to the servient estate which has been transmitted to the defendants.

The presiding justice instructed the jury substantially that

Thorndike, upon the testimony, had authority to interfere with the use of the way, and that an interruption by him would enure to the defendants.

To authorize such an instruction, he must have had some title which has come to the defendants, and the case must show it as matter of law.

It appears that in 1796, Paul Thorndike, senior, being in possession of lot 25 in Camden, conveyed five-sixths of a portion of it to Ephraim Barrett and four others, "in equal parts or shares." In 1823, Barrett conveyed his one-sixth by quitclaim deed to said Ebenezer Thorndike. Whether the portion of lot 25 thus conveyed included all, or a part, of the land over which the way in question passes does not clearly appear, but from the deed in the case it seems that this quitclaim deed is all the title which Ebenezer had in the premises in 1854, when it is claimed he interrupted the use of this way.

There is testimony tending to show that Ebenezer occupied the premises with his brother Paul, junior, up to the time of Paul's death in 1846, and after that and up to a time subsequent to 1854, the time of the alleged interruption, alone.

On the other hand, in 1826, one Jonathan Thayer recovered judgment against Paul Thorndike, junior, and levied his execution upon the premises as the sole property of said Paul. This title is the one claimed by the defendants, coming to them through several mesne conveyances.

It is true that a conveyance from the heirs of Ebenezer, is one of the links in the defendants' title, but it is also true that another link is a conveyance from Sarah T. Smart and Rebecca K. Thayer, grantees of Jonathan Thayer, to said Ebenezer, dated in 1856, subsequent to the alleged interruptions.

The result is that, so far as the deeds show, the defendants are claiming under a title which in 1826, the date of the levy, and up to 1856 was adverse to any title whatever in Ebenezer.

Whether he had a title in 1854 would depend materially upon the nature of his previous possession; whether he was in under

Paul, junior, and in submission to his title, and that obtained by the levy, or whether he was holding adversely thereto and under his deed from Barrett. A fair inference from the testimony might perhaps lead to the latter conclusion; still, it is a question for the jury, and the error was in taking it from them.

If said Ebenezer acquired a title before 1854, by his deed from Barrett, or by adverse possession, or by both, and transmitted that title to the defendants, they could legally avail themselves of whatever he did for the purpose of interrupting the use of the way by the plaintiff's grantors. But if he transmitted to them no title except such as he acquired by his deed from Thayer's grantees, there would be no such privity between him and the defendants as would authorize them to make use of his acts in 1854.

Exceptions sustained.

APPLETON, C. J., WALTON, BARROWS and VIRGIN, JJ., concurred.

SILAS W. McLOON and others, appellants from decree of Judge of Probate, *vs.*
HENRY SPAULDING and another, Administrators.

Probate law and practice. Administrator's compensation. Evidence. Exceptions. Onus probandi.

The amount of compensation received by a special administrator upon an estate cannot affect the amount to which the administrators upon the same estate, subsequently appointed, are entitled; hence, the inventory returned and the account rendered by such special administrator are not admissible, upon the hearing of an appeal from a decree of the judge of probate allowing a certain sum by way of compensation to the administrators.

Upon an appeal from such allowance in a second account of administration, the compensation allowed in their first account is not properly subject to revision; and exceptions to a ruling that such first account, having been passed upon by the judge of probate and not appealed from, could not properly be reviewed, with a view to fixing the compensation of the administra-

tors in the second account, cannot be sustained when neither of the accounts is brought up with the exceptions, and there is nothing tending to show that the excepting party was injured thereby.

If the word "reviewed" is to be understood in a technical sense the ruling is correct; but such first account may and should be referred to, and it is competent evidence between the parties upon such hearing so far as the facts exhibited therein have a bearing upon the questions raised by the reasons of appeal.

The burden of proof is upon the administrators, upon such an appeal, to establish their claim to the amount allowed therein as compensation by the judge of probate, and they have the right to open and close.

On exceptions.

Appeal from a decree of the judge of probate of Knox County, allowing $1,575 as commissions to the administrators upon their second account of the administration of the estate of late William McLoon. The appellants alleged this allowance to be excessive, inasmuch as $6,000 had been allowed the administrators as commissions upon the settlement of their first account.

There had been a special administration upon the estate, pending the determination of a controversy as to the administration. The inventory filed by the special administrator and his account, closed before the appointment of the appellees, was offered in evidence on the hearing of this appeal, and was excluded by the presiding justice, who also ruled that the compensation allowed in the first account was not properly subject to revision upon this appeal; and that "the first account having been passed upon by the judge of probate, and not appealed from could not properly be reviewed, with a view to fixing the compensation of the administrators in the second account, from the allowance of which this appeal was taken."

Both parties claimed the right to open and close. The judge accorded this privilege to the administrators; and after hearing the cause and arguments of counsel, affirmed the original decree and the appellants excepted.

Peter Thacher and *J. H. H. Hewett*, for the appellants.

Gould & Moore, for the appellees.

BARROWS, J. The single issue presented to the judge at *nisi prius* by the reasons of appeal filed in the probate court was this: Was the allowance of $1,575 as commissions to the administrators of the estate of Wm. McLoon, in addition to the sum of $6,000 thus allowed in a former account, unreasonable and excessive?

With this question neither the inventory nor the account rendered by the special administrator, whose connection with the estate subsisted before these administrators received their appointment, had anything to do. They were properly excluded.

That former accounts from the allowance of which no appeal was taken, and the matters passed upon in them are not subject to revision and readjustment upon an appeal from the allowance of a later account in which the same question was not before the judge of probate for consideration, was settled in *Sturtevant v. Tallman*, 27 Maine, 78. In that case and in *Coburn v. Loomis*, 49 Maine, 406, and *Arnold v. Mower*, id., 561, a mode is pointed out by which the attention of the probate court may be called to the correction of alleged errors in previous accounts, and a refusal to correct upon good cause shown may become a fresh subject of appeal. But so far as appears nothing of that sort was done at the hearing before the probate court in this case. The second ruling complained of was therefore correct. The third ruling to which exception is taken, was as we understand it, in purport and effect the same as the second. The presiding judge could not have intended that the appellants should understand that the previous account could not be referred to for the purpose of ascertaining, for example, how near the statute limit of commissions had been reached—or the character of the work already done, and remaining to be done, by the administrators—or that any fact appearing in it having a bearing upon the question of the amount now to be allowed should not be considered.

He only meant that the question of the propriety of the allowance made in the first account was not here and now an open question. But even if the ruling would bear the interpretation which the counsel for the appellants claims, there is nothing in the case

before us to show that the error and exclusion were prejudicial to the appellants. It is their business to show not merely that the ruling was technically erroneous, but that the error was injurious to their cause. Neither of the accounts, nor the inventory, nor any report of the testimony is before us. For aught that appears an examination of the first account would have demonstrated not only the propriety of the allowance therein made to the administrators, but the justice of their claim to the further compensation now given.

A rehearing for such a result would be nugatory. *Lord v. Kennebunkport*, 61 Maine, 462.

Whether the appellant or the appellee shall have the opening and close depends upon the character of the issue presented.

Upon the preliminary question, whether the appellants have such an interest as to entitle them to an appeal, the affirmative is upon them and they have the right to open and close. *Deering v. Adams*, 34 Maine, 41.

But where the issue is upon the sanity of a testator, it belongs to the executor to open and close, though he is the appellee. *Ware v. Ware*, 8 Maine, 42.

In the present case the burden of proof being upon the accountants to establish the correctness of their claim, they have the right to open and close. *Exceptions overruled.*

APPLETON, C. J., DICKERSON, DANFORTH and VIRGIN, JJ., concurred.

HENRY SPAULDING and others, Administrators, in equity,

vs.

NATHAN A. FARWELL and others.

Equity practice upon exceptions to answer.

Matter in an answer in equity may be generally regarded as impertinent, which cannot be put in issue, or given in evidence between the parties.

The decision of a member of the court, under the eighth rule in chancery, whether allegations in an answer are impertinent or not, cannot be revised before final hearing, unless the decision is made in open court in term time as a part of the proceedings of the case, for the purpose of presenting important questions in a summary manner.

ON EXCEPTIONS.

BILL IN EQUITY, brought by the late William McLoon, and prosecuted by his administrators, to obtain an adjustment of the accounts of the ship Amelia, formerly owned by the parties to the bill, and of the proceeds of her sale. The answers of Mr. Farwell and of Francis Cobb, two of the respondents, contained allegations of indebtedness on the part of Capt. McLoon to these parties respectively, and in that of Mr. Cobb was a further averment that the complainant had told him he did not intend to have Cobb's name in the bill, and would instruct his counsel to strike it out. To these statements the complainant excepted, under the eighth rule regulating chancery practice in this respect, as impertinent, and the justice to whom the papers were forwarded ordered them stricken out. To this ruling these respondents took the exceptions here presented.

Peter Thacher, for the respondents, Farwell and Cobb.

Gould & Moore, for the complainants.

PETERS, J. The complainants except to a portion of both answers in this case as impertinent.

It has often been declared by the courts, that the best rule to ascertain whether the matter excepted to, be impertinent, is to see whether the subject of the allegation could be put in issue or be given in evidence between the parties. An application of this test here clearly shows that the ruling of the presiding judge must be sustained.

The bill seeks to obtain from the respondents an account and settlement of the earnings of a vessel, owned by the parties to the bill as tenants in common. Two of the respondents, in their answers, virtually admit the principal facts alleged in the bill, but set up the statute of limitations as a defence thereto. This, of course, is proper enough. But they then go further and, by way of excuse or justification for setting up such a plea, assert that the complainant is indebted to them respectively in certain other accounts, which have no connection whatever with the transactions set forth in the bill. This was unnecessary and improper. It introduces matters which cannot be put in issue, and about which evidence cannot be received. It would only excite prejudice or feeling, and tend to unnecessary discussion and delay. The rule which disallows impertinent allegations is a sound and just one, and, whenever required, should be enforced.

Another question arises which, as a rule of practice, it may be well to advert to. The complainant contends that exceptions by the respondents to the order of the court, will not lie in a case like this, and that they should therefore be dismissed. This, however, we think depends upon circumstances. Ordinarily, in such a case, exceptions would not lie. By the eighth rule in chancery, (37 Maine, 583,) the papers with the remarks of counsel are to be presented "to a member of the court for decision." This decision must be conclusive unless it can be reviewed by force of some statutory provision. By R. S., c. 77, § 13, among the cases which come before the court as a court of law, are "cases in equity presented on demurrer to the bill, or when prepared for a final hear-

ing." This would seem to exclude the hearing of exceptions upon interlocutory motions, at any rate before the final hearing. But by § 21, it is provided that when the court is held by one justice, a party aggrieved by any of his opinions, directions or judgments "in any civil or criminal proceeding," may, during the term, present written exceptions thereto in a summary manner. We think that, from the statutes and the rule taken together, it plainly results, that summary exceptions, as in the present cases, are allowable where the member of the court, to whom the papers are referred, sees fit to make his order in open court upon the records thereof, but that it would be discretionary with him to do so or not as he pleased. Whether he would do so, of course, would depend upon the good faith exhibited by parties in these proceedings, and upon the importance of the questions raised. We do not, however, mean to intimate, if any questions are incorrectly decided by a member of a court, and no opportunity is given for a revision of such decision before final hearing, that the court would not then examine into such question, and see that no injury shall thereby be sustained.

Respondents' exceptions overruled.

APPLETON, C. J., DICKERSON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

ALFRED LENNOX, petitioner,

vs.

KNOX AND LINCOLN RAILROAD COMPANY.

Motion to set aside award of damages for land taken.

A motion to set aside a verdict because of misconduct on the part of some of the jury will not be granted where the names of the jurors charged, and the nature of the communications made to them, are not stated in the motion; especially if the verdict is well sustained by the evidence.

The judge at *nisi prius*, upon a motion to set aside the verdict of a jury drawn to estimate the damages sustained by the location of a railroad, refused to hear any evidence to show that the award was excessive, or that the jury disregarded the instructions of the person appointed to preside at the hearing; *held*, that exceptions would not lie on account of such refusal.

ON EXCEPTIONS.

PETITION for an increase of the damages awarded to Mr. Lennox for land taken by the location of the defendants' railroad.

A view and hearing were had before a jury, presided over by George B. Sawyer, Esq., on the ninth day of August, 1871, and a verdict for $412 was returned to this court, at its October term, 1871, when the respondents filed a motion to set aside the verdict upon the ground that it was against law and evidence, and that the damages were excessive; also, because the petitioner held communications with, and gave evidence to, the jury, or some of them, prejudicial to the defendants, and calculated to increase the damages, during the view and at a time when the case was not being heard, and when the respondents had no opportunity to hear and controvert it; and because the jurors did not regard the instructions of Mr. Sawyer, directing them to hold no communications with the petitioner, his counsel and witnesses, during the view, but allowed these persons to talk with them (said jurors) relative to the matters on trial and the amount of damages to be

awarded; and, finally, because the petitioner had no title to the premises described in his petition.

The defendants offered, upon the hearing of their motion to set the verdict aside, all the evidence that was before the jury, to show that the damages were excessive, and to prove that the petitioner, instead of being injured, had been greatly benefitted by the location of the railroad; but the presiding justice declined to receive it.

The defendants also offered testimony to prove the improper conduct of the jury, in holding communication with the petitioner during the view and hearing, which the judge declined to hear, for the reason that the allegations were not sufficiently specific, but overruled the motion and directed the affirmation of the verdict. The respondents excepted.

Gould & Moore, for the respondents.

It was Mr. Sawyer's duty to "keep order and direct the course of proceedings." R. S., c. 18, § 12. This duty he endeavored to perform, but the jury did not obey his directions. Such a flagrant disregard of order and propriety, and of his instructions, as we stated in our motion, and proposed to prove should vitiate a verdict thus obtained. The presiding officer had no power to commit for this contempt of his authority, and the only possible remedy is to set aside the verdict. It was the misdoing of the whole jury, therefore the motion could not be more specific. It was the fact of consulting with the petitioner and his friends, not the nature of any particular communication, that we make the ground of objection.

Any communication relative to the subject matter of the controversy outside of the testimony given upon the trial was unauthorized and wrong; was such an injury to the respondents as to require the verdict to be set aside. *Heffron v. Gallupe*, 55 Maine, 563.

What difference can it make whether it is within a jury-room or outside of it, that a party intrudes himself into the deliberations of a jury. The effect is the same in either case. And our motion is as specific as is ever required where it is not attempted to set

out precisely what was said. *Perkins v. Knight*, 2 N. H., 474; *State v. Hascall*, 6 N. H., 352; *McAlvaine v. Wilkins*, 12 N. H., 474; *Allen v. Aldrich*, 29 N. H., 63; *Cilley v. Bartlett*, 19 N. H., 313; *People v. Packers*, 5 Cal., 275; *Commonwealth v. Roby*, 12 Pick., 496, 510. R. S., c. 18, § 13, provides that "either party may file a motion to set aside the verdict for any cause that a verdict in court may be set aside. The court shall hear any competent evidence relating to the same, adjudicate thereon," &c. Where the presiding officer does not fully report the evidence, the court may take testimony *aliunde* the record, and set aside the verdict upon it. *Commonwealth v. Norfolk*, 5 Mass., 435; *Harding v. Medway*, 10 Metc., 465; *Fitchburg v. Eastern R. R.*, 6 Allen, 98. If the ruling of the justice at *nisi prius* was correct, that as matter of law he was precluded from looking at the evidence before the jury, or receiving any outside of that, to show that the damages awarded were excessive, then there is no remedy upon this score, however outrageous the verdict may be.

A. Libbey and *Samuel E. Smith*, for the petitioner.

The motion was not sufficiently specific in its charges of misconduct. *Warren v. Hope*, 6 Maine, 479; *Dennett v. Dow*, 17 Maine, 19.

Rescript.

A motion to set aside a verdict because the jurors at the view held communications with the petitioner, his counsel and witnesses, will not be heard by the court, where there is no specification in the motion as to what jurors are thus charged, nor as to what was said or done in such communications; especially where from a report of the evidence in the trial, which is made a part of the case, the verdict seems to be well sustained by the evidence reported. If the evidence could be construed as showing that the refusal to hear any evidence upon the motion to set aside the verdict as being against evidence, embraced the evidence reported by the person presiding at the view, it becomes immaterial, as such

report is referred to as a part of the exceptions and shows that, upon such a motion the verdict should not be disturbed.

Exceptions overruled.

ALONZO HALL, petitioner, *vs.* COUNTY COMMISIONERS.

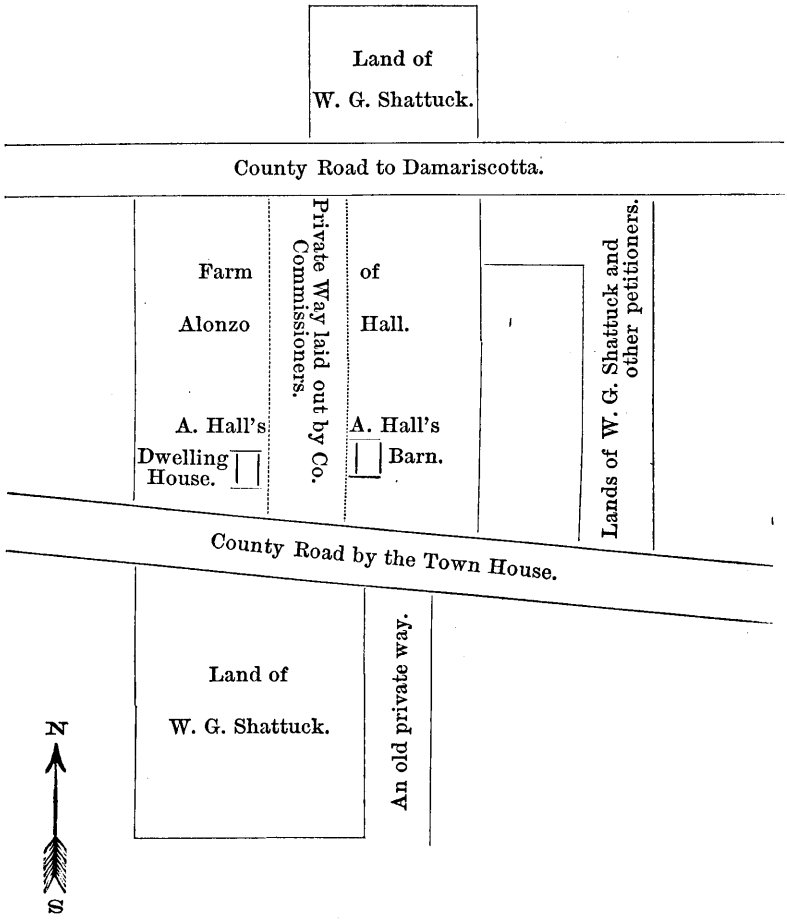
Distinction between town and private ways. R. S., c. 18, § 18.

A town way may be laid out on the petition of an inhabitant, whether he is an owner or occupier of land or not; but a private way can only be laid out either for residents who occupy, or non-residents who own, cultivated land which such way will connect with a town or county road.

ON FACTS AGREED.

PETITION for *certiorari*, to quash the proceedings of the county commissioners of Lincoln county in locating a private way from one county road to another county road in the town of Newcastle. Upon the twelfth day of September, 1872, Wilmot G. Shattuck and eleven others, inhabitants of Newcastle, petitioned the selectmen of that town to lay out either a town way or private way for their use and benefit over the land of Mr. Hall, so as to connect the two county roads and thereby facilitate the passage of the petitioners from their residences to cultivated lands not connected therewith, which the selectmen refused to do, and application was then made to the county commissioners, Oct. 11, 1872, who located and established a private way, as prayed for, for the use and benefit of the petitioners and at their expense, from county road to county

road, wholly across the land of Mr. Hall, as appears from the accompanying plan.



It will be seen that the county ways divide the lands of Mr. Shattuck from this private way, and that none of the petitioners owned land adjoining it. Mr. Hall resisted the petition at every stage of the proceedings which he now claims were illegal, in that the original petition does not state that any of the petitioners owned land under improvement from which said private way

leads to a town way or highway, and that such is not the fact, and the whole record discloses that the county commissioners had no jurisdiction.

Benj. F. Smith, for the petitioner for *certiorari*.

Gould & Moore, for the respondents.

PETERS, J. The question presented here was not necessarily involved in the decision of the case of *Orrington v. Co. Coms.*, 51 Maine, 570, cited by the respondents. The point settled by the result in that case was, that a town way could be laid out upon a petition of inhabitants of the town, whether the way leads from cultivated land owned by such inhabitants or not. The distinction drawn in the separate opinion in the case delivered by Kent, J., is, in our opinion, a correct one. A town way may be laid out on the petition of inhabitants whether land owners, or occupiers of land, or not; because a town way will be for all the inhabitants of a town who may have occasion to use it. But a private way can only be laid out in a town either for residents who occupy, or non-residents who own, cultivated land therein; and, in such case, the private way, which is for the exclusive use of such occupiers or owners, must of course lead from land so occupied or owned to a town or county road. The very object of a private, in contradistinction from a town way, is to provide a communication into the general channels of passage in a town for those only, whose lands are otherwise shut out from a connection therewith. How can a way be regarded as laid out for any one inhabitant, any more than for all the inhabitants of a town, when it does not connect land owned or occupied by him with some other road or way?

In this case the private way, as laid out, merely connects two county roads. It is not laid across either of them, but only to them; nor could it be, as one way could not be laid over another. It begins and ends upon the land of none of the petitioners. Nor

does it appear but that they are already well accommodated with access to their lands by the public ways.

R. S., c. 18, § 18, is blindly comprehensive. Punctuated as follows, and its real as well as grammatical construction would more clearly appear: "The municipal officers of towns may personally, or by agency, lay out, alter, or widen town ways, (and private ways for one or more of its inhabitants or for owners of cultivated land therein) on petition therefor." That is, on petition therefor, they may lay out a town way for the town, or a private way for any inhabitant or owner of cultivated land therein, where such inhabitant occupies, or such owner has, cultivated land in the town which such way will connect with some town or county road.

Writ granted.

APPLETON, C. J., CUTTING, DICKERSON, DANFORTH and VIRGIN, JJ., concurred.

JAMES LITTLE, in equity, *vs.* THOMAS J. MERRILL and others.

Equity procedure. Upon a bill between part owners of a vessel, the court will fix the sum due to each.

Upon a bill in equity between part owners of a vessel, to obtain an account, all the parties are to be regarded as actors. The decree should settle the accounts between the several owners as if each were plaintiffs in a bill against his co-owners, and execution issue in favor of each part owner to whom a balance is found due against such as are equitably liable to pay the same.

ON EXCEPTIONS to the acceptance of a report of a master in chancery.

Wales Hubbard, for Merrill, the excepting party.

Gould & Moore, for the complainant.

VIRGIN, J. This is a bill in equity brought by the plaintiff as owner of one-fourth of the brig "George S. Berry," against the other part owners thereof, seeking for an adjustment of the net earnings arising from several freighting voyages.

The bill alleges, *inter alia*, that Merrill, one of the defendants and ship's husband, has since Nov. 1, 1870, received large sums of money from the master, as earnings of the vessel, and especially the sum of $1,503.94, which he has not paid or accounted for to the plaintiffs and the other defendants, according to the just proportion due to each, &c.

A master was appointed, who upon a hearing stated the account between all the owners, finding in the hands of Merrill the sum of $1,641.92, with the proportion thereof belonging to the plaintiff and each defendant respectively. The counsel for Merrill objected to the acceptance of the master's report, on the ground that by the rules of equity practice, Merrill is not liable in this suit to a decree against him in favor of any co-owner other than the plaintiff; but the presiding judge ruled otherwise and he alleged exceptions.

The exceptions must be overruled. For it is the well settled rule in relation to part owners of vessels that in the absence of any specific agreement concerning the shares of a vessel's earnings, equity is the proper remedy. *Hardy v. Sprowl*, 33 Maine, 508; Story's Eq. Plead., § 72. If the objection should prevail, its logical consequences would necessitate a separate suit by each part owner; and the common law, bound down as it is to a fixed and invariable form of judgment in general terms, altogether absolute for the plaintiff or the defendant, could furnish such a remedy. On the other hand, this class of cases illustrates what Judge Story denominates the beautiful character and pervading excellence of equity jurisprudence. The constant aim of courts of equity is to do complete justice by calling before them all persons materially interested in the subject-matter of the suit, and after viewing the whole matter, by deciding upon and settling the rights of all; so that the decree, being adapted to the mutual and adverse claims and sub-

stantial rights of all the parties, may be safely performed by those compelled to obey it, and future litigation prevented by doing away with the necessity for it. Story's Eq. Plead., § 72.

Hence, in taking an account on a bill filed by one part owner against his co-owners, all the parties are to be regarded as actors, and the decree should settle the net earnings between all the individual part owners, as if each was a plaintiff in a bill against the others. The whole case should be adjudicated upon, not only the claims of the plaintiff against the defendants, but also the claims of the defendants between themselves. And an execution may be issued in favor of each part owner to whom a balance is found due, against such as are equitably liable to pay the same. Such is substantially the decision in *Grove v Fresh*, 9 Gill & J. (Md.) 280; *Raymond v. Came*, 45 N. H., 201. *Exceptions overruled.*

APPLETON, C. J., CUTTING, WALTON, DICKERSON, DANFORTH and PETERS, JJ., concurred.

SCHOOL DISTRICT NO. 6 IN DRESDEN,

vs.

ÆTNA INSURANCE COMPANY.

Where a committee were authorized by vote of a school district to sell a school-house, a sale thereof on credit, instead of for cash, is void, unless ratified by the district afterwards.

Where the committee kept the proceeds of sale in their own hands, making no report in any form to the district of their doings, the district never receiving or using such proceeds, or having any benefit therefrom, but at the first corporate meeting held after such sale, passing votes condemnatory thereof; no ratification can be inferred, although no district meeting was held for some months after such sale was known to individuals in the district, during which time the house was removed from the site it stood upon, by the vendees.

A verdict will not be set aside on account of the admission of improper evidence, rendered immaterial by a special finding in the case, on a point to which that evidence had no relation.

School District *v.* Ætna Ins. Co.

On exceptions and motion for new trial.

Assumpsit upon a policy of fire insurance on a school-house, dated March 1, 1860; and a renewal thereof April 1, 1861, for one year. The writ is dated November 23, 1861. This case has been before considered by the court, on other questions raised by it. 54 Maine, 505.

It was admitted, that proof of loss on May 11, 1861, was duly given and received, and that the house was of the value alleged in the writ.

In defence, were read the original application for a school district meeting, the record of the warrant calling the meeting, and the record of the doings of the meeting held June 4, 1860.

On an article in the warrant,—"to see if the district will vote to sell the new school-house therein, and pass any votes necessary to accomplish that purpose" the district voted" to sell the new school-house, and that Ephraim Alley, Edward Lawrence and Seth H. Whitcomb, be a committee to sell it." The bill of sale to the purchasers, Bickford & Houdlette, was read.

It appeared in evidence that the committee advertised for proposals to purchase on July 12, 1860, to be received until the nineteenth of that month. Notices were posted in three public places. The notices contained the terms of sale—"ten per cent. down, the balance in one year, with good security and interest." Five proposals were received by the committee. The year's credit was at the suggestion of the committee. The money and the notes received by the committee for the house, remained in their hands. There were two notes payable to the district or its order in one year with interest. One of the notes Lawrence signed as surety.

On the nineteenth of August following the sale, the purchasers removed the house to their lot, adjoining the school-house lot.

Against the objection of the defendants, the plaintiffs were permitted to read from the records of the district the call for a meeting on the first day of August at the school-house; and there was evidence that the purchasers of the house, having the keys, would not open the house, and the meeting was not held.

The plaintiffs offered a "protest of certain voters of the school district, read in town meeting, when the division of the district was under consideration, March 11, 1861." The defendants' objection to this evidence was overruled. The remonstrants represent that they are a majority of the legal voters of the district, and set forth their reasons why the town should not divide the district, as requested by the vote of the district passed June 4, 1860.

There was evidence introduced for the plaintiffs, which they contended showed collusion or fraud between the committee and the purchasers.

P. F. Houdlette testified that he procured the renewal of the policy, "that he had a full knowledge of all the circumstances about the house and the controversy." Witness further testified: "When I asked for the renewal, I wrote that we have had a good deal of trouble in the district about the house; and it has been moved about fifty feet to the west, and that would carry it that distance further from the nearest building."

The defendants put into the case the writ of the Plaintiffs v. Bickford & Houdlette, (the purchasers of the house) for carrying away the school-house, and converting it to their own use, on the nineteenth day of August, 1860. The date of the writ was March 27, 1861. This action has under it an entry, made at the present term, of "neither party."

The records of the district made part of the case.

Several instructions were given, by the request of the plaintiffs, among which were these:

That the committee were not authorized, by the vote under which they acted, to sell the school-house on credit.

That if they did sell it upon credit in part, receiving notes on a year's time for ninety per cent. of the price, and ten per cent. cash, and Lawrence has ever since retained the money and notes in his possession or control, and the committee never made any report of that sale to the district, or in any way informed the district of it at a legal meeting thereof, the sale did not transfer the house so as to prevent a recovery in this action, unless the district ratified the sale.

That the non-action of the district before this insurance was effected would not operate as a ratification in law if no report of the acts or doings of the committee had been made to the district, nor in any other way communicated to it.

The instructions, requested by the defendants, which were not given, appear in the argument in support of the defendants' exceptions. The judge submitted to the jury certain questions to be answered. The special findings were affirmed as special verdicts. What was the nature of the special findings of the jury, is sufficiently stated in the opinion.

Wales Hubbard, for the defendants.

Statement of the case and the issues made by the parties at the trial:

The plaintiffs owned a school-house; and at a legal meeting, June 4, 1860, voted to sell it, and chose a committee to make the sale. The committee made the sale on the nineteenth of July following. The purchasers entered into possession of the house; and soon after removed it to their own lot of land.

The defendants insured the building, against loss by fire, for one year from March 1, 1860. The policy was renewed for one year from April 1, 1861. The loss of the house by fire, May 11, 1861, was admitted.

Before the policy was renewed, the house had been sold, the purchasers were in possession, and the plaintiffs on the 27th of March, 1861, four days before the renewal, had commenced an action against the purchasers for a removal, and conversion of it to their own use.

The defence was, that when the policy was renewed the plaintiffs had neither title to, nor any insurable interest in, the house, and that there had been a change of title.

The plaintiffs contended, that the sale, made by their committee, was void for two reasons: I. That their committee exceeded their power by a sale on credit. II. That the sale was void on account of collusion or fraud between their committee and the purchasers.

These positions the defendants denied. These were the issues to be tried.

Is it not obvious, that all testimony respecting a division of the district was incompetent? It had no tendency whatever, to prove or disprove either of the matters in issue. It tended to lead the minds of the jury from the consideration of the real issues, and to create a prejudice injurious to the defendants.

Besides these, there are other reasons, why the "remonstrance" read in town meeting was improperly admitted. It shows an attempt, by persons claiming to be voters of the district, and to be a majority of them, to destroy the effect of a legal vote of the district. The record showed that thirty-nine voted to sell the house,—a majority of those voting. The remonstrance purports to be signed by forty-six members of the district opposed to the sale of the house and a division of the district; while this paper could properly have no effect upon a legal vote of the district, it was suited to deceive the jury, and lead them to suppose that the vote to sell the house was against the wishes of the majority; and to excite a strong prejudice unfavorable to a fair consideration of the true issues. No instruction was given to prevent these effects.

Nay, if a division of the district had been the issue to be tried, by what rule of evidence, would that paper be made competent evidence, to be read to the jury, and to be taken to their room to be re-read and examined?

The jury were instructed, "That the committee were not authorized by the vote, under which they acted, to sell the schoolhouse on credit." Such is not the true rule of law. It prevents the consideration of the question of usage. The power of an agent is measured by usage. An agent "has authority to sell on credit, where such is the usage." *Upton v. Suffolk Co. Mills*, 11 Cush., 589. There may be no usage in Dresden, as to a sale of a schoolhouse on credit; but there is such a usage, as to the sale of personal property; the consideration of which, the instruction excludes.

The cases cited in support of the instruction differ from the case at bar in material particulars. If bonds and other securities are

sent to a broker for sale, the usage is to sell for cash. But if the principal knows that these are advertised for sale, in whole or in part, on credit, and remains silent, he should not be permitted after the sale, to repudiate it.

The record of the district meeting, at which it was voted to sell the house, showed also a vote to apply to the town at its next annual meeting to divide the district. The sale of the house was not for the purpose of raising money for immediate use.

The defendants requested this instruction: "If the district wished to repudiate the sale, for the reason that the committee gave credit for a part of the purchase money, immediate action should have been taken to vacate the sale, and restore the money and the notes." This was given, omitting the word "immediate," and adding, "immediately after they [the district] had received them."

Thus modified, the instruction was erroneous. By it, the district was not required to take any action to vacate the sale, and restore the money and the notes, unless it had received them.

If the district knew that the sale had been made on credit, and that the money and notes were in the hands of its own agents, it should have called upon its agents for them, and offered to restore them. The agents held them for the district; and their possession of them, was, in law, the possession of their principal. The case shows that Lawrence, who held the money and notes, was district agent, as well as one of the committee. But the proceeds of the sale were rightfully in the hands of the committee. Were not the committee the legally constituted agents to make the sale? And are not agents authorized to sell, authorized to receive payment? Do not the proceeds of sale, on payment to the agent, become at once the property of the principal, so that he can immediately claim the possession and control of them?

With respect to the sale without authority, and rescinding it without a return of the money and notes, it is admitted, this could not be done, if the principal was informed of the acts of its agents.

Notice of acts of agents may be presumed; and if not disap-

proved within a reasonable time, a ratification arises. *Johnson v. Wingate*, 29 Maine, 404. Ratification may be presumed from acts or from omissions. 26 Wend., 190. From the facts that a sale of the house had been made; that possession had changed from the sellers to the purchasers; that they had removed it to another lot of land; had continued openly in possession more than seven months; and that the plaintiffs had commenced an action to recover for its value, a jury would be fully authorized to find that the plaintiffs had a knowledge of the acts of their agents. All these transactions were open and notorious. No voter of the district could have been ignorant of them.

The advertisements for bids, posted in three public places in the district, contained the terms of sale, "ten per cent. down, the balance in one year, with interest and good security."

"A principal who does not promptly disavow the unauthorized act of his agent, makes the agent's act his own," is a very familiar rule of law. The district records, which make part of the case, show no complaint that the sale was on credit, or for any cause, either at the meeting in September or in October, 1860.

No complaint that credit was given was made at the former hearing of the case. 54 Maine, 505. It was sought to avoid the sale for very different reasons. Now, after the lapse of more than eight years, this is made for the first time a point of contention, in a suit not between the parties to the sale, to determine the validity of it, but in a suit against an insurance company, from which all these facts were concealed when the policy was renewed.

It does not appear that these facts were made known to the district as a corporate body in legal meeting. But is not a corporation to be held responsible for what is known to all its members, though not stated in a legal meeting? If such is to be the rule, when corporations are so numerous, they will be greatly favored at the expense of the community. Such is not the rule in relation to corporations acting as common carriers, nor to railroads. Cities and towns are held to have a knowledge of what is known to a few of their taxable inhabitants. School districts should be held as

knowing what is well known to its members, so far as regards the acts of its agents, respecting their dealings with other persons. The safety of the community requires it.

Gould & Moore, for the plaintiffs.

The only question is that of insurable interest. The instructions given were too favorable to the excepting party. Fraud rendered the sale void, not voidable; and three juries have specially found the transaction between the committee and the pretended purchasers fraudulent. Story on Agency, § 211; Sugden on Vendors, 392; *Copeland v. Ins. Co.*, 198 and 204; *Church v. Maine Ins. Co.*, 1 Mason, (Cir. Ct. R.,) 341, 344, 345.

The sale upon credit was void. It was not merely good till repudiated; it had no effect unless, nor until, ratified. *Johnson v. Wingate*, 29 Maine, 407, and cases there cited; *Delafield v. Illinois*, 26 Wend., 193, 223; *Bank v. Cartwright*, 22 Wend., 348; *Ives v. Davenport*, 3 Hill, 374, 377; *Parsons v. Webb*, 8 Maine, 38; *Cowan v. Adams*, 10 Maine, 374; *Corning v. Strong*, 1 Carter (Ind.,) 329; *Kirk v. Hiatt*, 2 Carter, 322; *Upton v. Suffolk Co. Mills*, 11 Cush., 586, 589.

There was no notice of the action of the committee to the district; no report was ever made to it. No knowledge possessed by any number of individuals could affect the district as such. The district could only ratify at a meeting held upon a warrant containing an article to see if they would ratify. *Chamberlain v. Dover*, 13 Maine, 466.

The district, never having received the money, could not return it; nor would they be held so to do, in any event, since the sale was void. *Peters v. Ballistier*, 3 Pick., 504; *Snow v. Perry*, 9 Pick., 542; Hilliard on Sales, (1st ed.) 55; *Munn v. Commonwealth Co.*, 15 Johns., 44, 54; *De Bouchout v. Goldsmidt*, 5 Vesey, jr., 211; *Van Amringe v. Peabody*, 1 Mason, C. C., 440. No usage to sell school-houses on credit can be reasonably pretended to exist. The defendants first introduced the town clerk and records, to show a division of the district, and that the No. 6

prosecuting this action, was not the No. 6 that owned the house, when the policy issued. Then we introduced the protest. At most, this was merely immaterial, and so the verdict should not be set aside on account of its admission. *Polleys v. Ocean Ins. Co.*, 14 Maine, 152; *Watson v. Lisbon Bridge*, Id., 204; *Page v. Homans*, Id., 478; *Merriam v. Mitchell*, 13 Maine, 439.

PETERS, J. The fact that the sale of the school-house in question was, in most part, upon credit instead of for cash, as the vote of the district imported it should have been, settles this controversy for the plaintiffs. This phase of the case does not appear to have been presented in any of the bills of exceptions or motions considered by the court before.

The authority was by recorded vote easily to be seen and understood by those concerned. It is needless to cite cases to establish the general principle that a specific authority or direction to sell, does not authorize a sale on credit; unless, at the place of sale, there is an usage of business, general or special, in reference to which an authority to sell upon credit is supposed to be given. It is suggested in argument that this doctrine may be inapplicable to persons, acting as agents for *quasi* corporations, like towns and school districts, and that they might be regarded from convenience and necessity, as clothed with executive and prudential power, superior to that of agents of ordinary business corporations or persons. We find nothing in the authorities, and see no reason upon principle, in support of such a modification of the general rule. If there is any distinction, it would seem that the acts of public agents, acting in pursuance of a special authority are to be construed perhaps more strictly than the acts of agents of private persons, upon the ground that public agents are less within the immediate supervision and control of their principals. *State of Illinois v. Delafield*, 8 Paige, 527; S. C. 26 Wend., 192. *Cushing v. Longfellow*, 26 Maine, 306.

The jury by a special verdict, find that the sale was made upon one year's credit, except ten per cent cash; that the proceeds of

the sale never came into the possession of the district, nor were used by them; and that the district never ratified the sale. These findings are supported by the evidence.

The district would not be bound by the sale made without authority, unless in some way by them ratified. The ratification must be by the principal, and not by the agent of his own acts. The retention of the money and notes by the committee, unless consented to by the district, would be no more evidence of an authorized contract, than their taking the same originally would be. The ratification must be proved. It is not in this respect like a contract obtained by fraud which stands till rescinded; but a contract made by an agent without authority is no contract unless shown to be ratified, though such ratification may, under a variety of circumstances, be presumed. A presumption from the non-action of a corporation like a school district, would be less readily inferrible than in the case of individuals who can more readily act. A district can be bound only by some recorded vote, or some act, or an acquiescence upon their part as a corporation, equivalent thereto. The unofficial conduct of individuals in the district has no controlling effect. As bearing upon these general propositions see *Chamberlain v. Dover*, 13 Maine, 474; *Davis v. School District in Bradford*, 24 Maine, 349; *White v. Sanders*, 32 Maine, 188; *Fisher v. School District in Attleborough*, 4 Cush., 494; *Bliss v. Clark*, 16 Gray, 60.

In this case the sale was not warranted by any vote. All parties are presumed to have known it. The proceeds of the sale have remained in the hands of the committee from that day to this. The district have neither had nor used them, directly or indirectly. They were neither deposited with the officers of the district who dispense its funds and credit, nor with the town treasurer where the money of the district should be kept. The committee never informed their principals of their action in any official communication or form whatever. Beyond all this, there is plenary evidence to inspire the belief that the committee, with the full knowledge of the vendees, were executing the trust committed to

them, in some respects at least, unfaithfully. The rule that where a principal has full knowledge of the acts of his agents, he must dissent, and give notice of his dissent within a reasonable time, is stringent in its application only where the agent and those dealing with him are acting in good faith, and the principal receives a direct benefit therefrom. Here no benefit whatever but, on the other hand, an injury would have accrued from the action of the committee, if about four hundred dollars were to be received for a property, admitted in the report of the case to have been worth several times that sum. All the subsequent corporate action of the district, so far as any appears, shows that the sale was repudiated. An insurance on the building was renewed. Attempts were made to hold district meetings in the house. An effort was undertaken to have the building put back to the place from which the purchasers removed it. The persons claiming to own the building were prosecuted by a vote of the district as trespassers, (although the suit was subsequently withdrawn) a significant evidence of disaffirmance of the contract attempted to be made. Upon all this evidence the finding of the jury upon this point must be deemed to be a correct one; and the rulings and refusals to rule upon the questions involved in such finding were sufficiently favorable to the party excepting. All other questions, therefore, but the admission of an item of testimony objected to, become unnecessary to be considered.

It seems a paper got into the case, against the objection of the defendants, containing a protest of a majority of the voters against an attempted division of the district, which would have relevancy only upon a question whether the district number six who were insured, were identical with the plaintiffs who bring this suit. If such a question was broached, evidently it was not pursued. No reference to the question is made in the judge's charge as reported. So that this piece of evidence would be immaterial. But the defendants contend, that, for that reason, it had a tendency to confuse and prejudice the jury. While, if anywhere, it might have a breath of weight upon the question of fraud that was specially sub-

mitted to the jury, it is not perceived how it could in the slightest degree weigh with the jury upon the only issue which, in our view of the case, has become material. The verdict should not therefore be disturbed.

Motion and exceptions overruled.

APPLETON, C. J., CUTTING, DICKERSON, VIRGIN, JJ., concurred.
DANFORTH, J., having been of counsel, did not sit.

WASHINGTON ICE COMPANY *vs.* NATHANIEL WEBSTER.

Statute of Frauds. Replevin, R. S., c. 96, § 11. Damages. Remedy on replevin bond. Jury.

The written acceptance of a verbal offer, not containing its terms, is not binding upon the party so accepting within the Statute of Frauds.

If the verbal offer is subsequently reduced to writing in the form of a contract by the party making it, and the party to whom it is made refuses to sign it, the latter is not bound by it.

A seizure of goods by force, or under color of legal process, is not a receipt or acceptance of them within the Statute of Frauds.

Where a defendant in replevin is entitled, under R. S., c. 96, § 11, to a return, he is likewise entitled to damages and costs.

The damages are to be the compensation for the interruption of his possession, the loss of the use of the goods from the time of the replevin till their restoration, and their deterioration within the intervening time.

Actual damages must be proved to entitle a defendant in replevin to recover more than nominal damages.

When the property is goods or merchandise, capable of physical use or enjoyment, the damages assessed are interest upon their use to the time of the rendition of the verdict in the replevin suit, or compensation for the loss of their use and enjoyment when that exceeds interest.

The damages arising from the possible loss of customers, in not having the goods ready for sale, or in purchasing goods of the same description as those replevied, to fulfil existing contracts, are too remote, contingent and indefinite, to become an element of damages.

The expense of procuring men, teams and appliances for the removal of the goods replevied, which becomes useless by reason of their being so replevied, may be recovered as damages.

Where the damages are assessed for the defendant at *nisi prius*, and the goods replevied are not restored on demand upon the writ of return, the defendant in a suit upon the replevin bond, is entitled to the value of the goods at the date of the demand and interest thereon, in addition to the damages and costs in the replevin suit and interest.

If the damages for the unlawful taking are not assessed in the replevin suit, and the goods replevied are not restored, the defendant may recover, in an action upon the replevin bond, all damages sustained by such taking; which will ordinarily be the value of the goods when replevied and interest thereon.

Where the plaintiff becomes nonsuit, and at the time of a demand on the writ of return, the goods are of more value than when taken, and they are not restored, the defendant in his action upon the replevin bond may have the damages provided by R. S., c. 96, § 11, assessed upon the same principles as if the assessment had been made at the time of the nonsuit, and in addition the value of the goods at the time of demand, and interest.

The plaintiff is bound by his valuation of the goods replevied, but it does not bind the defendant.

By his bond, the plaintiff is bound to restore the goods in like good order and condition as when taken.

Where, upon the plaintiff's evidence, the court has ordered a nonsuit, the defendant has a right to have the damages to that time assessed by a jury.

On report.

Replevin of four thousand tons of ice stored in the defendant's ice-house at Boothbay, in this county, which the plaintiff company claimed had been sold by him to them, but that he refused to ship it in accordance with the terms of their contract. On the fifteenth day of June, 1870, the plaintiffs made Mr. Webster a verbal offer of $4.50 a ton for his ice, but refused to put it in writing to be "peddled round," though consenting to let him have a week to consider of it. Two days later Mr. Webster telegraphed that he would accept their offer. The president of the company then wrote to him, enclosing a memorandum of their contract for his signature, but owing to its being misdirected, this letter did not reach the defendant till the twenty-ninth day of June, 1870. In the meantime, failing to hear from the plaintiffs, he had sold, and contracted to deliver, his ice to other parties. The Washington Ice Company claimed that the property passed to them under their negotiations with Mr. Webster, and, upon his refusal to deliver it to them, replevied it on the twelfth day of August, 1870.

After the facts, which are stated more in detail in the opinion, had all been elicited, the case was taken from the jury and submitted to this court, under an agreement that if the action was maintainable, it was to stand for trial; otherwise, a nonsuit to be entered.

A. P. Gould, for the plaintiffs.

I. The written evidence of the contract is sufficient to take it out of the Statute of Frauds. It was not necessary that plaintiff's offer should be reduced to writing before it was accepted. If, in the course of the correspondence between the parties, written evidence is found, which shows the terms of the contract, it is immaterial in what order such evidence proceeds. The mischiefs which the statute was intended to prevent are avoided, if at any time, and in any form or order, there is such memorandum of the sale made as is required.

If a verbal offer is reduced to writing after it is accepted, it is sufficient. A memorandum in writing will be as effectual against perjury, although signed subsequently to the making of a verbal contract, as if it had been executed at the moment when the parties consummated their oral agreement. *Marsh v. Hyde*, 3 Gray, 331, 332.

It has been sometimes doubted whether it might not be reduced to writing after action brought, upon the ground that the statute only meant to secure written evidence of the contract. Browne on the Statute of Frauds, (3 ed.) § 352, *a*.

A note or memorandum in writing of an oral contract, is essentially different from a written contract. The latter supercedes and takes the place of the former, and is conclusive evidence of all the stipulations of the bargain; but the former may be made at any time after the parties have entered into an engagement by verbal agreement, and only the main features, or essential elements, of the contract are required to be reduced to writing. *Sievewright v. Archibald*, 17 Adol. & Ell., (N. S.) 107, 114; *Morton v. Dean*, 13 Metc., 385.

In the very nature of such transactions, the memorandum must

be *posterior*, in point of time to the contract of which it is the record; and it has accordingly often been held that documents and letters, though all written subsequent to the conclusion of the bargain, may be coupled together for the purpose of showing that a written memorandum of it was duly made. *Williams v. Bacon*, 2 Gray, 387; Browne on the Statute of Frauds, § 346 and notes; *Gale v. Nixon*, 6 Cowen, 445; *Ide v. Stanton*, 15 Vermont, 685; *Jackson v. Lowe*, 1 Bing., 9; *Sanderson v. Jackson*, 2 Bos. & Pul., 238; *Salmon Falls Manf. Co. v. Goddard*, 14 Howard, 447; *Jenness v. Mount Hope Iron Co.*, 53 Maine, 20.

It is not essential that the paper relied upon as containing a sufficient memorandum of the bargain, or of the offer of one party, which is accepted by the other, should have been made as a memorandum of it, but if the terms are contained in any document, or any number of documents relating to the same matter, though intended for another purpose when written, it is sufficient. And it does not invalidate the document as a memorandum of the bargain, if the same paper contain additional matter, or if written out as a formal contract intended for execution as such. *Lerned v. Wannemacher*, 9 Allen 412, 416.

Indeed, it is entirely immaterial what the form of the memorandum is, or for what purpose it is made, or whether it contains matter foreign to the necessities of a memorandum; if it is only signed by the party to be charged, and contains by statement or reference, the essential parts of the bargain, it is sufficient.

And it is immaterial whether the terms of the bargain are set forth in the offer, or in the acceptance of it; if together they show the terms, it is sufficient.

If the offer is in writing, and the acceptance verbal, and the acceptance is afterwards reduced to writing, it is sufficient to charge both parties. If the offer is verbal, and the acceptance in writing, and the offer is afterwards reduced to writing, the result is the same.

If a contract is wholly by correspondence, it is complete when a distinct proposition is made, which is accepted by a letter mailed

by the party receiving the offer, within a reasonable time, and before he receives information of a withdrawal of the offer. 1 Parsons on Con., 439, 440, and notes; Chitty on Con., 11, 12.

Putting the answer by letter in the mail, containing the acceptance, and thus placing it beyond the control of the party, is valid as a constructive notice of acceptance. 2 Kent's Com., 477; *Taylor v. Merchants Fire Ins. Co.*, 9 Howard, 390, 401, 402.

And this is true, even if a withdrawal of the offer is made before the acceptance reaches the party making it. *Wheat et al. v. Cross*, 3 Md., 99.

June 15, 1870, defendant had an interview with the plaintiffs in New York, wherein they stated to him the terms upon which they would purchase his ice.

This may be regarded as a verbal offer of purchase, or as a statement of terms which, if offered, they would accept. Defendant requested plaintiffs to put their terms in writing. They declined to do this at that time, but promised to put their offer in writing as soon as it should be accepted by defendant, which seems to have been satisfactory to him. Defendant requested that a time should be fixed, within which he might accept, and a week was agreed upon. Two days afterwards, plaintiffs received from defendant the following telegram: "You shall have my ice for your offer. Write me."

Even without the request to write him, it may be assumed that in accepting the offer, defendant acted upon the promise of plaintiffs that they would reduce their proposition to writing, as soon as it was accepted, for he must have understood that the offer and acceptance must both be in writing to be binding; and it is not to be supposed, that he did not intend to make a valid contract. But he makes a special request to plaintiffs to write him. What did this mean under the circumstances? The telegram, in terms, refers to the previous offer. The request to write him could only mean, that he desired plaintiffs to put the offer, as containing the terms of the contract, into writing and send it to him. Plaintiffs complied with this request.

The telegram was received June 17. On same day plaintiffs mailed a letter to defendant saying, "your telegram accepting our offer is received. I will send memorandum of the offer to-morrow." This letter must have been received by defendant on the evening of the 18th, and gave him notice that there would be legal evidence of the bargain the next day. June 18, plaintiffs reduced their offer to writing, putting it in the form of a contract, mailed it to the defendant, and although by mistake it was addressed to Gloucester, Me., we prove that it was re-mailed to defendant, and reached his place of residence, and was placed in his box in the post office, June 22. It was not our fault that he was not there to receive it in person, but left the matter in charge of a clerk, who received and opened it.

Plaintiffs thus went beyond legal necessity, to take the case out of the statute. It was only necessary that they should reduce the offer to writing. They not only did this, but put a copy of it into the hands of the defendant within five days after it was accepted, incontestably within a reasonable time, if that had been necessary. There is no pretence that the offer had been withdrawn before the memorandum, and if he had bargained the ice to another, it could have no effect upon the plaintiffs' right, as there had been no delivery to the third party.

The principal assertions of the defendant's letter of June 30 are proved to be untrue. The memorandum was received at Gloucester, June 22, instead of 29. Defendant did not wait a week, as his letter asserts, for it was admitted at the trial, that he left Gloucester on the morning of June 22, less than five days after he sent his acceptance of the verbal offer. And his departure from home was the cause of his not receiving the memorandum before the twenty-ninth, not its mis-address. On this question whether plaintiffs shall be nonsuited on their own evidence, the assertion of defendant in a letter, that he had sold the ice, without proof of the fact, or that delivery had been made to a third party, could have no legal effect upon the plaintiffs' rights, nor in any way invalidate the contract of sale to them. Where there are two equally bind-

ing contracts of sale, he who first gets possession holds the goods. Plaintiffs had no intimation that defendant had sold to another, until they received defendant's letter dated June 30, twelve days after both their offer and defendant's acceptance, were reduced to writing.

That the memorandum contained a true statement of plaintiffs' verbal proposition, we have the testimony of Leonard, sustaining it in all particulars.

Defendant introduced a letter from Leonard in which he says defendant named September as the time of delivery, and that plaintiffs did not, at the date of the letter, demand it earlier. But this letter was written fifteen days after the offer was made, and thirteen after it was reduced to writing, and in no way tends to impeach Leonard's testimony as to what the offer was, even if it can be considered at all, as the case is now presented. But it is the plaintiffs' evidence alone which can be considered in determining the propriety of a nonsuit. The stipulation of the report is, that if the action can be maintained "upon the evidence introduced by plaintiffs," it is to stand for trial. If called upon to explain the letter as an element of defence, our answer would have been, that by the usages of the ice business, September is regarded and treated as a summer month. We had a right to have the question submitted to the jury, whether the memorandum stated the verbal contract correctly.

The memorandum contained all the elements of a contract, which it is necessary to reduce to writing. The lot of ice is sufficiently designated without filling the blanks. It was, "all the ice of said Webster, consisting of about four thousand tons, being the same now housed on the shore of the State of Maine, referred to in an interview" between the parties. This is clearly a sufficient designation of the thing sold. The quantity, price, time of delivery, and manner of payment, are all stated. It was not necessary that the precise locality of the ice should be stated in the memorandum. No authority goes as far as this. Defendant's treatment of the memorandum shows that he regarded it as a true

statement of plaintiffs' offer. He retained it in his possession until the trial, without complaint that it was inaccurate in any particular. In his letter of June 30, he acknowledges the receipt of it, and does not deny its correctness but, assuming that it did truly state the offer, excuses himself from the performance of his agreement, upon the fictitious ground that he did not receive the memorandum in due season. This letter is an important link in the chain of written evidence to take the contract out of the statute. Chitty on Contracts, 59.

The jury would have been authorized to find from all the evidence introduced by plaintiffs, that their verbal offer accepted by defendant's telegram was stated in the memorandum with substantial accuracy; and that it was reduced to writing, and signed by plaintiffs, with notice to defendant, within a reasonable time. It is a much stronger case than *Williams v. Bacon*, *supra*, where the contract was sustained.

II. This was not an agreement to sell merely, but was a contract of sale, and the property, and the right of possession were transferred to plaintiffs.

It was not a sale for cash on delivery; but payment was to be made at a time subsequent, dependent upon the option of defendant in drawing his bill. Defendant had, therefore, no lien for the price; and although he was to make delivery, if he failed to do so, plaintiffs had a right to take possession.

As soon as the bargain is struck, the property of the goods is transferred to the vendee, and the price to the vendor; and where payment is not to be made till after delivery, if the vendor refuses to deliver, the vendee may seize the goods, or have an action against the vendor for them. If the goods should be destroyed by accident before vendee gets possession, the loss would be his, because by the contract the property was in him. 2 Black. Com. 448; Chit. on Con., 297, 298; 1 Parsons on Con., 440; *Wing v. Clark*, 24 Maine, 336; *Webber v. Davis*, 44 Maine, 147; Parsons' Mercantile Law, 42 and note.

Delivery was to be made on board vessels to be provided by

plaintiffs, at the dock near where the ice was stored, and the price was to be paid on sight drafts, but not until after plaintiffs had received the bills of lading.

Under such a contract, delivery to vendees on board their vessels must necessarily be made, and the vessels be on their voyage to New York, before payment could be demanded, as no bills of lading are signed until cargo is received.

Where by the terms of the contract the vendor precludes himself from the right to demand payment until after delivery, he has no lien for the price, no right of detention until it is paid, and no right of stoppage *in transitu*, unless the vendor becomes insolvent. Parsons' Mercantile Law, 44; *Parks v. Hall*, 2 Pick., 206; 2 Kent's Com., 64, 499.

Although it was the duty of defendant to remove the ice from the house to the vessel, plaintiffs might waive this and do it themselves; and if he failed to do it within the time stipulated, they might take the property, and charge defendant with the cost of delivery. It was simply labor to be performed by defendant, upon plaintiff's property, and defendant was not entitled to retain possession for the purpose of performing it.

The ice was to be weighed on delivery; but not by defendant. Weighing by a disinterested party, as in this case, was a sufficient compliance. Weighing and measuring are not always necessary to constitute a delivery and transfer of property, even when it is sold by weight or measure; but in cases where the property sold is in a state ready for delivery, and the payment of the price, is not a condition precedent to the transfer, a good delivery may be made without weighing. *Denny v. Williams*, 5 Allen, 1; *Riddle v. Varnum*, 20 Pick., 280.

Where by the terms of an agreement of sale, or by a fair implication therefrom, the article sold is to remain in the possession of the vendor for a specific time, or for a specific purpose, as part of the consideration, as for instance to perform certain labor upon it, and the sale is otherwise complete, the possession of the vendor will be considered the possession of the vendee, and the delivery

will be sufficient to pass the title, even as against subsequent purchasers. *Hotchkiss et al. v. Hunt*, 49 Maine, 213, 221; *Morse v. Sherman*, 106 Mass., 430.

Under the contract in this case it seems clear that the title passed. Whether plaintiffs seized the property before the time expired, which was allowed to the defendant in which to make delivery, would seem to be immaterial on this issue, as the seizure before that time would not affect the plaintiffs' right to hold the property, but would affect only their right to charge him the cost of transfer from house to vessel.

III. The suit was not premature. The ice was the plaintiffs' property. If we grant, for the sake of the argument, that defendant had the right of possession, a sale of it to a third party, and his preparation for delivery to that party, which is proved in this case, was a conversion, and authorized the immediate commencement of this suit.

Any act by a party who has the rightful possession of the property of another, which negatives the right of the owner, or is inconsistent therewith, is a conversion, authorizing an action of tort by the owner. 1 Hill. on Torts, 90, 91.

So also the misuse of a thing, or the use of it without the license of the owner, or wrongful sale. 2 Id., 102. *Fuller v. Tabor*, 39 Maine, 519.

Notwithstanding lawful possession, the owner may bring replevin without demand, if the possessor has exercised acts of ownership inconsistent with the plaintiffs' title; as by attempting to sell, &c. Hill. on Rem. for Torts, 67, § 52. *Prater v. Frazier*, 6 Eng., 249; *Emerson v. Fish, et al.*, 6 Maine, 200. *Whitney v. Lowell*, 33 Maine, 318, where it was held that "the sale, or offer to sell, by the defendant, was evidence of conversion."

If defendant had the right of possession until the full time for delivery had expired, by his sale, or attempt to sell, to a third party, he forfeited that right without any manual taking, or removal of the ice, and the plaintiffs thereby acquired the right of immediate intervention. *Webber v. Davis*, 44 Maine, 147, 152.

IV. Defendant can recover no damages unless he is entitled to judgment for a return. R. S., c. 96, § 11.

If the ice was the property of plaintiffs', but they were not entitled to the possession at the time the action was brought, they would be entitled to it at the present time—there being no lien for the price—and there can be no judgment for a return. *Ingraham v. Martin*, 15 Maine, 371, 373; *Tuck v. Moses*, 58 Maine, 461, 474; *Bath v. Miller*, 53 Maine, 308, 315; *Wheeler v. Train*, 4 Pick., 168; *Simpson v. McFarland*, 18 Pick., 427, 431; *Whitwell v. Wells*, 24 Pick., 31; *Martin v. Bailey*, 1 Allen, 381.

If there was no lien for the price, defendant would not be entitled to judgment for a return, but plaintiffs would be entitled to retain the goods, and defendant would have his action for the price, just as if he had delivered the goods under the contract.

If the general property of the ice was in plaintiffs, and the defendant had a lien for the price, he would be entitled to judgment for a return, but be entitled to no damages for detention, for he could recover only the price, with the interest thereon, as that was the only claim he had on the property. *Witham v. Witham*, 57 Maine, 447, 449; *Bartlett v. Kidder*, 14 Gray, 449.

Under our statute and practice, the question of damages for taking cannot be reached until the motion for a return is disposed of, as defendant is entitled to damages only upon condition that, "it appears that the defendant is entitled to a return of the goods." Whether the action can be maintained, must first be settled by a decision of the questions of law and fact, respecting the maintenance of the action; and the question of damages for taking is not decided in the same trial; but after judgment for the defendant upon nonsuit or otherwise, is rendered, it is his duty to file a motion for judgment for a return of the property replevied, and without such motion, no such judgment can be entered. *Smallwood v. Norton*, 20 Maine, 83, 88; *Badlam v. Tucker*, 1 Pick., 284, 286.

In *Bath v. Miller*, *supra*, on p. 316, the court say, "In actions of replevin, when it is determined that the action cannot be main-

tained, it is always essential to inquire and determine, and to have a distinct adjudication, whether or not the property shall be returned to the defendant; and this latter inquiry necessarily involves an inquiry into the title and the right of possession, as between the contending parties, of the broadest and most unlimited character." It is a very different question from that, whether the action can be maintained, and must be decided by the court, though perhaps an issue of fact to the jury could be framed to aid the court in reaching its decision. There would be an incongruity in the trial of this issue at the same time of the trial of the question of the maintenance of the action. The objection of the defendant, therefore, to the final disposition of the main question, before the hearing upon the question of damages, was without foundation. He lost no rights by being compelled to wait until the right to maintain the action was determined, and could not regularly have had the question of damages for taking decided by the same jury, and on the same trial, which disposed of the main question.

V. The rule of damages is the same in replevin as in other actions of tort, 2 Parsons on Con., 478. The general rule in tort is the value of the property at the time of conversion, with interest from that date. 2 Greenl. on Ev., § 276, notes and authorities.

Though it has been held in England that the jury may, under some circumstances, in their discretion, find the value at a subsequent time, the courts in most of the States in this country, hold to the former rule as the safer. *Greenfield Bank v. Leavitt*, 17 Pick., 1; *Brown v. Haynes*, 52 Maine, 578, 581; *Robinson v. Barrows*, 48 Maine, 186, 190; *Hayden v. Bartlett*, 35 Maine, 203; 2 Parsons on Con., 472; Hill. on Rem. for Torts, 419, 435.

More latitude is allowed to the jury in New York. *West v. Wentworth*, 3 Cow., 82; *Clark v. Finney*, 7 Cow., 681; *Suydam v. Jenkins*, 3 Sandf., 614.

But in Maine and Massachusetts, the rule which makes the value at the time the right of action accrues, with interest thereon, the measure of damages for taking or withholding property, has been uniformly held.

The rule contended for by defendant would be too uncertain, remote, and contingent.

In this State, if the property has perished, or been destroyed, pending the replevin suit, so that it cannot be returned, there is no necessity for the assessment of damages for taking or detention in that suit, as the whole damage may be recovered in the suit upon the replevin bond. *Smith v. Dillingham*, 33 Maine, 384; *Thomas v. Spofford*, 46 Maine, 408, 411.

It was conceded at the trial, that the ice could not be returned, hence the ruling of the judge, that the damages might be recovered in a suit on the bond.

If at the time of the rendition of judgment in the replevin suit the property is in existence, the proper method, after the entry of the judgment for return, is to cause the damages for taking to be assessed. In such case the rule of damages is the interest upon the value of the property at the time it was taken in replevin to the final judgment.

If the property is of less value at the time it was taken in replevin than at the time of demand upon the writ of return, defendant may have damages in a suit upon the bond, based upon the value of the property at the time of demand. *Tuck v. Moses*, 58 Maine, 462.

He has his election, betwen the value at the time of taking, and the time of demand on the writ of return.

It is only in cases where the property is capable of use, that damages may be recovered for the loss of the use of the property pending the suit; as in case of the replevin of horses, oxen, milch cows, and perhaps a machine. *Stevens v. Tuite*, 104 Mass., 328.

There is no point of time between the taking, and the judgment for a return, at which the market price can be inquired into. The court cannot follow the fluctuations of the market. It would be too contingent and speculative. The general rule in tort, as has been shown, is, that inquiry cannot be made into increase in market value, subsequent to the conversion; and the only reason why

it is allowed in an action on a replevin bond, is that when the plaintiff in replevin fails to return the goods upon demand on the writ of return, he is at that time guilty of a breach of his bond; and as the defendant is entitled to have his property, or its value, at that time, if he chooses, its value may be inquired into.

In the case at bar, the ice being simply an article of commerce, the only damages which can be assessed upon the entry of judgment for a return, is the value of the ice at the time of the taking, with interest to the date of the judgment. *Kennedy v. Whitwell et al.*, 4 Pick., 466; *Whitwell v. Wells*, 24 Pick., 34; *Berry v. Hoeffner*, 56 Maine, 170; *Pierce v. Benjamin*, 14 Pick., 356, 361; *Johnson v. Sumner*, 1 Metc., 172, 179.

B. F. Butler, *C. P. Thompson* and *H. Ingalls*, for the defendant.

Burden is on the plaintiffs to show title. *Cooper v. Bakeman*, 32 Maine, 192.

They fail to do it, in this case, because there is no sufficient memorandum to take it out of the Statute of Frauds. *Jenness v. Mt. Hope Co.*, 53 Maine, 20; *Waterman v. Meigs*, 4 Cush., 497; *Morton v. Dean*, 13 Metc., 385.

The defendant is not bound by the plaintiffs' statement of what their own verbal offer was. *Smith v. Gowdy*, 8 Allen 566; *Boardman v. Spooner*, 13 Allen, 353; *Lyman v. Robinson*, 14 Allen, 242; *Hazard v. Day*, Id., 487.

The damages should be the highest price ice has reached since this was taken, with interest, and compensation for the special damages shown in addition. *Tuck v. Moses*, 58 Maine, 462; *Barnes v. Bartlett*, 15 Pick., 71; *Swift v. Barnes*, 16 Pick., 194; *Parker v. Simonds*, 8 Metc., 205; *Kafer v. Harlow*, 5 Allen, 348; *Stevens v. Tuite*, 104 Mass., 328.

The valuation named in the writ cannot affect the defendant, though it does estop the plaintiff to claim it should be any less. *Howe v. Handley*, 28 Maine, 241; *Thomas v. Spofford*, 46 Maine, 408.

APPLETON, C. J. The plaintiffs replevied some four thousand tons of ice in store at Boothbay, in this State, from the defendant, who is admitted once to have been the owner.

By R. S., c. 111, § 4, no contract for the sale of any goods, wares or merchandise, for thirty dollars or more shall be valid, unless the purchaser accepts and receives part of the goods * * or some note or memorandum thereof is made and signed by the party to be charged thereby, or by his agent.

The first question presented for consideration, is whether the plaintiffs have acquired any title to the ice in controversy by virtue of any note or memorandum of sale "signed by the party to be charged thereby, or by his agent;" for if not, this suit cannot be maintained unless a receipt or acceptance of the whole or a part is shown.

The defendant, then owning some four thousand tons of ice, on the fifteenth day of July, 1870, called upon Moses G. Leonard, the president of the plaintiff company, at their office in the city of New York, and proposed to sell the company the same. Leonard, in behalf of the plaintiffs, offered the defendant $4.50 per ton for the ice he described, to be delivered on board vessels to be provided by his company during the ensuing summer; the ice to be properly stowed with sufficient dunnage on board vessels, at defendant's expense; and to be weighed on delivery into vessels; the plaintiffs to pay for it on receipt of sight drafts, accompanied by bills of lading. The defendant wanted time in which to accept or reject this proposition, and a week was given. He then desired it to be put in writing, which was declined. The parties then separated.

June 17, 1870, the defendant sent the following telegram, which was received on the same day at New York by the president of the plaintiff company.

"GLOUCESTER, MASS., June 17, 1870.

To M. G. Leonard, President of Washington Ice Company, New York City, No. 393 and 395 Canal St.

You shall have my ice for your offer. Write me.

NATH'L WEBSTER."

The dispatch refers only to a verbal offer. It does not describe the price or the quantity of the goods to be sold, nor contain any of the elements of a sale. It leaves the whole contract, whatever it was, to be established by parol evidence. It is clearly within the Statute of Frauds. *Waterman v. Meigs*, 4 Cush., 497; *Jenness v. Mount Hope Iron Company*, 53 Maine, 20.

On the same day, June 17, 1870, Leonard answered the defendant's telegram, substantially as follows:

"Your telegram accepting our offer is received. I will send a memorandum of the offer to-morrow."

On the next day he sent the following letter:

"GENERAL OFFICE OF WASHINGTON ICE COMPANY,
393 and 395 Canal Street.
NEW YORK, June 18, 1870.

DEAR SIR: I inclose to-day the form of contract for ice purchased, &c. You will examine, and if found correct, you will sign, and inclose one copy by mail to us; filling the blank, which, as you will perceive, is descriptive and not essential to the main question.

Very truly yours,
M. G. LEONARD, President."

NATHANIEL WEBSTER, Esq.

The form of the contract forwarded in the preceding letter was as follows:

"MEMORANDUM OF SALE.

Nathaniel Webster, of Gloucester, *Maine*, has sold to the Washington Ice Company, of the city of New York, all the good and merchantable shipping ice of the said Webster, consisting of about four thousand tons, more or less, being the same now housed in good and proper order, and condition on the shore of
at in the State of Maine, referred to in an interview heretofore had by the said Webster with the president of said Company to be delivered by said Webster and properly stowed with sufficient dunnage at his expense on board vessels to be provided by the said company at the dock nearest to where said ice is stored, during the present summer, at the following prices to be paid by

said company by sight drafts, on receipt by them of bill of lading of each cargo, viz: Four dollars and fifty cents for each and every ton thereof weighed on delivery into the vessel, which prices the said company agree to pay at the time and in the manner specified.

Dated, June, 1870.

M. G. LEONARD, President."

(Internal Revenue Stamp, 5 cents.)

This contract was never signed by the defendant.

The letter enclosing this contract was addressed to Nathaniel Webster, Esq., Gloucester, *Maine*, and went to New Gloucester, Maine, arriving there on the 19th or 20th of June. On the twenty-second day of June it was forwarded to the defendant at Gloucester, Massachusetts.

The plaintiffs next sent the following telegram:

"NEW YORK, June 27, 1870.

To NATHANIEL WEBSTER, Gloucester, Mass.,

When may we expect a cargo? Have you received our contract?

M. G. LEONARD."

To this the defendant being absent, his clerk sent in reply the following despatch:

"GLOUCESTER, MASS., June 27, 1870.

To M. G. Leonard, President of Washington Ice Company, 393 and 395 Canal Street, New York.

Have received contract. Mr. Webster is away. Expect him home to-morrow.

CLERK."

On the thirtieth day of June, the defendant sent the following letter to the plaintiff:

"GLOUCESTER, MASS., June 30, 1870.

M. G. LEONARD, ESQ.,

DEAR SIR: Your letter and contract was received by me yesterday, June 29. Not hearing from you, I supposed you had purchased the ice you spoke of in our interview of the eastern man, and consequently after waiting one week, I disposed of my ice to other parties. Your letter instead of being directed to

Gloucester, *Mass.*, was directed to Gloucester, *Maine*, which may account for my not receiving it before.

Yours very respectfully,

NATH'L WEBSTER, per C. H. C."

On the same day the plaintiffs sent the following letter to the defendant:

"GENERAL OFFICE OF WASHINGTON ICE COMPANY,
393 and 395 Canal Street,
NEW YORK, June 30, 1870.

DEAR SIR: If it will not be inconvenient to you to forward your ice during the month of July, we should prefer it at that time, as our greatest sales occur in this month, and as most of our ice comes to us from a distance, we are not always sure of having a full supply on hand. I am aware that you named September as the time of delivery, and we do not demand it at an earlier day, unless it may be just as convenient to you to do. Please let me hear from you in reply. Truly yours,

M. G. LEONARD."

To NATHANIEL WEBSTER, Gloucester, Mass.

The contract of sale to be binding by the Statute of Frauds, must be in writing. Thus far, in the process of the negotiation between the parties, there has been no note or memorandum setting forth the terms of any contract which has been signed "by the party to be charged thereby." The telegram of June 17, referring only to a verbal offer, was not binding any more than a verbal acceptance of a written offer upon the party so verbally accepting. *Smith v. Gowdy*, 8 Allen, 566.

June 18, 1870, the plaintiffs sent the form of a contract which "if found correct," they desired the defendant to sign. The contract, with its blanks to be filled, left it utterly uncertain to what ice it referred, or where the same was situated. This contract the defendant did not sign, for the reason alleged in his letter, that previous to receiving it, the ice had been sold. As this letter is introduced by the plaintiffs, assuming it true, there could not be a contract passing the title to them, even if it had been signed, for

the ice had then been sold and they would have purchased with a knowledge of such sale. But howsoever that might be, the plaintiffs' letter requires the blanks to be filled, and the contract to be signed, having previously thereto declined to reduce their offer to writing. It was the first time the plaintiffs had done anything by which their company might be bound. Until that time they legally were at liberty to take or refuse taking the defendant's ice. The defendant, too, was in similar condition as to selling. Not being previously bound, it was for the defendant to determine whether he would then become bound by signing the proposed memorandum of sale, or not, and he determined not so to sign. He cannot be bound by a written contract to which he never became a party.

The memorandum forwarded for signature provided for the delivery of the ice "during the present summer." By the letter of the president of the plaintiff company of June 30, the ice was to have been delivered in September. The memorandum, therefore, was variant from the verbal conversation. The defendant, therefore, might rightfully decline signing a written contract, different from the verbal conversation between the parties. *Richards v. Porter*, 6 B. & C., 437; *Hazard v. Day*, 14 Allen, 487; *Lyman v. Robinson*, 14 Allen, 242.

The case of *Carter et al. v. Bingham*, 32 Up. Can. R., 615, is in point. It was an action for non-delivery of fifteen bales of hops alleged to have been sold by defendant to plaintiffs, the evidence showing that in conversation with one of the plaintiffs about the purchase of hops, defendant said he would sell at twenty cents per pound, and would keep the offer open for a few days. Subsequently, on the 17th of August, plaintiffs telegraphed defendant, "will take 15 to 20 bales good new hops at 20 cents, cash." On the 21st, defendant replied by telegram, "Your offer accepted. Have booked your order for fifteen bales new hops, for delivery when picked." On the 16th of September, defendant telegraphed: "Hops picked, ready for delivery. Answer back." On the 21st of September, plaintiffs telegraphed: "Our man will be there

ready to receive hops early next week;" and on the 26th of September, "Ship the 15 bales hops to us at Galt to-day, and draw at three days sight;" and on the 27th, "If hops not shipped, will send team and money for them to-morrow; answer quick." On the same day defendant answers: "Cannot have hops." A tender of the price was subsequently made and refused.

Held, I. That there was no binding contract at any time between the parties, for the defendant's answer of the 21st of August, was not a simple acceptance of the plaintiffs' offer of the 17th, but qualified it both as to quality (by leaving out the word good,) and as to time of delivery; and assuming defendants' telegram of the 16th of September to be a renewal of such acceptance, the plaintiffs' subsequent telegram did not show an assent to it. In delivering the opinion of the court, Morrison, J., says: "The rule of law I take to be, that an acceptance of a proposition must be a simple and direct affirmation, in order to constitute a contract, and if the party to whom the offer or proposition is made, accepts it adding any condition, with any change of its terms or provisions, which is not altogether immaterial, it is no contract until the party making the offer, consents to the modifications; that there can be no contract which the law will enforce until the parties have agreed upon the same thing in the same sense." The agreement must be entire—as to the thing sold, its price, the time of delivery, and the terms of payment. In the present case, no such agreement is shown. To the same effect are the cases of *Sievewright v. Archibald*, 17 Q. B., 103; *Gether v. Capper*, 14 Q. B., 39; *Hamilton v. Terry*, 11 C. B., 954.

There are one or two more telegrams introduced, but it is not perceived that they affect in any way the rights of the parties. The result is that the plaintiffs have failed to make out a sale "by any note or memorandum, signed by the party to be charged thereby."

It is urged that the plaintiffs have accepted and received the ice. To constitute an acceptance there must, first, be a delivery by the seller with intent to give possession of the goods to the

purchaser. Here, no act on the part of the defendant is shown, indicating such intention in the slightest degree. The letters and telegrams of the plaintiffs show a claim to the ice, and a desire for its delivery, but to such claim or desire the defendant never acceded.

The taking possession of the ice without, or against, his consent, is not a receipt or acceptance binding him. The forcible seizure of property sold, when the sale is void by the Statute of Frauds, cannot be deemed an acceptance or receipt within its provisions. If it were so, it would be to affirm judicially the rule that might makes right. Nor does the seizure of the ice by this writ of replevin, and a delivery of the same by an officer to the plaintiffs, constitute a statutory receipt, and an acceptance by the purchaser.

The defendant not having signed the memorandum of sale, transmitted for his signature, is not bound thereby. A seizure of the ice by force, or under color of legal process, without payment therefor, is not a receipt or acceptance thereof, within the Statute of Frauds. The plaintiff failing to show a legal title, the nonsuit must stand and a return be ordered. *Hoeffner v. Stratton*, 57 Maine, 360.

After a careful examination of the cases cited in the elaborate argument of the counsel for the plaintiffs, we think they fail to sustain the plaintiffs' right to maintain this suit, or to show a title in him to the property replevied.

By R. S., c. 96, § 11, "if it appears that the defendant is entitled to a return of the goods he shall have judgment and a writ of return accordingly, with damages for the taking and costs."

When the defendant makes a good title to the goods replevied, he is entitled to damages for the interruption of his possession, the loss of the use of the goods from the time of their replevin till their restoration, and for their deterioration. *Whitwell v. Wells*, 24 Pick., 34. Actual damages must be proved to entitle the defendant to recover more than nominal damages. "The cases in which six per cent. upon the value of the goods replevied has been allowed as damages, in analogy to the rule in other cases of unlawful

detention of property," observes Hoar, J., in *Bartlett v. Bricket*, 14 Allen, 62, "will be found to be cases where the defendant was entitled to a return, and where the chattels replevied were merchandise or other property capable of physical use or enjoyment." The damages, exclusive of the return of the goods or their equivalent in money, as secured by the bond, consists of interest upon the money value of the goods replevied up to the time of the verdict, and any special damages shown to result directly from their taking, in addition to such interest. *Stevens v. Tuite*, 104 Mass., 328. The damages for detention may exceed the interest upon the value of the property replevied; as in case of the replevin of a horse, or oxen, the defendant would be entitled to the value of their use, or for what their services in use would be worth. As in *Dorsey v. Gassaway*, 2 Har. & Johns., 402, where negroes were replevied without right, the defendant was held entitled to a sum equivalent to the value of their labor. The damages are to be assessed to the time of the verdict for the defendant, upon the principles adopted in trover, save that the value of the property is not to be included therein.

The measure of damages in trover is the value of the property at the time the right of action accrues with interest thereon. *Robinson v. Barrows*, 48 Maine, 188; *Pierce v. Benjamin*, 14 Pick., 356; *Kennedy v. Whitwell*, 4 Pick., 466. Such is the general rule as recognized in this State and in Massachusetts.

The expenses of procuring teams and appurtenances actually incurred for the purpose of removing ice, which were rendered useless by the wrongful suing out of the writ of replevin, may enter into and become a portion of the damages.

The damages arising from the possible loss of customers are too indefinite, remote and contingent to become an element of damages. *Brannen v. Johnson*, 19 Maine, 361.

If the defendant was liable on outstanding contracts which he was obliged to fulfill, it would be easy for him to replace the ice taken, by ice to be purchased, for which he would be obliged to pay only the fair value, which will be precisely what he will receive.

The damages being assessed to the time of the verdict, if the goods replevied are not forthcoming on demand on the writ of return, the defendant in a suit by him on the replevin bond will be entitled to recover as damages, the value of the goods replevied at the date of the demand on the writ of return with interest thereon, the damages and costs assessed in the replevin suit, and interest. *Swift v. Barnes*, 16 Pick., 194.

The assessment at the trial becomes important principally when the goods are *in esse* and may be returned on demand upon the writ of return; as, if they are not then assessed and the goods are returned and costs paid, the defendant has no further remedy on his bond. *Pettygrove v. Hoyt*, 11 Maine, 66.

In this State it has been repeatedly held when there is no return that the damages for the unlawful taking, which may not have been assessed in the replevin suit, may be recovered in a suit upon the bond. In *Dillingham v. Smith*, 32 Maine, 182, where upon report a nonsuit had been entered without an assessment of damages, Shepley, C. J., remarked that he considered damages recoverable in a suit upon the replevin bond. Subsequently the question came before the court in that case, in 33 Maine, 385, damages were allowed in a suit upon the bond from the time of taking at the rate of six per cent., no other or higher damages being claimed. In *Thomas v. Spofford*, 46 Maine, 408, the ruling of the court in *Smith v. Dillingham*, was affirmed and again re-affirmed in *Tuck v. Moses*, 58 Maine, 461. It seems, therefore, fully settled that in a replevin suit, when damages are not assessed at *nisi prius*, or where a nonsuit is entered, that the defendant, when the property replevied is not returned, may recover all damages sustained, in a suit upon the replevin bond.

The plaintiff in replevin is bound by his own valuation of the property replevied; not so the defendant, who may show the valuation too low, and in a suit upon the bond recover the actual value of the goods or other property taken wrongfully from his possession. *Thomas v. Spofford*, 46 Maine, 408.

So, he is bound by his replevin bond to restore the goods in like

good order and condition as when taken. He is responsible, if judgment is against him, for the damages or deteriorated condition of the goods when restored. *Berry v. Hoeffner*, 56 Maine, 171.

When goods not held under legal process are replevied, and after entry of the action the plaintiff becomes nonsuit and a return is ordered, but the goods replevied are not forthcoming on demand, the defendant in a suit on the bond is entitled to recover as damages, the value of the goods when taken, and interest thereon from the service of the writ to the time of the rendition of judgment. *Wood v. Braynard*, 9 Pick., 322; *Thomas v. Spofford*, 46 Maine, 408. So, where upon the evidence a nonsuit has been ordered, without any assessment of damages, and the goods replevied are not restored upon demand, or on the writ of return, the defendant may recover the damages sustained, which are to be assessed upon the same principle as they would have been if a verdict had been rendered when the nonsuit was ordered. *Dillingham v. Smith*, 30 Maine, 370; *Smith v. Dillingham*, 33 Maine, 384.

The defendant is entitled to a full indemnity for the taking and conversion of his property without right. When, at the time of the demand on the writ of return, the goods replevied are not returned, if they shall then be of an increased market value, the defendant is equitably entitled to such increase. The damages in such case may be assessed up to the time when judgment was rendered on nonsuit, as they would have then been by the verdict of a jury, if a nonsuit had not been ordered. Then the value of the goods replevied, or of goods of like description at the date of the demand on the writ of return with interest, with the damages at the time of nonsuit, and cost and interest will constitute the amount the defendant will be entitled to recover on his bond. *Tuck v. Moses*, 58 Maine, 461.

If the market value of the goods replevied shall be less at the time of the demand on the writ of return, than when the goods are taken the loss must fall on the plaintiff by whose wrongful act the defendant is deprived of his property. Besides, the plaintiff

having possession might have sold them, which the defendant could not do. *Gordon v. Jenney*, 16 Mass., 465.

The parties had a right to have damages assessed up to the time of trial at *nisi prius* by the jury. The defendant claimed that they should then be assessed. The plaintiff did not. The presiding justice denied to the defendant the right to have his damages assessed. In this he erred.

By the terms of the report if the action is not maintainable the nonsuit is to stand.

The nonsuit is to stand. Judgment for return of the goods replevied. Damages to the time of taking to be assessed at nisi prius, if the defendant so elect.

CUTTING, DICKERSON, DANFORTH, VIRGIN and PETERS, JJ., concurred.

INHABITANTS OF DRESDEN *vs.* COUNTY COMMISSIONERS.

Amendment. Certiorari.

The county commissioners have a right to amend their records in accordance with the facts at any regular meeting of the board.

In their report of the location of a town way the county commissioners accidentally omitted to state that the selectmen unreasonably refused to lay it out; upon the hearing of a petition for *certiorari* to quash the proceedings on account of this omission, the county commissioners offered to testify that they did determine the refusal to locate to be unreasonable, and to amend their report accordingly; *held*, that they should have been permitted to do so.

ON EXCEPTIONS.

PETITION for *certiorari* to quash the proceedings of the respondents in laying out a town way in Dresden, which the selectmen of that town had refused to locate. The petition to the county com-

missioners alleged this refusal to be unreasonable, but the commissioners did not say, in their report, that they determined it to be so; the attorney for those who asked to have the way established, however, at the hearing at *nisi prius*, offered the commissioners as witnesses to prove that they did so determine in fact, and would amend their record accordingly, if the law would permit. The presiding justice excluded the testimony, to which exceptions were taken.

Wales Hubbard, in support of the exceptions.

The ruling in *State v. Pownal*, 10 Maine, 24, was upon the final writ; upon the petition for it, evidence *aliunde* is admissible, because it is matter of discretion whether to grant or withhold it. *West Bath*, pet'r, 36 Maine, 74; *Smith*, pet'r, 42 Maine, 395.

Gould & Moore, contra.

This court could not order the amendment of the record of another tribunal. *Hobbs v. Staples*, 19 Maine, 219. Therefore it would have been useless to hear the testimony offered. If admitted, it could not change the record, which spoke for itself. If the commissioners have the power to amend their records, they do not derive it from this court, but can do so without leave, and their oral statement is not to be substituted for the record. The ruling was discretionary and not subject to exception.

The commissioners never had jurisdiction of this matter because the petition to them does not appear upon its face to have been presented by the persons, or within the time, mentioned in the statute.

Every fact essential to give jurisdiction must be distinctly alleged. *State v. Pownal*, 8 Maine, 271, and 10 Maine, 24; *Goodwin v. Hallowell*, 12 Maine, 271; *Small v. Pennell*, 31 Maine, 267.

APPLETON, C. J. This is a petition for a writ of *certiorari* to quash the proceedings of the county commissioners of Lincoln county in laying out a town way in Dresden.

The error alleged, and to which the exceptions relate, is in these

words. Because "it does not appear by the record of the proceedings and adjudication of the county commissioners that it was considered or adjudged by them that the municipal officers of the said town of Dresden had unreasonably neglected or refused to lay out said town way, or that said court of commissioners took any action or made any adjudication thereto."

The original petitioners in their petition set out that the road in question "would be of public convenience; that the selectmen of Dresden aforesaid have unreasonably refused to lay out said way."

At the hearing of these petitioners for *certiorari*, the attorney of the original petitioners for the road offered to prove by the county commissioners, that, on the hearing of the case, they determined that the selectmen of Dresden had unreasonably refused to lay out the road as prayed for and that the commissioners would, if by law allowable, amend their report accordingly."

The writ of *certiorari* had not issued. The question for adjudication was whether it should issue. The issuing is a matter of judicial discretion. It should never issue when injustice would ensue.

It does not follow that it should issue because there may have been errors in the proceedings. Now, the evidence being excluded, we must assume the facts offered to be proved, as proved. It being shown then, that in truth, the county commissioners had adjudicated that the selectmen of Dresden had unreasonably refused to lay out the way prayed for, and that through negligence or any other cause they omitted to make a full record of their doings and findings, why should the writ issue? To allow it to issue, this being shown, would be to defeat the ends of justice.

The county commissioners have the control of their own records. Any error of omission, they could, at a legal meeting of their body, correct. It would be their duty so to do. The case shows that they would so amend, if by law allowable. If the writ should issue, and the record should be offered with the amendment made, the proceedings would not be quashed because the error for which it is sought to quash would have ceased to exist.

After the writ has issued, and the record is before the court on *certiorari*, evidence extrinsic to the record is inadmissible. *Rutland v. County Commissioners of Worcester Co.*, 20 Pick., 71. Its errors cannot be corrected nor its omissions supplied. The action of the court is upon the record as certified. But it is otherwise, when the question to be determined is whether, in accordance with the prayer of the petition, the writ shall issue or not, because, observes Shaw, C. J., in 20 Pick., 71, "in this stage of the inquiry, the question is * * whether the party complaining has suffered any wrong or injustice from such a defect." Accordingly in *Inhabitants of West Bath*, pet'r, 36 Maine, 74, it was held that on the petition for a *certiorari* evidence *aliunde* the record was admissible to show a compliance with statutory requirements, which the record failed to show.

As the issuing of the writ is a matter of judicial discretion, the evidence offered and excluded was clearly admissible to show the actual state of facts. It would then become a question of law, whether if the facts were as they were assumed to be, in and by the offer of the excepting counsel, it would be a rightful exercise of judicial discretion to permit the writ to issue, and we think it would not.

There are various other questions of grave moment discussed by the learned counsel for these petitioners, but as they are not properly before us on these exceptions we must defer their consideration for the present. *Exceptions sustained.*

CUTTING, DICKERSON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

MARY A. ROBINSON, Appellant,

vs.

FRANCIS ADAMS and another, Executors.

Probate appeal—practice. Burden of proof. Will. Delusion, insanity, and undue influence. Spiritualism.

The burden of proving the due execution of an instrument offered for probate as a will, and the competency of the alleged testator to make it, is on the proponent throughout; he is, therefore, entitled to open and close the case to the jury.

These matters are to be proved by a preponderance of testimony.

As the statute requires a testator to be of sound mind, the usual presumption of sanity does not exist in these cases, but this condition of mind must be proved by the proponent.

In this case the main issues were, whether or not the testatrix was of sound mind when she made her will, and whether or not she was unduly influenced in making it, either by living persons or by what she believed to be communications from the spirit of her deceased husband, whom she declared had thus either dictated the will, or expressed his approval of its provisions. This belief, and an idea entertained by her that the husband of her only child was possessed of a familiar demon that enabled him to control his wife's affections and alienate them from her mother, and other similar opinions, together with some acts consonant therewith, were relied upon as evidence of the testatrix's insanity, or that she was governed by some extraneous influence superior to her own will. Upon the issue as to mental capacity the jury were instructed that when a mind not imbecile acts healthily it may be called sound; but if a testator acts under, and is influenced in making his will by a delusion which is the result of a disordered mind amounting to insanity, this will avoid the will; that there are different degrees of insanity; that entire lunacy would incapacitate a person from making a will, without proof of any delusion operating upon the testator's mind in making it; but that, where it is not contended that general insanity existed, but merely an insane delusion upon a special subject, then it is for the jury to determine, as matter of fact, whether or not such monomania predominated in the testator's mind at the time the will was made, so as to influence him in making it, and to affect its provisions; if it did, then the instrument would be void; that, to have this effect, it must be an *insane* delusion, and not a mere mistake of fact, or being misled by false testimony; that a false assumption does not invalidate unless it amounts to an insane delusion, which was defined by reading this extract from Bouvier's Law Dictionary. "A delusion is a diseased state

of the mind, in which persons believe things to exist which exist only, or to the degree they are conceived of only, in their own imaginations, with the persuasion so fixed and firm that neither evidence nor argument can convince them to the contrary," and adding that insane delusions as a fact may exist where the supposed fact is the coinage of the brain without evidence, a figment of the imagination. The judge then read a definition furnished by the appellant's counsel, as follows: "In a legal point of view, insanity is where a person believes something to exist which not only does not exist, but of which he has no evidence sufficient to satisfy any healthy mind, and he acts upon it, reasons upon it, and holds it as a reality," and added, "that may be an insane delusion; that is to say, where it is palpable that he believes it without any reason sufficient to satisfy any healthy mind, and he acts upon it when it cannot possibly be true, that is an insane delusion." The jury were told to apply this test to the evidence in the case, and say whether or not, as matter of fact, the testatrix was laboring under an insane delusion when she made this will, the judge holding that it was not competent for him to determine this question as matter of law: *held*, that the instructions, rulings and submission were correct, and that it was properly left to the jury to say whether or not the testatrix's belief in spiritual communications and phenomena amounted to an insane delusion, and influenced the terms of her will.

The court declines to determine, as matter of law, that such a belief, if proved to exist is, *ipso facto*, evidence of insanity, or of an insane delusion.

The appellant requested to have the jury instructed:

I. That if the testatrix believed that the spirit of her deceased husband directed or dictated the will and codicil, and acted under that belief, they are void;

II. That if she entertained a groundless and causeless suspicion of her son-in-law's character, and that he was exposed to the control of evil spirits, and made the will and codicil under that influence, they are void;

III. That if she disliked her son-in-law, and believed he had a supernatural power over his wife, through the aid of evil spirits, and was influenced to make her will and codicil by this belief, then they are both void;

IV. That the will must be wholly the offspring of her own mind, uninfluenced by any delusion.

Thinking the first requested instruction applicable to the issue of undue influence, the judge gave it; the second, third and fourth, he gave with the qualification in each; that if such matters amounted to an insane delusion, as before explained, and influenced her in making the will, it would be void; *held*, that there was no error in giving these instructions thus qualified.

Upon the issue of undue influence the jury were told that if such a dominion, or influence, was obtained by others over the testatrix as to prevent the exercise of her own will, wishes and intention, and make it the act of others and not her own, the will would be void; that a testator might receive advice, opinions and arguments from others, yet if, after all such advice, requests or persuasions, the testator is not controlled by them to the extent

of surrendering his free agency, and yielding his own judgment or will, and so not making his own will, but adopting as his the will of another, then there is no such undue influence as is required to avoid a will; and that the same principle applied whether the advice, opinions, or influences came from living persons, or were supposed to be communicated from the spirit of a deceased person. To this last clause, making no distinction as to the source of the influence, the appellant excepted; *held*, that this exception could not be sustained.

Upon an issue as to the sanity or insanity of a testator, a subscribing witness to the will, who is not an expert, may give his opinion as to the testator's mental condition when the will was executed, without first stating the facts and premises from which he arrived at his conclusion; though either party can, if they please, examine such witness as to what transpired at the time he witnessed the instrument.

It is no sufficient ground of exception that witnesses are permitted to state negatively in the course of their testimony, that they did not observe any thing peculiar about the mental condition of the testator at a time other than that at which the will was executed.

At the trial of this cause the appellant was rightly refused permission to adduce secondary evidence of the contents of papers not shown to be lost, and which she had not seasonably notified the executors to produce, if in their custody.

The issue framed being as to the testatrix's general soundness of mind, the court properly refused to confine the appellees to the introduction of testimony (relating to this branch of the case) as to the acts, declarations, conversations and statements of the testatrix, upon the single subject of spiritualism only; especially after the appellant had put in evidence as to her conduct, speech and opinions upon other topics, as indicating insanity or delusion.

Greater latitude in the admission of testimony must be given where the issue is as to a mental condition than would be permitted in relation to a single fact. Declarations, acts, and statements of a testator, extending over a term of years, may properly be admitted to establish the *status* of his mind when he made his will; but the jury should be cautioned (as they were in this case) that these are not to be taken as evidence of the truth of the matters stated, but only as to the mental condition of the decedent.

The fact that one such declaration, admitted for the purpose above indicated, has a jurat attached to it does not change its character, nor require that it be excluded for that reason.

ON EXCEPTIONS AND MOTION FOR A NEW TRIAL on the ground that the verdict and special findings of the jury were against law and evidence.

This was an appeal from the decree of the probate court of this

county at its November Term, 1867, approving, allowing and admitting to probate certain instruments purporting to be the last will and testament of the late Mary W. Green, and a codicil thereto. Mrs. Green's residence at the time of her death was in Topsham, where she had formerly lived with her late husband, Gardner Green, who died in 1840. His widow, the testatrix, survived him about twenty-seven years, dying August 25, 1857, aged sixty-eight. Their only child, who survived the mother, was the appellant in this case, who married George O. Robinson in 1854, and immediately afterwards accompanied her husband to Bloomington, Illinois, where they have ever since resided. Mrs. Green made no objection to her daughter marrying Mr. Robinson, but favored it, and went with them when they first moved to Illinois, where they arrived October 21, 1854, remaining there twenty months, (nearly) when she returned to Maine. The appellant testified that she did not then receive from her mother all the money promised ($3000,) as a marriage portion, though Mr. Robinson was then poor, just starting in practice as a lawyer, and they needed it; but she claimed that this was not the cause of her mother's leaving them, but that she was made uneasy and discontented by letters from Maine. The appellant was asked by her counsel from whom these letters came, and offered to show that they were from Mrs. Green's brother, Alfred J. Stone, and sister, Mrs. Eliza Dennett, but this was objected to and excluded. In June, 1856, Mrs. Green came back to Maine, but before leaving Bloomington, she gave her daughter two thousand dollars, and upon her second (and only other) visit to Bloomington, in 1864, gave her the other thousand dollars required to make up the promised dowry, with interest at the Illinois rate of ten per cent. per annum for the ten years that her daughter had then been married. Mr. Robinson testified that he discovered that Mrs. Green was discontented in the December or January after they first reached Bloomington, "when the first payment was to be made under an arrangement by which we were to purchase a house lot, and a portion of the money that she had promised her daughter was to go in, and I was

to furnish part, and she refused to do it;" that it was originally agreed that the lot and house to be built upon it, were to be in his wife's name, but that on the tenth of May, 1856, he took a deed to himself. Though Mrs. Robinson disclaimed any ill-feeling, originating in this subject, between herself and her mother, it was evident that Mrs. Green was not satisfied, and took additional offence at some other pecuniary transactions between herself and Mr. Robinson. During the eight years and more, from 1856 to 1864, that intervened between the two visits of Mrs. Green to Bloomington, Mrs. Robinson neither wrote to her mother, nor came to Maine to see her, though the latter wrote repeatedly both to Mr. and Mrs. Robinson largely upon the subject of spiritualism, in which Mrs. Green first became interested soon after coming home in the summer of 1856, many of her letters covering communications purporting to come from her deceased husband and children, and also sent the Banner of Light, which, as well as several of her letters, and a gold chain she sent her grandchild, was returned to Mrs. Green. In 1864 Mrs. Green again visited her daughter, arriving December 17, saying she proposed to spend the rest of her days there, but she in fact stayed till August 14, 1866, when she again returned to Maine, Mr. and Mrs. Robinson coming with her for a short visit.

Mrs. Green never saw her daughter after this summer of 1866; nor were harmonious relations and feelings ever restored. Complaint was made that Mrs. Green while in Bloomington, and by letters subsequently written to that place, had caused rumors to be there circulated prejudicial to Mr. Robinson, and very annoying to him and his wife, though imputing no criminal offence, but relating to his treatment of his wife and her mother, importuning the latter for her money, and desiring to get her property into his hands. An unsuccessful attempt was made by Mr. Robinson to obtain possession of these letters, and the nature of their contents was the occasion of some unpleasant letters from Mr. and Mrs. Robinson to her mother, and uncle, A. J. Stone, who was supposed to have the custody of them.

Mrs. Green, on each return to Maine from Illinois, spoke to her friends here of her disappointment, in discovering the character and temper of her son-in-law, not to be what she had supposed and wished it to be; and complained of his conduct and language toward his wife and herself, as brutal, profane and abusive, and as being such as to excite alarm for her own personal safety. After her first visit, to wit, on the twenty-fifth day of September, A. D., 1857, she made a detailed and circumstantial statement in writing of these grievances, which she subscribed and made oath to before her brother (A. J. Stone) in his capacity of justice of the peace. This statement was received in evidence to show the relations between the parties, against the appellant's objections, based partly on the fact of it having the jurat attached to it. Upon the eleventh day of August, 1867, Mrs. Green made a second, briefer statement, of similar purport, entitled "Statement and deposition taken *in perpetuam*," &c., signed and sealed by her, and witnessed by Francis Adams, Esq., and Dr. Joseph McKeen. This statement was also admitted, for the same purpose, subject to exception, and also oral testimony of the testatrix's declarations of like character and purport.

In some of her conversations upon this subject, after she became interested in the subject of spiritualism, Mrs. Green expressed her firm conviction that her son-in-law was under the control of an evil spirit, through whose aid he was enabled to influence his wife and alienate her affections from her mother; and stated that upon one particular occasion, during her first visit to Bloomington, Mr. Robinson and his wife went out into the garden, where he took her first by one hand and then by the other, looking all the while steadfastly into her face, and when they returned to the house, Mary Ann (Mrs. Robinson) was a wholly changed person, and so continued ever after; adding that, at the time of the occurrence, she (Mrs. Green) could not account for it, but after she became acquainted with the nature of spiritual phenomena she could, and understood that he had obtained complete spiritual dominion over his wife's mind and heart, diverting her thoughts and affections

from her mother. She told Dr. James McKeen that even when Robinson was not bodily present, if Mary Ann was kindly disposed toward her, he would "learn the current that was going through her mind, and stop all that;" that he would be standing way off in the garden, or some vacant lot, and weave his web round Mary Ann's mind, &c., &c. She made many other similar declarations; implicitly believed that the communications made to her purporting to come from her deceased husband and children actually came from them, saying it was "like advice or letters from a friend in some foreign part;" that she had the power of healing, which she occasionally attempted to exercise by "passes," or gestures with the hands; and she kept large books of spiritual communications which she deemed of great value.

Such being the relations between the parties, and the peculiarities of Mrs. Green's opinions and conduct, on the fifteenth day of January, 1866, she made the will here offered for probate. After the introductory clause, and a provision for the payment of debts and necessary expenses, the will proceeds:

"SECONDLY. I give, devise and bequeath all the property and estate, real, personal or mixed, and wherever situated, of which I may die seized and possessed, to Francis Adams, of Topsham, aforesaid, in trust, to be appropriated to and for the uses, and in the manner following, to wit:

I. During the lifetime of my daughter, Mary Ann Robinson, wife of George O. Robinson, my will is that said trustee pay and allow the use, income and interest arising from my said property to my said daughter, Mary Ann Robinson, the same to be to her own exclusive use, benefit and behoof, and to be in no wise subject to the debts, contracts or liabilities of her said husband.

II. After the decease of my said daughter, Mary Ann Robinson, my will is that, if the said Mary Ann leave an only child, the said trustee shall pay and allow the use, income and interest, arising from my said property to said child, during the lifetime of said child; or if said Mary Ann leave more than one child, the said trustee shall pay and allow the use, income and interest, aris-

ing from my said property to said children, during their lifetime, and the lifetime of the survivor of them, said children (if there be more than one) to share equally in such income and interest.

But if such child or one or more of such children, be under the age of twenty-one years at the time of the said Mary Ann's decease, my will is that the said trustee shall, thereafterwards, during the minority of such child or children, appropriate so much only of the income of said property, as shall be sufficient for the thorough and suitable education of said child or children, to that purpose, and I give to my said trustee power, and direct him, if necessary, by reason of a deficiency of all other resources, to use and appropriate for the support and maintenance of said child or children during their minority, so much of my said property and the income thereof as may be requisite for that purpose, but said last named power is not to be exercised, if the father of said child or children be of sufficient pecuniary ability to support and maintain them himself.

III. If my said daughter, Mary Ann Robinson, die, leaving no child living, and there shall be a grandchild or grandchildren living, (the issue of a deceased child or children of the said Mary Ann,) at the time of her decease; or if the said Mary Ann at her decease leave a child or children, and at the decease of said child, or the survivor of said children, (if there be more than one) there be issue of said child or children living, under the age of twenty-one years, my will is that during the minority of such grand-child or the youngest of such grand-children of the said Mary Ann, said trust estate shall continue, and the said trustee shall appropriate to the suitable education, support and maintenance of such grand-child or grand-children of the said Mary Ann, during their minority, the income of my said property, or so much thereof as may be necessary for that purpose.

IV. On the arrival of such grand-child, or the youngest of such grand-children, of the said Mary Ann at the age of twenty-one years, (there being no child of the said Mary Ann then living) my will is that said trust estate shall terminate, and the whole of my

property, real and personal, shall go to such grand-child, or be divided equally among such grand-children (as the case may be) the share of each to be to them, their heirs and assigns forever.

THIRDLY. Should my said daughter, Mary Ann, die leaving no children or grand-children, or leaving children and such children should die leaving no issue, or leaving issue, such issue should die before coming to the age of twenty-one years, then my will is, that upon the happening of either of said contingencies, the residue of my estate and property, real and personal, remaining at that time shall forthwith go to the children of my brother, Alfred J. Stone, and to the children of my sister, Eliza Dennett, to be equally divided between them, and to hold to them, their heirs and assigns forever."

The next and concluding clause related to the appointment of executors and trustees, and then followed the customary formal execution and attestation of the instrument.

By a codicil, executed on the fourteenth day of August, 1867, presented for probate with the will, Mrs. Green made this testamentary provision—the first clause merely adding another gentleman as trustee:

"SECONDLY. I direct my said trustees, instead of paying to my daughter the whole of the income arising from my estate and property, as in my said will directed, to pay to the said Mary Ann, during the lifetime of her said husband, the sum of five hundred dollars for each year, and the residue of said income to be invested by my said trustees in such manner as they may judge most beneficial to my estate, but if the said Mary Ann shall survive her said husband, then from and after his decease she is to have the whole of said income during her lifetime as in said will provided."

At the time this codicil was executed Mrs. Green's statement dated August 11, 1866, hereinbefore mentioned, was signed by her and attested by the witnesses, being apparently intended as an informal explanation of her motives in making the testamentary disposition which she did of her property.

To defeat this will and codicil as obtained by undue influence,

and upon the ground of the insanity of the testatrix, the contestant introduced the books of spiritual communications kept by Mrs. Green and evidence of her acts and declarations, of the character hereinbefore indicated. It was testified that she had repeatedly said that her will met the approval of her husband, as she learned through a medium, and that she once declared that his spirit directed the terms of that instrument; and the communications purporting to come from him, said that her will was right, &c., &c. To rebut the presumptions thence arising the proponents proved that before she took any interest in the subject of spiritualism, she frequently expressed her determination that Mr. Robinson should not have the handling of any of her property after her decease; giving as her reason his treatment of her, alienating her daughter from her, ill-treating his wife, &c., &c.,—substantially the same grounds as set forth in her subsequent written statements. Upon the ninth day of June, 1856, just before leaving Bloomington, on the occasion of her first visit there, Mrs. Green made a will giving only the income of the estate to her daughter; and on the ninth day of October of that same year, after coming to Maine and finding that our law required three witnesses, whereas that of Illinois required but two, which was all there were to the instrument made in Bloomington, she applied to Hon. Edward E. Bourne, the judge of probate of York county, a connection of hers by marriage, to draw another will, carefully tieing up the estate so that it should never reach Mr. Robinson, and making Mr. Henry Kingsbury and Judge Bourne executors, and the latter a trustee, to receive and pay the income only to Mrs. Robinson. Mr. Bourne, called as a witness by the appellees, said that three facts or statements were impressed upon his mind: *first*, "that she did not want Mr. Robinson to have any of her property; that was the principal object of the will;" *second*, "that there was nothing strange in the rest of the will;" *third*, "she wished Mr. Kingsbury to be an executor." Subsequently, she became apprehensive that there was one possible contingency in which the instrument might fail of its desired effect; she therefore requested a friend to pro-

cure Hon. Wm. G. Barrows, now a justice of this court, "to draft a will which would be as strong as language could make it"; * * * * * * "particularly to impress upon his mind that under no possible circumstances could Mr. Robinson control a dollar of her property." Accordingly such a will was drawn by Mr. Barrows, who testified, without objection, that "Mrs. Green at that time appeared to be a woman of good health of body and mind as far as I could judge;" and afterwards replied to a question which was admitted, subject to the defendant's objection, that he "observed nothing peculiar any more than in any other lady, neither then nor at any other time."

Francis Adams testified that he drew the will now offered for probate; that Mrs. Green had it prepared because she saw that the one written by Judge Barrows did not provide against the contingency of Mr. Robinson's inheriting the estate as heir of his child should they all survive Mrs. Green and he outlive his wife and daughter, the latter dying of age and unmarried; and added, against objection, that he saw nothing peculiar in her at the time of its making or execution. Mr. Adams was not a medical man nor an attesting witness. The three gentlemen who did witness it, as well as those witnessing the codicil, were permitted to give their opinion that Mrs. Green was perfectly sane at the time of the execution of those instruments, without stating the appearances observed by them as the grounds for forming that judgment; to which the contestant excepted.

When the cause came on for a hearing at *nisi prius* the justice presiding directed (substantially) these three issues to be made up, joined and put to the jury: *First*, Were these instruments duly executed? *Second*, Was Mrs. Green then of sound mind? *Third*, Was she unduly influenced in making them by other persons or other influences than her own mind? To the first two questions the jury returned an affirmative and to the last a negative answer.

The court held that the burden was upon the appellees to sustain the instruments offered by them, and that they were, therefore,

entitled to open and close the case, to which the appellant excepted, as well as to the refusal of the judge to confine the appellees' testimony of Mrs. Green's acts and declarations to the single subject of spiritualism.

The several propositions, maintained in argument by the counsel for the appellant were presented to the court as requests for instructions; how far they were given, withheld, or modified, sufficiently appears by the opinion. They were as follows, viz:

"I. If Mrs. Green believed that the spirit of her deceased husband directed or dictated the will and codicil, and acted under that belief, they are void.

II. That if she entertained a groundless and causeless suspicion of Mr. Robinson's character, and that he was exposed to the control of evil spirits, and made the will and codicil under this influence, they are void.

III. That if she disliked Mr. Robinson and believed he had a supernatural power over his wife, or power through the aid of evil spirits, and was influenced to make her will and codicil as she did by this belief, they are void.

IV. That the will and codicil must be wholly the offspring of her own mind, uninfluenced by any delusion.

V. That if the said Mary W. Green was unduly influenced by Alfred J. Stone, or any other person, in making the codicil, it is void; and the same is true also of the will."

The appellant also contended that if Mrs. Green was in any respect influenced in the making of her will and codicil by supposed communications from the spirit of her deceased husband, they were void; that if she acted upon them simply as advice from her husband, or from his spirit, and made them in accordance with that advice, they were void.

A. P. Gould, for the appellant.

The questions to be considered are:

1. Whether the rulings and decisions of the court during the trial were correct, and whether the proper questions and issues were presented to the jury by the presiding judge?

2. Whether the questions and issues submitted were decided properly by the jury?

3. Whether upon all the facts proved or admitted, and the application of sound legal principles thereto, this will and codicil ought to be admitted to probate?

I. This case is of novel impression in this country, and of sufficient importance to the public to demand careful attention and a somewhat protracted discussion. The first step was proof of execution. The subscribing witnesses were improperly allowed to give their impressions as to the testator's mental condition without stating the facts upon which those opinions were founded. The rule is very clearly laid down in *Cilley v. Cilley*, 34 Maine, 163. Judge Redfield in his work on Wills, part 1, page 145, cites this case. See also *Hathorn v. King*, 8 Mass., 371; *Dickinson v. Barber*, 9 Mass., 225; *Heald v. Thing*, 45 Maine, 392, 397. Judge Barrows and Mrs Stone were permitted to give their opinions on this subject though they were neither experts nor subscribing witnesses. And Mallett is allowed to state, from what he observed, his opinion as to sanity; what it then was, not what it is now. This was erroneous. *Runyon v. Price*, 15 Ohio St. R., 1.

Counsel then discussed the influence of A. J. Stone upon his sister, and the impropriety of preventing the appellant from showing that the letters causing the original trouble in this family were from him and Mrs. Dennett, and of the exclusion of the testimony as to the contents of these letters.

The larger part of the testimony as to the testatrix's declarations was inadmissible, the instances in which such evidence is properly receivable being exceptional and the general rule being against their admission. Redfield on Wills, part 1, 544, citing *Stevens v. Vancleve*, 4 Wash., C. C., 265. This testimony is limited according to the issue presented. If general insanity is alleged, the declarations of the testator, during the period proposed, may be heard, but if the charge is special or topical insanity, proof of declarations should be confined to the particular topic. If a delusion is charged, bearing directly upon the will, its

nature and contents, the declarations admitted should be such only as relate to that particular delusion. The facts connected with the making of the wills in 1858, &c., were too remote in time to affect the question of sanity when this will and codicil were made. Redfield on Wills, part 1, 555–6.

II. We respectfully submit that on account of the peculiar difficulties of the case, the charge and instructions to the jury were in several material matters, defective, erroneous, and came short of the full duty of the court.

Perhaps no case has been tried in this State, where the duty of the presiding judge was more difficult, and certainly none where the full, complete and exact performance of that duty was more necessary, to enable the jury to perform their duty. Indeed, we cannot refrain from the remark that it is one of those cases in which the court can derive little aid from the jury, and that notwithstanding the findings upon the feigned issue to the jury, the principal duty still devolves upon the court. About the essential facts, there is no dispute. It is not every thing which is to be left to a jury in such a trial as this; nor in any trial.

There are some facts in nature which the court will assume the existence of, and will not leave to the jury. Among these facts are the well known laws of nature.

The court will not ask the jury whether there are such facts in nature as life and death; nor whether a dead man can speak, or can make a contract, or a will; nor whether he can dictate or advise a living person how to do either. Nor will the court of a christian country ask a jury, whether death is a dissolution of the body from the soul; nor whether the spirit of a man, which has returned to God who gave it, and whose body has long since returned to dust, can participate in human affairs, which are the subject of legal action.

Such a court will not ask a jury, whether the universal philosophy is true, which teaches us that there is a great gulf betwixt the dead and the living, "So that they which would pass from hence cannot; neither can they pass to us that would come from

thence;" nor whether "the spirit of man goeth upward" and has no longer any habitation here, and can no longer have any participation in the affairs of the living; nor will such a court admit, that departed spirits can invest the bodies of the living, whether such spirits are as pure and holy as Milton's angels, or as hideous and fiendish as Dante's devils.

But this court, we confidently trust, will, on the other hand, acting in harmony with that other christian court speaking for the British nation but a few months ago, by its Vice Chancellor Gifford, judicially declare, that this system of spiritualism, as it was believed and acted upon by the testatrix, "is mischievous nonsense, well calculated on the one hand, to delude the vain, the weak, the foolish, and the superstitious; and on the other, to assist the projects of the needy, and of the adventurer; and that beyond all doubt, there is plain law enough, and plain sense enough to forbid and prevent the retention of any acquisitions obtained through its aid." *Lyon v. Home*, 6 Eq. Cases, L. R. 1868, 655, 682.

This is not only good logic and sound sense, but good orthodox christianity also; and we therefore respectfully submit, that it ought to be declared by this court to be good law.

No mind can be sound and free from undue influence which is moved, constrained or restrained, in business transactions by this diabolical system.

We respectfully submit that it was the duty of the court to instruct the jury what constituted a "sound mind" in the sense of the statute, and what was necessary to prove it. While it was the province of the jury to determine whether those facts existed which would show whether the mind was sound or unsound, or whether the testatrix was possessed of testamentary capacity, we insist that it was the duty of the court to determine what constituted testamentary capacity.

It is one thing to determine in what testamentary capacity consists, and another thing to decide whether those facts or elements exist in a particular mind, which prove the person to be in posses-

sion of it. The same is true, beyond all question, in respect to what constitutes "undue influence."

The questions submitted to the jury were, whether the testatrix was of "sound mind," and whether she was "unduly influenced." In what respect did the jury need the aid and instruction of the court, more than in determining what undue influence was, or what constituted a sound mind?

We claim that the judge, on these subjects, in some respects came short of his duty, and in others gave erroneous instructions. In almost every case to be found in the books in which the matter of testamentary capacity and undue influence are considered, we find the court discussing and deciding the question, as to what they are, and in what they consist. This is abundant proof that it is the duty of the court to decide these questions. The citation of numerous authorities is not necessary. We will note a few. *Overton v. Overton*, 18 B. Munroe, (Ky.) 61; *Pool v. Pool*, 35 Ala., 12; *Cornelius v. Cornelius*, 7 Jones' Law, (N. C.) 593.

It was claimed by the appellant that the testatrix was laboring under certain delusions; and that she was influenced in the making of her will by these delusions; and that these delusions constituted such a partial insanity as rendered a will made under their influence void. And in respect to what constituted such a partial insanity, the appellant's counsel maintained this proposition: that "In a legal point of view, insanity is where a person believes something to exist, which not only does not exist, but of which he has no evidence sufficient to satisfy any healthy mind, and he acts upon it, reasons upon it, and holds it as a reality."

This proposition which was taken from a work of very high authority, was not given to the jury as it stands, but was accompanied by this qualification, which the judge says is, "an additional qualification of my own," to wit: "That may be an insane delusion, that is to say, where it is so palpable that he believes without reason, any reason sufficient to satisfy any healthy mind, and he acts upon it when it cannot possibly be true, that is an insane delusion." And subsequently, in the course of the charge,

as will presently be seen, the judge virtually instructed the jury that it was incumbent upon the appellant to disprove the system of spiritualism, as developed in this case and believed by the testatrix. All the way through the trial and charge, the judge seemed to make a distinction between such delusion as constitutes a diseased state of mind, according to the authorities produced and relied upon by the appellant, and an *insane* delusion; and maintained that it was incumbent upon us to show the existence of an insane delusion, or something beyond the delusion described in the books produced.

The judge qualified the definition of insanity cited by us from Bouvier's Law Dictionary, by adding, "but insane delusion as a fact may be where the supposed fact is the coinage of the brain without evidence, a figment of the imagination." Now we know that there are many delusions which are not the coinage of the brain of the testator, but which are created in the mind of the testator by other parties or outside influences. Such was the fact in this case. There may be insane delusions, which are purely the manufacture or coinage of the deluded brain; but there are surely other delusions which render the mind insane upon particular topics, which are produced by extraneous influences.

The essence of a delusion which constitutes a diseased state of the mind is, that persons believe things to exist which do not exist, and that they believe them with a persuasion so fixed and firm, that they act upon them as truths. It is entirely immaterial whether they are the fruit of the individual imagination, or whether the mind has been wrought upon by outside influences.

Many other authorities were produced to show what constituted partial insanity.

Dew v. Clark, 1 Addams, 279; 2 Addams, 102; 3 Addams, 79; 1 Beck's Med. Jur. (11th ed.) 864; Redfield on Wills, 71, 72, note 1; 76, 77; *Stanton v. Whetherwax*, 16 Barb., 259; *Commonwealth v. Rodgers*, 7 Metc., 500, 502; Elwell on Malpractice and Medical Evidence, pp. 386, 390; *Boyd v. Eby*, 8 Watts, 71; Redfield on Wills, (2 ed.) pp. 78, 79; *Leech v. Leech*, 2 Penn. Law Journal, 179; *Woodbury v. Obear*, 7 Gray, 467, 470.

We do not contend that a mere speculative belief in spiritualism if it is not acted upon, and has no influence over the testator, would render a person incompetent to make a will; but we do contend that if the will was made under such an influence, or such an influence had any effect upon the mind of the testator in making the will, it is invalid.

The first request was, that, "If Mrs. Green believed that the spirit of her deceased husband directed or dictated the will and codicil, and acted under that belief, they are void."

On this subject, in his general charge, the judge instructed the jury, in substance, that the burden of proof was upon the appellant to disprove the truth of spiritualism. The appellant claimed that it was a delusion; that it should be assumed by the court that her husband who had been dead twenty-six years could not direct or advise the testatrix how to make a will; and that if she believed and acted upon the conviction that he could, and was governed in making the will by the belief that her husband directed it, speaking to her from the land of spirits, it was such a delusion as constituted her insane upon this subject.

But the judge says: "Now as to this matter of spiritual belief, there has been a great deal of testimony upon that subject generally; there has been a great deal of speculation, and a vast deal of evidence upon the subject. Did she believe in this spiritual revelation? Can there be any doubt that she did? To what extent, how far do they show delusion under the rule which I have given; that is to say, if she believed that spirits did communicate with human beings, through mediums, was that fact an insane delusion alone? * * * * Before you can say a thing is a delusion, you must have evidence that it does not exist; that is, before you can be safe in saying it, you must know it is not true, or have overwhelming evidence, that it is not true. * * * Before anything in law is a delusion, the non-existence of it must first be established."

Can there be any doubt that a jury would understand from such instructions as these, that it was incumbent upon us to disprove

the truth of spiritualism, before it could be assumed to be a delusion? What other force could this instruction have, than that they must have evidence that it did not exist; that they must have *overwhelming* evidence that it is not true; that before the law would treat it as a delusion, the non-existence of it must first be *established?*

Instead of assuming as the Vice Chancellor did in *Lyon v. Home*, that spiritualism is "mischievous nonsense," the judge left it to the jury to determine its truth, with the burden upon us to show that it is not true.

By his instructions the judge puts the living and the dead upon precisely the same footing, in respect to their influence, or supposed influence, over the mind and conduct of a person about to make a will. He assumes that the supposed communications of the dead may properly and legitimately influence and aid a woman in forming her conclusions, in respect to the disposition she will make of her property, in precisely the same manner as a living husband might do, if he were standing by her, giving her his advice, and the fruits of his larger experience and better judgment.

There is no doubt that a married woman, about to make a will, may very properly consult her husband, and may be largely governed by his judgment, and influenced by his better experience, and even by his wishes, and still the will be valid, so long as her own will is active, and is simply acting in accord with her husband's, and is not absolutely subordinated to his will in such a manner as to destroy her free moral agency.

The charge of the judge lays down this principle,—that a widow may be acting, in making her will, under the full conviction and belief that she has received from the spirit of her deceased husband, his advice, his wishes, the expression of his better judgment, purified, and rendered infallible, by heavenly scenes and associations, communicated to her directly from the presence of Deity himself, with the sanction and approval of Deity, (for communications can hardly be supposed to be made, without His knowledge and approval by the holy spirits who surround Him) that she may make

the will in exact accordance with such supposed advice, wishes and judgment, and still the will be valid, however great the influence which such fancied communications may have over her in forming her conclusions and making the will, so long as the effect falls short of an absolute subordination of her will, but simply brings it to accord with the supposed wishes and advice of the departed spirit.

That is, if she adopts the advice of the supposed spiritual communication, and acts upon it, believing it to be genuine, the will is valid, provided the effect of the advice simply is, to persuade her to form just such conclusions, and make just such a will, as the spirit advised, so that it was in fact her own wish, will and judgment, at last.

Perhaps the most prominent infirmity in this instruction is the obvious fact, that the two kinds of influence cannot be compared. They bear no relation whatever to one another. The advice of a living person is a fact; the supposed advice of a departed spirit is a fiction, and a miserable delusion. The mind may entertain the advice of the living person and be powerfully influenced by it, and still be sane; but the mind cannot entertain the delusion, that it is in direct communication with the spirits of the dead, upon business affairs, and be wholly sane. The court should have treated this whole matter of spiritualism, as bearing upon the question of soundness of mind, and have charged the jury that it was a delusion, and to be treated as such by the jury, and not charged them that it was to be regarded as a legitimate influence, capable of being compared with other legitimate influences over the mind of the testatrix.

Another great infirmity in this treatment of spiritualism is, that it cannot be possible that the testatrix should believe that she had received from the departed spirit of her husband, in whom she had absolute and entire confidence, "requests, persuasions and arguments, however persistently or however strongly urged," without being controlled by them, to the extent of surrendering her free agency, and yielding her own will and judgment, or subordinating

it, to the dictation of the spirit. She believed the communications came from a pure, holy spirit, and from the presence of "the Holy of Holies." Her faith in these communications is abundantly demonstrated by the evidence, and is even conceded by the appellees. Its effects upon, and influence over, her mind were fearful. She believed that she had power, directly communicated from above, through the intervention of these spirits, to heal the sick and to cast out devils; and that this power was the same in kind, which was possessed and exercised by the Saviour of mankind. Was it reasonable and proper, and in accordance with the demands of the case, that the judge should instruct the jury that they might compare this delusion with the advice of living persons, and treat it as an influence over the mind, as they were instructed to treat the influence of the advice of a living person? To her it was as though one "had arisen from the dead," and stood before her with a divine commission, revealing to her the hidden things of the future life; communicating to her all knowledge, past and future; investing her with more than mortal power, and taking her before her time, into the society of, and daily communion with, "the spirits of just men made perfect." She not only believed these spirits to be good, true and holy, but that freed from the restraints of "local habitation," they had the free range of the universe; that heaven hid nothing from their view, "nor the deep tract of hell;" that they had the same power of communicating to her the designs, the purposes and the deeds of angels of darkness, as of the angels of light. She saw with the same clearness the good spirit, which was advising, directing and counseling her, and the evil spirits which had taken possession of her unfortunate son-in-law, and were, in his person, weaving that fatal web, with which they held captive the mind, the heart and the affections of her much loved daughter. To compare such fatal delusions as these, with any rational influence, we respectfully submit, was a mistake in the presiding judge, fatal to the purposes of the trial.

The second and third requests pertain to the same general proposition, and will be considered together.

They are as follows: "That if she entertained a groundless and causeless suspicion of Mr. Robinson's character, and that he was exposed to the control of evil spirits, and made the will and codicil under that influence, they are void." The judge did not give this request, but said in reply, "I say so, if that amounts to insane delusion, as I have explained in the charge." Then follows the third request, as follows: "*Third.* That if she disliked Mr. Robinson, and believed that he had a supernatural power over his wife—a power through the aid of evil spirits—and was influenced to make her will and codicil, as she did, by this belief, then they are void."

In reply to this request, the judge instructed the jury: "I say no, unless that was an insane delusion as I have explained it; unless it amounts to an insane delusion." That she did thus believe will not be disputed, for it is proved by repeated witnesses called by both sides. That she was influenced to make her will as she did by this belief, and by the groundless and causeless suspicion of the character of Mr. Robinson, cannot be reasonably doubted by any one who carefully examines the will, and the evidence of her views and feelings and delusions in respect to him. Did the court perform the full measure of its duty to the appellant, when called upon to instruct the jury, that if in making the will and codicil, which deprived her of her just rights, her mother was influenced to make it as she did, by a groundless and causeless suspicion of Mr. Robinson's character, and that he was exposed to the control of evil spirits, and that he had a supernatural power over his wife—a power through the aid of evil spirits—then they are void, by saying to the jury, "I say no, unless that was an insane delusion?" In his general charge he instructed the jury as follows:

"Now as to this matter of spiritual belief, we have had a great deal of testimony upon that subject generally; there has been a great deal of speculation, a vast deal of evidence upon the subject. Did she believe in this spiritual revelation? Can there be any doubt that she did? To what extent, how far do they show delusion under the rule which I have given; that is to say, if she

believed that spirits did communicate with human beings through mediums, was that fact an insane delusion alone? If so, gentlemen, undoubtedly there would be a very large number of people in the country incapable of making wills. A great many people believe it is a reality. Then comes up the difficulty of our being able to say that because we think a thing absurd, that therefore it is a delusion in their minds; that they believe a thing that does not exist, and therefore it is a delusion. Before you say a thing is a delusion, you must have evidence that it does not exist; that is, before you can be safe in saying it, you must know it is not true, or have such overwhelming evidence that it is not true, that no sane man can believe it true. Is this opinion one of that sort of things that people believe in so as to upset their reason and their ability to take care of their property, and to dispose of it? Before anything in law is a delusion, the non-existence of it must first be established." We say that it was the duty of the court to declare, that spiritualism, as applied to the making of the will in these requests, was an insane delusion, and that the will and codicil, if made, as assumed in the request, under the influence of this delusion, were void. And we contend, that it should not have been left to the jury to say whether a will could be sustained which the testatrix was influenced to make as she did, by the belief that Mr. Robinson was under the control of evil spirits, and himself was endowed with supernatural power, and that he exercised that power through the aid of evil spirits, over his wife. Under this delusion she excluded the husband of her only child forever from any participation in her estate, and excluded her daughter from it, (except less than one-half of the income) simply because her daughter was the wife of a man whom she believed to be an incarnate devil.

That partial insanity avoids a will affected by the particular monomania of the testator, see 1 Redfield on Wills, 82, § 13; *Seaman's Soc. v. Hopper*, 33 N. Y., 619; *Lucas v. Parsons*, 24 Georgia, 640; Greenwood's case, 13 Vesey, 88; Taylor's Medical Jur., 631, 673; Shelford on Lunacy, 41; *Coleman v. Robertson*, 17 Ala., 84; *Florey v. Florey*, 24 Ala., 241; Encyclopedia Brit-

tanica, vol. xiv., Mental Diseases, Monomania, 531; Ray's Medical Jur., 265, § 274, and p. 268, § 276; 2 Pothier on Obligations, App., 24.

The counsel then entered into a very elaborate and able examination and analysis of the testimony, to show the verdict erroneous as matter of fact.

He then claimed, as a legal proposition, that the peculiar provisions of the will were, of themselves, indications of a disordered intellect. *Peck v. Cary*, 27 N. Y., 9; *Fairchild v. Bascomb*, 35 Vermont, 398.

The jury should have been instructed, agreeably to our request, that the burden of proving the testator's sanity was upon the proponents of the will, "and if upon the whole evidence it is left uncertain, whether the testatrix was of sound mind or not, the will cannot be proved." This is the language of *Crowninshield v. Crowninshield*, 2 Gray, 524. It seems impossible to resist the conviction that the jury must have understood that the delusions proved in this case did not constitute unsoundness of mind; that spiritualism was not to be regarded as a delusion, in the absence of testimony produced in court, to show that it was not true; and that the belief in supernatural influences over the mind and conduct of Mr. Robinson, and in the exercise of diabolical power by him over his wife, did not constitute insane delusion, or unsoundness of mind. Fearing this, we asked for a distinct finding by the jury whether or not Mrs. Green was influenced by her peculiar opinions upon these subjects in making her will; accordingly we drew a question, asking whether or not Mrs. Green was influenced in making her will, by the belief that she was acting in accordance with the advice or direction of her spirit husband, but the court declined to submit it to the jury. Doubtless, it would have been answered in the affirmative; and the court would then have had to determine whether or not this was such a delusion or undue influence as to invalidate the will.

In the case of *Shaler v. Barnstead, et als.*, 99 Mass., 112, 131, the court says: "The findings of the jury in such cases, are

availed of to inform the court in matters of controverted facts, which may become material in settling the final decree. They may be disregarded, in whole or in part, if on the final hearing they are not deemed important or relevant; or such new issues may from time to time be framed and submitted as a just regard to the rights of all may seem to require."

Unless the court is satisfied upon the evidence that this will ought not to be admitted to probate, we ask that new issues may be framed, inquiring more definitely of the jury as to the effect of these delusions upon the testatrix's mind, in the matter of making this will, put in a more simple and direct form, giving less occasion for learned discussions before the jury upon questions of mental and moral science, which it is so difficult to bring within their comprehension, leaving the more abstruse and complicated questions for the determination of the court, upon the findings of the jury upon simple matters of fact.

But we ask the court now to decide whether they will give this system of spiritualism a standing in court. Shall it be treated as a legitimate influence in business transactions? Are we to treat it as a fact in legal investigations, as a due and proper influence over any mind, weak or strong, in the gravest business transactions of life? How is the court to take cognizance of it? By what rules weigh or measure it? What rules of logic will you apply to it? With what other phenomena, physical or mental, will you compare it? What bounds will you set to it? With what judgment will you judge it? From what source will you demand authority for your guidance in your judgments upon it?

It is impossible. True or false, as a speculative or religious theory, we cannot allow its influence or its aid, in making contracts or wills.

There is much practical sense in the remarks of the London Saturday Review for May 2, 1868, p. 582, upon the case of *Lyon v. Home*, then just argued before Gifford, V. C.: "It is not necessary to say whether the spirit revelations are, or are not true.

However true they may be, our question is, whether we are to allow them to be other than undue influences?

The spirits may be very virtuous, pious, pure, disinterested and righteous; might arrange mundane things better than we do; but their sort of purity and righteousness is quite incompatible with our poor, unspiritual society, such as it is. And, therefore, we cannot come to an understanding with the spirits. In other words, the Vice Chancellor will have to notify all and singular, spirits and souls of the righteous and unrighteous, all witches and wizards, ghosts and ghost-seers, goblins and mediums, spirit-drawings and airy harps, that deeds of gift, assignments and wills, dictated by the spirits to rich and silly widows, will be summarily set aside, as transactions which English law and equity decline to recognize."

A. Libbey, *W. Gilbert* and *Francis Adams*, for the appellees.

The opinion of the subscribing witnesses was properly admitted. *Ware v. Ware*, 8 Maine, 42; *Cilley v. Cilley*, 34 Maine, 162; *Poole v. Richardson*, 3 Mass., 330; *Buckminster v. Perry*, 4 Mass., 593; *Needham v. Ide*, 5 Pick., 510; *Commonwealth v. Wilson*, 1 Gray, 337.

The exceptions must be confined to the instructions given contrary to the appellant's requests and to those refused; exceptions to the charge *en masse* cannot be sustained. *Lincoln v. Claflin*, 7 Wallace, 132.

The qualification annexed to the second instruction was required by law. An erroneous belief in regard to the character of Mr. Robinson, not improperly imposed upon Mrs. Green by any one to induce her to make this will, and not amounting to insane delusion, will not invalidate the will. 1 Redfield on Wills, 89, § 23; *Woodbury v. Obear*, 7 Gray, 467; *Thompson v. Quimby*, 2 Bradf. Sur. R., 449; *Thompson v. Thompson*, 21 Barb., 107.

The instruction requested did not embrace the element of unsound mind, nor undue influence exerted upon Mrs. Green by any one, to induce her to make the will. It embraced only the element of unfounded and erroneous belief.

The fifth proposition is precisely correct as qualified and stated in the charge. 1 Redfield on Wills, 524, §§ 30, 36, 38, 43, 45, 46, and cases cited. *Small v. Small*, 4 Maine, 220; *Gardner v. Gardner*, 22 Wend., 526; *Eckert v. Floury*, 43 Penn. St. R., 46; *Dean v. Nagley*, 44 Penn. St. R., 312.

The instruction in regard to the influence on Mrs. Green, resulting from her belief in the spiritual communications from her deceased husband, placing it on the same ground as if the communication had been made by a living person, to induce her to make the will, was favorable to the appellant; more favorable, if these communications were not true, than the law will warrant. Because it is an influence arising from an erroneous belief not imposed upon the testator by any living person to procure the making of the will, is entirely free from fraud, and does not possess the elements which all the authorities, which we have been able to find, lay down as essential to undue influence sufficient to avoid a will. 1 Redfield on Wills, 89, § 23, and cases cited.

Especially is this favorable to appellant when we consider the fact that the only evidence that the approval of her husband's spirit was communicated to her at all, is the proof of the declarations of testatrix made after the will was executed; and the authorities agree that such evidence is not to be received as evidence of the fact, but only to show the condition of the mind. 1 Redfield on Wills, 546, § 39, p. 555, o. p. q. *Woodbury v. Obear*, 7 Gray, 467.

The jury have found that testatrix was of sound mind, and that she was not unduly influenced by other persons and other influences than her own mind.

These findings, based on correct rules of law, are conclusive.

KENT, J. This is an appeal from the decree of the probate court, allowing and probating the instruments purporting to be the last will and testament and codicil of Mary W. Green, widow of Gardner Green, late of Topsham, in this county, deceased.

The sole heir at law, the appellant, contests the probate of the

will and codicil. The will and codicil, instead of giving the estate directly to her, absolutely and in fee, devises all the property and estate, after payment of debts and expenses, to trustees, in trust for the uses specified. The substance of the provisions as to the trusts designated is—that the daughter, the appellant, shall have five hundred dollars *per annum*, out of the income of the estate, during the life of her husband, the residue of the income to be invested by the trustees. If the daughter shall survive her husband, then, after his decease, she is to have the whole of the income of the estate during her lifetime, to her own exclusive use and benefit. After her decease the whole income is to be paid to her surviving child or children, and to the survivor of them during life, or during minority what the trustees may deem necessary for their thorough and suitable education; and, if necessary, they are to appropriate a part of the property, beside the income, for their support and education, provided the father is not of sufficient pecuniary ability to support and maintain them himself. The will then proceeds to make provisions by which the trust is to be continued, for the benefit of grand-children of the daughter, if any, and it is not to be terminated until the arrival of the youngest grand-child at the age of twenty-one years, when the whole estate, real and personal, is to go to the grand-child or grand-children, absolutely free of the trust, to them and their heirs forever.

In case the testatrix's daughter dies leaving no lineal descendants surviving her, the property is to be divided among the children of the brother and sister of the testatrix, to whom it is also to go in case of the death of all the *cestuis que trust* before the youngest attains the age of twenty-one years.

In the trial of this case, certain questions were put in issue, under the direction of the court, arising under the pleas filed and joined. There were three separate pleas; in substance, these:—I. Denial of the due execution of the will; II. That the testatrix was not of sound mind at the time of the supposed execution of the will; III. That she was unduly influenced in the making of the will by various persons "and that the instruments (will and

codicil) were not the fruit of her own mind and will, uncontrolled by other persons and influences." There was no brief statement specifying or limiting the points presented by the pleas.

The executors introduced evidence to prove the legal execution of the will, and the soundness of the mind of the testatrix. The only questions raised under this part of the case had relation to the admission of certain evidence, and the instructions given as to the burden of proof and as to preponderance of evidence. These will be considered hereafter.

The appellant then offered a large amount of testimony under the second and third pleas, and to rebut the evidence as to soundness of mind, and to establish the fact of undue influence. This testimony took a wide range, and had relation to the history of the domestic relations between the daughter (the appellant) and the mother (the testatrix) and the husband of the daughter, including acts, visits, declarations, letters, evincing more or less of affection for her daughter and of aversion and dislike to her son-in-law, and persistent determination in such dislike, and in a purpose to prevent the daughter's husband from receiving anything from her estate. The same kind of testimony was introduced to show undue influence on the part of living persons and from what she believed to be the spirit of her deceased husband, communicating with her through mediums. Under these pleas also there was a large amount of evidence, oral and written, to show that the testatrix was a firm believer in what are termed spiritual communications, between the living and the dead, generally believed by the class of people known as modern spiritualists.

The appellees (the executors) then introduced counter evidence on the same general topics, and such as they deemed pertinent to sustain their proposition of testamentary capacity and to refute the allegations of undue influence.

On this body of evidence it became the duty of the presiding judge to give instructions to the jury, and to some of these instructions, and to some denials of instructions requested, the appellant excepts.

We will first consider the exceptions to the charge.

The judge first considered the questions of soundness of mind, and subsequently as a distinct matter, the question of undue influence, placing them before the jury separately.

I. Sanity. The presiding judge stated to the jury that the statute makes soundness of mind a requisite qualification in a testator; hence, that it was incumbent on those who set up the will to establish this fact, and that burden does not shift; that the rule of preponderance of testimony in civil cases applies—not the rule of the criminal law. He said that "a person of sound mind" were the words of the statute; that a sound mind was a sane mind; that sanity meant health, and that, therefore, a sane mind was a healthy mind. When a mind, not imbecile, acts healthy it may be called sound. But if a testator acts under a delusion which is the result of a disordered mind, amounting to insanity, and this delusion influences the testator in making his will, or any part of it, it will be sufficient to avoid it, on the ground of want of a sound mind when he made it.

The judge,—after stating the fact that there were different degrees of insanity, and alluding to the cases of general insanity, in which all or most of the faculties and affections are deranged, so that this class are commonly said to be lunatics, entirely crazy, sometimes raving maniacs and sometimes quieter, yet with most of their powers of mind deranged, and the whole mind in a state of chaos and confusion,—said he did not deem it necessary to discuss that kind of insanity as it was not contended that this testatrix was in that condition of entire lunacy or madness. He would only say that if she was in that condition, then she was incapable of making a will, whether it could be established or not that any of such insane delusions operated upon her to make the will, or any part of it. But he did not understand that it was contended in this case that the testatrix was in that condition of entire lunacy when she made the will and codicil, but it is contended that her mind had become deranged from a healthy state and that she entertained insane delusions, within the rule before given. He then

told the jury that it was for them to decide whether she did or did not; and that if Mrs. Green, at the time of executing her will and codicil, or either of them, was laboring under a delusion or delusions amounting to insanity or monomania, which is insanity on a particular subject, or under insanity generally; and any of these insane delusions operated upon or influenced her in making the will as it was made, then she was not of the sound mind required by law.

The substance of this seems to be that the appellant contended that the evidence was sufficient to prove delusions, existing in her mind, such as would invalidate the will. The court ruled that the delusions must be such as amounted to insane delusions.

The propositions of the counsel, presented as requests for instructions, indicate clearly the specific points and grounds in relation to which it was claimed that these delusions existed, and to which the rulings were applied. The first requested instruction was this: that if Mrs. Green believed that the spirit of her deceased husband directed or dictated the will and codicil and acted under that belief, they are void.

The second was: That if she entertained a groundless and causeless suspicion of Mr. Robinson's character, and that he was exposed to the control of evil spirits, and made the will and codicil under that influence, they are void.

The third was: That if she disliked Mr. Robinson, and believed that he had a supernatural power over his wife—a power through the aid of evil spirits—and was influenced to make her will and codicil as she did by this belief, then they are void.

The fourth was: That the will and codicil must be wholly the offspring of her own mind uninfluenced by any delusion.

As to the first requested instruction, the judge said, as appears by the report: "I give you that. I have already given it to you in substance." The judge evidently understood the request as bearing on the other point, of undue influence, concerning which the fifth request was presented. The judge had charged fully that if she believed that the spirit of her deceased husband direc

ted or dictated the will, it would be void on the ground of undue influence, as will more fully appear when we come to consider that point of undue influence. The counsel, in his argument on this hearing, regards this as in substance a request to instruct that if such belief had any influence, although short of direction and dictation, it would invalidate the will. Or perhaps, in short, that a belief in spiritual communication was in itself an insane delusion, if it had any influence on the mind of the testatrix in making her will. If the judge had so understood the request, he would, doubtless, in consonance with his whole charge, have given this as he gave the second, third and fourth requests (above recited) with the qualification in each, that if such matters amounted to insane delusion, as explained in the charge, and influenced her in making her will, the will would be void. The requests were, in effect, that the judge should rule as matter of law, that these specified matters, under each head, did establish such delusion as would render the will void. The judge did not thus take the question from the jury, but told them that it was for them to determine whether there was such a state of mind as came within the rules and definitions given to them. This was stated, as before recited, in the first part of his charge; and after calling the attention of the jury to the points made, and the facts proved, and the evidence bearing on each and all of them, he concluded his charge on this part of the case by saying: "The point is this: did these things, these beliefs, these matters, with other influences, no matter what, create in her mind insane delusions? Did she act on them in the making of her will, or any item of it? If so, then you will be justified in saying she was not of sound mind." We think it clear that the final determination as to the testamentary soundness was with the jury after the definitions and rulings of the court as to the legal questions had been given to them.

Was there any substantial or material error in these rulings and definitions?

The charge was long and is reported by the stenographer in full and doubtless correctly. But it necessarily presents many

remarks and illustrations and repetitions which render it somewhat difficult to reduce the whole to a few simple propositions. Indeed, it is very difficult to comprehend the exact import of the charge in all its bearings without a perusal of the whole as given; but to afford this would extend this opinion unreasonably; a brief statement of the points must, therefore, suffice.

After stating that if a testator acts under a delusion, the will which is the result of a disordered mind is invalid, (as before set forth) the judge called the attention of the jury to the point that the delusion must be the act of a disordered mind, and that the term delusion, as applicable to insanity, is not a mere mistake of a fact, or the being misled by false testimony or statements to believe that a fact exists where it does not exist. This is sometimes termed delusion in common conversation. So some men will believe on much less evidence than others that a fact exists, particularly in matters not tangible to the senses, but resting in mental or spiritual theories or beliefs. A false assumption does not invalidate, unless it is an insane delusion.

The principal objection now made to the charge, under the general objection to it as a whole, relates to the definition given of an insane delusion. The judge read from Bouvier's Law Dictionary this definition: "A delusion is a diseased state of the mind in which persons believe things to exist, which exist only, or to the degree they are conceived of only, in their own imaginations, with the persuasion so fixed and firm that neither evidence nor argument can convince them to the contrary."

The judge then added: "But insane delusion as a fact may be where the supposed fact is the coinage of the brain, without evidence, a figment of the imagination." To this addition the counsel excepts, assuming that this was a definition extending and including all cases of insane delusion. But it was simply a definition applicable to one class of delusions and not intended to exclude all other cases; and even this was not stated absolutely and was confined to delusion as of a fact. The judge then explained to the jury the difference between a delusion as to the existence

of a fact and one where the fact is rightly apprehended, but the reasoning upon the fact and the conclusions drawn from the existing fact are entirely wild and absurd, showing that the insanity is in the mental powers and operations.

Coming to the case before them, the judge asked "if a delusion existed in any form, was it an insane delusion?" He then gave to the jury a definition furnished by the counsel for the appellant, as follows: "In a legal point of view, insanity is where a person believes something to exist, which not only does not exist, but of which he has no evidence sufficient to satisfy any healthy mind, and he acts upon it, reasons upon it, and holds it as a reality." This was given as an instruction, the judge adding this: "That may be an insane delusion; that is to say, where it is so palpable that he believes it without reason; any reason sufficient to satisfy any healthy mind; and he acts upon it, when it cannot possibly be true; that is an insane delusion."

Now this additional explanation is strongly objected to by counsel as extending the rule given in the book to the injury of his client. But the rule starts with the absolute assertion, or assumption, as the basis of the whole rule of law, of the fact that the "something which the person believes to exist" does not exist. It requires, to start with, the absolute non-existence of the fact believed to exist, and this, of course, must be established conclusively, before any conclusion of insanity can be drawn. It would seem to be too plain to need any argument, that before an insane delusion as to a fact, could be predicated or established, the non-existence of the fact must be, in some mode, put beyond doubt. The judge in another part of his charge said: "Before any thing (in law) is a delusion, the non-existence of it must first be established."

The qualification, as given, was rather to relax the rule in favor of the positions of the appellant than to make it more stringent. It evidently had particular reference to the belief in spiritual and supernatural influences and communications. By the literal meaning of the rule given in the book, it must first be established absolutely, as a demonstrated fact, that the matter or fact, about which

the delusion was said to exist, had no existence. But, clearly, it would be impossible to prove that, in the present instance, by direct testimony. The judge, therefore, qualified the rule, by allowing the jury to find that it might be an insane delusion, if the testatrix believed what could not possibly be true, although no positive or direct evidence was or could be offered, to establish the falsehood of such spiritual beliefs. The jury might determine this point in favor of the proposition of insanity, on their own conviction of the impossibility of the truth of the facts on which the claimed delusion rested. We do not see how the appellant was injured by this qualification of his requested instruction by the presiding judge.

The jury were then directed to apply this test to all the facts in the case, as shown in the evidence. The principal difference between the requested instructions and those given, is in this: the requests asked for rulings that should declare, as matter of law, that certain facts and matters recited, were each in themselves, insane delusions, and rendered the will, for that cause, void; the rulings given did not so declare, but required the jury to determine, after a full and fair consideration of all the evidence bearing on the question, whether the testatrix was under an insane delusion, within the rule given.

The court will not ordinarily withdraw the questions raised under the issues framed from the jury, where the very purpose of framing such issues, is to have the jury inform the court as to the truth of certain allegations, as is the case where the Supreme Court of Probate is called upon to probate a will, and the due execution of it, or the soundness of mind of the testator is in question. It is the duty of the court to give instructions on the points of law, and to explain and illustrate them, but it will not, unless possibly in some cases where there can be no real question of fact to be determined, undertake to direct the jury what their finding shall be. Even then it would be the more proper course to withdraw the issues from the jury, and for the court to act on its own convictions, without the aid of a jury. There is no com-

mon law right to demand a trial by jury in cases of appeal from the probate court. It is only when, upon a hearing of such appeal "any question of fact occurs proper for a trial by jury, an issue may be formed for that purpose, under the direction of the court, and so tried." It is true that if the requested instructions had been given, some questions of fact would have remained for the jury; but, substantially, the court would have declared that she was not of sound mind.

The grounds chiefly relied upon to show unsoundness of mind were the belief in spiritual communications, particularly with the spirit of her deceased husband, and her suspicions and beliefs as to her son-in-law, Mr. Robinson, touching his exposure to the control of evil spirits, and his possession of supernatural power over his wife, through the aid of evil spirits.

The judge did not rule that the belief in what are called spiritual communications or revelations, that is, that spirits do communicate with human beings through mediums, was *ipso facto*, and in itself, an insane delusion. Nor did he say peremptorily that it was not; but he told the jury to consider how far that belief showed delusion, under the rule before given them, and whether that belief was in itself an insane delusion.

The learned counsel for the appellant, has denounced such belief in very powerful and eloquent language, and calls upon the court to deny to it "a standing in court," and to show its concurrence in the denunciation of an English judge, who termed it "mischievous nonsense," with other like designations.

And yet the good sense of the counsel realized that we were called to deal with this matter not theologically—or in one sense, morally or scientifically—but legally, as bearing on the single point of insanity, or insane delusion. What our individual or collective opinion as to the facts, truth, possibilities, or evidence, or claims, of this so-called spiritualism, may be, has nothing to do with the questions before us. It is only as to the proved effect of this belief on another person's mind, that is before us. Did this belief unsettle her intellect, and make her of unsound mind,

within the meaning of the statute? Even if true, it might produce that effect, by a long continued, and exclusive and fanatical devotion to the thought. The judge so said in substance when he stated to the jury, by way of illustration: "Now there are questions constantly arising in relation to mere speculative belief in abstract propositions of theology or law, or other matters, particularly in theology, spiritual truths. These mere speculative beliefs of abstract propositions you may think very absurd; you do not see how anybody could believe such things, such creeds or doctrines, yet others may believe them, and not be insane. They may rest so in a person's mind, and work so in his intellect, may upset his mental powers generally, or partially, or topically, on particular points, so that he may become insane, arising from this very cause."

He illustrated further, by the case of a man, who believed fully in the second coming of Christ, personally and bodily. This to many may seem a strange and unsustained faith. But would any one say it was an insane delusion? But by constantly dwelling on this single idea, he comes to believe and to proclaim his belief, not merely that Christ will come again on earth, but that he himself is the very Christ that was to come, and to assert his official character with perfect assurance and sincerity. There the delusion would be, not in the original faith, but in the consequences that have worked out from it in his mind, finally upsetting his powers of reasoning, until we say that man has an insane delusion.

The judge also stated further that in this case it was contended that the testatrix believed more than this simple proposition of the existence of spiritual communications; that she believed that she had the power to heal, and to some extent exercised it at home and on others; that she believed it was the same sort of power that was employed by Christ and the apostles; and, further, that she had various other imaginations and delusions, in one form or another. The judge then gave the rule before stated, telling the jury that all these matters were before them, and it was for them to say, in view of them all, whether singly or together they had brought her to the state of unsoundness of mind, by reason of insane delu-

sion or illusions; and whether such delusions operated upon her in making this will.

Preliminary to this summing up and as included within it, attention had been called also to all the evidence touching the relations between the testatrix and her daughter and Mr. Robinson, and her beliefs and acts, and feelings and declarations, with the distinct instruction that "if the conditions in the will were made through dislike of Mr. Robinson, if that state of mind was a delusion and had reached the point of being an insane delusion, and it was for them to determine whether it did or not, then it would invalidate the will."

We do not perceive what valid objection can be made to the charge on this point of soundness, when it is examined in its full scope and fair meaning. Indeed, the counsel frankly admits in his very elaborate argument on all the points; "we do not contend that a mere speculative belief in spiritualism, if it is not acted upon, and has no influence over the testator, would render a person incompetent to make a will."

This belief, then, *per se*, is confessedly not insanity or an insane delusion. But the counsel does contend that "if the will was made under such an influence, or if such an influence had any effect upon the mind of the testator in making the will, it is invalid."

But if the belief was not in itself an insane delusion, how could acting upon it sustain the plea of unsoundness of mind? Or why should the judge rule, as matter of law, that acting upon a belief, confessedly not in itself incapacitating, invalidates the will?

But it was contended that the proposition was correct as applied to the issue, charging undue influence. This leads us to the consideration of the rulings on this separate and distinct point. The instructions on this head started with the assumption that the jury failed to find such insane delusion as would invalidate the will. The court said: "It is contended that if there was sanity, and no general or specific delusion to a degree sufficient to invalidate the will, yet that such a dominion or influence was obtained by others over the testatrix as to prevent the exercise of her own

judgment, will and wishes, and that the will was in fact not the expression of her own will and wishes and intentions, but was substantially the act of others, and not of herself." The judge in substance, said that such influence, however exerted, would be undue, and would render the will made under it, void; that it must be such and so exercised, as in effect to destroy the freedom of the testatrix's will, so as to render her act more the offspring of the will of others than her own, at least in some of the provisions of the will.

He said, "that a testator might receive the advice, opinions and arguments of others, and if after all such advice, requests or persuasions, however persistently, or however strongly urged, the testator is not controlled by them to the extent of surrendering his free agency, and yielding his own judgment or will, and so, not making his own will, but adopting for his own will, the will or wishes of others; then there is no such undue influence as is required to be proved to avoid the will."

There seems to be no exception to these rulings so far as they apply to living persons. The rule as given is according to the most approved authorities. But there remained the point, as to undue influence, connected with the alleged spiritual communications. On this, the judge said: "The question arises, if she was of sound mind generally, and if no living person did unduly influence her, yet she may have been under the control and dictation of what she believed was the spirit of her deceased husband, communicating to her directly through a medium: and that to her it was a reality; and that her own will was subordinated to her husband's will, and that will was his and not hers. It is contended that this was a delusion, and an undue and improper influence. On this point I give you the same rule as before stated. If she did thus believe, and if she did have what she deemed direct communications on the subject of this will, and implicitly followed them, yielding her own will and judgment and exercising no free agency (as before explained) then it would not be her will, but another's, in the same manner as if actually dictated by a living person.

But if she did thus believe, and had what she deemed her husband's opinions, wishes or judgment, if she nevertheless acted her own will and her own judgment, as before explained, and did not abandon both to the supposed wishes and opinions of her husband, then it would not be undue influence, although she might have had full faith in the supposed communications and have regarded them as her husband's advice. I give you the same rule, in short, as I gave as to living persons."

We have made these full extracts, in order to present distinctly the exact point decided.

It will be observed that the ruling on this point was entirely disconnected from that relating to insanity or insane delusion. It proceeds on the ground that the testatrix was of sound mind, and that this matter of a belief in spiritual manifestations was not found by the jury to be an insane delusion.

The appellant contends that if any such communication had any influence, however slight, or however short of dictation, on the mind of the testatrix, it would invalidate the will, although in all respects she was of sound mind.

There is no doubt that the law allows any person to seek advice, suggestions and opinions from others, where no fraud or deception is practiced. The law does not limit the range. If a pious man of sound mind should seek advice by prayer, and should believe that he had a direct answer and should regard it, not as dictation but advice entitled to consideration, would any one say that his will could be set aside as made under undue influence? Or if such a man should say, "I have had a dream which impresses me considerably as to the disposition of my property, and I shall give it consideration," would any one say his will was void, unless it was shown that the testator yielded his own will and judgment to the suggestions of his dream? In this case, the widow, it is assumed, thought she had received letters, not from an absent husband, but from one who had gone beyond this world to another, and in them some suggestions as to the disposition of her property; that she did not yield implicitly and blindly to these suggestions,

but regarded them,—as she would have regarded such letters if they had been written during life—as friendly suggestions, which had some effect on her mind, but not to the point of destroying her own free will and deliberate judgment. Now, it is evident that the judge must either direct the jury to disregard entirely all this matter about spiritual communications, as having no bearing on the question of undue influence, or rule that if they had the slightest influence on the mind of the testatrix in making her will, they entirely invalidated it; or else rule, as he did, that they must be taken into consideration by the jury and come under the general rule as to undue influence, and be subjected to the same test. If they dictated the will, it was void. If they influenced the mind, but did not control it in making the will or any part of it, then the will would not be by them invalidated on the ground of undue influence.

Without pursuing this point at more length, we say that we do not find these instructions erroneous.

There were several objections made and exceptions taken in relation generally to the admission or rejection of evidence. The first is, that the subscribing witnesses to the will were allowed to testify to their belief and opinion as to the soundness of her mind at the time of executing the will. It is not denied, however, that such witnesses may so testify.

But it is insisted that, to lay a foundation for such admission, all the facts transpiring at the time, all that was said and done, and all the premises from which the conclusion was drawn, must be stated. We do not so understand the rule or the practice. The rule admitting the opinion of witnesses to a will is somewhat exceptional. It is thus stated in Greenleaf on Evidence: "Witnesses to a will are permitted to testify as to the opinions which they formed of testator's capacity, at the time of executing his will." It is the opinion then formed that is admissible. The precise point in the examination when the question is put is not material. It may be as soon as they have shown that they were present and witnessed the will at the request of the testator. It

is the fact of being a witness to the will, that gives this right to ask his opinion of the soundness of mind of the testator. It may be given, although the witness was suddenly called in, and heard only the request to sign and the declaration of its being his last will. It is undoubtedly true that all the facts seen or known by the witness at the time are proper subjects of inquiry by either party, and it is proper that they should be. But it is not legally necessary that all should be detailed by the witness, if not asked by either party, before he can give his opinion. The weight and value of his opinion may depend very much upon his means of observation and knowledge; and if he can give few grounds for his belief or opinion his testimony would, doubtless, have very little weight with the jury. But it is for the parties to bring out from the witness such facts as they deem important, touching the extent of knowledge on which the witness bases his opinion.

The exceptions to the answers of Narcissa Stone and Wm. G. Barrows are based on the assumption that they were expressions of opinions by non-experts. These answers were given in connection with details of certain facts introduced by the appellees, in refutation of the allegation of unsoundness of mind made by the appellant.

They were both mere negations; statements that they did not observe certain facts touching the mental condition of the testatrix; i. e., one said she did not observe any failure of mind, and the other, who was a witness to a former will, that he observed nothing peculiar. *State v. Pike*, 49 N. H., 408.

The only objection in the argument is, that these were expressions of opinion on the question of testamentary capacity.

The question, whether opinions of witnesses not experts are, in all cases where insanity or delusions are in question, to be excluded, has recently been much discussed, particularly in a learned opinion by Mr. Justice Doe of the supreme court of New Hampshire.

If the case required it, we might, perhaps, review some of the former decisions of this court. But, certainly nothing less than a

distinct expression of the opinion of the witness, given as such opinion directly, comes within our rule. Mere negations, such as stated by these witnesses, do not give to the jury an affirmative opinion. They, at most, state negatively that nothing was observed by them. This is not an opinion of the witness, but had relation to a fact, as to the condition of the person.

The next exception is that a witness was not allowed to testify to the contents of a letter. A witness (the appellant) having testified that her mother, (the testatrix) when visiting her at the west, had received letters, a good many from Maine, which made her uneasy and discontented, she was asked from whom they came. This was objected to; the appellant, by her counsel, then offered to show that they were received from A. J. Stone and Mrs. Dennett, but it was objected to, and the question ruled out. A similar ruling was made, when, after Mr. Robinson had testified that some communications were sent to Bloomington that were injurious to him and his family, on objection, the court ruled that the witness could not state the contents of the communications.

No evidence was offered of the loss of the letters or of any attempt to obtain them, by summons or otherwise. The rejection of this evidence was clearly within the well-established rule, that the contents of a written document cannot be given by a witness, except in case of loss or inability to obtain it.

Another objection has relation to the admission of the declarations of the testatrix, written and verbal, to show the state of her mind. The report states "that the defendant (the appellant) seasonably made a general objection to all declarations, conversations, statements and acts of Mrs. Green, which did not relate to the subject of spiritualism, or the execution of the will or codicil sought to be set up. The testimony was not thus limited by the court, by a specific ruling to that effect as requested, but testimony was given, as appears in the report," not limited as requested.

Was it the duty of the judge thus to limit in advance, or at all?

The issue was a general one; soundness of mind. The executors had offered some testimony upon this point; the appellant then

offered a great mass of evidence, tending to show a want of soundness. This evidence was not confined to spiritualism, or the execution of the will; it embraced evidence tending to show that Mrs. Green not merely believed in spiritual communications, but that she entertained delusions of an extraordinary nature concerning her son-in-law and his wife; particularly concerning Mr. Robinson. As before stated, there was a great deal of evidence on this matter, covering many years and many declarations, acts, imaginations, and asserted delusions. And there was further evidence, on a matter not properly a part of a belief in spiritualism, as generally understood. It is thus stated by the judge in the charge: "But it is contended that she believed more than that simple proposition; that she believed that she had power to heal, and to some extent, exercised it at home and on others; that she believed it was the same sort of power that was employed by Christ and his apostles; I suppose of the same nature as the power possessed in those miraculous days; and that she had various other imaginations, delusions in one way and another." The appellant offered evidence on all these matters, which was admitted, including spiritual communications and declarations of various kinds; all admitted to show the state of the testatrix's mind, covering many years.

The executors resumed, and the judge permitted them to show like declarations, acts, beliefs, &c. There was no limitation suggested until after the appellant had put in this great mass of evidence. The issue was on the soundness of mind of the testatrix, and the court ruled that the burden to sustain this general proposition was on the executors, and that it did not shift, but remained on them to the end. Spiritualism and the due execution were not the only matters to be considered, or rebutted. The great fundamental rule of law, which requires impartiality between the parties, would have been violated by the ruling requested, and it was properly refused. How far a party can be allowed to interpose objections as to particular testimony under such a general objection, may be very questionable. But if open, we do not find, on perusal of the report, any admission which is clearly illegal. The rule allowing the introduction

of the declarations of a testator, to show the condition of his mind, is very general, and admits much that would be excluded if offered as testimony to prove facts. The rule allows great liberality to both parties as to the kind of evidence, and as to the length of time over which it extends. Much is necessarily left to the discretion of the presiding judge, and it is impossible to lay down any general rules which would cover all cases. To enable the jury to determine the real state of mind, the action of that mind, as shown best by conversations, declarations, claims and acts, is the most satisfac tory evidence. But, in order to fairly judge, the examination must not be confined to a single declaration, or conversation, but must embrace sometimes many years and many different acts and declarations, and sometimes, perhaps, the evidence may, at first view, be remote and far from a demonstration.

The judge was very decided and emphatic in his charge to the jury in enforcing upon them the fact, that these declarations of Mrs. Green were admitted to show her state of mind, and of her feelings toward the parties, and whether or not they exhibited evidence of insanity, or delusion amounting to insanity, at any time. "They are not to be regarded as proof that what she said to the witnesses, or wrote in these papers, were facts. They are not given on oath. They are not legal evidence of the facts stated." The judge repeated and elaborated this idea, so that the jury must have understood the weight they could give to this species of evidence.

The exceptions, however, as to this part of the case, are that the evidence was not confined to spiritualism and the execution of the will. We think it clear that it should not have been.

The chief, if not the only, specification dwelt upon by the counsel, is the written statement of Mrs. Green, which has annexed to it a jurat. The counsel is mistaken in saying that it was used as evidence of the facts therein stated. It was admitted expressly—the same as much other evidence of a like character—solely to show the state of mind of the testatrix in reference to the very matters in question. The jurat did not make it a deposition, or

give it any greater force or effect. It was still the declaration of Mrs. Green, and the jury were charged distinctly, not to regard it as proof of the actual existence of any fact.

The rule given as to the burden of proof was clearly correct.

Exceptions and motion overruled.

APPLETON, C. J., WALTON and DICKERSON, JJ., concurred.

BARROWS, J., did not sit in this case.

NOTE:—At the December term, 1874, for Sagadahoc county, the proponents having withdrawn from the prosecution of the will, it was disallowed and refused probate, by arrangement, and upon payment of $3000 to the contingent legatees by Mrs. Robinson, the sole heir-at-law; the whole estate being valued, at that time, at about twenty-seven thousand dollars.

AARON H. Goodwin *vs.* ALBION JACK and another.

Evidence. Ancient records and plan admitted.

The plaintiff offered in evidence ancient books, purporting to be the records of the original proprietors of Pejepscot (now Topsham) for more than a century, now produced from the archives of the Maine Historical Society, and they were received against the defendants' objection: *held*, that they proved themselves, and were admissible without extraneous evidence of their authenticity, or of the organization and meetings of the proprietors, inasmuch as no suspicion was cast upon them, but their contents bore internal evidence of verity, the organization had long ago ceased to exist, and there is no person to represent it, or interested in it, and no authorized custodian of its records.

Copies of letters and memoranda of the agents and officers of the proprietors, relating to their affairs, found extended upon these records among their proceedings, bearing internal evidence of genuineness, are admissible without evidence of the existence, loss, or destruction of the originals; since after the lapse of so long a time, it may well be presumed that the originals are lost, and that the record contains a faithful transcript of them.

By these books it appeared that John Merrill was employed by the proprietors to draw a plan of the township from actual survey, in 1768; by parol evidence it was shown that a plan, purporting to be his, was, several years ago, in the possession of a gentleman since deceased, but could not now be found; and that a plan produced, purporting to be certified as a copy by said Merrill, was a true copy of his original plan; *held*, that such copy is competent to prove any fact which could be established by the original.

In an action of trespass *quare clausum* the evidence relating to the *locus in quo* supported the declaration as to the number of the lot, and of the acres it contained, and the town in which it is situated, but in a single other particular it failed to correspond; *held*, that there was no error in an instruction given to the jury that they might, if in other respects satisfied of the truth of the facts alleged in the declaration, find for the plaintiff, notwithstanding the failure to prove this element of the description of the close upon which the trespass was committed.

On exceptions.

Trespass *quare clausum* for breaking and entering the plaintiff's close in Topsham and cutting down a tree. The real purpose of the suit was to determine the location of the plaintiff's line between himself and Mr. Joseph L. Jack, father of the defendants, who admitted the cutting and justified it as done by the direction of said Joseph, as the owner of the premises.

To establish his title, Mr. Goodwin offered the old records of the Pejepscot proprietors, and the copy of a plan of the township made by John Merrill in 1768, the facts relative to which are fully stated in the opinion, and both were admitted against the objection of the defendants.

After identifying the *locus in quo* as No. 19, containing fifty acres, &c., the plaintiff's declaration alleged that it was "called the fifty acre lot, being the same set off to Catherine W. Merrill, &c." There was no proof of this last averment, and the defendants claimed that, for this reason, they were entitled to a verdict; but the justice presiding instructed the jury that, if the plaintiff had shown himself otherwise entitled to maintain his action, he might recover without having proved that that part of his description of the premises was correct. The jury gave the plaintiff a verdict for nominal damages, and the defendants filed exceptions and moved for a new trial; but no question of law arose upon the motion.

Tallman & Larrabee, for the defendants.

W. Gilbert and *Henry Orr*, for the plaintiff.

DICKERSON, J. The first error alleged in the bill of exceptions is the admission by the presiding justice of certain ancient books entitled "Pejepscot Records."

Courts have felt obliged from necessity to depart from the strict rules of evidence in the admission of ancient writings, documents, books and records, to prove the existence of the facts they recite. The rule of evidence requiring the testimony of the lawful custodian of books of record offered in evidence, that they are of the description claimed, before they are admissible, has repeatedly been relaxed in the case of ancient books of record of proprietors of land. In such instances, such books have been held to prove themselves. When ancient books, purporting to be the records of such proprietary, contain obvious internal evidence of their own verity, and there is no evidence of the present existence of the proprietary or of any person representing it, or any clerk or other person authorized to keep the records, they are admissible in evidence without proof of the legal organization of the proprietary, or of its subsequent meetings. *King et als. v. Little et als.*, 1 Cush., 440; *Rust v. Boston Mill Corporation*, 6 Pick., 165; *Monumoi Great Beach v. Rogers*, 1 Mass., 159; *Pitts v. Temple*, 2 Mass., 538; *Tolman v. Emerson*, 4 Pick., 160.

The books offered in evidence purporting to be "Pejepscot Records," cover a period of more than a hundred years and contain strong internal evidence of their own verity. There is no evidence to impeach their genuineness, or of the present existence of the proprietary, or of any person authorized to represent it, or having any proprietary interest therein. Previous to the decease of John McKeen of Brunswick, they were in his possession, he claiming title to certain lands under the Pejepscot Proprietors. At the time of the trial they were in the possession of the librarian of the Maine Historical Society. Time has swept away all who could have testified to the original organization of the association, so long

known as "Pejepscot Proprietors." To require such evidence, or even parol testimony in the ordinary way, that the books offered are what they purport to be, would be practically to exclude these records from being used as evidence in any case affecting the title to any land originally derived from those proprietors.

Under these circumstances, we think that the books offered are to be regarded as proving themselves to be what they purport to be, —"Pejepscot Records,"—and that they are competent evidence of the doings of the "Pejepscot Proprietors," without parol or other evidence of their original organization, or the regularity of their subsequent meetings; they are, in fact, the very best evidence of those facts that is attainable.

It appears from these records that, at a meeting of the proprietors held February 12, 1767, by adjournment, it was voted, "that the plan of the township of Topsham be completed in order for a division among the proprietors, and that Belcher Noyes be directed and empowered to see it effected in the best manner.

The same book contains a record of Noyes' letter to Merrill, of Merrill's attestation of the genuineness of that letter, of his acceptance of the trust committed to him by Noyes in his letter, and the "Field book of the survey as drawn by Merrill, on the 23d and 26th of July, 1768," in pursuance of his instructions from Noyes.

These entries were made by authority of the party interested to preserve and perpetuate the evidence of these transactions, contained in letters and other fugitive papers, liable to be lost or destroyed. They were made, too, among the solemn records of the doings of the meetings of the proprietors, where they would be most likely to escape the fortuities of accident and mischance, and the ravages of time. Being found, as we have seen, among records that prove themselves, after the lapse of more than a hundred years, these entries may properly be regarded as primary evidence, the presumption being that the originals have long since been lost or destroyed, and no shadow of suspicion resting upon their authenticity. Moreover, there does not appear to be any

known place to search for the originals, or any living witness by whom to prove their loss or destruction. They are, therefore, the best evidence that exists, of the facts they contain.

The next objection is to the admission in evidence of a copy of what purports to be John Merrill's plan of the township of Topsham. This objection is two-fold: 1st, That no such original plan is proved to have been made; and 2d, that if it is, there is no sufficient evidence of the loss of the original, or that the plan offered is a copy.

Did John Merrill make a plan of the township of Topsham? We have already seen that the proprietors by their vote of February 12, 1767, ordered "a plan of the township of Topsham to be completed," and "directed and empowered Belcher Noyes to see it effected in the best manner;" that Noyes, by his letter of October 21, 1767, to John Merrill, authorized him to perform that work "by a regular survey;" that Merrill accepted that trust, on the same day, and returned "A Field Book of the survey of the respective divisions of the lots in the township of Topsham, as drawn by him the 23d and 26th of July, 1768." It further appears that at a meeting of the proprietors on the same 26th of July, 1768, Merrill's account for surveying the township of Topsham was allowed, and Belcher Noyes was authorized to execute a deed of certain land to Merrill in payment of his services, which was done August 5, 1768, the deed specifying that it was given "in payment for surveying the township of Topsham."

From the declared purpose and acts of the proprietors, the directions of Noyes to Merrill, and Merrill's doings, it is reasonable to conclude that a plan of the township of Topsham was made by Merrill. Indeed, the certificate of Merrill upon the copy offered, in substance, that the original plan was drawn "at the request of the proprietors of said Topsham," confirms this conclusion; and though this certificate bears date July 21, 1786, instead of 1768, we think it is clear from the dates of the several transactions touching this subject, that the copyist inadvertently transposed the last two figures, writing 86 instead of 68. By making

this correction, the drawing of the plan becomes cotemporaneous with the survey, and the extension of the field notes upon the proprietor's records, and consistent with their declared purposes, and Noyes' directions to Merrill.

But if there could be any doubt as to whether Merrill ever drew a plan of Topsham, it is removed by the testimony that such a plan was seen some twenty-five years before the trial, in possession of John McKeen, who claimed to have an interest in certain land derived from the Pejepscot Proprietors, and with whom was, also, found their records, including the field book. It further appears in evidence, that the original plan could not be found in possession of the family of McKeen after his decease, nor in the archives of the Maine Historical Society, where the other muniments of the proprietors were deposited.

We think the plaintiff has placed himself in a situation to introduce a copy of Merrill's plan of Topsham, and in view of the strong internal evidence borne upon the face of the paper offered, of its identity with the original, on the testimony that "it is the same as the original," we think it was properly admitted in evidence as a copy of Merrill's plan.

The objection to the court's instructions to the jury that the action might be maintained, though a part of the description of the premises in the declaration was not sustained by the evidence, is obviated by the fact that, in one of the counts, the *locus in quo* is described as "land of the plaintiff situated in Topsham, containing about fifty acres." There being no demurrer to that count, and the defendants having pleaded to it, the action might at least be sustained on that count. But we think the objection cannot be sustained on any ground. The same particularity of description is not required as in criminal cases. In the other count in the writ the *locus in quo* is alleged to be "a fifty acre lot," "numbered 19" "in the town of Topsham." If the *locus* proved conformed to the declaration in these several respects, the jury would be authorized to return a verdict for the plaintiff, though it should not answer to the description in some other respects.

Our conclusion is, that the rulings and instructions of the presiding justice afford no legal ground of exceptions, and that there is nothing to warrant setting the verdict aside on the motion.

Motion and exceptions overruled.

APPLETON, C. J., CUTTING, DANFORTH, VIRGIN and PETERS, JJ., concurred.

KATHARINE FLAHERTY *vs.* NATHANIEL LONGLEY and another.

Search warrant.

A search warrant commanded the search for intoxicating liquors, upon "certain premises and their appurtenances, &c., occupied by Michael Neagle, &c. Then followed the description by metes and bounds of a block of two dwelling-houses, each separated from the other by a partition wall, with no means of communication on the inside—one occupied by Michael Neagle and the other by Flaherty. In trespass for ale seized in Flaherty's house; *held,* that the warrant did not authorize the search of Flaherty's house.

ON EXCEPTIONS.

TRESPASS *de bonis* for taking and carrying away twenty bottles of ale belonging to the plaintiff, and taken by the defendants from her father's cellar. The defendants justified under a search warrant, the essential portions of which, together with the other facts necessary to an understanding of the question presented, are fully stated in the opinion.

The action originated in the municipal court of Bath and was brought up by the plaintiff on appeal, and a verdict obtained for the defendants, upon the refusal of the presiding justice to instruct (as requested by the plaintiff) that the warrant did not justify the officers in entering any premises not occupied by Michael Neagle; that they had no authority to enter Flaherty's house; and, such entry being illegal, therefore they were liable as trespassers; and giving an instruction that the officers were authorized to take the ale if found in a house "embraced in the premises described by metes and bounds in said complaint."

W. Gilbert, for the plaintiff.

The verdict was practically directed by the judge, and the question is whether his construction of the law was correct. It is true Flaherty's house was within the geographical limits given as the premises to be searched; but there was a further essential qualification of the description: i. e., that only so much of that territory as was "occupied by Michael Neagle" was to be searched. No part of Flaherty's house was described as used as a shop. R. S., c. 27, § 35.

C. W. Larrabee, for the defendants.

VIRGIN, J. The complaint alleged that, on a certain day therein named, "intoxicating liquors were and still are kept and deposited by Michael Neagle, of Bath, in said county, in certain premises and their appurtenances in said Bath, occupied by said Neagle and in which a shop is kept by him, and bounded on the East by Water street, on the South by premises occupied by Reed Nichols, on the West by land occupied by one Campbell, and on the North by land of the Railroad Company." The warrant commanded the defendant "to enter the premises named in the complaint, and *therein* search for said liquors, and, if *there* found to seize and safely keep the same * * and to apprehend the said Michael Neagle," &c. The territorial limits mentioned embraced a block of two dwelling-houses, each separated from the other by a partition wall, with no inside means of communication—one "occupied by Michael Neagle," and the other (from which the plaintiff's ale was taken) occupied by the plaintiff's father and family.

The question is whether the defendants were authorized by the warrant to search the dwelling-house of Flaherty and seize the plaintiff's ale therein. If the defendants were not thereby authorized to search Flaherty's house, then the seizure of the plaintiff's ale "*there* found" would be a trespass; for the warrant authorized a seizure in the place only in which it commanded the search to be made.

Art. 1, § 5 of the constitution forbids the issuing of a warrant

"to search any place or seize any person or thing" * * "without a special designation of the place to be searched." And R. S., c. 27, § 35, on which these proceedings are founded, provides that the magistrate shall issue his warrant commanding the officer "to search the premises described and specially designated in such complaint and warrant." Was the dwelling-house of Flaherty "described and specially designated" in the complaint at bar? We think it was not. The place to be searched was accessible—readily and easily described. There was no necessity for any general and indefinite description; and it was Neagle's premises which the officer believed contained the liquors. We cannot believe that the officer was justified in searching both houses simply because both are within the geographical limits mentioned; especially as the house of Neagle only was specially designated, and he was the only person charged with the offence set out.

Again, there is no pretence that any part of Flaherty's house was "used as a shop," &c., and "no warrant shall be issued to search a dwelling-house, occupied as such, unless it, or some part of it, is used as an inn or shop," &c. R. S. c. 17, § 38.

To hold the officer justified in this case, would justify an entire street or village to be searched by a warrant mentioning its metes and bounds, although the premises of but one of its residents be specially designated, either by its number, or by the name of its occupant.

If the plaintiff's ale had been seized in the premises occupied by Neagle, and therefore in the place authorized by the warrant to be searched, then, although it might not have been intended for unlawful sale, the officer might lawfully seize it; and the plaintiff's remedy would be found under § 37, *et seq*, for then it would be "seized as provided in § 35." But it not having been seized in the place "described and specially designated in the complaint and warrant," and therefore not "as provided in § 35," the plaintiff was not obliged to seek her remedy, under § 37, *et seq.*, but could, as she did, resort to her action of *trespass de bonis asportatis.*

Exceptions sustained.

APPLETON, C. J., CUTTING, DICKERSON and DANFORTH, JJ., concurred.

WALTON, BARROWS and PETERS, JJ., did not concur. They held that, inasmuch as the building to be searched was accurately described by metes and bounds, the officer was justified in searching every part of it, notwithstanding it was also described as occupied by Michael Neagle, when in fact he occupied but one of the two tenements which the building contained. They held that the description by metes and bounds, being accurate and specific, was the more reliable of the two descriptions; and that the officer was, therefore, justified in following it, and was not a trespasser for so doing.

DANIEL HUNTER *vs.* ELBRIDGE RANDALL.

Statute of Frauds as a defence to an action for money had and received.

Where the gist of an action for money had and received consists in oral representations falsely and fraudulently made by the defendant, concerning the financial character and credit of another, to the injury of the plaintiff, the statute of frauds may be invoked as a defence thereto.

ON EXCEPTIONS.

The plaintiff was a farmer with considerable money at interest, and the defendant, who was also accustomed to let out quite large sums of money, was professedly a friend of Mr. Hunter, in whom Hunter placed great confidence in regard to the investment of his surplus funds. Ezekiel Oliver, who, for several years prior to the transactions out of which the present litigation originated, had borrowed frequently of Randall, at high rates of interest, and was largely indebted to Randall and others, beyond his ability to pay, in 1868, built a mill upon leased land, at Parker's Head. At the time he first thought of building, he was unacquainted with Daniel Hunter; but in June of that year the defendant introduced these

gentlemen, carrying Oliver to Mr. Hunter's house, and recommending him, (Oliver) as the plaintiff and his witnesses testified, as a very honest man, deacon of the church, and abundantly able to meet all of his liabilities. By these means he then procured a loan of $500 for Oliver, and by similar representations, upon several other occasions afterwards, Hunter was induced to lend Oliver other sums, amounting in the aggregate to about three thousand dollars. All of these loans, part of which were in notes and bonds that could be, and were, turned into money, passed from Hunter, through Randall's hands, into Oliver's, and were, in part, subsequently applied upon Mr. Oliver's indebtedness to Mr. Randall. The only security Mr. Hunter had was a mortgage upon the mill built with part of his money, which his witnesses swore was utterly worthless as a mill, and that it would cost all the timber was worth to move it away. There was some testimony relative to statements made by Randall to Hunter as to the value of the mill, and of other property, which he said Oliver owned at Parker's Head; affirming that the mill was a good investment, sufficient security, &c. He charged Oliver for his services in procuring these loans of Mr. Hunter. The plaintiff had fallen into intemperate habits to an extent that impaired his capacity to look carefully after his property and investments.

Upon these facts the plaintiff based this action for money had and received.

In the course of his charge the judge said: "So, in this case, if this defendant has wrongfully or fraudulently induced this plaintiff to loan this money, and obtained it by this means, it is immaterial to the plaintiff whether he afterwards paid it over to another person, for whom he obtained it. It is immaterial to the plaintiff that he told him, at the time, that he obtained it for another." * *

"It would not relieve him, that he gave it to another person, that he spent it, or that he devoted it to the purpose for which he obtained it, though it might not be for any purpose of his own." * * * "They must satisfy you, in short, of the representations, the falsehood of them; that the defendant knew they were false

when he made them, and made them for the purpose of obtaining money; and that the plaintiff, in the exercise of such prudence, care and discretion as his capacity would enable him to use, relied upon them, and parted with his money in consequence of them; in other words, that the money was obtained from him by the defendant by false representations, which were material to enable him to make up his mind, and come to a conclusion as to whether it was safe to loan the money to Mr. Oliver." * * * "If he has thus dealt dishonestly with this man, the law requires that he should make amends." * * * "But if there was a fraud, and the plaintiff was in consequence induced to part with his money, then the plaintiff would have a claim upon him." * * *

"If then, upon these principles, you come to the conclusion that he is liable, the next question is as to the amount; and all I have to say upon this point is, simply, that he is liable for such amounts of money, or its equivalent, as he has obtained by means of this fraud, with interest on the same from the date when the defendant received it."

There was nothing in the rest of the charge to modify the instructions thus given.

The plaintiff obtained a verdict for $3,503.50.

To the instructions which we have quoted, the defendant took exceptions.

Tallman & Larrabee and *W. Gilbert*, for the defendant.

N. M. Whitmore and *J. S. Baker*, for the plaintiff.

PETERS, J. In our view of the facts of this case, the instruction complained of was erroneous. There was evidence tending to show that the plaintiff made certain loans to one Ezekiel Oliver; that he was induced to do so by means of certain false and fradulent oral representations, made by the defendant, concerning the financial credit and ability of Oliver; that the money was paid by the plaintiff into the hands of the defendant, as the bailee or agent of Oliver, and immediately passed by him to his principal.

The jury, among other things, were instructed, substantially, that it was immaterial whether the defendant paid the money over to Oliver or not; or that he informed the plaintiff, when he obtained the money, that he got it for Oliver; or that he, in fact, got it for Oliver, and upon his credit, provided it was passed to him through the defendant's hands.

We think that these facts would bring the case within the Statute of Frauds; and that, for that reason, the instruction cannot be sustained. Besure, in this case the statute was not specially pleaded by the defendant, nor was it required to be, where the declaration contained only the general count of money had and received, as the nature of the claim alleged was not thereby disclosed to him. *Boston Duck Company v. Dewey*, 6 Gray, 446. Nor does it appear that the evidence alluded to was admitted against the objection of the defendant, but it was so interwoven with the other testimony, which was admissible, that any attempt at separation in the story of witnesses would have been impracticable. We are of the opinion that the defendant was guilty of no laches that should debar him of this defence.

The declaration does not, of itself, set out the particular facts which show the wrong complained of to be within the Statute of Frauds. Nor is that necessary in order to make a defence under the statute available. The language of the act is that "no" action shall be maintained "by reason of" any representation. It does not require that the plaintiff must, in terms, declare upon the representation. The true test whether the cause of action, in whatever form alleged, comes within the statute is, whether the action can be sustained without proof of the representation. If such proof is essential to the action, the statute applies. It is immaterial that the defendant may have had some design of obtaining an advantage to himself in consequence of the loan to Oliver, or that such a thing resulted from the transactions, provided the primary object of the representations was to induce the procurement of a credit to Oliver, and the loans were obtained thereby. In such case the protection extended by the statute is absolute and

complete. These propositions are directly maintained by the following authorities. *Kimball v. Comstock*, 14 Gray, 508; *Wells v. Prince*, 15 Gray, 562; *Mann v. Blanchard*, 2 Allen, 386; *McKinney v. Whiting*, 8 Allen, 208; *Haslock v. Ferguson*, 7 Ad. & Ell., 94; Browne on Statute of Frauds, § 184; *Hearn v. Waterhouse*, 39 Maine, 96.

This view of the case does not necessarily deprive the plaintiff of all remedy. The rulings and instructions now complained of would undoubtedly be right, should it appear at another trial that the credit for the loans was given to the defendant, instead of to Oliver. The statute was evidently intended to bar only actions for verbal representations, made with the intent that the person concerning whom they are made may obtain credit money or goods thereupon. *Norton v. Huxley*, 13 Gray, 287. Or should the plaintiff be able to show that he parted with his money in consequence of representations made by Oliver himself, of which the defendant had knowledge, concurring and conspiring with Oliver, in such case the defendant might be liable in tort, or for money had and received, the plaintiff waiving the tort. See *Knapp v. Hobbs*, 50 N. H., 476, a case in some of its features resembling the case at bar. *Richardson v. Kimball*, 28 Maine, 476. Or should it appear that the representations relied upon, if made by the defendant, related to the nature, character and title of the mill property of Oliver, rather than to his general character and credit pecuniarily, then an interesting question would arise, upon which judicial opinion is somewhat divided, whether or not the action can be maintained on that account. All these hypotheses of fact have some semblance of foundation, at least, in the evidence reported. See Browne on Statute of Frauds, §§ 182, 183; *Medbury v. Watson*, 6 Metc., 246; *Swann v. Phillips*, 8 Ad. & Ell., 457; *Lyde v. Barnard*, Tyrw. & Gr., (Exch.) 250.

Exceptions sustained.

APPLETON, C. J., CUTTING and DICKERSON, JJ., concurred.

WALTON, J., concurred in the result.

REBECCA E. PRESCOTT *vs.* JOSEPH PRESCOTT and another.

Execution—when void—levy of.

An execution must not exceed in amount the judgment thereby to be enforced.

A levy of an execution exceeding the amount of the judgment on which it issued is void, and is not saved by the provisions of R. S., c. 76, § 20.

Upon a libel for divorce, a specific sum in lieu of alimony was decreed, to be paid in twenty days from the final adjournment of court; if not so paid, execution was then to issue "for said sum." The execution that issued required the officer to collect the amount, with interest from the day of final adjournment, and not from the expiration of the twenty days. Interest was so computed, and made part of the amount satisfied by a levy upon real estate; *held*, that the levy was wholly void.

ON REPORT.

WRIT OF ENTRY to recover a parcel of land, with the dwelling-house thereon, in the city of Bath.

The demandant claims title under a levy of a writ of execution issued upon the judgment sought to be reversed in the case of *Prescott v. Prescott*, 59 Maine, 146.

To prove her title, the demandant put into the case, the record of that judgment, recovered upon her libel against the said Joseph for a decree of divorce from the bonds of matrimony; from which it appears that a divorce was decreed at the December term of this court, A. D., 1867, when the libellee was ordered to pay the said Rebecca twenty dollars monthly, until otherwise ordered by the court. At the next term (April term, 1868) the libellee having wholly failed to comply with the order, he was adjudged to be in contempt of the authority of the court, and was therefore committed to the jail at Wiscasset, to be there "imprisoned and detained until he shall perform said order or be otherwise discharged by due course of law."

At the August term, A. D. 1868, upon further hearing, it was decreed: "That in addition to the dower in the libellee's real es-

tate to which the libellant is by law entitled, and in addition to the sums heretofore ordered by the court to be paid by the said libellee, the said libellee pay to the said libellant, instead of alimony, the sum of six hundred dollars; and in default of payment of the same, with the costs on this libel legally taxable, within twenty days from the final adjournment of this court, that execution issue for the said sum of six hundred dollars and taxable costs, to be levied on the goods and chattels, lands or tenements of the defendant, and in default thereof upon his body. And the order for monthly payments henceforth ceases. *Ordered also*, That execution issue for the amount of such of the monthly instalments heretofore ordered to be paid by the libellee, as have accrued since his commitment to jail."

No part of the said several sums having been paid, at the expiration of said twenty days from the day of the final adjournment of the court, execution in common form was issued, wherein the officer was commanded to collect the same, with interest from the day of the final adjournment (as the day of the rendition of judgment). The interest was so computed, and made a part of the amount to satisfy which the premises were levied on.

For this and for other causes, which the court found it unnecessary to consider, it was contended that the levy was void.

Francis Adams, for the demandant.

Wales Hubbard, for the tenant.

Appleton, C. J. It is well settled that execution may issue in favor of the wife against the husband for alimony decreed the wife. So, an action of debt will lie on such decree. *Howard v. Howard*, 15 Mass., 196. In *French v. French*, 4 Mass., 587, it was held, where alimony was decreed to be paid quarterly, that the court would not issue execution without first making a rule on the husband to show cause. But in that case, the alimony had been decreed in one county and the application for an execution was in another. In the case at bar, the libel was pending and the monthly

instalments remained unpaid, for which execution was to issue. There was no occasion to issue a rule on the libellee, for he was in court by his counsel, and it being shown satisfactorily to the court, that monthly instalments due remained unpaid, the libellant was entitled to an execution for the amount, and whether the instalments were included with the sum allowed in lieu of alimony, or several executions were issued for each instalment, was a matter which could not injuriously affect the libellee.

While the joinder of the instalments with the sum allowed for alimony cannot prejudice the libellee, the issuing of execution for a greater sum than was ordered by the decree of the court must be to his injury.

To sustain a levy there must be an execution. No execution can properly issue unless it corresponds with an antecedent judgment, which is thereby to be enforced. An execution which is not preceded by a judgment, is void. In *Clark v. Fowler*, 5 Allen, 45, it was held that a valid title to land was not acquired by the levy thereon of an execution, issued on a judgment in a suit in which no legal service was made on the defendant, though, after the rendition of judgment, he verbally waived the want of legal service upon him. In the present case the judgment and the execution are both before us, and there is an important and material variance between them. The judgment is for a sum payable at a future day without interest, while by the execution the officer is commanded to collect the same sum with interest for the time during which, by the judgment of the court, there was to be no interest. The mandate of the execution exceeds in an important particular the judgment of the court, varying from it in being more onerous on the libellee.

The error in this case is not that of the court in making an erroneous computation of the amount due, which, perhaps, might be rectified. *Avery v. Bowman*, 40 N. H., 453. It is in commanding the collection of what by the judgment of the court was not to be collected. No motion was made for correction or amendment of the execution. The levy was consequently for too large

a sum—to wit: the sum of $2.40. In *Glidden v. Chase*, 35 Maine 90, a levy of land on execution greater in value by fourteen cents, according to the appraisement, than the officer was authorized by his precept to take was held invalid.

The case does not fall within the provision of R. S., c. 76, § 20, by which a remedy is given against the officer or creditor, when, through the mistake of the officer, the levy is made for too much, for here there was no error on the part of the officer. He only followed the commands of his precept.

In *Wilson v. Flemming*, 16 Vermont, 649, an execution, misdescribing the judgment as to sums, was held void, and was set aside on *audita querela*. "When the judgment is thus misdescribed," observes Redfield, J, "it is the same as if there was no judgment upon which the subsequent proceedings rested; for, in fact, there is no such judgment as is recited." The record of the judgment and the execution, both of which were introduced by the demandant, show precisely the same variation as in *Wilson v. Flemming*, and the facts fully appearing in the evidence, no reason is perceived why the same result should not follow. So, an execution made returnable in sixty days, when it should be made returnable in one hundred and twenty, is void, and will afford no justification to an officer seizing and selling property. *Bond v. Wilder*, 16 Vermont, 393; *Fifield v. Richardson*, 34 Vermont, 410.

The case of *Smith v. Keen*, 26 Maine, 411, is not applicable. There the execution was in conformity with the judgment, but the judgment exceeded the *ad damnum*, and it was held that the judgment was valid until reversed. Here no exception is taken to the validity of the judgment. The objection is that no execution has been issued in conformity therewith.

There are other exceptions taken to the levy but it is unnecessary to consider them, as the objection discussed we regard as fatal.

Judgment for the tenant.

CUTTING, DICKERSON, DANFORTH, VIRGIN and PETERS, JJ., concurred.

HARMON SMITH *vs.* HENRY M. FOLSOM.

Award of referee.

In a real action, referred by rule of court, the referee reported that the demandant was entitled to the land claimed by him, and that a specified line constituted the true division between the estates of the parties. To the acceptance of this report the tenant objected, because there was no submission of the question of the location of the dividing line, and that the boundary designated was not mentioned in the writ or pleadings, but the award was accepted; *held*, that exceptions would not lie for this cause.

ON EXCEPTIONS.

WRIT OF ENTRY referred by rule of court to Hon. Charles Danforth, who reported, at the August term, 1872, "that the blue line as marked on Hayden's plan of November 24, 1869, is the true line between the parties, and that the plaintiff is entitled to judgment for the land claimed by him in his writ."

To the acceptance of this report the tenant objected, on account of its containing this statement, as assuming to decide a question not embraced in the submission; that the only issue presented was, which party had the better title to the land particularly described by metes and bounds in the writ, which gave the courses and distances of the boundaries, the blue line named by the referee not being identical with any boundary alleged or described in the plaintiff's declaration.

The presiding justice overruled the objections, and ordered the acceptance of the report, to which the defendant excepted.

Jos. W. Spaulding, for the tenant.

It is for the court, not the referee, to determine what is within the terms of the submission. *Sawyer v. Freeman*, 35 Maine, 546.

Smith claimed premises particularly described; Folsom, by his pleadings, admitted that they were in his possession; thus raising the distinct and only issue, which had the better title in himself to

this lot of land thus designated. No controversy as to the dividing line between this and an adjoining lot could arise because no disclaimer was filed. *Blake v. Ham*, 50 Maine, 311; *Tibbetts v. Estes*, 52 Maine, 566. No greater power than the court possessed could be given to the referee; and the jury, had it been left to them, could have rendered no verdict as to the line dividing this from an adjoining lot. Therefore, so much of the report, at least, is bad and must be rejected. *Clement v. Durgin*, 1 Maine, 300; *Sawyer v. Freeman*, 35 Maine, 542; *Wyman v. Hammond*, 55 Maine, 535. The referee gave the demandant all he claimed and then went on to fix the line between this estate and a coterminous one, the ownership of which nowhere appears! and establishes a line not named in the writ!

A. Libbey, for the demandant.

RESCRIPT.

The court perceives no error in the award of the referee. He decides that the plaintiff is entitled to judgment for the land claimed by him in his writ. This was a substantial determination of the whole matter in issue, and nothing more could be required of the referee. But it was not improper for him to state, as the ground of his decision, where he found the true line between the parties to be. Such a statement could do no harm, while it might be a satisfaction to the parties to know what the conclusion of the referee was. The court is of opinion that there was no error on the part of referee in making such a statement in his award.

Exceptions overruled.

ALEXANDER SNOWMAN *vs.* JACKSON HARFORD and another.

Decree in equity—who are bound by.

The rule in equity that whoever takes a deed of real estate, pending a bill in equity in relation to the title thereto, is bound by the decree ultimately made therein, is available in an action at law, after the decree has been carried into effect.

ON REPORT.

TRESPASS *quare clausum.* By agreement of parties the case was submitted to the determination of the presiding justice without the intervention of a jury, the defendants reserving the right to have a single question of law arising in the case determined by the full court. The question is this: Is the rule that "whoever takes a conveyance of real estate, pending a bill in equity in relation to the title thereto, is bound by the decree ultimately made therein," available in an action of law, or is it to be enforced only in equity. This is a suit in which the plaintiff and one of the defendants are the same parties mentioned in 55 Maine, 197, and 57 Maine, 397, which reports state all the facts, upon which this question arises.

Pending a bill in equity brought by Snowman against Harford, to compel a conveyance of real estate, the latter conveyed the property to Benjamin Saddler, who conveyed to the other defendant; and subsequently the court decreed that the respondent in equity convey the estate to the complainant.

The presiding judge ruled that the principle of law above quoted was available to the plaintiff in this suit, and decided that the defendants were guilty, as the plaintiff had declared against them, and assessed the damages at twenty-five dollars. If the ruling was correct, judgment is to be rendered for the plaintiff for that amount, and interest from the date of this writ; otherwise a nonsuit is to be entered.

Francis Adams, for the plaintiff.

Tallman & Larrabee, for the defendants.

The decree in equity cannot affect the grantee of Saddler, who was himself an innocent purchaser for value, not being party or privy to the equity proceedings; nor make him a trespasser who has bought in good faith and upon full consideration.

DICKERSON, J. Trespass *quare clausum*. Trial by the presiding justice, the defendant reserving the right to have the following question of law determined by the law court: "Is the rule that whoever takes a conveyance of real estate, pending a bill in equity in relation to the title thereto, is bound by the decree ultimately made therein, available in an action of law, or is it to be enforced only in equity?" The presiding justice decided that such rule is available in an action of law, assessing damages for the plaintiff in the sum of twenty-five dollars. To this decision the defendants excepted.

The plaintiff in this writ was plaintiff in *Snowman in equity v. Jackson*, 55 Maine, 197, and 57 Maine, 397, and one of the defendants—Jackson Harford—was sole defendant in both of these cases. In the first writ, this court sustained the bill and granted a decree for conveyance of the premises in fee, free from all incumbrances, for process to enforce the same, and for an injunction against other conveyance and incumbrances during the pendency of the bill. The defendant conveyed the premises, pending the bill in equity, and refused to make the conveyance to the plaintiff, as directed by the decree. Thereupon the plaintiff filed a rule setting forth the facts, and praying for a writ of attachment against the defendant, as in contempt. A writ of attachment was issued, and the defendant offered and alleged in his answer, that he was not in contempt for refusing to make the conveyance to the plaintiff, because it was not in his power to do so, when the decree was issued, having previously conveyed the land to Benjamin Saddler, in pursuance of an agreement with him.

In that case, *Snowman v. Jackson*, cited *ante*, the court held, in accordance with the general current of decisions, that the purchaser, *pendente lite*, is bound by the decree which may be made against the party from whom he takes his title, and that "the conveyance made to Saddler by the defendant, while the bill was pending, was entirely void of effect upon the rights and duties of these parties, and was, in fact, no excuse for the defendant's refusal to obey the decree of the court." The court further add, in that case, that the purchaser, *pendente lite*, need not be made a party to the bill in order to be bound by the decree.

In these two cases equity ascertained, determined, affirmed, and reaffirmed the plaintiff's right to the *locus in quo*. The deed, required to be given by the defendant to the plaintiff under the decree, had been executed and delivered prior to the commencement of the present suit. Equity had thus performed its office, exhausted its powers, and could do no more in respect to that controversy. With a title thus perfected the plaintiff has a plain, adequate and complete remedy at law for any invasion of his property. The proceedings in equity are available at law to show that the deed given by the defendant to Saddler, prior to his deed to the plaintiff under the decree, is void and of no effect between the parties. There is neither reason nor law in invoking equity, to enable a party to enforce his rights thus acquired under an executed decree of a court of equity, as often as these rights should be invaded. It is the office of equity, in such cases, to settle the rights of the parties, and of law to provide the appropriate remedies to secure their enjoyment. Happily, each is competent for its allotted task, and performs its office without infringing upon the prerogatives of the other.

We have examined the authorities cited by the learned counsel for the defence, and find them inapplicable. Those cases arose upon a very different state of facts from the case before us, and have a very remote tendency to support the doctrine of the defence.

The ruling of the presiding justice being sustained, judgment

must be rendered for the plaintiff according to the agreement of the parties. *Judgment for the plaintiff.*

APPLETON, C. J., CUTTING, DANFORTH, VIRGIN and PETERS, JJ., concurred.

JOHN F. TIBBETTS *vs.* KNOX AND LINCOLN R. R. Co.

Respondeat superior. R. S., c. 51, § 22. Damages—liability for.

A railroad corporation is not liable for injuries to buildings in the vicinity of its road caused by blasting done by those who have contracted to grade the road, or persons in their employ, although under the contract the corporation reserves the right to retain in its hands, sums sufficient to pay all damages that are not adjusted within thirty days from the time they are inflicted. Such a case is not within the provisions of R. S., c. 51, § 22.

ON EXCEPTIONS.

CASE, brought under R. S., c. 51, § 22, to recover for injuries done to the plaintiff's land and buildings by rocks thrown by blasts out of excavations made in the course of the construction of the defendant's road-bed. The plaintiff suffered severely by having his roofs, doors, chimney and glass shattered, and his mowing land covered with the pieces thrown out of ledges near his residence in Woolwich, by the blasting done in the ordinary course of building the railroad, during the summer of 1870. The defence was that the company had contracted to have their work done and were not liable for any injuries resulting from an improper method of doing it, which was something beyond their control, as it was performed by sub-contractors.

The cause was submitted to the presiding justice who ruled that the defendants were not liable, and the plaintiff excepted, that right having been reserved.

Tallman & Larrabee, for the plaintiff.

Gould & Moore, for the defendants.

VIRGIN, J. Action founded on R. S., c. 51, § 22, to recover for injuries caused to the plaintiff's land and buildings adjoining the defendant's line of railway, by the blasting of rocks during the construction of the road-bed, in the season of 1870.

On March 20, 1869, one Hogan contracted with the defendants to construct and finish, in a substantial and workmanlike manner, the first five sections of their railroad. Among other numerous stipulations common to such instruments, not material to the determination of this case, were the following: "the work to be finished as described in the following specifications, and agreeably to the directions from time to time, of the engineer, on or before May 1, 1870, * * all damages from blasting to be paid by the contractor. * * And in case any damages shall occur to such premises [of landowner] through the wilfullness or carelessness of the contractor or his employees, and remain for thirty days unsettled by the contractor, the company shall have full right to retain in its hands out of moneys that may be due the contractor such sums as the chief engineer and committee of construction may think sufficient to pay said damages."

On April 14, following, O'Donnell, Hinds and Morgan entered into a contract with Hogan to construct section five—this contract containing the same stipulations as the former.

The parties submitted this case to the presiding judge, reserving the right to except in matters of law. The presiding judge found as matters of fact—That the work was being performed by the sub-contractors at the time of the injury complained of; and that the damage was occasioned by the carelessness of the sub-contractors. Thereupon he ruled, as matter of law, that the railroad corporation was not responsible; and ordered judgment for the defendants.

This ruling is in strict accordance with the law laid down by this court in *Eaton v. E. & N. A. Railway Co.*, 59 Maine, 520; and the law there declared is the settled law of England, as well as of this country.

The stipulations relating to retaining money to pay damages are immaterial in the determination of this action.

Exceptions overruled.

APPLETON, C. J., CUTTING, WALTON, DICKERSON and BARROWS, JJ., concurred.

JAMES M. HAGAR *vs.* HUMPHREY M. RANDALL.

What demand and refusal are evidence of conversion.

Refusal to comply with a premature demand of an article is no evidence of an intention to convert it.

A second demand tends to prove a waiver of the prior one.

To have the effect of a proof of conversion, the refusal to deliver upon demand must be such as to amount to a denial of the plaintiff's right, and be made by one who has it in his power to make delivery of the article demanded.

ON REPORT.

TROVER, against the cashier of the Union National Bank of Brunswick to recover for a note of $1000, dated September 15, 1871, signed by the plaintiff and C. Houdlette, payable to said bank in four months from date, and there discounted. When it matured Mr. Hagar was in Philadelphia, but upon his return home he went to the bank, on the sixth day of February, 1872, with a new note of same amount and tenor, dated January 18, 1872, the last day of grace upon his former note. He was a large stockholder of the bank, and the dividends then due him upon the shares owned by him, amounted to $202.50, which the cashier paid him on that day less $25.50 deducted as discount upon this second note. He asked for the old note, but the defendant said there was $1.75 costs of protest to be paid upon it, and declined to surrender it till they were paid. Mr. Hagar said that they were unnecessarily incurred, inasmuch as the bank held more than enough of his property to meet all he owed there, and also because Mr. Houdlette was a surety, and not an indorser and, therefore, not entitled

to notice. In April, 1872, the plaintiff again called for his note, but Mr. Randall said the other had not been discounted, so he did not give up the old one. The entries upon the bank's books showed that the note dated January 18, 1872, was discounted April 6, 1872, two months after it was carried to the bank by Mr. Hagar, and the payment of the discount upon it.

About the twentieth of August, 1872, Mr. Hagar made a third and formal demand upon Mr. Randall, who at first said he did not know but he had sent the note to the plaintiff by mail; that he had no time to hunt it up. Upon these facts Mr. Hagar based his claim to recover in this action, which was commenced July 25, 1873.

Mr. Randall testified that, after Mr. Hagar's last call upon him, he searched all through the bank for that note, and was unable to find it.

Judgment was to be entered upon these facts as the legal rights of the parties required.

J. W. Spaulding, for the plaintiff.

Francis Adams, for the defendant.

DANFORTH, J. This is an action of trover to recover damages for an alleged conversion of a promissory note given to the Union National Bank, for one thousand dollars, signed by the plaintiff, and payable January 18, 1872. The defendant was cashier of the same bank.

To support this action, it is incumbent upon the plaintiff to prove both property in himself, and conversion by the defendant. Waiving the question of property, has the plaintiff proved a sufficient conversion.

It is conceded that, at some time, the note was paid to the bank by a renewal, but at what time, does not so clearly appear. The new note with the discount was undoubtedly left at the bank, February 6, 1872. This act would become effectual as a payment, only when accepted by the authority of the directors. The books

of the bank show this acceptance to have been on the sixth day of April following. These books may not be competent evidence for the defendant, to show that the acceptance was no earlier, but they are competent for the plaintiff to show the acceptance of the new note, as early as that time. The case then shows no evidence of a completed, valid payment, until the time then specified. The note sued for, up to the time of payment, was the property of the bank and, as such, rightfully in the possession of the defendant. There is no proof, nor any pretence of any acts of the defendant which would amount to a conversion unless shown by a demand and refusal. A demand, to be effectual, must be made after the plaintiff's right to the possession has accrued, and the burden is upon him to show this right. The testimony of the plaintiff shows that he made three requests, at different times, for the note; the first on February sixth, when he left the new note. But, at this time, there is no proof whatever that the new note had been accepted by the authority of the directors, and this demand, if it was one, was evidently premature. The second request, as we infer from the testimony, was also premature, as it appears that the excuse given for not complying, was the very fact that the directors had not accepted the renewal. But this is not all. A subsequent demand is proof of a waiver of a prior one; not conclusive, but, in connection with other matters, may be satisfactory. In this case, it appears that a final demand for the note was made August 20, 1872, or thereabouts. The plaintiff testifies: "I stated to him that the note had been outstanding about long enough. I had called for it a third time. I made a formal demand for it then." This, taken with the circumstances shown by the testimony in relation to the previous transactions between the parties, would seem to be satisfactory proof of a waiver of all previous demands, even if not premature; or that, at the time they were made, they were not insisted upon, but rather that the plaintiff had yielded to the excuses given by the defendant for withholding the note.

On the last occasion the demand was clearly sufficient; but, to lay the foundation for an action, there must also be, not only a

neglect, but a refusal. "This refusal must be absolute, amounting to a denial of the plaintiff's title to the possession; and not a mere apology for not delivering the goods at present." 2 Greenl. on Ev., § 644.

"The refusal * * will not necessarily in all cases constitute a conversion, unless the party refusing have it in his power to deliver up the goods detained, and the refusal be made in a distinct, unqualified manner." 1 Chitty on Pleading, 160.

An action of trover "cannot be maintained without proof that the defendant either did some positive wrongful act, with the intention to appropriate the property to himself, or to deprive the rightful owner of it, or destroyed it." Gray, J., in *Spooner v. Holmes*, 102 Mass., 506. If the plaintiff "relies only upon a demand and refusal, as evidence of a conversion by the defendant, he must also show that the latter had the power to give up the goods." *Boobier v. Boobier*, 39 Maine, 406; 2 Greenl. on Ev., § 644.

In this case the testimony fails to show, at any time, any act on the part of the defendant tending to prove an intention on his part to deprive the plaintiff of his property, or to appropriate it to his own use, or to that of the bank. On the other hand it appears by his own uncontradicted statement that he never has done any such thing, or had any such intention. Further, the plaintiff not only fails to show that it was in defendant's possession at the time of the demand in August, but it affirmatively appears by defendant's testimony that he did not then have it, and that it could not be found in the bank, but that he had supposed that he had given it up; and by his diligent search for it for that purpose, indicated a desire to restore it, and a recognition of the rightfulness of the plaintiff's claim to it.

After the payment of the note, without insisting upon a surrender of it at the time, the highest duty which the law will impose upon the bank or its cashier, is the exercise of ordinary care in its keeping as bailee. In case of loss no liability can be imposed, except on proof of intentional wrong or negligence. No intentional wrong is proved here, and if negligence can be inferred

from the testimony, the plaintiff must seek his remedy in a different form of action. The facts upon which this case must rest, bring it within the principles settled in *Dearborn v. Union National Bank*, 58 Maine, 273, and in accordance with that decision there must be, *Judgment for the defendant.*

APPLETON, C. J., DICKERSON, BARROWS and VIRGIN, JJ., concurred.

JAMES T. MORSE *vs.* ALBION W. MORSE.

Referee's finding as to law, when conclusive. Acceptance of report.

When a referee, to whom a cause has been submitted by the parties under a rule of court, makes a direct and unconditional award, and submits no question of law to the court for decision, the court will not inquire whether or not his award was based upon a correct view of the law.

A loose memorandum returned by the referee with the papers in the case, but not made a part of his report, in which he states certain propositions relating to the law of the case, furnishes no ground for the rejection of the report whether the law is therein stated correctly or otherwise.

ON EXCEPTIONS.

At the December term, 1871, this action, brought to recover possession of certain premises in Bath, was referred to Hon. Rufus P. Tapley, the justice presiding, who heard the parties and permitted the tenant to file a paper in the nature of a disclaimer. The referee's report, filed at the April term, 1873, was then recommitted, and was by him returned at the April term, 1874, unchanged, accompanied by a memorandum showing the construction put upon R. S., c. 104, § 6, apparently as explanatory of his reasons for reporting that the demandant should recover costs of the tenant though found only entitled to that part of the demanded premises which the tenant had disclaimed.

The paper, entitled "*Morse v. Morse*,—Brief," was of this purport.

"R. S., c. 104, § 6, undertakes to regulate two classes of cases, viz:—

I. Where the defendant was not tenant of the freehold at the time the action was commenced.

II. Where he was tenant, claiming only a part of the premises.

The first of these two classes is provided for by a plea of non-tenure, or brief statement, which, if sustained, defeats the action and entitles the defendant to costs.

The second class of cases is provided for by statement and disclaimer, which do not defeat the action, but only limit the recovery. A judgment upon them is for the plaintiff, who, therefore, is entitled to his costs as the prevailing party

If, under the second class of cases, the defendant desires to avoid costs, he may enter notice upon the record in open court, under § 22, that the demandant may recover a specified part of the demanded premises."

This memorandum, though not annexed to the report, was returned to court with it, and was offered in evidence by the defendant in support of his objections to the report, but was excluded by the presiding justice. The objections were that the demandant recovering only the land disclaimed, costs should have been awarded against him, instead of in his favor.

An order was made that the report be accepted and judgment entered for the plaintiff for his costs. The tenant excepted.

W. Gilbert and *Francis Adams*, for the tenant.

Tallman & Larrabee, for the demandant.

Barrows, J. The referee in his report submits no question of law to the court. He decides the case both as to law and fact, and awards costs as he thought fit, and as he had the right to do. The report had been once recommitted on the defendant's motion in order to ascertain whether the award as to costs had been designedly made, or was the result of some clerical error; but the referee distinctly and positively re-affirms it; and the mere fact

that he states upon a loose sheet (returned with the report and the other papers in the case, but not made part of the report) some propositions relating to the law of the case will not avail to impose upon the court the duty of revising his decision.

The presiding judge properly excluded this memorandum. The award is peremptory and there is nothing to show that the referee designed to have its acceptance depend upon the concurrence of the court in the view which he took of the law.

It is by no means apparent that the defendant has any equitable cause of complaint. It would rather seem that his disclaimer of any portion of the demanded premises came so late that the referee was of the opinion that it ought not to affect the plaintiff's right to costs. *Exceptions overruled.*

APPLETON, C. J., DICKERSON, DANFORTH and VIRGIN, JJ., concurred.

ANDREW MORSE *vs.* ROBERT WILLIAMS.

Title by prescription.

A possession to give title must be adverse for all the requisite time, and so notorious that the owner may be presumed to have knowledge that it is adverse.

ON MOTION FOR A NEW TRIAL.

CASE, alleging that Andrew Morse and his predecessors in title to the premises described in the writ, for more than forty years prior to the first day of July, 1871, had and enjoyed a certain aqueduct, and the right to the water flowing therein, from a spring upon the defendant's land; but that on the sixth day of July, 1871, said Williams deprived the plaintiff of the aqueduct, and of the use and benefit thereof, by plugging up the pipes, and diverting the water. The writ was dated September 5, 1871. The evidence showed that, about 1840, the plaintiff's father com-

menced to draw water through this aqueduct from a spring by the side of "the mill road," upon land the fee of which belonged to Judah McLellan, by consent of the owner, Mr. McLellan; that in 1856, in locating and constructing the railroad, this spring was destroyed, and a new one had to be opened further up on Mr. McLellan's land, which has been since used to supply the estate described in the writ; that the plaintiff's father formerly owned the lot on which the defendant's house stands, and which is crossed by the aqueduct, but not that on which the springs were situated, which came to the defendant by another title; that in conveying this house-lot the plaintiff's father reserved the right to use the aqueduct; and there was some testimony, that for a number of years past—how many did not appear—the plaintiff has claimed the use of the spring, as belonging to him, adversely to the land-owner, and irrespective of his wishes.

The verdict was for the plaintiff, and the defendant moved to have it set aside, as against law and evidence.

D. D. Stewart and *Wm. Folsom*, for the defendant.

S. D. Lindsey and *H. & W. J. Knowlton*, for the plaintiff.

RESCRIPT.

The plaintiff claims the title to the spring, which is the fountain from which his aqueduct flows, by prescription.

The preponderance of the testimony shows decidedly that the use of that spring by the plaintiff's grantor begun under a verbal license from the former owner. There is no testimony tending to show any subsequent change in the use, or that it was at any time inconsistent with the title of the original owner or his grantee. A possession which gives title must be adverse for all the requisite time, and so notorious that the owner may be presumed to have knowledge that it is adverse. *Motion sustained.*

AMORY PRESCOTT, Administrator, *vs.* CHARLES MORSE, Executor.

Action of Assumpsit—when it lies for a legacy.

One to whom a bequest of $200 had been made in his father's will,—the fund to be placed in the hands of the executor for the use and benefit of the legatee as he may need it, he not to receive any more than was necessary for his benefit at the time—died before any part of his legacy had been paid him, and his administrator brought this action at law to recover the amount and interest of the estate of the executor, who had also given bond as testamentary trustee, and had commingled this money with his own personalty instead of keeping it separately invested as a trust fund; *held*, that the plaintiff was entitled to recover, and need not resort to proceedings in equity.

ON REPORT.

ASSUMPSIT to recover a legacy given by the will of the late Willoughby Prescott, to his son George Prescott, who died after his father, and of whose estate the plaintiff is administrator. The defendant is executor of the estate of late Charles Morse, who was executor of the will of Willoughby Prescott. If proof of the allegations of the writ would sustain the action, the case is to stand for trial; otherwise the plaintiff is to become nonsuit.

The declaration stated the facts as above; that the late Charles Morse gave bond as testamentary trustee, as well as executor, and received the money here sued for, which is now needed to pay the debts of the late George Prescott.

The precise terms of the legacy are recited in the opinion.

John H. Webster, for the plaintiff, cited *Kimball v. Crocker*, 53 Maine, 263.

S. Coburn, for the defendant.

The remedy, if any, is in equity. R. S., c. 68, § 11, and c. 77, §§ 4 and 7. As the legacy is payable in discretion, it cannot be recovered at law. *Lynde v. Estabrook*, 7 Allen, 71. It had not vested, so as to support an action.

It was appropriated only to the personal and immediate needs of the legatee, and was not holden for his debts.

Being contingent, it lapsed at the death of the legatee.

An administrator *de bonis non*, and not the executor of an executor, succeeds to the estate of the testator on the death of the original executor. *Farwell v. Jacobs*, 4 Mass., 634; *Knight v. Loomis*, 30 Maine, 204; *Coburn v. Loomis*, 49 Maine, 406.

The goods of the late Charles Morse, attached in this suit, are not subject to this legacy. No notice or demand of the legacy is alleged in the writ; nor of assets in the hands of the late Charles Morse, or of the present defendant.

This legacy was left in the hands of a trustee, not of an executor. R. S., c. 68, § 13. *Deering v. Adams*, 37 Maine, 264; *Elder v. Elder*, 50 Maine, 548.

APPLETON, C. J. The plaintiff, as administrator of the estate of George Prescott, brings this action to recover the amount of a legacy given to his intestate by the last will and testament of Willoughby Prescott. By the same instrument Charles Morse, since deceased, was made the executor of his estate.

The second item in the will of Willoughby Prescott is in these words:

II. "I give and bequeath to my son George Prescott the sum of two hundred dollars, placing it in the hands of the executor for his use and benefit as he may need it, and not receiving any more at a time than what is necessary for his benefit at the time."

The legacy is in the present. It is a gift of a specified sum to the testator's son. There is no limitation over. The only limitation relates to the payment. No provision is made for the legacy to lapse. Suppose the executor should die and the legatee should need the money "for his use and benefit;" is he to lose the legacy of the father because the executor is not living and therefore cannot determine "what is necessary for his benefit at the time?" The rights of the legatee do not depend upon the living of the trustee.

In Dewart's appeal, 70 Penn., 403, the legacy was in the following words: "I give and bequeath to my son William, in trust for my grandson, Lewis Dewart, Jr., the sum of two thousand dollars to be paid between the ages of twenty-one and twenty-five years, at the discretion of my son William, and I hereby charge my farms in Penn township, Union county, with the payment of the same. In case of the death of my grandson before the age of twenty-five this legacy to lapse." In delivering the opinion of the court Thompson, J., says: "This was a vested legacy, beyond doubt, but was not payable until between the ages of twenty-one and twenty-five to the legatee, at the discretion of the father, the trustee. It is apparent that, in this case, time was annexed to the payment, and not to the gift. This circumstance has no influence to prevent the vesting of the legacy." The law favors the vesting of estates. 1 Jarman on Wills, Am. Ed., 631. More especially must the legacy be regarded as vested, when, as in the case at bar, there is no provision for the lapsing of the legacy and no disposition of any remainder, if there should be any, after the death of the legatee. In Page's Appeal, 71 Penn., 402, the bequest was "to my goddaughter, Margaret B. Page, twenty-three hundred dollars to be paid to her by my executor, when she attains twenty-one years, but if she die in her minority the same to fall into the residue of my estate." "This," remarks Agnew, J., "is a vested legacy, but the time of payment is deferred until the legatee shall arrive at age."

Charles Morse, deceased, by his last will and testament, appointed the defendant, bearing the same name, as his executor. As such executor he represents the estate of his testator. He has nothing to do with that of Willoughby Prescott. He does not represent it. He is not authorized to discharge debts due to, or to pay those due from, the estate. All existing claims against that estate, or arising under the will of said Prescott, must be brought against the administrator *de bonis non*, with the will annexed, upon whom the duties of his executor devolve and against whom all actions must be commenced. *Farwell v. Jacobs*, 4 Mass., 634.

If therefore the legacy in controversy had remained in the hands of the executor of Willoughby Prescott, no action could have been maintained against the defendant as he was not authorized to discharge the liabilities of that estate, or to interfere with the fund belonging to it by virtue of his being the executor of the estate of Charles Morse, the executor of said Prescott.

But in the present case, as we understand the report, Charles Morse the executor of the last will and testament of Willoughby Prescott, gave bonds as trustee in accordance with the provisions of R. S., c. 68. The amount of the legacy was in his hands as testamentary trustee. As executor, he had duly accounted for it, and was henceforth liable therefor on his bond as trustee. It does not appear that he made any investment of it as trustee. It would seem, indeed, that this became a part of his estate, commingled with his other funds. The defendant then as his executor has this sum as part of the estate of the testator, which he is bound to account for according to law.

As the plaintiff is entitled to the legacy, and as the amount is in the defendant's hands, there seems to us no sufficient reason why he may not recover it in this form of action, or why he should be compelled to resort to a court of equity to enforce his rights.

The action is to stand for trial.

Cutting, Dickerson, Danforth, Virgin and Peters, JJ., concurred.

FARNSWORTH COMPANY *vs.* INHABITANTS OF LISBON.

Constitutional Law. Taxes. Towns.

The statutes, assuming to delegate to towns the power of determining whether or not certain manufacturing corporations therein shall be exempted from taxation, are unconstitutional and void.

ON FACTS AGREED.

The town of Lisbon, at a legal meeting, holden March 7, 1864, voted to exempt the plaintiff corporation, by name, from taxation, for the term of ten years, agreeably to the provisions of the act approved April 1, 1859, c. 91; but in 1869 the assessors of Lisbon assessed a tax of $1404.20 upon the property of the plaintiffs, which they paid under duress and protest, and then brought this suit for its recovery, submitting the question of the legality of its imposition to this court, upon a report of the facts.

Asa P. Moore and *A. A. Strout*, for the plaintiffs.

Frye, Cotton & White, for the defendants.

RESCRIPT.

Judgment for defendants, upon the ground that the statute authorizing towns to exempt manufacturing corporations from taxation is unconstitutional and void, as this court recently decided in Brewer Brick Company against the Inhabitants of Brewer, *ante*, 62, to which the parties and their counsel are referred, for a more full statement of the grounds and reasons on which the decision is based.

Nathaniel French *vs.* City of Auburn.

No implied promise that a city will pay one who, without request, performs a duty incumbent upon the municipality.

The legislature, by Private Laws of 1869, c. 230, established a court in Auburn to be held "at such place as the city shall provide." Upon the failure of the city to provide any place, the judge hired a room in which to hold the court; *held*, that there was no implied promise, upon the part of the city, resulting by implication of law from these facts, to pay the rent of such room.

Nor can a ratification of the hiring, or a promise to pay the rent, be inferred from a knowledge on the part of the citizens and officials of the city, of the court being held in the room so hired, nor from the fact that the bills therefor were presented to, and referred in concurrence by, both branches of the city council, and no further action taken thereon.

On exceptions.

Assumpsit to recover for use of office furnished by the plaintiff for the Auburn Police Court for the city of Auburn, during the years of 1869 and 1870, he being the judge of that court from June 7, 1869, to March 20, 1871. This court was established by Private and Special Laws of 1869, c. 230, which declares that it is to be held "at such place as the city shall provide." The city made no provision of any place for the court, though requested by the plaintiff in writing to do so, and the judge hired a room in which it was held so long as he presided over it, and he paid the rent, which this suit was instituted to recover. The plaintiff handed his claims to the mayor, who presented them to the city council, and they were referred in concurrence, by both branches of that body, to the succeeding council, and were then referred to the committee on accounts, and no further action ever taken thereon.

An order for the procurement of rooms was introduced into and passed by one branch of the city council, and a committee appointed therefor, but the other branch never acted upon the matter.

A nonsuit was ordered, and the plaintiff excepted.

Clarence C. Frost, for the plaintiff.

Corporations, as well as individuals, may be held upon implied promises; and such a promise is inferred from the same course of action which raises that inference with regard to individuals. If one man sees and knows that another is performing for him a duty incumbent upon the former, thereby conferring upon him a great benefit, the law implies a promise to pay for the service so rendered; and the same principle applies in the case of silent acquiescence on the part of that aggregation of individuals which compose a municipality, when a citizen relieves them by assuming to discharge a duty they have neglected. Their silence is a ratification of his acts.

Morrill & Wing, for the defendants.

PER CURIAM.

No promise, express or implied, on the part of the defendants has been shown, nor do the facts proved constitute a ratification of the plaintiff's act in hiring a room for the use of the court, over which he presided, and paying the rent.

Exceptions overruled.

BARROWS and DICKERSON, JJ., concurred in the following opinion by TAPLEY, J., dissenting.

The case finds that the plaintiff was duly constituted the judge of the Auburn Police Court, from June 7, 1869, to the third Monday of March, 1871.

Being thus constituted judge, certain duties devolved upon him which he was by law required to perform.

Under the provisions of law constituting the court, the judge had an original and exclusive jurisdiction over certain matters constantly arising. These duties must be performed. No other tribunal had original jurisdiction of the same. The duties thus cast upon the judge could not be performed in the open air. Some place under cover from the elements must be provided. The law required the defendants to provide such a place. This they failed to do, after application by the plaintiff for them to do so.

The failure of the defendants to furnish a place did not affect the jurisdiction of the court, nor discharge the plaintiff from his duties. The defendants could not thus nullify the commission and appointment of the plaintiff.

By the Private and Special Laws of 1869, c. 230, § 3, the court was required to be holden for the purpose of the transaction of civil business at such place as the defendants might provide. It could not be held at such place until they provided it.

The judge must, in the meantime, provide a place, or his court would be powerless.

There can be no doubt that, in the absence of any provision being made by the city authorities, he was authorized to designate a place, and hold his court there. Whenever the city should provide a place, it would be his duty to hold it at that place.

In view of the duties devolving upon him, and the failure of the city authorities to fix a place, he did provide one proper for the office, and presented to the defendants a bill of the necessary expense of rent, and continued holding his court there. The defendants at no time denied his right so to do, or disaffirmed his act, but on the contrary, received his bills and referred them to the financial committee, to whom such bills in the ordinary course of proceedings go, and continued to receive the benefit of the plaintiff's act, making no effort to change the place provided. This conduct continued the whole time claimed in the plaintiff's account. The bills accrued, were duly presented at the close of each fiscal year, and when thus received by the defendants, were appropriately referred, and no notice of objection given the plaintiff. We think the only reasonable inference to be drawn from this conduct, is, that the defendants ratified the act of the plaintiff in making the selection, and became liable to pay the rent. Any other construction would charge them with a wilful and continued disregard of their duty, and a fraudulent suppression of their design to repudiate the action of the plaintiff; for if they did not intend to ratify his act, a decent regard for fair dealing would have induced them to say so, when the first bill was presented, instead

of alluring him along by an apparently honest reception of it, and referring it in the ordinary course of business.

It is said "a private action cannot be maintained against a town or other *quasi* corporation, for a neglect of corporate duty, unless such action be given by statute." However that may be, the rule in such cases does not apply here, for this is not an action against the town for damages consequent upon a neglect of corporate duty. This action is founded upon the promise of the defendants to pay the sum sued for, and must be sustained upon such promise, found in the ratification of the plaintiff's act by the defendants.

Whether the law will or not raise a promise to pay under such circumstances, independent of any act of ratification, need not now be determined, for we think the ratification is clear, and their liability follows.

JASPER MORTON, Complainant, *vs.* THE FRANKLIN COMPANY.

Complaint for flowage; must aver respondent's ownership of land on which dam is built.

A complaint for flowage, under R. S., c. 92, § 1, containing no allegation of the respondent's ownership of the land upon which the dam causing the injury is erected, held fatally defective upon demurrer; affirming *Jones v. Skinner*, 61 Maine, 25.

ON EXCEPTIONS.

The respondents demurred to the complaint because it contained no allegation of the respondents' ownership of the land upon which the dam which caused the flowage was erected and maintained. The demurrer was overruled and the respondents excepted.

Frye & Cotton, for the respondents.

M. T. Ludden, for the complainant.

WALTON, J. This is a complaint for flowage. It contains no allegation of the defendant's ownership of the land on which the dam causing the flowage was erected. It was decided in *Jones v. Skinner*, 61 Maine, 25, that such a complaint is fatally defective.

Exceptions sustained.
Complaint adjudged bad.

APPLETON, C. J., DICKERSON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

AI BROOKS *vs.* ARNOLD BLANEY.

Promissory note. Indorser, demand on. Evidence, notice to produce. Notice.

The presentment and demand of payment of a promissory note at a former place of business, or former residence of the maker, are not sufficient to charge the indorser.

But presentment and demand of payment at the maker's residence on the day the note falls due, is a sufficient presentment and demand, though he is not found at home.

It is competent for the notary who protests the note to testify to the contents of the notice, sent by him to the indorser, though no notice has been given to the indorser to produce such notice at the trial.

It is not necessary to name the payee of the note in the notice to an indorser who is himself the payee, provided it contains other matters descriptive of the note, sufficient to identify it and to charge the indorser.

ON REPORT.

ASSUMPSIT upon a note dated May 1, 1869, for $250, signed by Cyrus Smith, payable in six months from date to the order of Arnold Blaney, which came to the plaintiff as indorsee thereof. The defendant pleaded the general issue, and the case was then submitted to the full court upon the note, notarial protest and the deposition of the notary, to enter such judgment as the case required. The protest alleges a presentment of the note on the last day of grace, at "the late place of business of the signer of the note." In his deposition the notary says he inquired for Smith

at his last place of business in Boston, but could not find him there, nor learn his whereabouts, but that he presented the note for payment at that place. He says he then looked in the directory "and found where he (Smith) resided;" went to the house indicated and "did not find the promisor in. I presented the note and asked if the promisor was in, and if any money was left for the note. The answer was that he was not in, don't know where he is, and that there was no money left. That is all the information I got there." He then sent the defendant a notice, the contents of which sufficiently appear in the opinion of the court. It did not give the name of the payee of the note, as payee.

Frye, Cotton & White, for the plaintiff.

A. Libbey, for the defendant.

Barrows, J. A protest setting forth a presentment "at the late place of business" of the promisor "to the person there in charge," who answers the demand of payment by saying, "the promisor is not here now, nor have we any funds for the note," is not sufficient proof of presentment and demand to charge an indorser.

Failing to find the present place of business or residence of the maker of the note, the notary should seek him elsewhere. *Freeman v. Boynton*, 7 Mass., 483.

In the present case the notary testifies that after making further and diligent search and inquiry for him at several places mentioned, in Boston, where the note was dated, and after visiting another person of the same name whose place of business was near by, he ascertained by the directory where the maker of the note resided, and went to his residence as there indicated and inquired if the promisor "was in," and received an answer in the negative; and, to further inquiry, that the person answering did not know where he was—that he presented the note, but was informed that no money was left to pay it. He further testifies that he notified the indorser, and states the contents of the notice which he sent. No testimony is offered by the defendant; but his counsel suggests that the tes-

timony of the notary fails to prove a proper presentment and demand of payment; that it does not appear that the place indicated in the directory was the actual place of residence of the promisor at the time the note fell due. But we think in the absence of any testimony tending to repel the inferences to be drawn from the acts of the notary and the replies which he received at the place which he speaks of as the promisor's residence, it may be fairly concluded that the demand was made at the place where the promisor then resided, and that sufficient effort to find his place of business, and present the note to him personally was previously made.

Where no place of payment is specified on the note a presentment at the residence of the maker will suffice, even though he be out of town at the time. *Moodie v. Morrill*, 1 S. C., 367; see also *Whittier v. Graffam*, 3 Maine, 82. The defendant also objects that the evidence of notice is insufficient. If the case rested upon the defective protest, it would be; for the protest, as we have already seen, shows no proper presentment and demand, and a notice of the facts set forth in the protest would be insufficient to charge the indorser. A notice which showed only a defective presentment and demand ought not to avail to charge the indorser any more than one which like that in *Page v. Gilbert*, 60 Maine, 485, said nothing about it.

But it is competent to prove the contents of what was in the outset a mere notice to the adverse party, without giving him notice to produce it in order to make the secondary evidence admissible. *Lindenburger v. Beal*, 6 Wheaton, 104. And the notary testifies that the notice addressed to the defendant ran thus: "A promissory note for two hundred and fifty dollars, dated Boston May 1, 1869, signed by Cyrus Smith, payable six months after date, and endorsed by yourself, has been presented for payment and no funds obtained for the note, and it is due this day and protested for non-payment; and payment with interest, costs and damages is due from you. Done at the request of the National Bank of Commerce in Boston.

The defendant objects that the notice does not state the name of the payee. But there is a description sufficient to identify the note and show the defendant's liability.

The defendant's silence affords an inference that the notice was duly received, and that it corresponded to the notary's testimony respecting its contents.

He seems to have had such immediate notice as enabled him to pursue the promisor at once, if pursuit would have availed anything, and to have rebutted the plaintiff's evidence of presentment and demand, had the facts permitted. *Union Bank v. Stone*, 50 Maine, 595. *Defendant defaulted.*

APPLETON, C. J., CUTTING, WALTON, DICKERSON, VIRGIN and PETERS, JJ., concurred.

MILTON CARVILLE *vs.* CHARLES A. ADDITON.

Collector—not liable for assessors' errors—may remove and sell property without the town where seized—if he refuse to collect, town may choose another. Sunday.

Inasmuch as a collector's warrant protects him against all illegalities but his own, proof of errors in the assessment of a tax cannot be considered in a suit against one entrusted with its collection.

If a collector refuse to collect a tax, the town may choose another for that purpose.

A collector is not bound to keep or sell distrained property within the limits of the town in which it is first seized by him.

It is no objection to the legality of the collector's proceedings that one of the four days during which he kept the distress (agreeably to R. S., c. 6, § 104,) was Sunday.

It is immaterial whether an officer states his fees for travel at four cents per mile each way, or eight cents per mile one way; and no exceptions can be sustained to a ruling permitting him to amend his return so as to state his travelling fees in the former, instead of the latter mode.

ON EXCEPTIONS.

TRESPASS *de bonis* brought by a citizen of Lewiston against one claiming to act as collector of the taxes of the town of Greene for

the year 1870, who, in that capacity, distrained a pair of steers and a cow belonging to Mr. Carville, in order to obtain payment of a tax of $25.50 assessed upon land of that gentleman lying in the town of Greene.

Stephen L. Morse was originally chosen collector of that town in 1870, and was re-elected in 1871, but in the fall of the latter year he refused to collect any more taxes and surrendered the lists and his warrant to the assessors, who thereupon appointed Charles A. Additon, collector, who was also elected by the town at a special meeting, to the same office, and qualified.

The exceptions state that the plaintiff did not rely upon "any want of legality in the tax or its assessment;" yet it appears that his counsel objected before the court at *nisi prius*, (1) that the assessors of Greene had not given the requisite notice to tax-payers to bring in their lists; (2) that there was no proper description or valuation of the property assessed, those stated in the assessment of the money tax not agreeing with the statement for the highway tax; (3) that it did not appear that Carville's lands in Greene were improved, and that he was not subject to arrest or his property to distraint for the tax thereon; (4) that parol testimony was inadmissible to prove that they were improved. He also claimed (5) that there was no legal vacancy in the office of collector; hence, that the defendant was improperly assuming to act in that capacity.

The cattle were taken on Thursday, the first day of February, 1872, within the municipal limits of Lewiston, about a mile from the boundary line dividing it from Greene, and driven into the latter town, where they were kept till the following Monday, when the steers were sold at auction at Greene depot, in the same town, for $35 to Henry A. Carville, son of the plaintiff, living at home with his father, whom he accompanied to the sale. The cow was duly returned to the plaintiff after the auction, together with an account of sale and charges, and the surplus ($5.42) arising therefrom. The plaintiff's sixth objection was that the collector had no right to remove the cattle beyond the limits of the town in which

they were originally distrained, or to sell them in any other town. He also contended, in his seventh, ninth and tenth specifications of errors, that the collector's charges were exorbitant, because he had taxed for travel eight cents per mile one way instead of four cents per mile each way; and that he was improperly allowed to make this verbal correction; and that his account and return of sale was illegal for this cause. The eighth objection was that the plaintiff had not four business days after the seizure and before sale, within which to redeem his property by paying the assessment and costs.

All of these objections were overruled and the plaintiff excepted.

Record & Hutchinson, for the plaintiff.

M. T. Ludden, for the defendant.

WALTON, J. The proceedings of the collector in seizing and selling the plaintiff's property appear to have been legally correct.

The first, second and third objections to his proceedings—namely: that no notice was given by the assessors; that the land is not properly described by the assessors; and that it does not appear to have been improved land—are errors, which, if they exist, the collector is not responsible for. A collector is responsible for no illegalities but his own. *Nowell v. Tripp*, 61 Maine, 426.

The fourth objection, that parol evidence was not admissible to prove that the land assessed to the plaintiff was improved land, is immaterial, for the reason already given, that the omission to describe the land properly would be the fault of the assessors, and not the fault of the collector, and he would not be responsible for it.

The fifth objection, that there was no legal vacancy in the office of collector, and that the appointment and election of the defendant, were therefore null and void, is not well taken. It was not necessary that there should be a vacancy. It was enough that the existing collector had not only neglected and refused to complete the collection, but had actually surrendered the lists committed to him to the assessors. R. S., c. 6, § 97, § 119, § 121, § 137, and § 138.

The sixth objection, that the defendant had no legal right to remove the property from the town in which it was distrained, is not in our judgment well founded. The property was removed from a place where there would be but few, if any, bidders, to a suitable place. The removal was therefore prudent and proper. There is no law requiring property to be sold in the town where it is distrained. In such cases town lines are of no importance. *Russell v. Richards*, 11 Maine, 371.

The seventh objection, that the fees and charges for keeping and selling the property were exorbitant and illegal, is not sustained. An officer's fees for travel are four cents a mile each way. It is mere matter of form, and of no practical importance, whether the fees are taxed at four cents a mile each way, or at eight cents a mile one way. The result is the same. In this case the officer taxed his fees at eight cents a mile one way. He was allowed to amend by taxing four cents a mile each way. We consider the amendment of no importance. The amount charged was not thereby changed. The taxation was well enough without the amendment. The other charges appear to be legal and reasonable.

The eighth objection, that the property was not kept four days, is not well founded in fact. The officer's return shows that it was kept four days, and there is no evidence in the case contradicting it.

The ninth objection, that the defendant was improperly allowed to amend his return, by taxing his fees for travel at four cents a mile each way, instead of eight cents a mile one way, is not sustained for the reason already given, that the amendment was wholly immaterial, the return being well enough as it was before the amendment was made. As before stated the amount of the charge was not changed.

The tenth and last objection, that no legal account of the sale was rendered to the plaintiff, is not well founded. The case shows that an account was rendered, and it appears to have been true in fact and legal in form. *Exceptions overruled.*

APPLETON, C. J., DICKERSON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

MAURICE LAWLER *vs.* ANDROSCOGGIN RAILROAD COMPANY.

Liability of master for injury to servant.

The rule that a servant, who is injured by the negligence or misconduct of his fellow-servant, cannot maintain an action against his master for such injury, is not altered by the fact that the servant guilty of negligence is a servant of superior authority whose lawful directions the other is bound to obey.

The master of men employed in dangerous occupations is bound to provide for their safety, and this obligation extends alike to the providing of good and sufficient machinery, and to the procuring skilled and judicious workmen by whom it is to be controlled.

When the servant injured seeks to hold the master for negligence in failing to procure suitable and proper servants, by whose incompetency the injury was caused, the charge of negligence should be distinctly set forth in an appropriate count.

ON EXCEPTIONS.

This was an action on the case for injuries received while employed by the defendant corporation in repairing its track-bed under the supervision of its road-master. The defendants filed a demurrer which was sustained, and the plaintiff excepted. The declaration was as follows:

"For that the said defendants, at Lewiston, on the third day of January, A. D., 1870, were the owners of a certain railroad running through the city of Lewiston and then out of repair at a certain point in said city of Lewiston, by reason of the washing out of a culvert upon the line of said road, whereby an excavation had been made under the bank upon one side of the said culvert, leaving the top of said bank, consisting of a large mass of stone, gravel and frozen earth, overhanging said excavation, and rendering it very dangerous and perilous to laborers making repairs therein; and the plaintiff, being then and there a laborer employed upon said road, and to assist in repairing the culvert aforesaid, being ignorant of the dangerous condition of said embankment, and in

the exercise of due care and diligence, then and there went into the said excavation for the purpose of repairing the said culvert at the request and direction of one Wagg, the road master upon said road, he, the said Wagg, as well as the superintendent upon said road, to wit, one Brown, well knowing the dangerous condition of the embankment aforesaid; yet, nevertheless and notwithstanding the premises aforesaid, the said railroad company, acting by their agent and road-master aforesaid, then and there did wantonly and wilfully permit, request, order and direct the plaintiff to go into said excavation and to work therein; and the plaintiff being and working therein at their request as aforesaid, the said company, by their agent and road master aforesaid, did so carelessly and negligently manage and conduct, supervise and control the making of said repairs upon said culvert, that the said overhanging bank, consisting of a large mass of stone, gravel and frozen earth, then and there broke off from the main embankment and fell into the said excavation where the plaintiff was working as aforesaid, falling upon the plaintiff and throwing him with much violence against a large stick of timber there lying, breaking both of the plaintiff's legs, crushing, bruising and otherwise injuring the plaintiff, so that he is, by reason of said breaking, crushing, bruising and other injuries, then and there sustained, wholly disabled for the remainder of his life, and hath been put to great pain, suffering and expense."

Bradbury & Bradbury and *Record & Hutchinson*, for plaintiff.

It is unnecessary to set out in the declaration that the defendants were in fault in employing an unsuitable man to superintend the repairs of the road. A declaration alleging negligence generally is sufficient. Hilliard on Remedies for Torts, 227; *Indianapolis v. Keiley*, 23 Ind., 133; *Chicago v. Carter*, 20 Ill., 370.

A master is liable if his own negligence was the proximate cause of an injury to his servant, though the acts of a fellow servant contributed to produce the result. Shearman & Redfield on

Neg., 113, § 87, and cases there cited. The roadmaster was acting for and represented the defendants. *Pro hac vice*, he was the railroad. A corporation can only act by its servants. *Goddard v. Grand Trunk Railway*, 57 Maine, 223.

The superintendent and road master, with power to employ and discharge hands, are not fellow servants with the laborers they hire. Shearman & Redfield on Neg., 127, § 102.

Frye, Cotton & White, for defendants.

A servant can only recover of his master for an injury when it was caused by the direct act of the master, or by his negligence in hiring an incompetent person to carry on the work, through whose incompetency the accident occurs. Therefore such negligence must be stated in the declaration or it will be bad on demurrer. Schouler on Dom. Rel., 642; Shearman & Redfield on Neg., § 90; Redfield on Railways, 518, § 131; 2 Hilliard on Torts, 470, § 25; *Carle v. B. & P. C. & R. R. Co.*, 43 Maine, 270; *Buzzell v. Laconia Co.*, 48 Maine, 113; *Beaulieu v. Portland Co.*, 48 Maine, 295; *Hayes v. Western R. R. Co.*, 3 Cush., 270; *Albro v. Agawam Co.*, 6 Cush., 75; *King v. B. & W. R. R. Co.*, 9 Cush., 112; *Gilshannon v. Stony Brook R. R. Co.*, 10 Cush., 228; *Seaver v. B. & M. R. R.*, 14 Gray, 466, and many other cases. It makes no difference whether the servants are of the same grade or not. 48 Maine, 295.

Appleton, C. J. It is well settled in this State that a servant who is injured by the negligence or misconduct of his fellow servant, cannot maintain an action against his master for such injury. *Carle v. B. & P. C. & R. R. Co.*, 43 Maine, 269; *Beaulieu v. Portland Co.*, 48 Maine, 291. "The rule," observes Earle, C. J., in *Tunney v. Midland Railway Co.*, Law Rep., 1 C. B. 291, "has been settled by a series of decisions beginning with *Priestly v. Fowler*, 3 M. & W., 1, and ending with *Morgan v. Vale of Neath Railway*, Law Rep., 1 Q. B., 148, that a servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, includ-

ing the negligence of his fellow-servants." This is pretty universally recognized as law in the decisions of the courts of the different States in this country.

Nor is the law held differently when the employee causing the injury is engaged in a different department of the same general service or exercising a higher grade of authority. In *Feltham v. England*, Law Rep., 2 Q. B., 33, it was argued that the foreman, by whose negligence the injury occurred, should be deemed as the "*alter ego*" of the master and not as the fellow-servant of the party injured, but the court held otherwise. "We think," remarks Mellor, J., "that the foreman or manager was not, in the sense contended for, the representative of the master. The master still retained the control of the establishment, and there was nothing to show that the manager or foreman was other than a fellow-servant of the plaintiff, although he was a servant having greater authority. As was said by Willes, J., in *Gallager v. Piper*, 33 L. J., C. P., 335, 'a foreman is a servant as much as the other servants whose work he superintends.'" This was held to be the law of this State in *Beaulieu v. Portland Co.*, 48 Maine, 295; and in Massachusetts in *Gilshannon v. Stony Brook R. R.*, 10 Cush., 228; in Vermont in *Hurd, adm., v. V. C. R. R. Co.*, 32 Vermont, 473.

The master is liable for the consequences of negligence in the selection of his servants. The gist of the action is negligence. It is the duty of the master to select fit and competent servants. Negligence exists when the master fails to do his best to accomplish this. *Gilman v. Eastern R. R.*, 10 Allen, 238; *Warner v. Erie R. R.*, 39 N. Y., 468. Where the servant attempts to hold the master for his negligence in procuring suitable servants, the charge of negligence should be duly alleged in an appropriate count. *Harper v. Ind. & St. Louis R. R. Co.*, 47 Mo., 567; *Moss v. Pacific R. R.*, 49 Mo., 167.

The master of men in dangerous occupations is bound to provide for their safety and this obligation extends equally to the providing good and sufficient machinery and to the procuring skilled and

judicious men by whom it is to be controlled. *Coombs v. New Bedford Cordage Co.*, 102 Mass., 572; *Fitch v. Allen*, 98 Mass., 573. When a master employs a servant on a work of a dangerous character, he is bound to all reasonable precautions for the safety of his workmen. *Patterson v. Wallace*, 1 Macq. R., 757. And that they be not exposed to unreasonable risks. *Noyes v. Smith*, 28 Vermont, 29. But the negligence of a fellow servant is regarded as an ordinary risk. *Brydon v. Stewart*, 2 Macq. R., 30.

The declaration alleges that a culvert being out of repair and in a dangerous condition and the plaintiff being employed to repair the same, he, being ignorant of its dangerous condition, of which the defendants, or their servants, were well aware, the defendants "by their agent and road master did so carelessly and negligently manage and conduct, supervise and control the making of said repairs upon said culvert," that the plaintiff was grievously injured. The careless and negligent management of the defendants' servants is the only cause of the injury set forth. There is no allegation of negligence on the part of the defendants in selecting incompetent servants, nor is it alleged that the dangerous condition of the culvert was the cause of the injury.

Exceptions overruled.

WALTON, DICKERSON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

ESTHER E. LESLIE, by next friend, *vs.* CITY OF LEWISTON.

Way. Traveller—who is within meaning of R. S., c. 18, §§ 40, 65. *Negligence.*

A ditch was dug along by the side of a house, and extended out into the street as located. There was no way to go from the house to the privy used therewith, without either crossing the ditch or passing around that end of it which was in the street. The plaintiff, a minor, living in the house as a member of her father's family, having occasion to visit the water-closet in the evening, attempted, while upon her return to the house, and having no other purpose than to reach it in the safest way, to go round the end of the ditch. After crossing the line of the street, but before reaching the wrought portion of it, or the end of the ditch, (the night being very dark) she turned, stumbled, fell into the ditch, and was injured; *held*, that she was not in the use of the street as a traveller within the meaning of the statute providing for the making and repair of highways.

The ditch was dug by the father's landlord for the purpose of drainage, and was suffered to remain open for several weeks before the accident; *held*, that there was such negligence in the father in permitting the drain to remain so long in this dangerous condition, and that his minor child was so affected by his negligence, as to preclude a recovery by her in this case, even if she were otherwise entitled to recover.

ON EXCEPTIONS.

TRESPASS on the case for an injury received on the night of December 10, 1871, through a defect in Horton street, Lewiston, a way which the city was bound to keep in repair. The plaintiff and her twin sister, then twelve years of age, had been passing the afternoon with a sick friend, and returned home to their father's house on said street, at about seven o'clock, it being a very dark evening, and went into the front entry. Immediately after going into the house the plaintiff requested her sister to go with her to the water-closet, which was about twenty feet in the rear of the south-westerly corner of the house. They went out of the same door they had just entered, passed along the street into their yard and to the water-closet. While upon their return the plaintiff stubbed her toe and fell into a drain, severely injuring her back

and spinal column. From the water-closet the drain extended close beside the south side of the house to the ditch of the wrought road on the westerly side of Horton street, and was two feet wide and eighteen inches deep. It had been dug a month before the injury, to drain the sink spout and privy. It had no crossings and had been left open its whole length, the same as when dug. The plaintiff's father occupied the upper, and another person the lower part of the house, as tenants of one McGillicuddy. There was some disagreement as to whether or not Mr. Leslie had requested to have the drain dug. He said he asked his landlord to cover it up some time before the accident, as it was dangerous, but the latter replied that he could get nobody to do it. McGillicuddy denied any recollection of this conversation.

The drain was between the house and the privy, so the Leslies had no means of reaching the water-closet, if they kept upon their own premises, except by crossing the drain. The family generally went out of the front door, the only one they had the right to use, and stepped across the drain by the corner of the house; but the children had frequently gone out into the street, round the end of the drain, and down the other side of it to the privy. On the night of the injury they went in this way, and on returning, plaintiff thought she had reached the end of the drain, and therefore turned to go toward the house, when she stubbed her toe, fell into the drain, within the limits of the street, and received the injuries mentioned. The point where she turned to pass the drain, and where she fell and was hurt, was about five feet from the end of the drain next the street, and about the same distance from the ditch on the westerly side of Horton street, within the limits of the street, but not of the portion wrought by travellers, and about sixteen feet from the front of the house. There was no sidewalk upon that side of the street, though a space ten feet wide had been left for one, there being no travel on that side of the street, except by those entering the house mentioned, and the one adjoining it, which were the only houses on that side of this street.

The defendants requested instructions to the jury that the plain-

tiff, at the time of receiving the injury, was not a traveller within the meaning of our statutes, and that she could not recover because the accident was occasioned by her father's neglect to keep the premises occupied by himself and family in a safe condition. The judge declined to give either instruction, and the defendants excepted. The verdict was for the plaintiff, assessing damages at $3500.

Record & Hutchinson and *E. F. Pillsbury*, for the plaintiff.

M. T. Ludden, for the defendants.

DANFORTH, J. In this case the defendants requested the court to instruct the jury, "that to entitle the plaintiff to recover she must at the time of the injury have been a traveller upon the street or highway, and must have been using the street as a thoroughfare; and if she was returning from the water-closet to the house in the manner shown by her testimony, and was at the time of the injury only about six feet within the located limits of the street, and outside the travelled and wrought portions, and had not entered upon the travelled or wrought part of the street, nor upon any part connected with the travelled and wrought portion, she was not a traveller within the meaning of the law." This was not given.

From the undisputed facts developed by the plaintiff's testimony, we think the requested instruction appropriate, and should, at least in substance, have been given.

The statute requires cities and towns to keep their "ways safe and convenient" for travellers only; and when this is done they have no further duties or responsibilities in relation to them. Hence, when the statute further provides that "any person" who suffers damage through any defect in a way, shall have a remedy, it necessarily refers to that class of persons who were, not only in the lawful use of it, but for whose use and whose safety and convenience it was established. This was settled in *Stinson v. Gardiner*, 42 Maine, 248.

No question is raised as to the safety and convenience of the

wrought part of the street, or of its sufficiency to amply accommodate all the travel having occasion to pass over it. The defect complained of, though within the located limits, was outside of the travelled part of the street. The plaintiff, at the time of the accident, had passed from the house she was then occupying, as a member of her father's family, to the water-closet, and was on her return to the house. The house stood upon the street, about ten feet from its westerly line, and the water-closet still farther from the street, and in the rear of the south-westerly corner of the house. The defect which caused the injury was a ditch dug along the south side of the house and into the street for the purpose of draining the sink spout and water-closet belonging to the house. It appears that the only occasion the plaintiff had for passing into the street was to go round the drain instead of crossing it. She had not reached, and had no purpose of reaching, the travelled part of the street. She was not using it as a highway, and had no intention of so doing. It was not as a part of the street, even, but as a curtilage of the house. She had appropriated it as a convenience for domestic purposes, as an appurtenant to the house in which she was residing. She was not, therefore, a traveller, in any such sense as is contemplated by the statute providing for the recovery of damages arising from defects in streets or highways.

The courts of Massachusetts have gone even farther than this. It is there held, as well settled law, that a person travelling upon the highway and voluntarily turning therefrom to enter upon his own premises, or private way, ceases to be under the protection of the law as soon as he leaves the travelled or wrought part of the way, though an injury happens from a defect within its located limits. *Kellogg v. Northampton*, 4 Gray, 65, and cases cited.

In this State the same doctrine is recognized in *Dickey v. Maine Telegraph Company*, 46 Maine, 483; and we have been referred to no case where any person having voluntarily turned from the travelled path, or not having reached the wrought part and suffering damages by a defect within the located limits of the road, has been allowed to recover of the town. It is true that it has often

been held incumbent upon towns to keep the whole width of their ways free from artificial obstructions and defects, but this duty has been imposed only for the protection of such persons as are in the use of the wrought part as travellers.

If the house had stood upon the line of the street, and the steps for the purpose of passing in and out had projected into the street, it would hardly be contended that any member of the family, receiving an injury from a defect in such steps while entering into or going out of the house, would be entitled to recover of the city as a traveller upon the highway. A person occupying land adjoining the highway, for the purpose of ploughing up to the line, might find it convenient to drive his team into the road. In such a case it would hardly be claimed that the town would be under any legal obligation to keep the road "safe and convenient," or even free from such obstruction as did not naturally exist. These supposed cases do not differ in principle from the one at bar. In each the highway is not used as such, or in any proper sense for the purpose of travelling, but rather as an appurtenant to, or part of, their own private premises.

There is another view of this case which is equally fatal to its maintenance. The plaintiff, at the time of the accident was a minor, a member of her father's family, and under his care and control. Such a relation made it incumbent upon him to provide her with all safe and convenient means required to enable her to supply such wants and necessities of life, as her state and condition demanded.

The way to and from the water-closet, in the use of which the accident occurred, with its defects and inconveniences, was provided by him as an appurtenant of his dwelling. The defect in this way, which was the alleged cause of the injury, though not of his creation, was continued by his neglect. It is not material that at the moment of the accident she was not under his immediate care and control, or that at the time she was herself in the exercise of ordinary care. It is enough that he required her to use this unsafe way from a neglect to provide any other, and that she was in the

use of that which had been provided by him, to whom alone she could look for such a provision for her wants. Even if the city were responsible to other parties, it would not, under these circumstances, be liable to the father, and his fault is so far attributable to her that if it would bar his right to recover, it would have the same effect upon hers. *Holly v. Boston Gas Light Co.*, 8 Gray, 123. *Exceptions sustained.*

APPLETON, C. J., WALTON, DICKERSON, BARROWS, and VIRGIN, JJ., concurred.

MAGNUS MANHEIM *vs.* RUFUS CARR and another.

Common carriers. Contract. Exceptions. New trial. Practice.

Exceptions not appearing on their face to have been allowed by the justice to whose rulings they are taken, cannot be considered by the court.

The plaintiff here sues the defendants as common carriers, for a breach of an alleged contract to deliver to the Eastern Express Company a box which the plaintiff had entered on the defendants' order-book to be taken "to the early train." The defendants' hackman testified that he had no other instructions relative to it, but the plaintiff introduced witnesses who swore that additional verbal directions were given to deliver the box to the expressman at the depot. The hackman took the box to the station and deposited it with other baggage intended to be carried out upon that early train: *held*, that a verdict for the defendants was not so manifestly against evidence as to justify setting it aside; nor was it against law, the deposit of the box upon the platform being a compliance with the order to take it to the early train.

ON MOTION FOR A NEW TRIAL, upon the ground that the verdict for the defendants was against law and evidence. The plaintiff was an itinerant vender of millinery goods which, for several years, he has been accustomed to sell throughout this State. The defendants were proprietors of hacks in Lewiston, their main business being the transportation of passengers, though their drivers occasionally took packages to the express, receiving pay therefor,

for which they accounted to the defendants. Upon the sixteenth day of November, 1871, Mr. Manheim was at the American House in Lewiston, having with him a case of his merchandize, which he had put up for S. J. Stanwood & Co., of Portland, and which he desired to forward by express to that firm. He left word to this effect at the express office; but, finding on his return to his hotel, at nine o'clock in the evening of that day, that it had not been called for, he told the landlord to give it to any hackman that came there, and tell him to deliver it to the Eastern Express Company at the depot, the next morning. Accordingly, the landlord made this entry in the defendants' order book, which they kept at his hotel: "Take a large case in the hall to the early train. It belongs to Manheim." The next morning it was taken by one of the defendants' drivers, who swore that he received no information upon the subject except that derived from this entry upon his book, while the landlord, and one or two others, testified that verbal directions were given him to deliver the box to the expressman at the depot. The hackman testified further that he carried the plaintiff's box, together with trunks belonging to other persons, to the Maine Central Railroad depot in Lewiston, and placed them all (the box and trunks) upon the platform where they check baggage; that the baggage-master checked the trunks, but not the box; wrote nothing on it; that the box was left upon the platform because the driver supposed Manheim was coming to attend to it himself; and that he had quite often carried boxes to the depot and left them, and Mr. Manheim would be there to look out for them. This box never reached its destination, nor was anything ever learned by the owner what became of it after it was deposited at the station.

The plaintiff's declaration alleged that the defendants were common carriers and that he delivered this box to them to be carried from the American House to the depot of the Maine Central Railroad Company in Lewiston, "there to be safely and securely delivered to the Eastern Express Company or its agent," which the defendants, for hire, undertook to do, but did not do it, and so

negligently conducted themselves that the box was lost. Verdict was rendered for the defendants, which the plaintiff moved to set aside because (as he said) the superiority of his witnesses in numbers and credibility was so manifest and overwhelming as to show the result reached to be plainly against evidence. He also contended that it was against law, because, even if the entry in the order book was the only instruction given, leaving the box upon the platform, without seeing that it was put into the car, was not carrying it "to the early train."

The last witness called by the defence was Frank Myrick, who was permitted to state, against objection by the plaintiff, that, being at the depot the morning Mr. Rose (the hackman) brought the box there, he saw Mr. Rose put it "where they always deliver the baggage," and heard the baggage-master ask, "where do you want this to go?" and Rose reply, "I do not know. I had the order from the American House to bring the box to the depot. I suppose Mr. Manheim will look out for it himself." In admitting this testimony the presiding judge remarked; "I think it is competent to prove what he (Rose) said and did, not as a declaration, but as a fact that he did deliver, and what conversation took place between Rose and the baggage-master." To this ruling, as well as to one permitting Joseph Littlefield, who, for over twenty years, was the depot-master upon the Maine Central Railroad at Auburn, to state that "it is the custom there to take charge of boxes, trunks or packages brought and deposited on the platform of the depot," the plaintiff excepted; but his exceptions, though drawn up in form, did not appear ever to have been certified and allowed by the justice who made the rulings by which the plaintiff considered himself aggrieved.

Frye, Cotton & White, for the plaintiff.

Record & Hutchinson, for the defendants.

WALTON, J. This case, as printed, presents a bill of exceptions as well as a motion for a new trial. But the exceptions do not

appear to have been allowed, and cannot, therefore, be considered.

With respect to the motion it is important to notice that the issue between the parties is not whether the defendants undertook as common carriers, to carry and deliver the box in question to the Maine Central Railroad Company, for the plaintiff's declaration avers neither the existence nor the breach of such a contract; but whether they undertook to carry and deliver it to the Eastern Express Company. The jury found for the defendants, thus affirming that there was no such undertaking; and upon this issue we think the verdict is not so clearly against the weight of evidence as to justify the court in setting it aside. The only entry upon the defendants' order book was simply to take the box "to the early train." No mention was made of the Eastern Express Company. The driver swears positively that he received no other direction. It was for the jury to determine whether or not he told the truth. If he did, that was the end of the plaintiff's case.

The plaintiff also claims that the verdict is against law. He insists that if no other direction was given than that put upon the order book, still, upon the defendants' own showing, that was not complied with. We think it was. If a hackman, whose business generally is the carrying of passengers to and from the hotels and depots of a city, can be regarded as a common carrier of goods, simply because he occasionally takes such parcels when no passenger accompanies them, still, if he receives no other direction than to take a box "to the early train," and he does take it to the early train, and finding neither the owner nor any authorized agent of his there to receive it, carries it into the depot—the depot being a substantial building with doors which are closed and locked at night—and in the presence of the baggage-master, and with his knowledge, places it upon the platform, where trunks and other articles going upon the train are usually put, we think he has done all that the law requires of him in fulfilment of his contract; and if the box is afterwards lost, that he is not responsible for it.

Motion and exceptions overruled.

Appleton, C. J., Dickerson, Barrows, Danforth and Virgin, JJ., concurred.

FRANK A. MILLETT and another *vs.* ALONZO C. MARSTON.

Parol testimony inadmissible to show written instrument incomplete. Only a party injured can except.

Parol evidence is inadmissible to prove a contemporaneous agreement that a written instrument, which appears upon its face to be duly executed, intelligible, unambiguous, reasonable and complete, should be considered only as the basis or outline of a contract to be subsequently filled out with stipulations other than those contained in the writing.

Though incompetent testimony be admitted at the trial, exceptions will not lie, if it is apparent from the nature of the testimony itself that the excepting party was not injured thereby.

ON EXCEPTIONS.

ASSUMPSIT to recover $121 for fruit trees and shrubs sold and delivered by the plaintiffs to the defendant, who pleaded the general issue. The plaintiffs introduced an instrument, partly in print and partly in pencilling, on which they relied as containing the whole contract between the parties, its due execution being admitted. It was in the form of an order addressed to the plaintiffs and signed by the defendant, the names of Millett & Jelerson only appearing, in their firm style, at the commencement of the writing. It directed them to deliver to Mr. Marston, at West Waterville, in May, 1872, the specified number of fruit trees of the various kinds mentioned, the heights of some of them being mentioned, but no other specification as to size; for which the defendant promised to pay $121, when notified of their being ready for delivery. The trees arrived at the West Waterville depot, May 9, 1872, from whence they were taken by Marston, who subsequently returned them to the same place. At the trial he alleged that they were not so good, nor in such condition, as his contract with the plaintiffs required. He also offered parol testimony to prove that the paper aforesaid was not the real contract between the parties, and that, at the time he signed it, it was agreed by them that the paper was used, and only to be used, as a mem-

orandum of the number, kinds and price of the trees to be furnished; also to show what was to be the size of the trees, according to the actual contract; and that he was to have the right to examine them, after their arrival at his place, in order to determine whether or not they were such as his contract required; but the presiding judge excluded all this evidence, ruling that the parties were bound by the contents of the paper, there being no allegation of fraud in procuring it, or the defendant's signature to it. Upon the question of damages, F. A. Millett was permitted to testify that he had paid $31.67 freight upon these and other trees all delivered in one lot, at the same time, at the West Waterville depot; but he could not state what proportion of that sum was for the carriage of the trees ordered by defendant.

The plaintiffs had a verdict for $78.14, and the defendant excepted to the aforesaid rulings.

Frye, Cotton & White, for the plaintiffs.

Record & Hutchinson, for the defendant.

DICKERSON, J. The written instrument introduced in evidence by the plaintiffs to support this action is intelligible, unambiguous, and explicit with respect to the number, kind and description of the articles to be furnished, the time of delivery, the amount to be paid therefor and the time of payments. It appears to have been duly executed, and nothing is wanting to make it a completed contract.

No rule of law is better settled by authority, or more easily sustained upon principle, than that where parties have thus committed their bargain to writing, that writing must govern. They will not be permitted to introduce contemporaneous parol evidence that they meant something else, or that other conditions, stipulations or requirements were inadvertently omitted, or agreed to be incorporated into the contract. "The fundamental maxim in the construction of instruments," says Vattel, book 2, c. 17, § 263, "is that it is not allowed to interpret what has no need of inter-

pretation. Where an instrument is worded in clear and precise terms—when its meaning is evident and leads to no absurd conclusion—there can be no reason for refusing to admit the meaning which the words naturally import. To go elsewhere in search of conjectures in order to restrict or extend it, is but to elude it. If this dangerous method be once admitted, there will be no instrument which it will not render useless." 1 Greenl. on Ev., c. 15, § 275: *McLellan v. Cumberland Bank*, 24 Maine, 569.

The parol evidence offered by the defendant, and excluded by the presiding justice, goes to show that the contract duly executed, and upon its face intelligible, unambiguous, reasonable and precise is incomplete, and was only designed as a basis or outline of a contract, to be subsequently filled up with other independent stipulations and requirements. It is obvious that written instruments would soon come to be of little value, if their explicit provisions may be varied, controlled or superseded by such evidence. It is plain also that to admit such evidence for such purposes would be greatly to increase the temptations to commit perjury, already quite too prevalent in jury trials.

The admission of the testimony of F. A. Millett, as to the amount of freight paid by him on the trees in question with other lots, against the objection of the defendant, affords him no legal ground of exception, as it appears from the testimony itself that it could not have damaged him. *Exceptions overruled.*

APPLETON, C. J., BARROWS, DANFORTH and VIRGIN, JJ., concurred.

RHODA NASON *vs.* EBENEZER JORDAN.

Parol evidence admissible to show contents of lost records.

Where the record of a partition, if such record ever existed, was destroyed by the great fire of July 4, 1866, in Portland, by which the probate records of Cumberland county were consumed, parol evidence of occupation, and other parol testimony, were properly admitted, to establish the fact that a partition had been made, and the nature of it, without first requiring the demandant to prove that no "authenticated copy" of such partition was in existence, to her knowledge; although the Public Laws of 1867, c. 128, § 3, authorized the recording of such copy in cases where the original record was destroyed in that fire.

ON EXCEPTIONS.

WRIT OF ENTRY to recover possession of one half of the southerly quarter of the Witham farm in Auburn, claimed by the demandant by inheritance, as sole heir of her deceased mother, who was one of the four heirs of the late Ezra Witham, who died, seized and possessed of this farm, in 1825. The town of Auburn was then part of Cumberland county. The demandant claimed this particular quarter of the farm by virtue of an alleged partition among the heirs of Ezra Witham, made by commissioners appointed by the judge of probate for Cumberland county, the record of which was destroyed in the great fire in Portland, July 4, 1866, by which all the records in the probate office there were consumed. The tenant, while conceding the claimant's title by inheritance to an undivided quarter of Ezra Witham's real estate, denied that any division of it was ever made among his heirs, or that the demandant was entitled to the specific portion described in her declaration. It was admitted that, if any such partition was ever made and recorded, the records were burned in the fire before mentioned; and that the premises demanded were one-half part of the southern quarter of the farm. In 1826, the demandant's mother, Sally Witham, daughter of the late Ezra Witham, married Seth C. Nason. Mrs. Nason died in 1828, leaving Rhoda as her only child.

Seth C. Nason, as tenant by the courtesy, occupied the real estate of his deceased wife from 1828 until he sold as hereinafter stated. At the trial of this cause the presiding justice, against the objection of the tenant, permitted the demandant to introduce oral testimony for the purpose of proving that Ezra Witham's farm was equally divided among his four children soon after his death. The first witness called testified that Seth C. Nason carried on the south quarter of the farm in 1827, and then told the witness that he was doing so in the right of his wife, Sally. At that time one Gowell carried on the other three quarters of the farm under a lease from the other heirs, (as this witness stated) but afterwards, a year or two later, the others took possession of their respective quarters, which were separated by division fences. This witness added that when Seth C. Nason took possession of this southern quarter he told the witness that he did so in the right of his wife, Sally, as one of the heirs of Ezra Witham. Other parol testimony as to the occupation of the quarters was introduced. One witness said that Seth C. Nason occupied Sally's share from the time she died till 1841, when he sold one half of it to Paul Curtis, occupying the rest till 1867, when he sold to the tenant the other half, claimed in this action. Seth C. Nason died in 1871.

To all of this testimony the tenant objected, and upon its admission consented to a verdict of guilty with twenty dollars damages, but excepted to the rulings of the presiding judge admitting the evidence.

Frye, Cotton & White, for the tenant.

The demandant claims a division was made by commissioners appointed by the judge of probate for Cumberland county, and it is admitted that the records thereof, if any, were burned in the great Portland fire. The law of 1821, c. 49, § 33, required a record in the probate office.

"Oral evidence cannot be substituted for any instrument which the law requires in writing, such as records, &c." 1 Greenl. on Ev., § 86.

Before a party can be permitted to use secondary evidence, he

must show that he has exhausted all means to procure the best evidence.

The Public Laws of 1867, c. 128, § 3, relating to the restoration of probate records for Cumberland county, provide that "duly authenticated copies of the record of any other instrument or paper which had been recorded in the registry of said court before the day aforesaid, may be presented to the judge in like manner, and the same shall be recorded anew."

The case finds no offer to show that the plaintiff had no "duly authenticated" copy of this record, or that none was in existence to her knowledge; so that she was unable to take advantage of the above provision of law. This she ought to have done, to have first laid a foundation for parol proof of a division.

N. G. Sturgis was permitted, against defendant's objection, to testify that "Seth C. Nason carried on, in 1827, the south quarter of the Witham farm, in the right of his wife, Sally, as he told me, while he was carrying it on." "When he took possession, he told me he took possession of the south quarter in the right of his wife Sally, as one of the heirs of Ezra Witham."

Seth C. Nason died in 1871. No claim is made by defendant under Seth C. Nason; and no declaration in disparagement, or otherwise, of his possession are admissible against this defendant.

Again, Ezra Nason was permitted to testify that he "was 43 years old; as far back as he could remember, father lived on Sally's share." Ezra Nason was born in 1830, four years after the claimed division, and three years after Sturgis says Seth C. Nason told him as above. Clearly a division could not have been a matter of personal knowledge to him; he didn't know Sally; he could have had no personal knowledge that the farm was in four equal lots for the purpose of a division between the heirs of Ezra Witham, or that the fence between what he calls "Charles's lot and Sally's" was a division fence. The same objections generally lie to the testimony of Joshua Small.

It is claimed, however, that testimony was rightfully admitted, because "exclusive possession by one tenant in common of a par-

ticular part of the estate, accompanied by a denial of his co-tenant's right of possession in the part thus occupied, may grow into a legal presumption of a partition being made."

Tenants in common "are individually seized *per mie et per tout.* The entry of one is the entry of both. Either has a right to actual possession, and his entry will be presumed to be in accordance with his title; and this presumption will hold until some notorious and unequivocal act of exclusion shall have occurred. *Duncan v. Sylvester*, 16 Maine, 390; *Colburn v. Mason*, 25 Maine, 435; *Thornton v. York Bank*, 45 Maine, 161.

Sally died in 1828, one year after (as Sturgis was allowed to testify) Seth C. Nason carried on the farm; there is no proof that Sally made claim to this or any particular portion of the premises, or that she lived upon the premises at all; the declaration of Seth C. Nason was inadmissible, therefore, to show the manner in which he occupied the farm; it affords no evidence that that "right" was an exclusive claim to a certain portion of these premises, while so broad a declaration might easily mislead a jury.

The presiding judge admitted this testimony on the ground of its tendency to show disseizin. When it is claimed Seth C. Nason took possession of these premises, Sally was under all the common law disabilities of coverture; she might have seizin in law but never in fact, for under the common law the wife could not become a disseizor. Sally died before enlarged rights were given to married women by the legislature. If she could not become a disseizor, no evidence of any act of disseizin on her part was admissible. *Sawyer v. Kendall*, 10 Cush., 241.

We call particular attention to the slight evidence of disseizin, for Seth C. Nason married Sally in 1826, and she died in 1828, and according to Sturgis's account Seth C. Nason carried on the farm in 1827, and Sally could have lived upon it but one year. If Seth C. Nason occupied it by right of courtesy from that time until 1867, and the defendant from that time, the disseizin could have been but one year possibly, for no one under whom the plaintiff claims has been in possession. The plaintiff must rely upon the

strength of her own title, and while the defendant does not seriously contend as to an undivided quarter of this land, he does claim judgment for the remaining three quarters.

Enos T. Luce, for the demandant, cited *Austin v. Austin*, 50 Maine, 74; 1 Washb. on Real Prop., 587, §§ 12, 13.

APPLETON, C. J. The demandant's title is not denied. The evidence from occupation and from witnesses is satisfactory that there was a division of the Witham estate among his four heirs, soon after his death, and forty years ago. The tenant does not deny the demandant's right to a quarter of that estate. We think she is entitled to the quarter as occupied in accordance with the partition: that is, the southern quarter of the Witham farm.

The loss of the records in the probate office of Cumberland county being admitted, the testimony offered was properly received, being the best attainable. *Exceptions overruled.*

WALTON, DICKERSON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

OBADIAH S. WEST and wife *vs.* JAMES S. JORDAN.

Practice upon the death of a party after verdict.

An action on the case brought by husband and wife for a personal injury to the wife, cannot proceed after the death of the wife except in the name of her legal representative. The husband should withdraw as an original party; but when appointed administrator of the wife's estate may come in and prosecute in that capacity.

Where, after verdict for the plaintiffs in such case, and pending the hearing and decision upon the defendant's exceptions in the Law Court, the wife dies, and her death is not suggested upon the docket, and the clerk, upon the overruling of the exceptions, enters up, and records a judgment as of a term subsequent to the death of the wife in the names of the original plaintiffs, such judgment and record are irregular and null; and the court, upon a written motion, of which the defendant has notice, will order the action brought forward upon the docket in order that a proper judgment may be entered in the manner above stated.

West *v.* Jordan.

When no proceedings have been had upon the former irregular judgment, and justice requires it, and third parties are not affected thereby, upon the appearance of the husband as administrator, the court will order judgment upon the verdict in the action thus brought forward.

ON EXCEPTIONS.

This was an action on the case brought by a husband and wife to recover damages for an injury to the female plaintiff, Phebe West, alleged to have been occasioned by the carelessness of the defendant's servant. The action was tried at the April term of this court, 1871, for the county of Androscoggin, and a verdict was found for the plaintiffs in the sum of $481.82. The case was carried to the Law Court, July term, 1871, on exceptions and a motion to set aside the verdict.

Mrs. West died on the 13th of November, 1871. August 5, 1872, the decision of the full court ordering "judgment on the verdict" was certified to the clerk of courts for the county of Androscoggin, and he thereupon entered up judgment accordingly, as of the April term, 1872, in that county, recorded the same, and the judgment as thus recorded remained, without any suggestion of the death of Mrs. West, until the January term, 1873, in the same county. The husband, Obadiah S. West, was appointed administrator of the estate of his said wife, at the December term, 1872, of the probate court for this county, and at the said January term, 1873, the said Obadiah S. West, as such administrator, filed a motion that said action should be brought forward and the proper judgment made up. The presiding judge granted this motion against the objection of the defendant, and the case was brought forward, and the following entry ordered to be made in the case: "Death of plaintiff, Phebe West, suggested. Obadiah S. West, husband, withdraws as a party, and it is discontinued as to him as original party, and said Obadiah S. West comes in as administrator of Phebe West, his late wife, and assumes the prosecution of this suit. Judgment for said administrator for $481.82."

To the granting of the foregoing motion and the directions by the presiding judge, in regard to the foregoing entry in the action, the defendant excepted.

Record & Hutchinson, for the defendant.

The plaintiffs have a judgment recorded in their favor which is good until annulled or reversed by some appropriate process. *Banister v. Higginson*, 15 Maine, 73; *Granger v. Clark*, 22 Maine, 128; *Smith v. Keen*, 26 Maine, 411. Then, while they have one judgment in force, another is ordered to be entered in favor of another party plaintiff. Obadiah West, as administrator, had ample remedy on the original judgment. R. S., c. 81, § 11; c. 87, §§ 20 and 21.

W. W. Bolster and *A. M. Pulsifer*, for the plaintiffs.

This action survives. *Hooper v. Gorham*, 45 Maine, 209; but the husband cannot prosecute it as survivor. R. S., c. 87, § 10; *Norcross v. Stuart*, 50 Maine, 87. Hence after the wife's death there was no party plaintiff in court until the administrator appeared.

BARROWS, J. Case for an injury suffered by the female plaintiff through the carelessness of defendant's servant. After verdict for plaintiffs at the April term, 1871, defendant filed exceptions and motion to set aside the verdict, which were overruled at the July term, 1872, prior to which, in November, 1871, Mrs. West died. But no suggestion of her death had been entered on the docket; and when the certificate of the decision of the Law Court was received, the clerk made up and recorded the judgment as of the April term, 1872. In November, 1872, the husband was appointed administrator on the estate of the wife, and at the January term, 1873, filed a motion that the action should be brought forward "that the proper judgment may be made up."

Against the objection of the defendant, the presiding judge allowed the motion, and thereupon the case was brought forward and, under the direction of the court, an entry was made setting forth the death of the wife, the withdrawal of the husband as a party, and a discontinuance on his part as an original party, his appearance to prosecute the suit as administrator of the wife, and

the rendition of judgment on the verdict in his favor as administrator.

To the allowance of the motion and all these proceedings the defendant excepted. That the proceedings would have been correct and appropriate if they had been had before the defendant's exceptions and motion to set aside the verdict were overruled, was settled in *Norcross v. Stuart*, 50 Maine, 87. But the defendant objects that one judgment has already been rendered and recorded against him, which will remain until reversed by some appropriate process, and he suggests danger of a double liability. We think the danger is more imaginary than real. We think the old record is effectually vacated by the allowance of this motion to bring forward the action "that the proper judgment may be made up;" and that though this could not be done where a judgment had been regularly rendered, it may be in a case like this, where one has been improvidently entered which would, unless corrected, be absolutely invalid.

The case is not a novel one. In *Stickney v. Davis*, 17 Pick., 169, similar proceedings seem to have been had, and Shaw, C. J., remarks: "where a cause, after argument, is held under advisement, the court will order a judgment to be entered *nunc pro tunc*, to avoid entering an erroneous judgment, when a party has died in the mean time. When it clearly appears that no action has been had on the judgment, or the execution, if one has been issued, has been returned to the files unexecuted, and where the rights of third persons cannot be affected, there seems to be no reason why the same thing should not be done by vacating the entry of judgment and bringing the action forward. This ought to be done with great caution, and with strict regard to the rights of others." That this caution was observed in the case at bar, the associates of the learned judge who directed these proceedings (and who has since retired from the bench) cannot doubt.

The defendant was heard upon the motion, or had an opportunity to be heard. There is nothing in the exceptions to indicate that any movement was ever made to enforce the judgment thus

improperly entered and recorded, or that, with these proceedings spread upon the record, there could be any danger of harm to the defendant, or to any third party, from the summary correction of this mistake. The clerk should make a reference to the subsequent proceedings in the case on the face of his first record, and then its invalidity is established and patent.

Among the records of judgments which are irregular and will be stricken out on motion, we find mentioned those which are entered after the death of a party. Freeman on Judgments, § 97; *Holmes & al. v. Howie*, 8 Howard's N. Y. Practice Reports, 384.

Why should it not be so? The court cannot proceed in a case where there is a want of living parties. Unless the case is one which can properly go forward in the name of survivors and a discontinuance as to the deceased is duly entered, every act done in the case except those which make known the fact of decease and tend to supply the vacancy, must be irregular and null until some living representative of the decedent appears. Then only can a judgment be regularly rendered.

Exceptions overruled.

APPLETON, C. J., WALTON, DICKERSON, DANFORTH, and VIRGIN, JJ., concurred.

HENRY WILLIS ET AL *vs.* GRAND TRUNK RAILWAY COMPANY.

Common carriers—liability for goods conveyed.

The objection that the verdict is against law, because the bill of lading signed by the defendants' agent had printed upon it, among other notices and conditions, a notice that the company would not be responsible for any deficiency in weight or measure of grain in bags or bulk, is overruled upon the ground that the law is now well settled that common carriers cannot stipulate for exemption from responsibility for losses occasioned by the negligence of themselves or their servants; the plaintiffs' action being based on the alleged negligence of the defendants.

The objection that the evidence is not sufficient to support such a claim is overruled, upon the ground that the verdict is not so clearly against evidence as to justify the court in setting it aside.

Willis *v.* G. T. Railway.

ON EXCEPTIONS AND MOTION FOR A NEW TRIAL, because the verdict is against the law and evidence.

The action was case for a short delivery of corn sent over the Grand Trunk Railway on its way from Chicago to the plaintiffs, at Auburn, Maine, the deficiency alleged being little over eight thousand pounds, worth about a hundred and sixty dollars. The defence was that the defendants' bill of lading, or railway receipt, given to the plaintiffs, contained an express condition, or notice, that the company would "not be responsible for any deficiency in weight or measure of grain, &c., in bags or in bulk," which the defendants' counsel (substantially) requested the court to instruct the jury was a bar to this suit, but the presiding justice held the contrary, and the defendants excepted. The verdict was for $179.86.

Morrill & Wing, for the plaintiffs.

J. & E. M. Rand, for the defendants.

WALTON, J. It is now well settled that common carriers cannot stipulate for exemption from responsibility for losses occasioned by the negligence of themselves or their servants. *Sager v. Railroad*, 31 Maine, 228; *N. Y. C. Railroad v. Lockwood*, 17 Wallace, 357.

In the case last cited the authorities are more fully collated, and the question more exhaustively discussed, than in any other case with which we are acquainted.

The plaintiffs' action is based on negligence. They aver that they delivered to the defendants to be carried, a certain quantity of corn, and that "by want of due care and preservation," a portion of it was lost. If this allegation is proved, the plaintiffs are entitled to recover, notwithstanding the notice printed on the margin of the bill of lading that the defendants would not be responsible for any deficiency in weight or measure of grain in bags or in bulk. If such a deficiency is occasioned by their negligence or the negligence of their servants, the law makes them responsible, and will

not permit them to exonerate themselves by any notice, condition or stipulation whatever.

The quantity of grain shipped, the quantity received, the quantity, if any, which was lost, and if lost, whether by the negligence of the defendants or otherwise, were of course questions of fact for the jury. We do not think their verdict is so clearly against evidence as to justify the court in setting it aside.

Motion and exceptions overruled.

CUTTING, DICKERSON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

JOHN T. WOODIS *vs.* CHARLES P. JORDAN, JR.

Conversion. Exceptions. New trial for newly discovered evidence.

Forbidding the owner of personal property, lying upon the land of defendant, to enter for the purpose of removing it; withholding the property from him, and claiming it as the defendant's own, constitute a conversion.

The presiding judge, while giving instructions as requested, is not limited to the requests made, but may add qualifications and modifications to meet the requirements of the case, and if the qualifications and modifications are in accordance with law, the party making such requests has no just cause of complaint. Nor has he, if the instruction is obscure in its meaning, without being adverse or injurious to the losing party.

A new trial for newly discovered evidence will not be granted unless it is apparent that injustice has been done. To authorize the granting of a new trial, the evidence newly discovered must have been such as the party offering it could not with reasonable diligence have procured, and of which he had no knowledge.

It must also be so material as to induce a reasonable probability that, on a second trial, it would be decisive and productive of an opposite result on the merits.

ON EXCEPTIONS AND MOTION FOR A NEW TRIAL.

TROVER for a taking by the defendant of thirty-two cords of wood, cut upon land owned by one Martin, who bought the farm of Jordan, and mortgaged it back to secure the purchase-money. After the wood was cut, and before its removal from the land, Mr.

Jordan took possession to foreclose his mortgage, Martin having before then sold the wood to one Leonard, who subsequently sold it to the plaintiff. There was some disagreement as to whether or not Jordan gave Martin leave to cut the wood; but the main controversy was whether or not Jordan prevented the plaintiff from taking the wood, or forbade his entry upon the land for the purpose of removing it, or claimed it as his own. The jury found a verdict for the plaintiff.

The defendant requested the presiding judge to give the following instructions to the jury, which the presiding judge gave, with additional instructions; those requested being stated, and then the additions in another paragraph, as follows:

"I am requested by the counsel for the defendant to instruct you:

First, That if defendant exercised no other dominion or control of the wood sued for, than merely to take and hold possession of his land as mortgagee, this would not amount to a conversion of the wood.

I give you that instruction. If he exercised no other dominion than to take possession of his land and hold that, that would not be exercising dominion over the wood; but I instruct you as I did before, that if he exercised dominion over the wood, claimed title to that and withheld the possession of that also, as well as the land, it would amount to a conversion.

Second, I am requested to instruct you, that defendant, after he took possession of the mortgaged premises, December 26, 1871, had the legal right to hold and maintain that possession against all persons until redemption of the mortgage, and that while defendant held such possession, no person having personal property placed or lying upon the mortgaged premises, by the acts of persons other than the defendant, and without his consent, had the legal right to go upon the land to recover said personal property without the defendant's consent.

I give you that instruction, but you will perceive that it does not apply very directly to the issue here, because no one pretends that

this property was carried on to the land, but was left there as you would haul a wagon into another's barn, or put a horse or cow into his pasture. It was cut upon the land, and I have already instructed you, if it was cut by the permission of defendant, so that it became the personal property of Martin, and Martin sold it to Leonard, and Leonard sold it to the plaintiff, and the defendant then claimed title to the wood, and withheld the possession from the plaintiff under that claim, and would not permit him to remove it, then that would be a conversion. It would not only be withholding possession of his land, but it would be withholding possession of the wood also.

Third, I am requested to instruct you, that if defendant being in possession of the land under his mortgage, forbade the plaintiff to go thereupon to get the wood sued for, and said wood was placed there without the defendant's knowledge or consent, and by no act of his, such forbidding of the plaintiff would not amount to a conversion of the wood.

That is undoubtedly good law; but you will see the element of claiming title to it by the defendant is wanting in this instruction. Just supply that, the defendant forbade his going to get it, and withheld the possession under a claim to hold it himself, and it would amount to conversion.

Fourth, I am requested to instruct you, that a license to do any act upon the land of another, is a matter of personal trust, and may be revoked at any time before it is executed; that it is not assignable.

That is undoubtedly good law. In a proper case it might be very important. I do not see the distinct application here unless they mean to say, if you find Martin had permission to cut this wood, he could not assign the right to another. I instruct you he could not. If the defendant forbade the plaintiff cutting upon his land, he would have no right to cut, and if he also in addition claimed the wood as his, and therefore he must not go and cut it and carry it away, it would be a conversion.

Fifth, I am requested to instruct you, that if the jury believe

from the evidence that the defendant told Woodis, the plaintiff, that he might buy the wood in question of Martin, this would not authorize Leonard to buy the same wood of Martin.

Of course it would not; the license would go no farther than the permission given. I do not understand that the plaintiff relies upon any such title. He does not rely upon the fact, as I understand it, that the defendant told him he might buy it of Martin. That evidence is only to show that he had given Martin consent to cut it. If you find Martin had permission from Jordan to cut the wood, so that it became the property of Martin, then Martin could sell it to whom he pleased.

These requests, considered in the abstract, so far as I have been able to consider them, are all good law; but how far they are applicable to the question which you are called upon to determine, will depend somewhat upon what you will find the facts to be. I have endeavored to give you such additional instructions and explanations of them as would prevent their misleading you."

The defendant excepted to the additional instructions.

No copy of the motion for a new trial, or of the evidence on which it was based, came to the hands of the reporter; but no statement of facts seems necessary for an understanding of the opinion of the court upon this branch of the case. There was also a motion, filed in the law court, for a stay of judgment and execution in the cause at bar, until the defendant could prosecute to final judgment a cross action in his favor against the plaintiff, commenced by writ returnable to the September term, 1873, of this court for Androscoggin county.

S. & J. W. May, for the defendant.

If the requested instructions were wrong, they should have been refused; if correct, how could they mislead the jury? We are as much aggrieved by their being given in the manner they were, as we should have been by a refusal to give them.

C. C. Frost, for the plaintiff.

APPLETON, C. J. This was an action of trover for a quantity of wood cut by one Martin upon land of which the defendant was mortgagee, and Martin was the mortgagor. The wood was piled on the mortgaged premises, and the plaintiff, while it was so piled, became its purchaser.

It was claimed by the plaintiff that the wood was cut under a license from the defendant. The issues presented for the consideration of the jury were, whether the wood was cut by the permission and license of the defendant, and if so, whether or not there was a conversion of it by him.

A series of requested instructions were presented by the counsel for the defendant to the presiding justice, who affirmed their correctness. But while he thus affirmed their correctness, he added qualifications and modifications to render them more applicable to the facts as developed. The defendant had the benefit of the requested instructions, for they were given in the language of the several requests. The court is not required to adopt the precise language of a request, nor is it bound to abstain from modifying it according to the necessities of the case. The real inquiry is, were the qualifications and modifications of the requested instructions correct and appropriate? If so, it was for the jury to determine whether by the instructions as requested and given, or as modified, the plaintiff had a legal right to recover. The defendant is only harmed when incorrect instructions, adverse to his interest are given.

The first three instructions, as modified, require that there should be proof that the defendant claimed title to the wood, forbade the plaintiff entering to remove it, and withheld the same under claim to hold it himself, to entitle the plaintiff to recover. In all it is fully stated that the mere forbidding the plaintiff to enter on the mortgaged premises would not amount to a conversion. This was sufficiently favorable for the defendant. *Hinckley v. Baxter*, 13 Allen, 139.

The fourth request was given in the language of the request. The additional remarks as reported, do not seem to be applicable,

but while inapplicable, it is impossible to say that they are injuriously adverse to the defendant. If the meaning was not clear, counsel should have requested an explanation. Any apparent obscurity could have been removed by a pertinent request. But whether obscure or not, still, if in no sense adverse to the defendant, he could never have been injured by instructions however obscure in meaning, if obviously in no way prejudicial.

The fifth request was given as desired, and the additional remarks are only explanatory of issues presented, and afford the defendant no reasonable ground of complaint.

There is no such preponderance of evidence on the part of the defendant as would justify our interfering with the verdict on the motion to set it aside as against evidence.

Before the adjournment of the term at which the verdict was rendered, a motion was made for a new trial on the ground of newly discovered evidence.

The discovery of new testimony immediately consequent on the loss of a verdict must always be looked upon with suspicion. The diligence which is speedily rewarded by the discovery of new testimony after the loss of a verdict, would have been better exercised before such loss in searching for testimony, which the event shows was so readily found that the rendition of the verdict and the fortunate discovery of the new proofs were all but simultaneous in time.

A new trial will not be granted unless it is very probable that injustice has been done. The evidence newly discovered must have been such as the party offering it could not with reasonable diligence have procured, and of which he had no knowledge. It must be material and so material as to induce a reasonable probability that it would, on a second trial, be decisive and productive of an opposite result on the merits.

The evidence purporting to be newly discovered consists mainly of the statements of witnesses who were present at the trial, or of members of the defendant's family. No inquiries were made of these witnesses previously. The evidence offered is not so mate-

rial as to induce the belief that the result would thereby be changed. And, further, it is the manifest negligence of the defendant, that they were not obtained at the trial.

The plaintiff is said to be a resident of New Hampshire. The defendant has offered proof that he has brought a suit against Woodis and moves that this case be continued, so that the executions severally to be recovered may be offset, under the provisions of R. S., c. 81, §§ 74, 75. Whether the defendant's writ will be entered, we cannot know. The question can be presented and determined at *nisi prius*, if the writ be then entered.

Exceptions and motions overruled.

WALTON, DICKERSON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

THEODORE RUSSELL, complainant, *vs.* RUSSELL TURNER.

Amendment after verdict, allowed. Pleading. Practice. R. S. c. 92.

A complaint for flowage may be amended after verdict by the insertion of the words "on his own land," so that it may be alleged that the dam causing the injury complained of was erected upon the land of the defendant, if that was conceded to be the fact upon the trial of the cause.

ON EXCEPTIONS.

COMPLAINT for flowage under R. S., c. 92, entered at September term, 1868, and verdict rendered for the complainant at the January term, 1870. The defendant took exceptions which were overruled; 59 Maine, 256. At the September term, 1873, before interlocutory judgment for the appointment of commissioners, the complainant moved for leave to amend by inserting the words "on his own land" in his complaint, so that it should declare that the defendant's dam, occasioning the injury, was erected upon Mr. Turner's own land, averring that this fact was admitted and proved at the trial of the cause and not disputed.

The court allowed the amendment, and the defendant excepted.

M. T. Ludden, for the plaintiff.

Frye, Cotton & White, for the defendant.

APPLETON, C. J. This is a complaint for flowage under R. S., c. 92, § 1, in which there is no allegation that the defendant owned the land on which the dam causing the flowage was erected. It was held in *Jones v. Skinner*, 61 Maine, 25, that a complaint without such allegation was bad on demurrer.

But in the case at bar no demurrer was filed. The cause proceeded to trial, and a verdict was rendered in favor of the complainant. Exceptions were filed, which upon full consideration were overruled. *Russell v. Turner*, 59 Maine, 256. After all this, under leave of the court, the words, "on his own land" were inserted in the complaint by way of amendment. To the allowance of this amendment exceptions were taken.

We must presume that the instructions were in all respects correct; that none which the case required were withheld, and that every fact essential to the maintenance of the complaint was fully proved. As the case has been rightly tried on its merits, the amendment was properly allowed, though after verdict. The defendant has been neither surprised nor misled. Had he been, he would long before this have brought the fact to the notice of the court. The authorities are almost uniformly in favor of sustaining the propriety of the amendment. *Cleaves v. Lord*, 3 Gray, 66; *East Boston Timber Co. v. Persons*, 2 Hill., 126; *Nichols v. Prince*, 8 Allen, 404; *Peck v. Waters*, 104 Mass., 345; *Banner v. Angier*, 2 Allen, 128. *Exceptions overruled.*

WALTON, DICKERSON, BARROWS, VIRGIN and PETERS, JJ., concurred.

JAMES A. STEVENS *vs.* ANDROSCOGGIN WATER POWER COMPANY.

Acceptance of a conditional order—effect of.

An acceptance of a bill or order may be absolute or conditional.

A conditional acceptance becomes absolute upon the performance or happening of the condition.

An acceptance to pay if on settlement "there is anything over," becomes on settlement an acceptance for what balance may be due, if the condition is assented to by the holder.

ON FACTS AGREED.

ASSUMPSIT upon an order, copied into the opinion, one of several drawn by James Hibbard upon the defendants. The company acknowledged the reception of this order in two letters, one of which appears in the opinion, both promising, in effect, to pay, upon final settlement, whatever balance was found due Hibbard, so far as necessary to cancel his orders. The defendants kept this order in their possession. March 25, 1873, A. S. Bean sued Hibbard, and summoned the company as his trustee, to recover $356.70, for groceries. The defendants notified Mr. Stevens' attorneys, on the twenty-eighth day of April, 1873, that this trustee suit would be entered at the September term of court, when they would make a full statement of the orders, and leave the matter to the determination of the court. Before the time for entry of this trustee suit arrived, it was settled by the parties, the trustee paying in accordance with Hibbard's directions, the amount claimed therein, without notifying the plaintiff of their intention, or that they had done so. At the time of this settlement there was due Hibbard from the company, four hundred and four dollars and forty-seven cents, out of which they paid Mr. Bean his debt and costs, three hundred and sixty-nine dollars and fifteen cents, and on the second day of August, 1873, they paid Hibbard the balance, thirty-five dollars and thirty-two cents.

The court was to enter such judgment as these facts require.

Record & Hutchinson, for the plaintiff.

This order was accepted in writing, upon a contingency which happened, and thereupon the defendants became absolutely bound. The language of this acceptance is to be "most strongly" construed against the acceptors. *Sylvester v. Staples*, 44 Maine, 496; *Townsley v. Sumrall*, 2 Peters, 170. Their payments to Bean and to Hibbard were in direct violation of their agreement with the plaintiff. *Phillips v. Frost*, 29 Maine, 77; *Clark v. Cook*, 4 East, 57.

Frye, Cotton & White, for the defendants.

There was no acceptance. The minds of the parties never assented to the same proposition in the same sense. What Hibbard, by his order requested, the defendants never consented to do, but proposed something else, to which the plaintiff did not assent. The condition precedent was, that there should, upon final settlement, be found in their hands funds sufficient to meet all Hibbard's orders,—not merely this one; and there is no evidence that this contingency happened.

The intervention of the trustee process before any final settlement prevented the carrying out of the terms proposed in the defendants' letters, the same not having been then accepted by the plaintiff.

APPLETON, C. J. This is an action of assumpsit against the defendants, as acceptors of the following order, drawn on them by James Hibbard.

"SHELBURNE, Feb. 25, 1873.

ANDROSCOGGIN WATER POWER CO.,

EDWARD PLUMMER, Agent.

Please pay to James A. Stevens, for cutting and hauling lumber, the sum of one hundred and thirty-four dollars, and charge the same to my account. JAMES HIBBARD."

In answer to a letter from the plaintiff, the defendants on March 18, 1873, wrote the following letter to him:

"Lisbon Falls, Me., March 18, 1873.

Mr. James A. Stevens,

Dear Sir: Yours of the thirteenth inst., is received. We shall not pay any orders of Mr. Hibbard until we settle with him. If there is anything over, I will keep it back for the purpose.

Yours truly, E. Plummer, Agent."

The order of Feb. 25 was retained by the defendants in their possession. On March 25, 1873, the defendants were summoned as trustees of James Hibbard, in a suit in which one Bean was plaintiff, returnable at the September term of the Supreme Judicial Court for the county of Androscoggin, and for the sum of $356.70. On April 28, 1873, the plaintiff's attorneys were notified that this action would be entered at the September term, and that the trustee would make a full statement as to all orders drawn, and leave the question of liability to the decision of the court. Prior, however, to the September term, Hibbard settled the suit of Bean, and directed the defendants to pay the amount due, without notifying the plaintiff in this suit. At the time of this settlement there were due Hibbard from the defendants, four hundred and four dollars and forty-seven cents, out of which sum they paid Bean three hundred and sixty-nine dollars and fifteen cents, and the balance of thirty-five dollars and thirty two cents they paid Hibbard. This payment was on August 2, 1873.

An acceptance may be absolute or conditional. A conditional acceptance at once becomes absolute upon the performance or happening of the condition.

In the present case the defendants' promise is to pay if in settlement "there is anything over." When the acceptance is conditional, the holder may accept or refuse the offer. The plaintiff acceded to the proposition of the defendants—permitted the order to remain with them, and did not sue out a trustee writ, by which his whole debt would have been secured. There was a settlement and the amount due exceeded the amount of Hibbard's order. The defendants then became liable, and this liability, conditional in the first instance, accrued long before the trustee suit of Bean.

The payment to Bean by the defendants was in their own wrong, and cannot defeat the prior right of the plaintiff.

Defendants defaulted.

WALTON, DICKERSON, BARROWS, VIRGIN and PETERS, JJ., concurred.

MOSES H. COLLEY *vs.* THOMAS DOUGHTY.

Practice. Who are necessary parties to a suit to enforce a mechanic's lien.

One who buys real estate subsequently to the erection of a house thereon, is not a necessary party to a suit brought by the builder to enforce his lien upon the building and lot on which it stands.

ON AGREED FACTS.

ASSUMPSIT to enforce a lien. Writ dated Nov. 6, 1866. June 1, 1866, Thos. Doughty was the owner of the real estate mentioned in the writ, and then contracted with the plaintiff to repair the house standing on the premises, which he accordingly did. Not being paid for the labor and material furnished he brings the present action to recover their value, and claims a lien upon the property to secure this indebtedness to him. On the fourth day of July, 1866, the defendant conveyed the estate to one Franklin, who conveyed it Sept. 6, 1866, to Almira W. Davis, by deed of warranty duly recorded before the date of the writ. The defendant removed from this State before suit brought, so no personal service could be made upon him, but notice of the pendency of the action was given by publication, to which he did not respond. At the January term, 1870, of this court, upon plaintiff's motion, a summons issued to Almira W. Davis, who ever since its conveyance to her has continued to own this real estate, to appear at the April term, 1870, of this court and show cause why a judgment for lien upon said building and lot, as claimed in the writ, should not be entered in the case. At the term last named, she appeared

specially and protested that no law authorized the plaintiff to so summon her in, and that she can not legally be made a party to this action. Thereupon it was agreed to submit the case to the law court upon the following questions:

"I. Is the said Almira W. Davis legally made a party to this suit by the proceedings above recited?

II. If not, if she voluntarily appears and contests the existence of the alleged lien, will the judgment of the court in respect to such lien be binding upon her and the plaintiff?

If either of these questions is answered in the affirmative, the case is to stand for trial; but if both are answered negatively, the case is to be dismissed as to Almira W. Davis, without prejudice to either party."

McCobb & Kingsbury, for the plaintiff.

These proceedings are under Public Laws of 1862, c. 131, § 2, the phraseology of which is different from that employed in the former or present revision.

J. H. Drummond, for Almira W. Davis.

This is purely a statutory proceeding and must be carried on in strict conformity thereto. It contains no provision for citing in any present owner of the estate; so my client, properly, is neither compelled to appear on summons, nor authorized to appear voluntarily.

TAPLEY, J. The plaintiff in this case, having commenced an action of assumpsit against the defendant and caused a third person to be summoned in to show cause why a judgment for lien upon certain real estate should not be entered in the case, now asks the opinion of this court whether such third person has been legally made a party to the suit.

It appears that the plaintiff contracted with the defendant to repair a house upon the premises June 1, 1866, and he contends that such proceedings were had as to give him a lien upon said real estate for the value of such repairs.

The validity of the lien, which is claimed by statutory law, depends solely upon the acts and doings of the parties to this suit. Almira W. Davis could not in any way defeat it. If such proceedings were had as to give a lien, summoning her in cannot change it; if none exists, making her a party will not give one. The right of the plaintiff to take the estate depends upon proceedings had before the motion to make her a party.

The only issue raised by this process is one of indebtedness upon the part of Doughty. If none exists, no lien exists. This fact has not, as between the plaintiff and defendant, been settled.

If it had been, *non constat* that the defendant would not respond to the judgment when that was entered up.

The question presented really is, has the plaintiff a valid security for the debt he is seeking to recover, if he should be able to do so, and if the defendant should not respond to it.

We know of no law authorizing us to inquire in the way sought into such questions. There is no provision of statute in relation to notice upon general owners as in cases of claims by lien for labor upon lumber or logs. They are altogether too contingent to make it wise or practicable to enter upon such an investigation. We may as well summon in different attaching creditors and determine the validity and priority of their attachments before levy, as to make this inquiry. This may never ripen into title, and those may never reach that point. Both are but liens, inchoate rights, depending upon subsequent proceedings for title.

It would be a novel proceeding to enter upon the question of such inchoate rights before judgment and execution.

The proceeding, so far, is *in personam*, involving only a question of indebtedness. When that is determined, and execution process upon that judgment is levied upon the property, the question of its efficacy in that direction may arise and be tried between such parties as see fit to question it, but until that is done we cannot settle the rights of the parties.

The question then will be one of title, and not whether the party may go on and get title by perfecting something begun, upon the happening of some uncertain event.

We think Almira W. Davis is not legally made a party to the suit, and as she does not propose to come in voluntarily, it is unnecessary to determine the legal effect of her acts, if she did.

Action dismissed as to Almira W. Davis, without prejudice to either party.

APPLETON, C. J., CUTTING, WALTON, DICKERSON and DANFORTH, JJ., concurred.

CUMBERLAND AND OXFORD CANAL CORPORATION

vs.

CITY OF PORTLAND.

Action. Corporation. Demurrer. Municipal liability. Nuisance.

If the state of facts necessary to support an action of nuisance exists, a corporation can institute such action, notwithstanding its charter and laws amendatory thereof provide special and peculiar remedies for such injuries to its property as constitute the acts of nuisance declared upon, and give authority for special proceedings relative thereto. These remedies and proceedings are not exclusive of the ordinary common law processes, or those authorized by general statutes.

The action may be maintained against a municipality if it is proved or admitted to be guilty of those acts of nuisance which are the foundation of such an action.

Where a declaration sets out a good cause of action, a demurrer thereto must be overruled and the declaration adjudged sufficient.

ON EXCEPTIONS.

CASE, for a nuisance committed by the defendants in filling up the bed of the plaintiffs' canal. The writ was dated December 9, 1870, returnable to the January term, 1871, of this court for Cumberland county. At the return term the defendants demurred to the declaration, which was as follows: In a plea of the case: "for that whereas the said Cumberland and Oxford Canal Corpor-

ation, on the twenty-first day of August, A. D., 1867, and for a period of thirty-five years prior thereto, were and had been possessed of a certain canal, called the Cumberland & Oxford Canal, extending from Sebago lake, in said county of Cumberland, to the harbor of the city of Portland, surveyed, laid out, made and maintained by the said Cumberland & Oxford Canal Corporation, under and by virtue of a charter or charters granted to the said Cumberland & Oxford Canal Corporation, by the said State of Maine, and of right might use the same for all the purposes of canal navigation, without interference, obstruction or hindrance, of all which the said defendants were well knowing, but contriving and intending to injure the plaintiffs, and to deprive them of the use and benefit of their said canal, and the navigation thereof, the defendants, by their servants and agents, at said Portland, on the said twenty-first day of August, did fill up the bed of said canal, and cover the tow-path and berme bank thereof with earth and stones, commencing at a point near and south of Vaughan's Bridge, in said Portland, and extending the distance of twenty-eight rods southerly and easterly, according to the course of said canal, as laid out and occupied, thereby rendering the said canal useless to the plaintiffs, and utterly destroying the same, and have kept the said bed of said canal, the berme bank and tow-path filled with earth and stones as aforesaid to the date of this writ, to the great nuisance of the said plaintiffs and all the citizens of the State having occasion to transact business upon said canal, and to the great damage of the plaintiffs, to wit, the sum of five thousand dollars."

The demurrer was, after joinder, overruled, and the defendants excepted.

Symonds & Libby, for the defendants.

This is a common law action for nuisance, in filling up the old site of plaintiffs' canal in the construction of West Commercial street. It is another form of complaining of the same acts alleged as the foundation of the suits of these same plaintiffs against the city, 56 Maine, 77, and against Mr. Hitchings, the contractor, 57 Maine,

146. Failing in these suits, brought upon special statutes made in their behalf, can they now resort to this general form of action? or are these special statute remedies, provided by special laws of 1821, c. 74, exclusive? As this act conferred the right and imposed the liability for its violation, we hold the remedy it gives to be exclusive, according to *Bath v. Miller*, 51 Maine, 347; Dwarris on Stats., 275, note 5; *Knowlton v. Ackley*, 8 Cush., 97; *Bassett v. Carleton*, 32 Maine, 553. And its provisions, together with those of the amendments thereto, are ample for the protection of the property and rights of this corporation. The penalty, under the Act of 1821, c. 74, § 7, is $5000; and by Special Laws of 1830, c. 86, §§ 15, 20, additional penalties are provided for every possible injury to the canal, its banks, gates and locks, or to the navigation thereof. The fifteenth section of this Act of 1830, punishes the precise offences now complained of by a penalty of $5 for each offence, and the payment by the offender of the expense of removing the obstruction. Section nineteen of the same act imposes fine and imprisonment for wilful trespasses upon the plaintiffs' property.

The care with which these provisions are framed indicate that it was intended they should be exclusive of general statutes and remedies, the twentieth section even prescribing the forms of action, the methods of procedure, and the courts which shall have jurisdiction.

This court held in 56 Maine, 77, that these special remedies could not be maintained against a municipal corporation; is there any more reason for sustaining the present action against the city? We think it cannot be supported. *Davis v. Bangor*, 42 Maine, 522; *Small v. Danville*, 51 Maine, 359; *Mitchell v. Rockland*, 52 Maine, 118; *C. & O. Canal v. Portland*, 57 Maine, 77; *Hawey v. Rochester*, 35 Barb., 177.

Bradbury & Bradbury, for the plaintiffs.

Under a special charter the plaintiffs constructed and operated a canal which the defendants have obstructed and still keep filled, for which this action is brought. That they have done so, is ad-

mitted by the demurrer, but it is contended that the defendants are confined to the remedies given by their act of incorporation, as amended, and cannot resort to this form of declaration. We say the provisions adverted to by the defendants are penal in their nature, and not applicable to civil suits.

RESCRIPT.

WALTON, J. The declaration avers, and therefore the demurrer admits, that the city of Portland did the acts complained of. Those acts are *prima facie* acts of trespass. No justification or excuse being shown, the plaintiffs are entitled to judgment.

Exceptions and demurrer overruled.
Declaration adjudged good.

CUTTING, BARROWS, DANFORTH and PETERS, JJ., concurred.

The following dissenting opinion was delivered by

APPLETON, C. J. The plaintiff corporation in their writ allege that the defendants, contriving and intending to injure it and deprive it of the use and benefit of its canal and the navigation thereof, by their servants and agents, on the twenty-first day of August, 1867, filled up the bed of said canal and covered the tow-path, &c., with earth and stones, thereby rendering the same useless to the plaintiffs and destroying the same, and have kept the bed of said canal and tow-path filled with earth and stones to the date of the writ, to the damage of the plaintiffs.

To this declaration the defendants have demurred.

The defendants are a municipal corporation. The common council is their agent. Their powers are limited and defined by law, and they can no more transcend them than any agent can bind his principal by acts beyond his authority; more especially when the extent of that authority is fully known. Their votes for illegal purposes are void. They cannot authorize nor command invasions of the rights of persons or property. Private property may be taken in certain cases for public uses by compensating the

owner therefor and complying with the regulations prescribed by law.

The city may raise money to enable it to comply with and discharge all its various municipal duties and obligations, but that is the extent of its power.

The acts in question do not appear to have been done under or by virtue of any authority conferred upon the city. They are naked trespasses upon the plaintiffs' property. The city of Portland had no more right to commit a trespass upon the property of the plaintiffs than upon the persons of the corporators. Nor could the city government pledge the estates of the inhabitants to make compensation for illegal acts which they had no authority to order or direct to be done.

If the acts were done in pursuance of an express vote of the city government, it was one not within the scope of their powers.

If they were done by the servants and agents of the city without any directory vote, they were the illegal and extra-official acts of such servants, for which the city would not be liable.

Such tortious acts could not be legally ratified, for the city government could no more ratify and confirm such illegal acts after their commision than it could, in advance, order and direct them to be done. *Small v. Danville*, 51 Maine, 359; *Mitchell v. Rockland*, 52 Maine, 118.

The remarks of Welles, J., in *Hawey v. City of Rochester*, 35 Barb., 178, are applicable to the case under consideration. "The question in the present case," he says, "then comes to this: have the common council authority by their agents, servants or otherwise, to enter summarily upon premises, within the corporate bounds of the city, which are owned or lawfully and peaceably possessed by another, and commit the tortious acts which the referee finds to have been committed in this case? The mere statement of the question would seem to indicate an answer in the negative. To maintain the affirmative would be monstrous. Most manifestly, it had no such power, and the case is one where the acts of the common council were clearly *ultra vires*, and for which

their constituent, the corporation, is not liable, even if the ordinance, under the authority of which the wrongful acts are alleged to have been done, had specifically directed the particular acts complained of to be done."

The result is the same, whether the agents did the tortious act specified in the plaintiffs' writ of their own volition, or in pursuance of the vote of the city government, which it had no authority to pass.

STATE OF MAINE *vs.* OLIVER A. GOOLD.

Libel or no libel is a question for the jury. Exceptions.

It is true that, in a prosecution for libel the respondent has the right to have the jury determine whether or not the publication is libellous; but he may waive this privilege by admitting it to be a libel; in which case he can not complain if this question is not left to the jury, nor can he be aggrieved by a ruling of the court, as matter of law, that it is a libel.

ON EXCEPTIONS to the ruling of Goddard, J., of the superior court.

INDICTMENT for an alleged libel. In the progress of the trial the prisoner's counsel formally admitted the publication complained of to be a libel, but denied that it was malicious. In his charge the judge adverted to the old English common law on this subject and its modification by statutes, and then said: "So that now the court is required to direct the jury, that is to say, to inform them whether or not the article in question is of a libellous nature, and further, the jury are to determine not only the fact of authorship and publication, but what was formerly declared to be matter of law, viz: the question of malice." To this instruction the respondent excepted, the jury having found him guilty of the offence charged.

WALTON, J. One of the instructions to the jury in this case was in our judgment erroneous. They were told that it was the

duty of the court to direct them whether the publication in question was, or was not, libellous, and that it was their duty to be governed by the direction which the court gave them upon that point; and the court did instruct them in effect that the publication in question was libellous.

This ruling was undoubtedly in accordance with what was formerly held to be the law in England; but this view of the law was never adopted in this country.

In this State, the right of the jury, in all indictments for libels, to determine, at their discretion, both the law and the fact, is secured by a constitutional provision. Art. 1, § 4.

Reading this provision in the light of history, we cannot doubt that it was the intention of the framers of the constitution that the jury should have the right to determine, not only as matter of fact whether the defendant was the author or publisher of the article in question, but also, as matter of law, whether it was, or was not, libellous. Whether the defendant published the article in question is plainly a question of fact. Whether its publication was illegal is plainly a question of law. Such was the answer of the twelve judges of England to the House of Lords. Their answer was, "that the criminality or innocence of any act done (which includes any paper written) is the result of the judgment which the law pronounces upon that act, and must therefore be, in all cases and under all circumstances, matter of law, and not matter of fact." 22 State Trials, 298.

While, therefore, it is undoubtedly true that the question of libel or no libel, is purely a question of law, we cannot doubt that it is the province of the jury in this State, by virtue of the constitutional provision referred to, to answer it.

This they do when they return a general verdict of guilty or not guilty. To justify a verdict of guilty the jury must not only find, as matter of fact, that the defendant published the article in question, but they must also determine, as matter of law, that its publication was illegal; for without the element of illegality there could be no guilt; while to justify a verdict of not guilty, the jury

must fail to be satisfied upon one or the other of these points. In fact, in all criminal trials, a general verdict of guilty affirms not only that the defendant committed the act in question, but also that the act was one prohibited by law; and to this extent such a verdict does in every case determine the law as well as the fact. But the difference between indictments for libels and other criminal prosecutions is this, that in the former the jury may rightfully pass upon the criminality of the act, although their judgment in that respect is contrary to the opinion of the court, while in the latter they have no such right. In the latter, as in the former, they do in fact pass upon the law as well as the facts involved in the issue; but in the former the constitution secures to them the right to determine the law for themselves, while in the latter it is their duty to follow the instructions of the court.

It seems to be now settled in England as well as this country, that the judge is not bound to state to the jury, as matter of law, whether the publication in question is, or is not, a libel; that the proper course for him to pursue is to define to the jury what a libel is, and then leave it to them to determine whether the publication in question does, or does not, come within that definition. 2 Greenl. on Ev., § 411; *Shattuck v. Allen*, 4 Gray, 546.

But while it is undoubtedly true that in prosecutions for libel the defendant has a right to have the question of libel, or no libel, submitted to the jury, we think it is equally clear that it is a right which it is competent for him to waive. If he chooses to admit for the purposes of the trial that the publication in question is a libel, we think he is no longer in a condition to complain because the question is not submitted to the jury. Being admitted, it is no longer a question for either court or jury; and it is impossible for the defendant to be aggrieved by any views the court may entertain or express, as to whose province it would be to pass upon the question, if the answer to it were not admitted.

The bill of exceptions in this case shows that the defendant expressly admitted that the publication in question was a libel. He also admitted that he composed, wrote and published the article.

He claimed the right to go to the jury upon the question of malice only. This right was accorded to him as fully as he desired. All this appears by the bill of exceptions. He was not, therefore,—in fact he could not be—an aggrieved party by the views expressed by the judge of the superior court, as to whose duty it would have been to pass upon the questions of law involved in the issue, if the answers to these questions had been controverted. He expressly waived his right to go to the jury upon these questions by his admissions. *Exceptions overruled.*

APPLETON, C. J., CUTTING, DICKERSON, DANFORTH and VIRGIN, JJ., concurred.

DAVID WEBBER and others, in equity,

vs.

LEMUEL H. STOVER and others.

School district, division of. R. S. of 1857, *c.* 11, § 1.

At a town meeting holden in Harpswell, October 2, 1865, a majority of the selectmen and of the superintending school committee, made a report recommending the division of an old school district, and the creation of two new ones from it, which report was then accepted by the town, and recorded upon its records, and the original placed on file. This proceeding was nugatory, because the R. S. of 1857, c. 11, § 1, then in force, (identical in this respect with the same chapter and section of the present revision) required such report to be made "at the annual meeting" of the town. But at the next annual meeting, holden in March, 1866, under an appropriate article in the warrant calling the same, after hearing the record of the report read by the town clerk, the town voted to accept the report and to divide the district agreeably to its recommendation; *held*, that the two new districts were legally constituted out of the old one, and that the action had was equivalent to a report made directly to this last meeting, at which this vote was passed.

Also, *held*, that, under the circumstances of this case, a recital in the report (substantially) that although a division of the district would not be desirable if its inhabitants could agree among themselves to forego it, yet the state of feeling actually existing was such as to require the division, was a sufficient "statement of facts" under R. S., c. 11, § 1, upon which to base the action of the town.

Bill in equity.

This bill of complaint was brought under the Public Laws of 1864, c. 239, § 1, by ten taxable inhabitants of the old school district No. 5 in Harpswell, which they claimed still existed as originally established, against the three defendants, selectmen of the town, alleging that these officers should have apportioned a due proportion of the school money of the town to this district, but that they refused to do so upon the ground that it had been legally divided into two new districts, to which they assigned the money, declining to recognize the existence of the old school district, No. 5. To prevent this diversion of the funds and to compel their application to the uses and purposes of this district, these proceedings were instituted. The main question at issue was the legality and efficacy of the alleged division, which the defendants set up in their answer as made by the town, upon regular petitions therefor, hearing had, and a written report and recommendation of a majority of the municipal officers and of the superintending school committee, duly presented and accepted at a meeting of the town held October 2, 1865, and also presented, read and accepted at the annual town meeting, held March 5, 1866, when it was voted to divide school district No. 5 at the limits recommended by the selectmen and superintending school committee.

It was agreed that this case should be heard on the Bill and Answer, modified by the following statements, so far as the facts therein stated were legally admissible in evidence.

At a meeting of the inhabitants of Harpswell, legally called and notified, held on the second day of October, A. D., 1865, the warrant contained (among others) the following article:

"To hear and act on the report of the selectmen and superintending school committee, concerning school district No. 5."

Upon said article it was voted: To accept the report of superintending school committee and selectmen concerning school district No. 5, which is as follows: "The selectmen and superintending school committee, in accordance with the petition of Arthur B. Webber and others, and also the petition of George W. Curtis

and others, asking for a division of school district No. 5, in the town of Harpswell, have notified the inhabitants of said district, and given them a hearing concerning the proposed division, and beg leave to submit the following report:

"Your selectmen and superintending school committee are of the opinion that under ordinary circumstances, if the inhabitants of the district could agree to forego a division of the said district, it would be to their advantage so to do (as we have before recommended), but considering the present state of feeling, engendered by existing circumstances, we are of the opinion that the peace and harmony of the district, and, consequently, the interests of education, would be better promoted by a division of the district; we therefore recommend that district No. 5 be divided on the line fence between the land of Norton Stover and land of Elijah Pinkham, commencing at the interval, (so called) and running in a north-western direction to the north-western limits of the said Elijah Pinkham's land, and thence continuing the said north-west course to the shore at Ash Cove (so called.)

HARPSWELL, September 30, 1865.

L. H STOVER, } Selectmen and Superintending
WM. C. EATON, } School Committee."

Voted: That the north part retain the old organization and name of No. 5. Voted: That the south part be called No. 18.

At the annual meeting in March, 1866, legally called and notified, the warrant contained (among others) the following articles: "To see if the town will vote to divide district No. 5 at the limits recommended by the selectmen and superintending school committee, September 30, 1865, agreeable to the petition of Paul Stover and others, and to hear the remonstrance of David Webber and others, against the same."

Under this article the following vote was adopted: Voted: To accept the report of the selectmen and superintending school committee in regard to division of school district No. 5, at the limits recommended by the selectmen and superintending school committee as reported September 30, 1865, agreeable to petition of

Paul Stover and others. Recorded in doings of meeting Oct. 2, A. D., 1865.

The action at the meeting in October was founded upon a petition and proper preliminary proceedings.

It was agreed that at the March meeting, the selectmen and superintending school committee being the same, before the town acted upon the article, and while it was pending, the clerk read from the record of the October meeting the report of the selectmen and superintending school committee, as recited in the vote above copied, and which was on the files of said town. It was agreed, also, that said L. H. Stover, W. C. Eaton and one other, were legally elected selectmen and superintending school committee at the meeting in March, 1865.

It was agreed that if said original district, No. 5, was legally divided by the proceedings aforesaid, this bill was to be dismissed with costs.

J. H. Drummond, for the complainants.

The action of the meeting of October 2, 1865, is clearly void. R. S., c. 11, § 1; that of the annual meeting, March 5, 1866, was equally so, because there was no "written recommendation of the municipal officers and superintending school committee, accompanied by a statement of facts," as required by that section. *Allen v. Archer*, 49 Maine, 346. At this last meeting these officers presented no report, nor does it appear they were present; but the clerk read from his record a copy of a report that had been made to the previous meeting, which was then accepted, acted upon, and became *functus officio*. The statute contemplates a recommendation contemporaneous with the action of the town, and a statement of the facts then existing. The report should be made for that time and at that time; this report, dated September 30, 1865, speaks of "the present state of feeling, engendered by existing circumstances," i. e., at its date, but both might have been changed before March, 1866. All these officers should sign the report to make it effectual.

The destruction of the original papers by the great fire of July 4, 1866, has delayed the presentation of this cause.

A. A. Strout, for the defendants.

The teachers in these districts should have been joined as defendants. The proceedings of the town were correct in substance, and that is enough. *Soper v. Livermore*, 28 Maine, 203. Prior to March, 1866, the report had no function to perform, and could not, therefore, be *functus officio*. Having been presented, and not afterwards amended or withdrawn, it continued to be the recommendation and report of these officers, and the proper basis of the town's action.

VIRGIN, J. Sometime prior to September 30, 1865, the municipal officers and superintending school committee of the town of Harpswell, recommended a non-division of school district No. 5. The district did not concur, but still sought a division. Thereupon, after a hearing upon the petition of certain inhabitants of the district, L. H. Stover and W. C. Eaton, each holding the respective offices of selectmen and superintending school committee, on September 30, 1865, made a written report, therein stating it to be their opinion—"that under ordinary circumstances, if the inhabitants of the district could agree to forego a division of the said district, it would be to their advantage so to do (as they have before recommended); but considering the present state of feelings, engendered by existing circumstances, they are of opinion that the peace and harmony of the district, and consequently the interests of education, would be promoted by a division of the district; and they therefore recommend that district No. 5, be divided on the line fence," &c.,—designating a territorial line of division.

This report was submitted to the inhabitants of the town at a meeting thereof, held October 2, 1865, when it was accepted by a vote of the town, and recorded *in extenso* as a part of the vote of acceptance, and the paper itself was placed upon the files of the town. This action of the town was without the authority of law.

R. S. of 1857, c. 11, § 1, then in force, provided that "school

districts shall remain as they are until altered or discontinued. A town, at its annual meeting, may determine the number and limits of school districts therein; but they shall not be altered, discontinued, or annexed to others, except on the written recommendation of the municipal officers and superintending school committee, accompanied by a statement of facts," &c. But the words "annual meeting" when applied to towns, mean the annual meeting for choice of town officers. R. S. of 1857, c. 1, § 4, cl. IV. And the annual town meetings for the choice of town officers, "shall be held in the month of March." R. S. of 1857, c. 3, § 10. Hence the town could not determine the limits of any school district therein at the October meeting, 1865.

At the succeeding annual meeting held in March, 1866, under an article—"To see if the town will vote to divide district No. 5, at the limits recommended by the selectmen and superintending school committee, September 30, 1865," &c., and before final action of the town upon the article, but while it was pending, the clerk read from the record of the October meeting the report of the municipal officers and superintending school committee, as recited in the vote of acceptance as hereinbefore stated; and thereupon the town "voted to accept the report," &c.

I. Is the recommendation of the town officers accompanied by such "a statement of facts" as is contemplated by the statute?

A statement of facts, whatever that phrase means, is expressly required as a pre-requisite condition to any change in the limits of a district. This condition is designed to prevent changes without sufficient cause; and when no statement of facts whatever is made by the proper officers (as was the case in *Allen v. Archer*, 49 Maine, 346) any alterations, however considerately made, or however wise and satisfactory they may prove to the inhabitants interested, must be deemed unauthorized and void.

A statement of facts in this class of cases and those analogous thereto, would seem to be a mere recital of the principal material facts upon which the recommendation is based. As already seen, this is a chronic strife. It seems that the same officers had previ-

ously recommended different action, which did not prove satisfactory, or allay the strife. But upon a rehearing, after witnessing the state of feeling engendered by the circumstances, and the uncompromising spirit of the persons seeking a division, they saw no other mode of bringing about peace and harmony to the inhabitants of the district, and of promoting the interests of education, than by a division of the district on the line designated and for the reasons stated; and the town concurred. If it is somewhat informal, and general, and even if the facts are somewhat peculiar, it is only such an irregularity as the courts have frequent occasion to observe when investigating the proceedings of our municipal corporations. If the law had lodged in us the authority to pass upon the wisdom of the proposed division, in the absence of any other information than that contained in the statement, we might desire a more detailed recital of the facts. But the statute submits the wisdom of the proceeding to the town alone, to which the details must necessarily be more or less familiar. The law requires of the court to give a liberal construction to such proceedings, and to uphold them, when, as we think in this case, they are in substantial compliance with the requirements of the statute.

II. It is contended, however, that the report comprising the recommendation and accompanying statement of facts, having been made to and accepted by the meeting of October 2, 1865, thereby became *functus officio*. We fail to perceive the force of this objection. The town had no authority to act then upon the subject matter of the recommendation, because, as already seen, it was not the "annual meeting." The town's action then, was without effect and void. But the report was placed on file. And at the succeeding annual meeting, when the matter could be lawfully considered and effectually decided, the town, under a proper article, did act. Instead of either of its authors taking it from the file and reading it for the information of the town, its contents were just as effectually made known by the clerk's reading a copy of it from the record. And the fact that it had been made and signed six months before final action by the town, could weigh nothing, provided the facts

therein recited remained unchanged, and we have received no suggestion that they did not. No statute limitation is violated. If the facts and opinions of the municipal officers and superintending school committee had changed, the report of the case would have shown it. What would have been the effect if the officers had submitted another and different recommendation and statement, need not now be discussed.

III. R. S. of 1857, c. 1, § 4, cl. III, removes all doubt as to the validity of the written recommendation and accompanying statement of facts, so far as the fact is concerned that it was signed by two only of the proper officers, without its appearing that the other acted.

The conclusion to which we have come renders a consideration of the preliminary question unnecessary.

Bill dismissed, with costs for respondents.

APPLETON, C. J., WALTON, DICKERSON, BARROWS and DANFORTH, JJ., concurred.

NATIONAL TRADERS BANK and others, in equity,

vs

OCEAN INSURANCE COMPANY.

Equity. Mistake—what is sufficient proof to authorize the court to reform an instrument.

When 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, a court of equity will order the policy reformed so as to describe the voyage correctly.

BILL IN EQUITY. The complainants seek to have an insurance policy issued by the Ocean Insurance Company upon the barque

Maria Henry, of which they are the owners, reformed so as to express what they allege to have been the intention of both parties at the time it was made, which (as written) it now fails to do, owing to a mistake in filling it out, as they say.

On the fifth day of April, 1866, at Liverpool, Eng., the master of the vessel chartered her to take a cargo to some place in Cuba "and there, or at some other usual place in the island be made ready and adapted to take on board a full and complete cargo * * * which the said charterer binds himself to ship * * * and the master is bound to receive, and being so loaded and dispatched shall proceed to Queenstown or Falmouth for orders, &c., &c. She proceeded to St. Jago with coal and then went to Mansanilla (both places being in the island of Cuba) where she loaded with timber and sailed for Falmouth, Eng., for orders, as per charter. While on this voyage, and after reaching a point where the routes from St. Jago and from Mansanilla to Falmouth are identical, the vessel was lost through perils insured against. The Company refusing to pay the sum by them insured on the vessel, ($5000) an action at law was brought against them, which they defended successfully on the ground of deviation, the policy as actually issued and delivered only covering a voyage "at and from Liverpool to port of discharge in Cuba, and at and thence to port of advice and discharge in Europe." The complainants set out in their bill that the ship's husband, (Hearne) in behalf of all the owners, agreed with the president of the company, acting and authorized to act in its behalf, for an insurance of $5000, on the whole round charter aforesaid, valued at $16,000, and then and there, at the office of said company, (the said Hearne) informed William W. Woodbury, the president of the company * * * * that the vessel was chartered for a round voyage to Cuba and back to Europe, and to go to Falmouth for orders where to discharge * * * that said Hearne had not received a copy of the charter-party, and did not know at what port in Cuba the vessel would discharge or to what port she would go to load; that said Woodbury replied that he would give him (Hearne) a policy for five

thousand dollars that would cover the round voyage, at the same rates of premium as charged by the New England, or any other good office in Boston; that he would make it all right. To this Mr. Hearne assented, and on the eighth day of May, in the same year, called for the policy," which is the one now sought to be reformed.

At that time, the complainants aver, Mr. Woodbury produced a premium note for Hearne's signature, dated May 8, 1866, for $251.50, payable in six months, being five per cent. on the sum insured, and a dollar and a half for the policy. Hearne demurred to the rate charged and Woodbury replied, "you don't know how many ports in Cuba will have to be used; the policy is to cover the round voyage. You sign the note and we will make it all right as we agreed." Thereupon Mr. Hearne, believing that the policy covered the round voyage, took it and signed the premium note, which was paid at maturity.

The prayer of the bill was to have the policy so reformed as to describe the voyage from Liverpool to be "to one or more ports in the island of Cuba," &c.

The bill was filed in January, 1871. By their answer the defendants deny that their late president, Mr. Woodbury, who died in July, 1869, made any such agreement or had any such conversations as are stated in the bill. The general replication was filed in June, 1871, and thereupon testimony taken by both parties, which it is not necessary to recapitulate, as the positive statements of the witnesses for the complainants, fully sustaining the charges in the bill, were not directly contradicted by the evidence put in by the defence. The cause was heard upon bill, answer and proofs.

A. A. Strout, for the complainants.

The action of the court now invoked by us is frequently exercised. 1 Parsons on Mar. Ins., 150, and cases cited. *Henckle v. Royal Ass. Co.*, 1 Vesey, 314; *Moteaux v. London Ass. Co.*, Atk., 545; *Collett v. Morrison*, 12 Eng. L. & Eq., 171; *An-*

drews v. Essex Ins. Co., 3 Mason, 10; *Tucker v. Madden*, 44 Maine, 215.

J. & E. M. Rand, for the defendants.

The strongest evidence is necessary to show such a mistake as will authorize this court to alter the terms of a written instrument. 1 Story's Eq. Jur., §§ 152, 157, and numerous cases. And it must be shown by the same weight of evidence that the mistake is mutual; that of both parties. Kerr on Fraud and Mistake, 409, note; 418 *et seq*; *Sawyer v. Hovey*, 3 Allen, 331; *Lyman v. Ins. Co.*, 17 Johns, 374. No evidence that the Insurance Company ever understood this policy was to be as the plaintiffs assert; this is expressly denied in the answer; and nobody ever heard that there was any error in the policy during Mr. Woodbury's life time.

The bill proceeds solely upon the ground of mistake, and to sustain it a mutual mistake must be proved.

WALTON, J.· 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.

It seems to be proved beyond reasonable doubt that the owners of the bark, Maria Henry, obtained for her a charter in Liverpool, requiring her to proceed to some safe port in Cuba, Havana excepted, there to discharge her outward cargo, and at that port, "or at one other usual place in the island," to take in a return cargo, and thence return to Europe; that after this charter had been obtained, and after the vessel had sailed in pursuance of it, one of the owners living in Portland, applied to the president of the Ocean Insurance Company for an insurance of $5000 on this charter; that he told the president of the insurance company that no copy of the charter had been received, and that he did not know what ports in Cuba it required the vessel to use; that he wanted a policy that would cover the round voyage; and that the president agreed to give him one; that he afterwards called at the

office of the insurance company and signed an application for the insurance and received a policy and carried it away without stopping to read them, not doubting, as he testifies, that they had been prepared so as to cover the round voyage, as the president of the company had promised him they should be; that it was afterwards discovered that neither the application nor the policy was so written as to cover the round voyage; that they limited the vessel to the use of one port only in the island of Cuba, whereas the charter required her, if necessary, to use two; that the vessel did in fact use two ports of the island, one to discharge her outward cargo, and one other to take in a return cargo, and that she was afterward lost on her return voyage.

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. Can there be any doubt that this 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 mistake—a mutual mistake—a mistake in which both parties participated; and we think equity and good conscience require that it should be corrected.

Decree, reforming the policy, as prayed for in the bill, with costs.

APPLETON, C. J., CUTTING, DICKERSON, DANFORTH and VIRGIN, JJ., concurred.

JAMES BAILEY *vs.* ORRIN S. CARVILLE.

Arrest under R. S., c. 113, § 2. Action dismissed where the magistrate's certificate is defective.

An arrest of a debtor, on mesne process, made under a creditor's sworn certificate which omits the word "his" in the statute phrase "of his own," is illegal. R. S., c. 113, § 2.

A motion duly made to dismiss the action because of the insufficiency of such certificate, will be sustained.

ON EXCEPTIONS to the ruling of Lane, late justice of the superior court.

DEBT on a judgment in favor of the plaintiff, as surviving partner of the late firm of James Bailey & Company, dissolved by the death of the other member, William Bailey. The defendant being only temporarily in this State, upon a visit, and about to return to his home in California, the plaintiff sued out the capias writ in this case, and procured the arrest of Mr. Carville upon it, by making oath that he had reason to believe and did believe the debtor was "about to depart and reside beyond the limits of this State with property or means of own," &c.; the certificate apparently conforming to all the requirements of R. S., c. 113, § 2, except in the omission of the pronoun "his" before the word "own." Upon the day after the entry of the action in court, the defendant

moved to dismiss it upon the ground that this defective certificate did not justify the arrest of the defendant, and that, for that reason, there was no legal and sufficient service of the writ. Lane, J., overruled the motion and the defendant excepted.

T. H. Haskell, for the defendant.

B. D. Verrill, for the plaintiff.

Dickerson, J. The provision of the statute for the arrest of a debtor on mesne process, at the instance of his creditor, is a proceeding *in invito*, contrary to common right, and must be strictly followed. Accordingly it was held in *Sargent et al. v. Roberts*, 52 Maine, 591, that an arrest of a debtor made upon the certificate of the creditor, which omitted the words "and take with him" (property or means as aforesaid,) was illegal. In that case the court says, "it is for the party making the arrest to comply in all respects with the requirements of the legislature." R. S., c. 113, § 2.

In the case at bar the certificate does not set forth that "the means" with which the debtor was about to depart and take with him were "his," as the statute requires it should do; nor does it contain language equivalent thereto. The omission in the certificate of the word "his," in the statute phrase "of his own," renders that phrase meaningless. The expression "of own" in the certificate gives no clue to the ownership of the "means." For aught that appears they may have belonged to the creditor, or some other person than the debtor. The whole phrase "of his own" might as well have been omitted as the word "his," since it is that word that fixes its meaning.

It is for the legislature to prescribe the conditions under which an arrest may be made, and for the creditor to follow it at his peril. It is not within the province of the court to interpolate words or phrases into a creditor's certificate, so as to make it conform to the requirements of the statute, or to give it a forced or unnatural construction to make it mean something contrary to

what its language imports, especially when the personal liberty of a citizen is imperilled.

The arrest made by the officer was illegal, and the motion to dismiss the action because of the insufficiency of the creditor's certificate, should have been sustained.

As our decision upon this point is fatal to the maintenance of the action, it is unnecessary to pass upon the other questions presented.

Exceptions sustained.
Action to be dismissed.

APPLETON, C. J., WALTON, DANFORTH and VIRGIN, JJ., concurred.

HENRY A. BACHELDER *vs.* CHARLES S. BICKFORD and others.

Agreement. R. S., c. 82, § 36. Day's work. Compensation for over-work. Assumpsit on implied promise.

Ten hours constitute a legal day's work in a grist mill where the labor is hired at a *per diem* compensation, payable weekly, this not being an agricultural employment, nor a monthly hiring. R. S., c. 82, § 36.

For work done at the request of his employer, by a laborer, so hired in a grist mill, after the completion of his day's labor, the law implies a promise of payment, which may be enforced by suit after the stipulated compensation for the day labor has been paid and accepted.

ON EXCEPTIONS to the ruling of the justice of the superior court.

ASSUMPSIT to recover $57.90 for labor performed by plaintiff for the defendants in their grist mill. The cause was submitted to the presiding judge, who found these facts: that the plaintiff was hired by the defendants to work for them in their mill, on or about the twenty-ninth day of May, 1865, at eight shillings per day, payable weekly; that at times it was necessary to run the mill all night; that it was customary, when a man wrought all night, for him to "lay off the next day," the night work counting for a day's work; but that the plaintiff, during the time of his engagement, worked

thirty-two nights and did not lay off and rest the next day, but worked all day; that he worked for the defendants until December 31, 1865, and they settled with him the next day, (January 1, 1866) and the plaintiff received what was due him for his day labor, but though he then claimed pay for his thirty-two nights' work, it was refused him; that, at the time of this settlement, the plaintiff was hired anew at nine shillings a day; that November 16, 1871, the plaintiff again demanded payment for his thirty-two nights' work, which was again refused, and thereupon this action was brought December 9, 1871. Upon these facts the judge ruled, as matter of law, that the plaintiff was entitled to recover for the nights' work, and was not precluded from sustaining this action by his acceptance of his pay for his day labor; to which rulings the defendants excepted.

Cobb & Ray, for the defendants.

The contract between the parties was for weekly, and not daily labor. 2 Story on Con., §§ 962, d, e and f; *Davis v. Maxwell*, 12 Metc., 286. Hence, R. S., c. 82, § 36, does not apply. The entire working time and ability of the laborer belongs to his employer; and to enable him to maintain this action an express promise should be shown. Schouler's Domestic Relations, 620.

His not following the usual custom of laying off, was his own act. His employers could no more compel him to sleep than to eat when he did not choose to do so. He abandoned his claim at the time of settlement, January 1, 1866, and did not again make it till November 16, 1871—six years later. It was an afterthought.

J. H. Drummond, for the plaintiff.

WALTON, J. When a contract to work in a grist mill, at eight shillings per day, to be paid weekly, is silent as to the length of time that shall constitute a day's work, the rule established by the statutes of this State that "in all contracts for labor, ten hours of actual labor shall be a legal day's work, unless the contract stipulates for a longer time," is applicable. R. S., c. 82, § 36. And if

the laborer works nights, after his legal day's work is done, at the request of his employer, and for his benefit, the law implies a promise on his part to pay for such labor. Acceptance of pay for the day labor will be no bar to a recovery for the night labor. It is true that the above rule is not applicable to "monthly labor," nor to "agricultural employments." But in our judgment, work in a grist mill, at eight shillings per day, to be paid weekly, is not monthly labor, nor agricultural employment.

Such, in effect, was the ruling in this case. We think the ruling was correct. *Exceptions overruled.*

APPLETON, C. J., DICKERSON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

CHARLES CROSSMAN *vs.* FRANK A. OWEN, administrator.

Officer, liability of, and indemnity to. Contract.

If an officer, requiring and receiving from a creditor an agreement for indemnity, attaches as the property of a debtor, and sells upon the writ, the goods of another man, who sues and recovers judgment against the sheriff for such unlawful taking, he can maintain an action upon the agreement given him, although in making sale of the articles attached, he has not strictly conformed to the requirements of the statute, unless it is expressly shown that his failure to comply with the law in this particular was the ground of the recovery of the judgment against the sheriff in the claimant's action.

ON REPORT.

David Owen, the defendant's intestate, was a member of the firm of Owen & Company, doing business at Bath, in December, 1865, and the plaintiff was the deputy at Brunswick of George W. Parker, Esq., then sheriff of Cumberland county. Upon the twenty-seventh day of December, 1865, several writs against William J. Harmon were placed in the plaintiff's hands for service, one of them being in favor of Owen & Company, who directed and requested Mr. Crossman to attach thereon a stock of goods

in a store in Brunswick occupied by Harmon. These goods were claimed by Jacob Harris, and the deputy declined to make the attachment unless indemnified. Owen & Company and the other attaching creditors then gave to Mr. Crossman the agreement to indemnify, which is fully recited in the opinion of the court.

After this paper was delivered to him he attached the goods, for which act his principal, the sheriff, was sued by Harris, who obtained a verdict and judgment in that suit in his favor, at the October term, 1870, of this court for this county, for $1401.19 damage, and $113.66 costs of suit, for which sums execution issued December 7, 1870. The plaintiff in the present action declares that his stock in trade, worth six hundred dollars, was taken by reason of the judgment aforesaid and sold for much less than its value, and that he is still liable for the unpaid balance of the execution issued thereon.

There was also a general count for $500 money had and received.

This action was commenced by writ dated August 7, 1871, issued out of and returnable to the superior court of this county at its September term, 1871.

The property attached by Crossman, as deputy sheriff, on the writs against Harmon, was appraised, at the request of the creditors, according to R. S., 1857, c. 81, § 47, and following sections, and sold before judgment. It was appraised January 5, 1866, and sold on the ninth day of the same month, having been kept, after its appraisal, less than the time fixed by the statute. It sold for $993.86, the expense of sale being $42.63, leaving $951.23 as the net proceeds. Of this he paid Owen & Company, January 24, 1866, two hundred and sixty-three dollars, for which he took their receipt, concluding in these words: "and we promise and agree to and with said Crossman to account to him for the said sum so as before paid us, on the execution which may issue in said suit," i. e., in their suit against Harmon. When judgment and execution were obtained by them against Harmon, this sum was endorsed according to agreement.

In the suit of Harris against Parker, the defence set up was the attachment of these goods as the property of Harmon, upon the processes aforesaid ; and that they were legally to be so taken at the suit of his creditors, the sale to Harris being fraudulent and void as to them. Parker subsequently sued Crossman and his sureties for the amount he was compelled to pay to satisfy the Harris judgment, and it was in this suit of Parker's that Crossman's goods were taken and sold as alleged in his declaration.

This court was to enter such judgment as the law and facts required.

Henry Orr, for the plaintiff.

Francis Adams, for the defendant.

TAPLEY, J. The plaintiff, a deputy of the sheriff of the county of Cumberland, being called upon to make an attachment of goods upon a writ, required of the attaching creditors an indemnity for so doing. An agreement to indemnify having been furnished, and the goods attached, he proceeded, under the direction of the creditors' counsel, to make sale of them upon the writ and hold the proceeds for application upon the executions when issued. A sale was made, the net proceeds of which were nine hundred and fifty-one dollars and twenty-three cents ($951.23). The sale was made the ninth day of January, 1866, and on the twenty-fourth day of the same month the creditors, now represented by this defendant, received of the plaintiff two hundred and sixty-three dollars of the proceeds, to be applied and accounted for upon the execution which should issue on the judgment recovered upon their claim.

In August following, execution having issued, this sum was duly accounted for upon the same.

On the third day of April, 1866, one Jacob Harris commenced an action against the sheriff to recover the value of the goods thus attached, alleging his ownership of the same at the time of the attachment by this plaintiff, and upon due proceedings recovered judgment for $1401.19, damage, and costs of suit, taxed at $113.66,

which sums the plaintiff has been obliged to pay from his own goods and estate upon due proceedings against him, by reason of the attachment. The plaintiff having been obliged to pay this amount by reason of the attachment, now seeks to recover the same upon the agreement, with his reasonable expenses incurred by reason of making the attachment.

The agreement given and now sought to be executed provides, that, "whereas Charles Crossman, a deputy sheriff within and for the county of Cumberland, has attached on several writs or mesne processes in favor of the undersigned, a stock of goods in the store lately occupied by William J. Harmon of Brunswick, as the property of said Harmon, to secure the several demands due us respectively. Now, therefore, in consideration of the premises and of one dollar to each of us paid before the execution hereof, the receipt whereof is hereby acknowledged, we do hereby promise and agree to and with said Crossman, his heirs and assigns that we will well and truly indemnify said Crossman for so attaching and taking said goods, and save him harmless from all actions, costs, claims or demands of all persons by reason of his said attachment, and holding said goods as aforesaid.

In testimony whereof we have hereunto subscribed our names this twenty-seventh day of December, in the year of our Lord eighteen hundred and sixty-five."

To excuse themselves from the liability assumed by them on account of the attachment, it is averred that the subsequent proceedings of the officer were not in accordance with the requirements of the statute concerning the sale of the goods, and therefore the plaintiff became a trespasser *ab initio*.

Without passing upon the soundness of this proposition it may be enough to say, that if the debtor in the original processes was not the owner of the goods, and Jacob Harris was, at the time they were taken by attachment, the subsequent proceedings can make him no more of a trespasser whether regular or irregular, and he would be entitled to recover their value regardless of these proceedings.

As an evidence that they were in fact the goods of Harris, the record of the judgment recovered in his favor against the sheriff is introduced, and seems to establish this fact.

It is said that this does not necessarily follow, because an action of trespass may be sustained by any party who has possession of goods against any one having no title, or right of possession, when he has unlawfully taken them into his possession.

This is true; but the action is not sustained because plaintiff has possession, but because the possession is sufficient evidence of title against a party showing none. The action is founded upon the plaintiff's title, and his possession is the evidence of it, in such cases.

The action of *Harris v. Parker* was founded upon the allegation of ownership in the plaintiff. The defendant in that case relied upon the ownership of one Harmon, and so far as can be gathered from the judgment, the issue was this ownership, and was decided in favor of Harris.

We find nothing in the judgment, and nothing in the admissions made by the parties in this case, to show that the alleged irregularities in any way affected the rights or interests of the respondents in that case.

That it may have done so is not quite sufficient to find that it did.

We think this judgment, with that recovered by the sheriff against the plaintiff, admitted without objection, having been satisfied, entitles the plaintiff to maintain this action; and that he is entitled to recover the amount of the judgment of *Harris v. Parker*, with interest since, less any balance of the proceeds of the sale on the original process, in his hands at the time the Harris judgment was recovered, the action of trespass against Parker being a confirmation of title in the proceeds held by his servant and deputy, the present plaintiff.

Judgment for plaintiff accordingly.

APPLETON, C. J., WALTON, DICKERSON AND DANFORTH, JJ., concurred.

CUTTING, J., did not concur.

MATTHEW ADAMS, complainant, *vs.* JAMES MCGLINCHY.

Costs. Replevin. Officer.

Adams, as a deputy of the sheriff, seized certain liquors upon legal process, and libelled them; before the day of hearing upon the libel arrived, they were taken from his possession by a coroner, upon a writ of replevin (defective in that the bond was not for double the value of the property replevied) which was never served upon Adams, nor returned to court; *held*, that though the coroner and plaintiff in replevin were liable as trespassers to the deputy sheriff for the taking, the party who sued out the replevin writ could not be charged for costs upon a complaint made by Adams to this court; nor could any order for a return to him of the liquors replevied be made upon such complaint. Adams' remedy is in trover or trespass, as in ordinary suits against trespassers.

ON EXCEPTIONS.

July 16, 1872, the complainant, as deputy of the sheriff of this county, seized thirty-four casks of intoxicating liquors, of the value of fifteen hundred dollars, upon a complaint made to the municipal court of the city of Portland, under R. S., c. 27, § 35, and warrant issued thereon, alleging that they were deposited and kept for the purposes of unlawful sale, by James McGlinchy and John H. McCue, in the basement of the store numbered 118 on Fore street, in said Portland. The liquors were, on the eighteenth day of July, 1872, libelled by the seizing officer, and a monition issued for any person interested to appear and claim them on the thirty-first day of that month, at nine o'clock in the forenoon; no one then appearing to claim them they were adjudged to be forfeited; but, prior to this date, to wit, on the twenty-seventh day of July, 1872, they had been taken from the possession of Mr. Adams, by Charles H. Hall, a coroner, upon a writ of replevin, sued out by McGlinchy against Adams, dated July 27, 1872, returnable to the term of this court, holden at Portland, on the second Tuesday of October, 1872; but, after the liquors were replevied, it was discovered that the replevin bond was for only $1500, the single, and

not the double, value of the liquors; therefore, no personal service was made upon Adams, nor was the writ ever entered in court. Thereupon, at the return term of the replevin writ, (October term, 1872,) Adams made this complaint, stating these facts, that the coroner had not possession of the writ, but had given it to McGlinchy's attorney; and praying that McGlinchy might be required to file a copy of it, to pay the costs, and to return the property replevied, and pay the damages occasioned by its taking and detention. The court ordered a return of the liquors and decreed costs, and the respondent excepted.

W. L. Putnam, for the respondent.

The practice exists where writs are served and not entered, to file a complaint and obtain judgment for costs; but there is no precedent for attempting to try, on such complaint, the issues of the original action. How could the court order a return? The petitioner filed no copy of the replevin writ; moved for no rule upon the officer to return it; but merely prayed this court, sitting as a court of law, to order McGlinchy to file a copy! a thing not within the common law jurisdiction of this court to decree.

The complainant has an ample remedy at law. Since the writ was not returned, the officer cannot justify under it, and he and McGlinchy are both liable, unless they can show that Mr. Adams had no title to the liquors, and that one of them had.

Butler & Fessenden, for the complainant.

R. S., c. 96, § 19, recognizes this mode of procedure. This remedy is peculiarly appropriate in a case like the present, where a return of the specific articles should be compelled, that they may be properly dealt with by the municipal court, from whose custody they were taken.

Appleton, C. J. The defendant sued out a writ of replevin by virtue of which certain specified property was taken from the possession of the plaintiff, without filing the bond required by statute. The service not being completed, the complainant files his com-

plaint, praying that McGlinchy may be required to file in court a true copy of the writ by him sued out, and for judgment against him for costs, and for a return of the goods and chattels taken upon said replevin writ.

As the plaintiff has never been summoned to appear at any term of this court, there was no reason why he should so appear. He is not entitled to costs for not appearing where he was not required to be. In *Hodge v. Swasey*, 30 Maine, 162, the defendant sued out a writ of attachment under which the complainant's property was taken, but the service was not completed by leaving a summons. The defendant in the original suit procured a copy of the writ upon which his property had been attached, and entered his complaint for costs, which the court denied to him, but allowed to his opponent. The same question arose in *Chadbourne v. Lancaster Bank*, 24 N. H., 333, and a similar decision was made. The complainant is not entitled to costs.

As the complainant was in possession of the intoxicating liquors replevied by him as a deputy sheriff, by virtue of a warrant issued from the municipal court of the city of Portland, upon their search and seizure the action against him was prohibited by statute. R. S., c. 27, § 43.

Further, the officer, without the statute bond, was not legally authorized to commence the service of his writ, and having never completed any service it can afford him no protection. He is a mere trespasser. A writ of replevin cannot be legally served before the plaintiff gives the bond required by statute. *Baldwin v. Whittier*, 16 Maine, 33. Trover may be maintained in such case, when the service is not completed. In *Purple v. Purple*, 5 Pick., 226, the officer was held to be a trespasser because he took the bond running to himself, and not to the defendant in replevin. The defendant, by whose direction these unlawful acts were done, is equally liable as the officer.

The defendant, being a trespasser, is situated like other trespassers. If he had seized the property taken without any writ, the person from whom it was so taken could not have claimed the intervention of this court to order its return. Neither can the com-

plainant do this. The defendant has no precept under which he can justify. He is in no better condition than if none had issued.

The complainant has the same legal remedies as any other party upon whom a trespass has been committed. He asks for a return of property upon a writ which was never served upon him, never entered in court, and upon which there can have been no order or adjudication as to the rights of the parties. He is not legally entitled to such return, and must resort to such remedies as the law affords for redress. The legal rights of parties are the same, irrespective of the subject matter to which the trespass relates, unless modified by special legislation, and there is none applicable to the present case. *Complaint dismissed with costs.*

WALTON, DICKERSON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

AMANDELL BARBOUR *vs.* NOAH R. MARTIN.

Evidence.

A physician who leaves a patient, at a critical stage of the disease, without reason, or sufficient notice to enable the party to procure another medical attendant, is guilty of a culpable dereliction of duty; hence, it cannot be said, in an action against a physician for such alleged misconduct, that a conversation between the patient and a third person, which tended to show the former's ignorance of the doctor's absence from town, is so irrelevant as to make it immaterial whether the exclusion of part of that conversation was proper or improper.

Where a witness, called by the defence, relates a portion of a conversation, stating that he heard no more because he then left the room, the plaintiff cannot properly be prevented from introducing other witnesses to prove the whole conversation, including that which occurred after, as well as before, the first witness left the room.

ON EXCEPTIONS to the ruling of the justice of the superior court.

CASE, brought by an administrator to recover damages of a physician for malpractice in a case of obstetrics. The plaintiff

alleged as one of the grounds of action that the defendant left the intestate on Tuesday, while she was sick, and went to Bangor, where he remained three days, during which time, viz., Wednesday night, she was delivered of a child, being attended by other physicians, and died.

The plaintiff asserted that Dr. Martin did not inform the deceased of his intended absence, nor did any of her family have any idea that he had left town; but this was denied by him, he alleging that he told her he was going, and that she must get another physician, if she had occasion for the services of one during his absence. He called to the stand a Mrs. Graffam, who stated that when the deceased was taken so much sicker, and her husband went for the doctor, the lady said she had rather have Dr. Martin because she had had him once; that she heard nothing said about his being away, but added: "I was not in the room much, for I had the little girl to take care of." The plaintiff then called the husband, and proposed to prove the whole conversation that then passed between him and his wife; to this the defendant objected, and the presiding judge excluded so much of it as occurred in the absence of Mrs. Graffam. The verdict being against him, the plaintiff excepted to this ruling.

Thos. B. Reed, for the plaintiff.

After the defence had elicited part of a conversation, we were entitled to the rest. The Queen's case, 2 Brod. & Bing., 298; *Clark v. Smith*, 10 Conn., 1; *Commonwealth v. Clark*, 14 Gray, 373; *Commonwealth v. Goddard*, Id., 403-4; *Sherwood v. Titman*, 55 Penn. St. R., 77. In this last case it was held admissible as independent testimony. One version of a conversation having been given, why could we not call any number of other persons who heard it, to state their recollection of it. It is immaterial that it was a fact we could not have originally introduced; after the defence had made it part of the case, we were entitled to have it presented as it really was. They could not select one witness and claim that her particular version only should be admitted.

Butler & Fessendens, for the defendant.

The statement made by Mrs. Graffam does not partake of the ordinary nature of the recital of a conversation, or of part of one. In answer to a general question, so put as to avoid its being leading, she repeated a remark she once heard the intestate make, not called for by us, and entirely immaterial and irrelevant. Upon the subject of Dr. Martin's going away—the material point—she testified she heard nothing said. The inquiry as to what she heard must have had reference to a time when she was present; therefore the limitation imposed by the court, was proper and necessary.

The finding of the judge that the excluded testimony was not part of the conversation inquired about of Mrs. Graffam, and did not relate to the same subject matter, is a determination of a preliminary question, upon which his decision is final and not open to exception. *Gorton v. Hadsell*, 9 Cush., 511; *Lake v. Clark*, 97 Mass., 349.

The excluded testimony was so immaterial and irrelevant that the plaintiff could not have been injured or aggrieved by its exclusion. *Webster v. Calden*, 55 Maine, 165, and 56 Maine, 204. As it is not stated what further the husband would have said relative to the conversation, and there was no offer to prove any specific matter, we cannot presume that what he retained in his own breast, was so material to the issue that the plaintiff was aggrieved by its suppression. *State v. Bartlett*, 55 Maine, 200, 214.

There was no evidence that the doctor ever engaged to attend the deceased during her sickness, or for any length of time, or that he would remain at home subject to her call, regardless of all other engagements. She could dismiss him at any time, and he could, at any time, decline to attend further. Hence, there is no foundation for the action, and, of course, none for the exceptions, which become entirely immaterial.

Danforth, J. From the exceptions in this case, it appears that one of the causes of complaint against the defendant, is an alleged abandonment of his patient without notice, while the attention of

a physician was still necessary. It does not appear that he undertook to attend through the sickness, or for any specified time. It may be conceded then, that he might leave his patient at any time he might choose to do so, that choice being governed by the circumstances of the case, and exercised in a reasonable manner. When a physician is called to a patient and attends, nothing being said as to the time, it would certainly be a dereliction of duty to leave that patient in the midst of a critical sickness without cause, or without sufficient notice to enable the party to procure other suitable medical attendance. Hence it became a matter of some importance, to ascertain whether the plaintiff's intestate had knowledge of the defendant's absence from town. With this view a witness is asked what she (the deceased,) said about the defendant at a time named, and whether anything was said about his being away. The answer to the first question, that she had rather have Dr. Martin, for she had had him once, taken in connection with the fact that her husband was about going for him, would imply, perhaps, a hope that she might obtain his attendance, but certainly a doubt as to whether she should succeed. From this doubt, the jury might well infer a knowledge of his absence, as also from the remark that she had once had him, that any prior engagement had been rescinded, and from the second answer, that nothing was said about his being away, that she had no complaint to make of that condition of things. It cannot be said then, that the testimony was immaterial. The remaining part of the conversation, as testified to by the husband, very materially modifies what had been previously said, or unsaid. The plaintiff was therefore entitled to it, even though it might be proved by another witness. The fact that one witness may not have heard all the conversation, or may have forgotten a portion of what he did hear, does not deprive the party of his right to the whole, if the whole can be proved. When a part or all of a conversation has been proved, we are not aware of any principle of law that will prevent any number of witnesses who may have heard it, from giving each his own recollection of it. It is sufficient that it is the same conversation, and relates to the same subject matter.

It is undoubtedly true, as contended in the argument, that when the admissibility of evidence depends upon the decision of some preliminary fact by the presiding judge, his finding is conclusive. But how does that affect this case? It does not appear from the exceptions that any such decision was made. On the other hand, it was expressly stated, that any conversation in the absence of Mrs. Graffam would be excluded. The only inference which we can draw from this is, that the exclusion was not on the ground that it was a different conversation, or related to another subject, but because Mrs. Graffam did not hear, and could not testify to it; which, as we have already seen, was an incorrect ruling.

Exceptions sustained.

APPLETON, C. J., WALTON, DICKERSON, BARROWS and VIRGIN, JJ., concurred.

WILLIAM H. BAXTER, administrator, in equity,

vs.

JAMES P. BAXTER and others.

Construction of a will.

By the terms of her will, of which a construction is sought in this case, a testatrix gave the use and income of all her property to her husband, during his life. After his death, their daughter, Alba, was to have the use and income of all the real estate, (except a farm in Gorham) during her life, with power to sell and invest proceeds, if thought best by the judge of probate. The use and income of the Gorham farm was given to her children, and the survivors of them, as a place of refuge; but, on attaining their majority, the children, by unanimous consent, were authorized to make that farm "a Home for Little Wanderers, and to transfer the same to the Maine Association of the New Jerusalem church, to be held by said association in trust for that purpose." Under these provisions it was *held;* that the husband took a life estate in the Gorham farm, and that, under the will, the children only took a life estate; but that, as heirs, they took the remainder, which was undevised; that the Maine Association of the New Jerusalem church took no legal or equitable title to the farm; and that the judge of probate might license the children's guardian to sell their interest in said farm.

Baxter *v.* Baxter.

BILL IN EQUITY, under R. S., c. 77, § 5, item seventh, to obtain a construction of the will of the late Sarah K. L. Baxter, who died January 12, 1872, leaving six children, the eldest of whom was seventeen at that time. The youngest, Alba, was three years old when her mother died, and this child also died on the twelfth day of February, 1873. The decedent constituted her husband, James P. Baxter, executor of her will, but he subsequently resigned that trust, and became guardian of his surviving children. In his answer to the bill, individually and officially, he submitted to the determination of the court as to the real meaning of the will, and represented that the farm in Gorham was bought in May, 1871, for $6000, and that over $15,000 had been afterward expended in buildings and improvements upon it, making it very valuable; but that it had become necessary for his own welfare, and that of his wards, in the prosecution of his business, that they should remove into Portland, where he had purchased a homestead; that the farm could neither be leased nor carried on by him, to advantage, so as to derive any profit or income therefrom, but would greatly depreciate in value in his absence; that it was his desire and purpose to sell it, which he could readily do but for the cloud which the dubious provisions of the will cast upon the title.

These proceedings were of an amicable nature, the Association of the New Jerusalem church in the State of Maine, (called by a slightly different name in the will) also appeared and submitted to the jurisdiction of the court. The provisions of the will which the court were asked to construe are stated in the opinion.

Butler & Libby, for the complainant.

James P. Baxter, for himself and children.

Benjamin Kingsbury, Jr., for the corporation.

APPLETON, C. J. This is a bill in equity brought under R. S., c. 77, § 5, to obtain a construction of the will of Sarah K. L. Baxter.

I. The question presented is whether James P. Baxter has under the will a life estate in the Gorham farm. The clauses bearing upon this inquiry are the following:

First. I give the use and income of all my property, real and personal, to my husband, James P. Baxter, during his natural life.

Second. At the decease of my said husband, I give the use and income of all my real estate to my daughter, Alba, during her life, except the farm in Gorham, purchased by me of Thomas Smith, with power to sell, and invest the proceeds if thought best for the above purpose, by the judge of probate for Cumberland county.

Fourth. I give the use and income of my said farm in Gorham to my children, and the survivors of them, during their natural lives. I wish it used by them all, and kept in a flourishing state. They will themselves decide, guided by just and conscientious motives, which one of them shall occupy it, or if they shall all reside upon it. I desire it to be regarded as a place of refuge for my children and their children, if they have any, in time of poverty or trouble, and if possible, that it should never be disposed of.

The first item in the will gives the use and income of all the property, real and personal, to the husband of the testatrix. This obviously includes the Gorham farm, on which she contemplated her children should reside. As all of the children were minors, it never could have been her intention that they should live apart from their father. The devise to her daughter Alba, is to take effect at the decease of her husband. Taking the fourth item in connection with those which precede it, we think the intention of the testatrix was, that the life estate of the children was not to commence until after the death of the father; that during his life the Gorham farm was to be the residence of her husband and children, and after his decease, of the children.

II. The children, under the fourth item, take only a life estate in the Gorham farm. They can take under that clause no more than is thereby given them. *Burleigh v. Clough*, 52 N. H., 267.

III. The children are the heirs at law of the mother, and take the remainder by descent. But having a life estate after the expiration of that of the father, and taking the remainder as heirs, the fee becomes vested in them.

IV. The fifth item is as follows: "Fifth. By the unanimous consent of my children (when of age) they may make said farm a Home for Little Wanderers, and to that end may transfer the same to the Maine Association of the New Jerusalem church, to be held by said association in trust for that purpose."

The children when of age might do as they should please with their own. The undevised remainder descending to them as heirs, they could dispose of it as they should deem most judicious. But this clause in the will gives no rights whatever to the Maine Association of the New Jerusalem church.

V. The guardians of minor children are empowered to sell the real estate of their wards in certain cases. R. S., c. 71, § 1. The term real estate includes any and all rights thereto and interests therein. As after the decease of the father the whole estate is in the children, a sale of the right of the children with a conveyance from the father would vest the whole estate in the purchaser.

According to the true construction of the will of Sarah K. L. Baxter, it is declared:

I. That James P. Baxter takes a life estate in the Gorham farm.

II. That under the fourth section in the will the children of the testatrix take only a life estate in said farm.

III. That, as heirs, the children take the remainder, which is undevised.

IV. That the Maine Association of the New Jerusalem church have no legal nor equitable title in and to the Gorham farm.

V. No reason appears from the papers before us, why the judge of probate of Cumberland county, upon proper proceedings had, may not, in his discretion, license the guardian of the children to sell and convey their estate and interest in said farm.

It is ordered and decreed that the costs of these proceedings be a charge upon the estate. *Decree accordingly.*

WALTON, DICKERSON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

ANDREW BENNETT *vs.* GEORGE DAVIS.

Amendment. Pleading. Declaration adjudged bad on demurrer. Account annexed.

A sufficient declaration must contain all the allegations necessary to make out the plaintiff's case. without reference to a paper not attached.

An account annexed is a part of the declaration. As each item is, or may be, a separate contract of itself, no proof in regard to such contract is admissible unless the contract is alleged in the declaration.

Where an amendment is necessary, and is not made, a demurrer will be sustained.

ON EXCEPTIONS.

ASSUMPSIT upon an account annexed. The count in the writ was in the common form, but the account referred to as annexed thereto was this:

"GEORGE DAVIS TO ANDREW BENNETT, DR."

"To groceries as per bill of particulars rendered, $28.52."

At the entry term of the action, the defendant filed a demurrer which was joined by the plaintiff and overruled by the justice presiding, and the defendant excepted.

T. H. Haskell, for the defendant.

My client objects that this declaration gives him no notice of the items or cause for which he is sued; and that, until they are specified, he cannot intelligibly defend. The plaintiff, by joining the demurrer, refuses to let us know for what we are sued, until we learn it, for the first time, from the evidence at the trial. The plaintiff might have amended, as the following citations show, but

they also show that such amendment is necessary. *Butler v. Millett*, 47 Maine, 492; *Tarbell v. Dickinson*, 3 Cush., 349; *Dorr v. McKinney*, 9 Allen, 361; *Priston v. Neale*, 12 Gray, 222; *Burgess v. Bugbee*, 100 Mass., 152.

R. W. Robinson, for the plaintiff.

The words "according to the account annexed," and the account itself, might be rejected as surplusage, and yet the declaration be good on demurrer.

DANFORTH, J. A sufficient declaration must contain all the allegations necessary to make out the plaintiff's case, without reference to a paper not attached.

An account annexed is a part of the declaration. As each item is, or may be, a separate contract of itself, no proof in regard to such contract is admissible, unless the contract relied upon is alleged in the declaration. The bill annexed in this case shows that different items are relied upon, but does not state what they are.

It is clear that the plaintiff cannot sustain his action, nor can he have judgment upon default, without an amendment; and where an amendment is necessary, and is not made, a demurrer will be sustained.

Exceptions sustained.

Declaration adjudged bad.

APPLETON, C. J., WALTON, DICKERSON, BARROWS and VIRGIN, JJ., concurred.

CHARLES F. BRYANT *vs.* WARREN SPARROW.

Trespass quare clausum by a tenant against his landlord. Construction of lease.

Where a lessor covenants that, in connection with the demised premises, and without payment of any additional rent, the lessee may use, occupy and improve an adjacent lot for a specified purpose, excepting only such portions as the lessor may sell or use for building, which sale or use is to terminate the lessee's right to such additional privilege; the tenant's possession of the adjacent lot, if it has been taken and improved by him for the purpose specified, is sufficient to enable him to maintain trespass *quare clausum* against his landlord for an entry thereon, not made for the purposes of sale or building, and for any unlawful infringement of the lessee's right of occupancy of said lot.

ON EXCEPTIONS AND MOTION FOR A NEW TRIAL, by the defendant because the verdict for the plaintiff was rendered against law and evidence, and for an excessive amount, $400. The action was trespass *quare clausum*, instituted by a lessee against his lessor for an entry upon and injury to premises, to the use of which the former had a right under a covenant in his lease. Upon the twenty-fifth day of May, 1865, Mr. Sparrow executed and delivered a lease to Mr. Bryant of the premises in Westbrook on the road to Woodford's Corner, known as "Elmwood Nursery," described particularly by bounds, in the instrument, which then proceeded thus: "To hold for the term of ten years from the seventeenth day of May, A. D., 1865, yielding and paying therefor the rent of two hundred dollars a year; and the said lessor doth covenant with said lessee, that in connection with the above described, and without any additional rent for the same, he may use, occupy and improve for the purpose of a garden or nursery, the land lying between the premises above described, and the highway, during the whole of the aforesaid term of ten years, excepting only such portion as said Sparrow may, from time to time sell and convey or use for building; the right of said lessee to said additional privilege to be subject to termination by such sale or use."

Mr. Bryant testified, that immediately after taking this lease, he entered into possession of all the land mentioned therein, and that his occupation and use of the parcel last named, for a nursery and garden, had been undisturbed for the next three years, and had been exclusive from the twenty-fifth day of May, 1865, to the time of trial, with the exception of the acts of Mr. Sparrow which were the ground of this action. The plaintiff complained that Mr. Sparrow had entered upon one corner, or side, of the piece first described in the lease and taken up some hedge and done other damage, to the amount of twenty-five dollars; but the most of the testimony, and the most severely contested part of the case, related to the entry of Mr. Sparrow upon the second parcel, lying between the first and the highway, for other purposes (as alleged by plaintiff) than sale or building, and his acts upon that land, in digging up and removing trees, shrubs, plants, &c., &c., and depriving the plaintiff of its use, in part, by the character of his own operations upon it. He removed trees, shrubs, &c., of the value of about one hundred and fifty dollars from their places upon this lot, according to the plaintiff's valuation, which the defendant said was a grossly exaggerated one, and that he did not in fact remove so large a number of them as the plaintiff said he did; and claimed that his object was to prepare the lots for building purposes; but the plaintiff said this was false,—a mere subterfuge. The presiding justice of the superior court, in which this cause was tried, instructed the jury that, "In regard to the second lot the terms of the instrument are somewhat peculiar," and then read to them the above quoted covenant of the lease, and added: "That is, undoubtedly, a clause in the lease upon the construction of which some doubt may be entertained; but, for the purposes of this trial, I rule that if it appears that the plaintiff had gone on under that provision of the lease, and had taken possession and occupied the front lot for the purposes of a garden or nursery, as set forth in the lease, and if while so in possession of the front lot, the defendant entered upon that lot, against the will of the plaintiff, and did the acts alleged in the writ, he would be guilty of

trespass. That is to say, that clause in the lease does give the plaintiff sufficient title and exclusive possession for the purposes named, so that for an unlawful infringement of his rights of occupancy, he may maintain an action of trespass;" to which ruling and instruction the defendant excepted. Upon the sixteenth day of June, 1869, Bryant mortgaged to Sparrow his greenhouse and all his stock and tools, &c., &c., in Elmwood nursery, upon land leased by Sparrow to Bryant as aforesaid. The mortgage was still outstanding in Sparrow's hands at the time of the removal of the trees, &c., for which this action was brought.

Butler & Fessendens, for the defendant.

The plaintiff had no lease of this front lot; only an easement or "privilege" to occupy it in a particular manner till the defendant wished to sell or use it for building purposes. To build upon it, it must be prepared for the reception of buildings before they could be erected. He merely conceded to Bryant a "privilege" (as the lease calls it) for an indefinite time. *Boston W. P. Co. v. B. & W. R. R. Co.*, 16 Pick., 522; *Harbock v. Boston*, 10 Cush., 298. The dominion over and possession of the lot remained in the defendant; so he cannot be held in this form of action for injury to the personal property of the plaintiff. *Ropps v. Barker*, 4 Pick., 239; *Eames v. Prentice*, 8 Cush., 337. Indeed, Sparrow had a right to the immediate possession of the personal property also as mortgagee. *Chellis v. Stearns*, 2 Foster, 312; *Smith v. Johns*, 3 Gray, 517. To sustain this form of declaring, under such circumstances, would be an anomaly. The plaintiff only claims $23, of injury done to the trees, &c., on his leased lot, and $148 to those on the front lot; while, in fact, the real value of all the articles enumerated by him could not exceed $60, or $70; yet the jury gave him $400, though it appeared that he never remonstrated, but tacitly acquiesced in the work of Mr. Sparrow upon these lots, at an expense of hundreds of dollars.

A. A. Strout and *M. P. Frank*, for the plaintiff.

The form of declaring adopted by us is correct. *Brock v.*

Berry, 31 Maine, 293; *Dickinson v. Goodspeed*, 8 Cush., 119. Whether or not the defendant was really, in good faith, preparing that ground for building purposes was a question for the jury; and they saw plainly that this excuse was an afterthought, a mere pretext, to shelter him from the consequences of his oppressive and arbitrary conduct.

WALTON, J. We think the construction put upon the lease from the defendant to the plaintiff, by the judge of the superior court, was correct. It is true that the defendant reserved the right to sell the second lot mentioned in the lease, or to use it to build upon; in which case the lease, so far as that parcel of land was concerned, was to become inoperative and void. But subject only to this right of the defendant to sell or use the land in question to build upon, the plaintiff was to have the exclusive right to use, occupy and improve it for a garden or nursery; and having in fact taken possession of it for these purposes, and being in the actual occupation of it when the defendant entered, his entry being for a purpose other than that mentioned in the lease, and without the plaintiff's consent, we think it was a trespass for which trespass *quare clausum fregit* could be maintained. The right of a tenant to maintain trespass *quare clausum fregit* against his landlord for an unlawful entry upon him before the tenancy is terminated, is well settled. *Dickinson v. Goodspeed*, 8 Cush., 119; *Brock v. Berry*, 31 Maine, 293.

The damages seem to have been very liberally assessed; but on the whole we think the verdict must be allowed to stand.

Motion and exceptions overruled.
Judgment on the verdict.

APPLETON, C. J., DICKERSON, DANFORTH, and VIRGIN, JJ., concurred.

ROBERT L. CAMERON *vs.* HUGH LITTLE.

Landlord and tenant. Rent.

When, under a tenancy of any nature, it is agreed that rent shall be paid at regular, stated periods, and the landlord voluntarily terminates the tenancy between such stated periods, he can recover nothing for occupation, after the last preceding pay day.

ON EXCEPTIONS to rulings in the superior court.

ASSUMPSIT for rent from July 1 to August 26, 1872, at fourteen dollars a month, amounting to twenty-six dollars and thirteen cents. The defendant hired the leased premises of the plaintiff just before the first of June, 1872, at the rental above stated, payable monthly. The month's rent due July 1, 1872, ($14,) was paid on that day. Upon the twenty-sixth day of the same month the plaintiff had a written notice to quit served upon the defendant. Upon the twenty-sixth day of August, the day fixed in that notice for the termination of the tenancy, the defendant yielded possession of the premises. No rent was paid after July 1, 1872. The ruling complained of was, that the plaintiff was entitled, not only to the fourteen dollars falling due on the first day of August, as rent for the month of July, but also to twelve dollars and thirteen cents for rent, at the stipulated rate, from the first day of August to the twenty-sixth day of that month.

M. P. Frank, for the defendant, relied upon *Robinson v. Deering*, 56 Maine, 357.

Wm. H. Motley, for the plaintiff.

WALTON, J. Where under a tenancy at will, or any other tenancy, it is agreed that the rent shall be paid quarterly, or monthly, or at any other regular stated periods of time, and the landlord voluntarily puts an end to the tenancy in the middle of the quarter, or the middle of the month, or at any other time between the

regular rent days, he cannot recover of the tenant rent for the fraction of time he occupied after the last regular rent day. The rent for the quarter, or the month, or other period of time agreed upon, is regarded as an indivisible item, and until the rent is due for the whole of one of these periods of time, in contemplation of law, there is nothing due. And it makes no difference whether the tenancy is created by a verbal or a written lease; for although our statutes declare that there can be no estate created in lands greater than a tenancy at will, unless by some writing signed by the grantor; still, it is well settled, both in England and in this country, that a verbal lease is not wholly void; that it is not only sufficient to establish the relation of landlord and tenant, by showing that the holding is permissive, and not adverse, but that so far as the amount of rent is concerned, and the times when it shall become payable, it is absolutely binding upon the parties and will control. Browne on the Statute of Frauds, § 39; Taylor's Landlord and Tenant, § 650; *Currier v. Barker*, 2 Gray, 226; *Nicholson v. Munigle*, 6 Allen, 215; *Robinson v. Deering*, 56 Maine, 357.

In this case the rent was payable monthly. The landlord by written notice ended the tenancy on the twenty-sixth day of the month. He can recover no rent for the twenty-six days.

Exceptions sustained.

APPLETON, C. J., BARROWS, DANFORTH and VIRGIN, JJ., concurred.

Hugh Campbell *vs.* Portland Sugar Company and others.

Negligence—who are liable therefor. When plaintiff must elect whom to sue, where several are liable.

The plaintiff, a driver of a job wagon, was employed by a seaman to take a chest on board of a vessel lying at a wharf owned by the Portland Sugar Company, whose general agents were the firm of J. B. Brown & Sons, the other defendants. Portions of the wharf, and among them the place where the plaintiff was injured, had been let by them to a mercantile house some months previously by a verbal arrangement, and were used by the tenants for the storing of merchandise, principally lumber and cooperage stock, and for the loading and unloading of vessels, many of which were dispatched from the wharf, and among them the brig to which the plaintiff was going with the chest. The way from the business streets of the city down the wharf, as far as the sheds near the foot of it, was open and much frequented. To reach vessels lying where the brig was, it was necessary, on account of piles of lumber, &c., to go through the shed, the doors of which, on the wharf side, had been removed, and on the water side were kept open during business hours, thus affording free passage for all who had business with the vessels lying there. Mariners' chests were always carried through there to vessels lying at that part of the wharf. The plaintiff, with the chest on his shoulder, after passing through the shed, when near the gangway of the brig, stepped into an old hole, worn through the covering of the wharf, which had been there a long time, and received severe injuries. As between the merchants who hired this part of the wharf, and the defendants, it was specially agreed that the defendants should do all the needful repairs, and their wharfinger spent most of his time on the wharf, and occasionally made repairs on the parts thus let. Upon this state of facts, it was *held*, that the plaintiff could not be regarded as a mere licensee; that all persons who were induced to go upon the wharf for the transaction of business, or the performance of work connected with the purposes for which the wharf was used and rented, might hold the owners responsible for negligence in the construction and maintenance of the wharf, as for the breach of a duty; that the liability of the owners would be the same with respect to one going on business to a vessel lying at a part of the wharf which was thus rented, as with respect to one going on those portions of it more immediately in the owners' possession, and under their control; that it made no difference, under the circumstances above stated, whether the passage through the shed was held out to the plaintiff by the owners or their tenants, inasmuch as the tenants were making no use of the property except what the varying exigencies of the business for which the property was hired might require; that so long

as the owners leased the property for such purposes they were bound to strict care to make it safe and free from pitfalls and traps; that the corporation was responsible for the negligence of its agents, on the principle, *respondeat superior*; that the agents were responsible as for personal negligence; that the action cannot be maintained against the corporation which owned the wharf, and their agents jointly, though both are responsible in several suits; that a verdict having been rendered against both upon the refusal of the presiding judge to rule that the action could not be maintained against the owner and agents jointly, it is necessary before the exceptions can be overruled that the plaintiff should enter a discontinuance at *nisi prius* against the owners of the wharf or the agents; that in the present case, by reason of certain testimony admitted, he must discontinue against the owners; that when such discontinuance is entered the ground of that exception would be removed, and that a new trial would not be granted on that account; that the case reported does not disclose such evidence of a want of due and ordinary care on the part of the plaintiff, as will preclude him from recovering; nor can the court say under all the circumstances that the damages are excessive.

On exceptions to the ruling of the justice of the superior court.

There was also a motion for a new trial filed by the defendants, upon the ground that the verdict for the plaintiff was against law and the weight of evidence; also, because the damages, assessed by the jury, at $9,500, were excessive. The plaintiff's injuries were of a very severe and painful nature, and at the first trial of the cause the verdict was for $8,166.

The facts and the rulings at the trial are fully stated in the opinion.

J. & E. M. Rand, for the defendants.

The court will find from the evidence that the wharf where the accident happened was the property of the Portland Sugar Company, and that neither of the Messrs. Brown (sued as defendants) had any interest in it, or anything to do with it, except as general agents of the sugar company.

The court will also perceive, from the evidence, that the entire end, or southerly portion of the wharf, including the place of accident, was let October 1, 1867, to and thereafterward occupied by Phinney & Jackson, who had the exclusive use and occupation of

the buildings, and of all portions of the wharf adjoining them, from that time; the owners of the wharf having no control of that portion of it, or of the buildings hired and occupied by Phinney & Jackson; that the owners of the wharf never place vessels, or permit them to be placed, at that portion of the wharf hired by Phinney & Jackson, and that no vessels, except those of Phinney & Jackson, land or receive goods at that part of this wharf; that Phinney & Jackson used these buildings for the storage of cooperage and shooks and molasses, bringing their vessels there to receive and to discharge cargoes. In a word, that Phinney & Jackson had the sole and exclusive use, occupation and control of the whole end of the wharf, including the place of accident.

The Hattie S. Bishop was loaded at the upper part of the wharf, near Phinney & Jackson's cooper shops, and only dropped down to this part of the wharf, the extreme lower end, on her way to sea.

The passage ways outside of the building are always kept open and free from obstructions, for public use. The plaintiff could have gone to the vessel by the outside passage way, without going through the buildings; in which case he would not have passed over the place of accident.

The sugar company were to keep in repair the parts of the wharf let to Phinney & Jackson.

People went through the buildings, to the wharf outside of them, at their own pleasure—because the doors were opened in business hours—without asking leave of any one.

We object that the action cannot be maintained against all of the defendants jointly. A principal and an agent cannot be sued jointly for a neglect, or nonfeasance. The Browns are mere agents. If any authority is needed, see *Parsons v. Winchell*, 5 Cush., 592.

The ruling and instruction of the court, that if the Browns were agents of the sugar company, and had the general management of the wharf, they were liable, was erroneous.

We apprehend that it is quite apparent that the portion of the wharf where accident occurred, was not kept for public use at the time of accident.

If a plaintiff, in such a case as this, is entitled to recover, it can only be by reason of some failure in duty towards him, on the part of the defendant, growing out of the relations between them. The plaintiff must have had right to pass there. This is the general principle laid down in all the books and adopted in the cases cited *infra*.

The defendant company were to keep the premises let to Phinney & Jackson in repair, but only for the business for which they were let; only for Phinney & Jackson, and persons employed by them in the legitimate business of the place; certainly not for persons who enter upon them, not only without any authority, or even permission from Phinney & Jackson, but without their knowledge, and upon business with which Phinney & Jackson had nothing to do.

In this case the plaintiff undertook to use for a passage way a building which was let as a warehouse only. The sugar company were bound to keep the premises in repair for warehouse purposes only, and to make them safe for all persons visiting them under Phinney & Jackson, with reference to that business. This is the extent of their liability and of their implied contract.

The plaintiff was carrying a chest to a vessel, stopping only for a few hours at the side of the wharf opposite the building—not loading at the warehouse—not placed there for any of the purposes for which the building was hired. He was not employed by Phinney & Jackson; they had nothing to do with him in any way.

The plaintiff had no right to pass through the building; at any rate, no such right to pass through it, for the purpose for which he did pass, as to impose any legal liability upon the defendant company.

To subject the owners to any legal liability to third persons using this building as a mere passage way, the owners must have held this passage through the building out to the public as a safe way, and proper way of going to vessels lying there. There is no evidence of their having done so; neither the sugar company, the owners, nor even Phinney & Jackson, the lessees. On the

contrary, a passage outside of the buildings, on each side thereof, was left open.

The most that can be said is, that Phinney & Jackson kept the doors of the buildings open while carrying on their own business there, and permitted persons to pass through without objection. But such mere permission will not subject the sugar company to any liability to third persons. One availing himself of a mere permission takes the chances of accidents. Had the plaintiff taken the outside passage upon the wharf, he would not have passed near the hole.

There was no privity of any kind between the plaintiff and the sugar company, or even between the plaintiff and Phinney & Jackson; he did not come to the wharf and building at the solicitation or inducement of either of them, or upon any business connected with the purpose for which the buildings were erected, or let, or hired. In the absence of any such privity, invitation or inducement, all the cases say that a plaintiff cannot recover.

The principles of law applicable to cases of this kind are fully discussed and settled in *Sweeny v. Railroad Co.*, 10 Allen, 368; *Elliot v. Pray et als.*, Id., 378; *Zoebisch v. Tarbell et al.*, Id., 385; *Wendell v. Baxter*, 12 Gray, 494; *Gautret v. Egerton*, L. R., 2 C. P., 371; *Collis v. Selden*, L. R., 3 C. P., 495; *Holmes v. Railway Co.*, L. R., 4 Exch., 255; *Carleton v. Franconia Iron & Steel Co.*, 99 Mass., 216; *Barrett v. Black*, 56 Maine, 504.

The instructions given to the jury not being in conformity with the principles enunciated in these cases, our exceptions thereto should be sustained.

Howard & Cleaves, for the plaintiff.

I. The wharf was established for the use of the public, and the defendants were bound to keep it safe for the uses for which it was constructed. *Wendell v. Baxter*, 12 Gray, 494; *Carlton v. Franconia Iron and Steel Co.*, 99 Mass., 218; *Stratton v. Staples*, 59 Maine, 94; *Radway v. Briggs et als.*, 37 N. Y., 356; *Pittsburg v. Grier*, 22 Penn. St. R., 54; *Gibbs v. Trustees Liv-*

erpool Dock, 3 H. & N., 175; *White v. Phillips*, 15 C. B., 245; *Smith v. London & St. Katherine Dock Co.*, 3 C. P., 326; *Barnaby v. Lancaster Canal Co.*, 11 Ad. & El. 223.

II. The lease to Phinney & Jackson did not relieve the defendants of their obligations to the public.

The premises were leased for the purposes of a wharf, and the defendants received compensation for such use. They were bound to keep it in repair by agreement, and upon well settled principles of law. *Taylor v. the Mayor of N. Y.*, 4 E. D. Smith, 559; *Radway et als. v. Briggs et al.*, 37 N. Y., 356.

III. The plaintiff was rightfully upon the wharf, in the prosecution of his business, and in the exercise of due care, and the injury happened through the negligence of the defendants. *Sweeney v. Old Colony R. R. Co.*, 10 Allen, 374.

IV. The defendants were properly joined in this suit. *Wright v. Wilcox*, 19 Wend., 343; *Phelps v. Waite et al.*, 30 N. Y., 78. If it were otherwise, a discontinuance should be allowed as to the parties improperly joined, and judgment rendered upon the verdict against the remaining defendants. *Hewett v. Swift et als.*, 3 Allen, 425.

V. The instructions given do not materially differ from those of the presiding judge in *Wendell v. Baxter*, before cited, and are quite as favorable as the defendants were entitled to. Shearman & Redfield on Negligence, 637, § 585, note 2.

Barrows, J. The plaintiff was the driver of a job wagon, and was employed by the mate of a brig to take the mate's chest aboard the vessel, then lying at Brown's wharf, loaded and nearly ready for sea. Going down to the wharf for this purpose soon after five o'clock, in the afternoon of November 7, 1867, while it was still sufficiently light out doors to see, but duskish enough to require a light in the cabin, after going through a shed near the foot of the wharf, when near the gangway plank with the chest upon his shoulder, he stepped into a hole which had been long before that time worn through the covering of the wharf, and fell, receiving very severe and painful injuries.

The Portland Sugar Company owned the wharf. The other defendants composing the firm of John B. Brown & Sons, were the general agents of the sugar company, and had the whole management of its business, and had charge of the wharf, collecting the rents for the sugar company through the wharfinger, who was employed by the company, bills for rent being made out in the name of J. B. Brown & Sons, and receipted by the wharfinger. At the time of the accident, the part of the wharf where it occurred was occupied by Messrs. Phinney & Jackson, merchants, who hired certain portions of the wharf some months previously, by a verbal arrangement with J. B. Brown, and loaded and dispatched vessels thence, among others, the brig to which the plaintiff was going when he received the injury. The undisputed testimony is, that it was part of the contract of hiring that Brown should keep the wharf in repair. As between the lessors and the lessees no part of that duty rested on the latter. The sugar company's wharfinger spent most of his time upon the wharf, and testifies that "when any repairs were needed on that portion of the wharf hired by Phinney & Jackson, they were generally made by Mr. Brown's carpenter, under my direction, unless there was a large amount to be made, and then Mr. Brown superintended it;" that he "did not know that Phinney & Jackson had any control of the repairs; that they did make repairs in several instances, but usually he sent a man when called upon," that he repaired the place where plaintiff was hurt immediately after it was shown to him; that the office of J. B. Brown & Sons was the office of the Portland Sugar Company; that repairs were usually made by carpenters paid by the month, by the sugar company.

Indeed, there seems to be no question, that in all that the Messrs. Brown did in relation to the wharf, they acted in their capacity as general agents and managers of the sugar company, who held the title, and received the rents and wharfage. A great many vessels loaded at the wharf that fall, and the way leading down upon it as far as the sheds at the foot of the wharf, was open to the public at all times. Phinney & Jackson, however, appear to

have had the right to the exclusive use and possession of those portions which they hired; or, in other words, those parts of the wharf were appropriated for their business. The shed through which the plaintiff passed to the brig, was occupied with their merchandise, and the doors on the eastern, or water, side of it were kept closed, except in business hours, during which all the doors were open, and all who had occasion to go to a vessel, lying at or near the end of the wharf, went through them freely. In fact, the only practicable passage way on board a vessel lying where this brig did, when the plaintiff went to take the mate's chest on board, seems to have been through the shed, the way the plaintiff went when this accident occurred. The way down the wharf, outside the shed, seems to have been so obstructed by piles of lumber and cooperage stock, that all who had occasion to go on board a vessel lying at the southerly end or easterly side of the wharf near the end, as matter of necessity went through the shed, when they had anything to carry. Phinney testifies that it was open to anybody who had business with the vessels lying there, and that seamen's chests were invariably taken through it.

Hereupon the defendants' counsel requested of the court the following instructions, which were either refused, or given with modifications, to be noticed hereafter, viz: That the action cannot be maintained against all the defendants jointly; that this action cannot be maintained; that, if that portion of the wharf where the accident happened, was leased to Phinney & Jackson, and they had the exclusive possession and control of it, then the defendants are not liable; that unless the defendants held out that portion of the wharf where the accident happened, for public use, they are not liable in this action; that unless a passage through the warehouse (meaning the shed above spoken of) through which the plaintiff passed was kept by the defendants for public use, the defendants are not liable; that if Phinney & Jackson had the exclusive possession and control of the warehouse through which the plaintiff passed, and of that portion of the wharf where the accident happened, and the defendants never in any manner

held out to the public the building and the eastern doorway as a public passage, the defendants are not liable; that if Phinney & Jackson permitted the plaintiff to pass to the vessel through the warehouse, such permission does not impose any duty or liability upon defendants, and defendants are not liable to plaintiff for any injury sustained by him, in thus passing to the vessel. The judge, among other matters not excepted to, instructed the jury in substance that, to make out a case, the plaintiff must not only show that he was in the exercise of ordinary care and that the defendants had been guilty of negligence, in consequence of which the injury was sustained, but he must also satisfy them that the wharf, and that portion of the wharf where he was injured, was devoted to public purposes; that it was a public thoroughfare; a passage thrown open to the public, and to which the public were invited, and that inducements were held out to the public to use it as a place of public travel. To this he added: "If you are satisfied that the defendants established the wharf for the use of the public and invited the public to use it for reasonable compensation, then they were bound to keep the wharf safe for the uses for which it was made and rented at that place; and if the plaintiff being properly on the wharf, in the prosecution of his business, and in the exercise of reasonable care and diligence, sustained the injury alleged through a defect in the wharf, then, the other conditions being fulfilled, the plaintiff is entitled to recover." The requests for instructions previously recited, so far as they tended to relieve the defendants from liability upon the ground that the place where the accident happened was in the possession of Phinney & Jackson, the lessees of the sugar company, or that a holding out of the place where the accident happened, or the passage through the shed as places of public travel by their said lessees, would impose no duty and no liability for negligence upon the defendants, the judge declined to give—some of them apparently not because he questioned their correctness as abstract rules of law in a case to which they could properly be applied, but because upon the testimony produced they were inapplicable here. For he thereupon

instructed the jury that the mere permission of Phinney & Jackson to the plaintiff to pass through would not render the defendants liable,—there must be something more than permission, "there must be a holding out to the public this as a place of public travel." If there were such a holding out and inducement to the public, he ruled in substance that it made no difference whether it was done by the defendants directly, or by and through their lessees. And he held that the obligation of the defendants to keep the wharf in repair extended to all persons rightfully prosecuting business or work relating to the loading, unloading and dispatch of vessels at that portion of the wharf hired by Phinney & Jackson, as well as to the immediate employees of that firm.

The distinction which runs through the cases between the relations which the owners of real estate bear to those who have been induced to enter upon the property of such owners by an appropriation of it to business purposes and to uses from which such owners derive profit, and the relations which they bear to mere licensees who are suffered, but not invited directly or indirectly, to pass over it at their own will and risk—where there is nothing to raise an implication that the property is fit for the use to which it is put, and that one may use it with confidence that no negligence on the part of him who derives a profit or advantage from such use has made or left it unsafe, was carefully observed at the trial. That a proprietor does not and ought not to stand in the same position with respect to injuries received on his premises towards mere licensees,—like the plaintiffs in the cases of *Hounsell v. Smyth*, 97 E. C. L. R., 731, and *Gautret v. Egerton*, 2 C. P. L. R., 371,—as he does towards one who is there by invitation, express or implied, for the transaction of a business out of which the proprietor gets his gain or income, is very certain. That a proprietor who has leased his estate, and is not in the present possession of it, would not be responsible for injuries occasioned to third parties by any use which his tenant might see fit to make of it, foreign to the purpose for which it was let, may well be conceded. If any unwonted or unexpected use of the property which the tenant

makes, creates the nuisance, it might well be argued that for such act of the tenant the landlord could not be held responsible.

But nothing in the instructions given, or in the refusals to instruct, will be found in conflict with the well settled doctrine of the law, or the most favorable view for the defendants which can be taken of it, so far as either of these points can be deemed involved in the case before us.

The remark in *Holmes v. N. E. Railway Co.*, 4 Exch., 255, is applicable. "The question of a mere license does not arise, for as soon as you introduce the element of business which has its exigencies and necessities, all idea of mere voluntariness vanishes."

The plaintiff was not a mere licensee. He went to the wharf in the prosecution of his own calling, it is true, but upon business directly connected with that for the transaction of which the wharf was built, and held out by the owners as well to the public as to those more immediately negotiating with themselves, as a safe and suitable place for the transaction of such business.

To all who had occasion to transact such business there, whether with themselves directly, or with their tenants, or with those on board the vessels lawfully lying there by the permission of the proprietors or their tenants, the owners of the wharf owed a duty, their neglect of which has been productive of serious injury.

The act in which the plaintiff was engaged was a necessary and common incident of the business for which the wharf was constructed and let. It is not necessary that the defendants should have had a direct interest in the transaction itself.

In *Tobin v. P. S. & P. R. R. Co.*, 59 Maine, 183, the business of the plaintiff, a hackman, like that of the present plaintiff, was not with the defendants but with the customers of the defendants.

In *Stratton v. Staples*, 59 Maine, 94, the plaintiff at the time she received her injury was going to the apothecary shop occupied by the defendant's tenant.

In *Wendell v. Baxter*, 12 Gray, 494, that part of the wharf where the accident occurred was let to the N. & C. C. Steamboat

Co., and while it is true that the plaintiff in that case was employed by the lessees to carry the mails from the steamboat to the post office, the reasoning of the court extends the right and remedy to all having lawful business on board the boat, Metcalf, J., remarking as follows: "Access over the wharf to the boat and from the boat over the wharf, for the purpose of lading or unlading the boat, was the undoubted right of all persons who had occasion for such access." The same argument was adduced there as here that the defendants could only be bound to keep the wharf in repair in favor of those with whom they as owners contracted or dealt, and that they had no contract with the plaintiff. And the same accurate and careful judge remarks thereupon: "But the plaintiff's right of action accrues from the duty which the law imposed on the defendant, to keep their wharf safe so long as they should permit it to be open and used, and not from any contract between them and him."

In *Smith v. London & St. Katharine's Dock Co.*, 3 C. P. L. R., 326, the question was raised under circumstances even less favorable for the plaintiff than those in the case at bar. The plaintiff there was an optician, and had gone on board a vessel lying in defendants' dock, at the request of an officer of the vessel, to exhibit some nautical instruments, presumably with an eye to trading in his own wares. It was argued, in defence, that he was not on board on the ship's business, or any business in which the proprietors of the dock were interested; that the contract for supplying access to the ship was with third parties, and did not affect the plaintiff's rights; but the court held defendants liable, maintaining in full, the doctrine that all persons coming to the vessel upon any lawful business would have the same right to safe access and egress as the passengers and crew of the vessel itself; and the chief justice remarked that "it is not one person in ten who goes on board a ship in a dock for the purpose of transacting business in which the dock company are interested, in any other sense than that he goes upon the business of the vessel or of those on board," and that "the dock company were paid for the use of

the access to the ship, not necessarily by every person who goes there, but by the owners of the ships in behalf of all who use it."

This is not a question of privity of contract, but of obligation under which the owners of real estate lie to all who are induced by the use which such owners make of their property to enter upon it for the transaction of business. And we fail to find any case where the owner has been exonerated from the consequences of neglect to make and keep the access to a place of business reasonably safe, because the property may be in possession of his tenant.

Certainly there can be no ground for claiming such exemption, where, as here, by express stipulation between the lessors and lessees, the former were to make all necessary repairs. To suffer such an exemption, even in the absence of such evidence as this case affords, we think would be contrary to public policy and substantial justice, for it would not unfrequently operate to deprive the injured party of all remedy except against an irresponsible tenant through whom a negligent landlord would reap the profits, without bearing the responsibilities, of his proprietorship. Like all who are engaged in business which involves the personal safety of large numbers, proprietors of wharves should be held to the exercise of the strictest care. *Pittsburg v. Grier*, 22 Penn. State R., 54.

A wharf used for the loading and discharge of the cargoes of vessels, is in its very nature a passage way over which, in all directions, the exigencies of business may take those people who have business to transact in connection with the vessels and those on board of them. To suffer a man-trap like this hole into which the plaintiff stepped, to remain as this had done for months, until an accident had demonstrated the necessity of replacing the worn out covering, might well be deemed a want even of ordinary care. The opening a way through the shed, when other access to the vessel lying there was prevented by piles of lumber, was no such unusual use of the property by the tenant, as would in any manner affect the liability of the owner. Had the accident occurred in the shed itself, (which was not the case) it would still have been

in a passage to which the plaintiff had been impliedly invited in the prosecution of the common business. The wharfinger of the sugar company spent most of his time upon the wharf. He must have been cognizant of the uses which Phinney & Jackson were making of the parts appropriated to their business; and such uses must have been contemplated by the lessors when they rented those parts.

The business to be done was the loading and unloading of ves sels, including, necessarily, the transportation to and from them, not only of seamen's chests, but of all such articles as make up their multiform outfit for sea voyages. A covering to the wharf that would be secure in any and all parts of it for the varying exigencies of such business, was an imperative necessity, and the wharf proprietors, so long as they kept the wharf open, and occupied or rented it for such business, were bound as to all whom the proffered facilities should bring there, to use due care to furnish it.

Vessels frequently change their position at a wharf for their own convenience, or that of others, and all parts of the wharf where they are allowed to lie, which are not actually covered by closed structures, are liable to come in use as ways of access, and due care should be used by the owners for the security of those having business there accordingly.

Apparently the request that the jury should be instructed that this action could not be maintained, was based upon the positions taken by the defendants (which we have been considering) with regard to the effect of the occupation of that part of the wharf where the accident happened by Phinney & Jackson, and the holding out of the particular spot as a way of access to vessels. The instruction was rightly refused. The renting of the property by the defendants for the purposes for which it was rented and used, imposed a duty upon them as to all who were induced to come upon the wharf upon lawful business connected with the purposes and uses for which it was let. That the occupier, as well as the owner, the tenant as well as the landlord, who directly, or by implication, induces persons to enter upon and pass over his prem-

ises, might also be subject to the action of a person injured by reason of his neglect to use due precautions for their safety, cannot better the position of the defendants. So long as the owner will receive his rents for the use of his wharf for such business, he must see to it that no neglect brings mischief to those who are thereby induced to go there.

The corporation is answerable for its constructive negligence, or perhaps (to speak more exactly) on the principle of *respondeat superior*, and must be held, as Lord Kenyon remarked, 1 East, 108, "to make a compensation for the damage consequential from the employing of an unskilful or negligent servant."

The other defendants, who were the general agents of the corporation, and had the care of this wharf, and who, through their senior partner, had agreed with the lessees to make all needful repairs, are certainly in no better position than their principal.

It is the actual personal negligence of the agents which constitutes the constructive negligence of the corporation. The corporation acts through and by them, and they act for the corporation, and when their acts or neglects result in injury to third parties, they are equally responsible with their principals.

But it does not thence follow that they are jointly responsible. The question whether they may be so held is a somewhat nice one, but we think there are substantial reasons assigned in *Parsons v. Winchell*, 5 Cush., 592, why the principal and agent should not be charged jointly in such a case. It is not, properly speaking, their joint act or neglect which causes the injury.

The proper adjustment of the final responsibility as between themselves, cannot well be effected if one who has distinct grounds of action against them—against the agents for their own negligence—against the principals because the law makes them responsible for the negligence of their servants—is permitted to recover against both in one suit. The distinction between actions on the case arising from negligence, and actions of trespass, where the wrong is inflicted at the command of the superior, in this respect is well marked, and goes somewhat deeper than mere form.

But if it were found that there was no other cause of complaint but this misjoinder, the objection might ordinarily be obviated, as it was in the case of *Hewett v. Swift et als.*, 3 Allen, 420, by entering a discontinuance as to the corporation before taking judgment against the agents, or *vice versa*, as the plaintiff should elect.

In the present case, however, it is thought by some members of the court, that the proof of certain declarations made by one of the firm of J. B. Brown & Sons, may have tended to enhance the damages, and that therefore the plaintiff should be required to discontinue against the corporation, which might otherwise be injuriously affected by evidence which was admissible only against the co-defendants. When this has been done at *nisi prius*, the substantial ground of objection and exception, so far as the other defendants are concerned, will have been removed.

The plaintiff's right to maintain his suit severally against the corporation which owned the wharf, and against their agents, is established, unless the verdict ought to be set aside as against the evidence, on one or other of the grounds relied on in argument by the defendants' counsel.

They insist that the plaintiff did not exercise due care—that he might and should have seen the hole into which he stepped. But it does not seem to us very decisive evidence of a want of ordinary care that, engaged in such a business, and loaded as he was, in the waning twilight of a November day, he failed to observe a hole no larger than this, in a place where he had a right to expect, and where, but for the dereliction of the defendants, he would have found secure footing.

Again they urge that the damages are excessive. It is difficult to measure excessive pain against money. Two juries have passed upon the question in this case with substantially the same result. We are not prepared to say, upon the evidence before us, that the estimate thus reached by different men acting impartially under oath, is so clearly unjust as to warrant us in setting aside the verdict, and sending the plaintiff to a third trial. When he shall have discontinued against the sugar company in the court below, he

will be entitled to judgment on the verdict against the remaining defendants. Upon the removal of that objection, the entry will be, *Motion and exceptions overruled.*

APPLETON, C. J., WALTON, DICKERSON, DANFORTH and VIRGIN, JJ., concurred.

JEFFERSON COOLIDGE and others *vs.* EDWIN R. WIGGIN.

Accommodation paper—contract implied between several indorsers of.

Where the names of several persons appear below that of the original payee, upon the back of a negotiable promissory note, the *prima facie* presumption is that they are successive indorsers, in the order in which their names appear; but this presumption may, *inter sese*, be controlled by proof of any other contract between them, express or implied.

The mere fact, however, that the original payee, and the other indorsers, placed their names upon the note for the accommodation of the makers and to enable them to obtain a discount of the note at the bank, will not change the legal presumption, nor make the indorsement a joint one. The rule, as above stated, applies to accommodation paper the same as to that given for value between the original parties.

ON FACTS AGREED.

ASSUMPSIT upon a promissory note for $5000, dated August 31, 1866, made by Bradley, Coolidge & Rogers, payable in four months from date, at any bank in Portland, to the order of Edwin R. Wiggin, indorsed by him, by Jane M. Bradley, and by Jefferson Coolidge & Company (the plaintiffs) in the order named. On the twenty-third day of November, 1865, and prior thereto, Bradley, Coolidge & Rogers, were doing business in Portland and accustomed to obtain discounts at the Cumberland National Bank on their notes, indorsed for their accommodation by Mr. Wiggin and Mrs. Bradley. Upon the day last named they presented to that bank for discount such a note for $5000, on sixty days, but it was refused, unless another name could be obtained, because the bank already held as much paper of these parties as their rule

allowed them to take. Thereupon Bradley, Coolidge & Rogers procured the plaintiffs' indorsement upon that note, they then knowing that Mr. Wiggin and Mrs. Bradley were accommodation indorsers. The note was then discounted at said bank, its avails carried, upon the books of the bank, to the account of Bradley, Coolidge & Rogers, and the note charged to that account when due, when it was provided for by a similar note, except that it was on ninety days, which was discounted, credited and charged in the same way. April 28, 1866, a third note for $5000, made by Bradley, Coolidge & Rogers, payable in one hundred and twenty days, to the order of Jane M. Bradley, indorsed by her, then by Mr. Wiggin, and then by Jefferson Coolidge & Company, was discounted at the same bank, in renewal of the other, and when this last note fell due it was renewed by the note in suit, Bradley, Coolidge & Rogers paying the discount upon each of these notes, all the parties well knowing that all this paper was for the accommodation of this firm.

Bradley, Coolidge & Rogers stopped payment on the eleventh day of December, 1866, before the note in suit matured, and it was paid January 4, 1867, by the plaintiffs, after it had been protested. The plaintiffs had also indorsed another note, of like amount, for the accommodation of Bradley, Coolidge & Rogers, held their memorandum for $500, and had exchanged notes dated October 31, 1866, on three months, for $3492.10 with that firm, all outstanding at the time of its failure; and Jefferson Coolidge & Co. had to pay the note so indorsed and the one given in exchange for that last mentioned. Upon the day after their failure, Bradley, Coolidge & Rogers conveyed to the plaintiffs certain merchandize, from which $2690 were realized, in part of their liabilities, without specifying any particular claim to be secured thereby; and Davis W. Coolidge, without the knowledge of Messrs. Bradley and Rogers, his co-partners, on the same day, took up their said note of October 31, 1866, for $3492.10, and gave instead of it a new note of that date payable on demand, in order that it might be sued, and property attached, which was done and the

proceeds of that property was applied by agreement with Davis W. Coolidge, but without the knowledge of his co-partners, towards the payment of the note so given by him, for his firm, as aforesaid. This firm existed till after December 12, 1867, when its members filed their petition in bankruptcy, but did no business, except in liquidation, after December 11, 1866. The plaintiffs did not call upon the defendant to pay this note till after the makers were discharged in bankruptcy.

The court to render judgment according to the legal rights of the parties.

J. H. Drummond, for the plaintiffs.

Strout & Holmes, for the defendant.

VIRGIN, J. On Aug. 1, 1865, the firm of Bradley, Coolidge & Rogers made their note for $5000 on four months payable to the order of the defendant, at any bank in Portland. The note was indorsed by the defendant (Wiggin), Jane M. Bradley and Jefferson Coolidge & Co., (plaintiffs), in the order named, and then, at the request of the makers, it was discounted by the Cumberland National Bank. On the last day of grace the note was duly protested by a notary public, from whose certificate it appears that the indorsers were legally notified of its dishonor.

From the order of their names on the back of the note, the law presumes that they thereby assumed the conditional liability of successive indorsers. Having thus held themselves out to the commercial world, this presumption is conclusive as to succeeding parties for value, and without notice of any other than such apparent relations. But as between themselves it is only a *prima facie* presumption, liable to be overcome by any material evidence which shall establish any actual contract, express or implied, entered into or understood by them when they became parties. *Sturtevant v. Randall*, 53 Maine, 149; *Smith v. Morrill*, 54 Maine, 48; *Clapp v. Rice*, 13 Gray, 403. And if any indorser has legally fulfilled his obligation as indorser, to whomsoever he was

thus bound, and can then establish such an agreement as between his co-parties, he may have his rights settled, *inter sese*, in accordance with the principles applicable to such agreement. Thus where a railroad company, having duly authorized their treasurer to give notes, and their president and treasurer to issue bonds as collateral security therefor, for the purpose of effecting a loan in behalf of the company, "unanimously voted" (at the same meeting) "that the officers of the company will unite their personal accountability with that of the company in the bonds and notes authorized to be negotiated in a preceding vote as the same shall become necessary, reserving to themselves the same authority over a sale of said bonds for the purpose of reimbursements which said preceding vote secures to any other holders of said bonds for the said purpose;" and notes were given by the treasurer and indorsed by the officers, one of whom paid the notes and thereupon sued the other indorsers for contribution; Kent, J., in delivering the opinion of the court, said: "All the circumstances connected with the creation and execution of these notes show that in law and in justice, the directors of the company, whose names appear as indorsers on them, were, as between themselves, in substance co-sureties and liable to contribution. This must be the result, or each subsequent indorser would seem to be entitled to maintain an action against any prior indorser, as indorser, in case he paid the note to the holder. The whole evidence seems to negative the latter proposition. They were directors of the company and equally anxious to facilitate the operations by which money could be obtained. They indorsed the different notes without reference to the order in which the names appeared. The bonds issued for their security were held for their joint security, and were so to remain under the charge and disposition of a majority of the signers, which power was executed by a joint instrument, signed among others, by this defendant. The votes of the directors and their acts point in the same direction. It may be questioned whether the vote was so far binding that the officers could be compelled to sign the notes when requested. * * * But having volunta-

rily acted in compliance with the vote, it is not unreasonable to refer to the vote as showing the actual understanding of the parties who unanimously agreed to it, as to the nature and extent of the agreement between themselves as to their joint suretyship. The exact form is not prescribed; but all of them must have understood that they were to embark in one boat, and that boat to act as a tow-boat to the somewhat heavily moving craft to which it was attached." *Smith v. Morrill*, Maine (unreported).

So, in *Talcott v. Coggswell*, 3 Day, 512, where both indorsers went and each paid a moiety, it was held sufficient evidence of their understanding that as among themselves, they were co-sureties.

As before seen, where the payee's indorsement is followed by others, all in blank, the presumption mentioned, in the absence of extrinsic controlling evidence, must govern all parties, including the indorsers themselves. And the fact that all indorse for the accommodation of the maker, and before the note goes into circulation, does not change the result. Accommodation paper is governed by the same rules in this respect as other paper. 3 Kent's Com., 86. If the last indorser has been obliged to pay the amount of the note to the holder, he may recover of any prior indorser, even if all were accommodation indorsers for the maker. *Young v. Ball*, 9 Watts, 141; *McDonald v. Magruder*, 3 Pet., 470; *Church v. Barlow*, 9 Pick., 547; *Shaw v. Knox*, 98 Mass., 214.

The remaining facts are as follows: On November 25, 1865, Bradley, Coolidge & Rogers on presenting to the bank for discount, their note of that date, for $5000 on sixty days, payable to the order of the defendant, and indorsed by him and Jane M. Bradley, were informed that for the reasons stated the bank declined to discount it unless the makers obtained another indorser; whereupon they procured the indorsement of the plaintiffs who knew the others to be accommodation indorsers; and the note was thereupon discounted and the avails carried to the bank account of the makers. The note was renewed three times in a similar manner, the third renewal being the note in suit.

In these circumstances we fail to see such evidence of an agreement of joint undertaking as will overcome the presumption of their several obligation. There is no evidence of any communication whatever between the parties in relation to their liability. If they intended to assume the liability of joint, instead of several, indorsers, they could have very readily so agreed, and the defendant could have as readily proved such agreement by his own testimony, and that of Jane M. Bradley; but he does not even vouchsafe us any evidence that he ever so understood their relations. There being no agreement as to any joint undertaking, the plaintiffs might be willing to become third indorsers, when they might absolutely decline any proposition of suretyship.

We are aware that a different opinion has been entertained in a few courts in this country, in some early cases. But those early cases have generally been revised and corrected by the same courts who made them. For instance, in *Pitkin v. Flanagan*, 23 Vermont, 160, wherein the contrary doctrine is stated with much force; but this case would seem to be overruled in the two subsequent cases of *Farmers' & Mechanics' Bank v. Rathbone*, 26 Vermont, 19 (a leading case in Lead. Cas. on Prom. Notes, 581) and *Keith v. Goodwin*, 31 Vermont, 268. And the large current of authority is in accordance with the views presented by us in this case, the latest of which that has come to our attention is *Kirchner v. Conklin*, 40 Conn., 77.

Judgment for the plaintiffs, for the amount of the note.

APPLETON, C. J., WALTON, DICKERSON and BARROWS, JJ., concurred.

SARAH H. DELA *vs.* EDWIN L. STANWOOD and others.

Mortgagee must account to dowress for all profits received while in possession.

Where the widow of a mortgagor institutes proceedings in equity to redeem the mortgage, in order that she may be let in to her dower, the mortgagee is liable to account to her for the rents and profits received from the date of his entry into the possession of the premises under the mortgage sought to be redeemed; not merely from the time that an account is first demanded of him by the dowress.

ON FACTS AGREED.

BILL IN EQUITY, brought by the widow of the late Lewis Dela, to redeem from two mortgages, held by the respondents, certain premises in Portland, that she might be let in to dower therein. The first of these mortgages, given by John Dela, the father of Lewis, to Josiah Pennell, embraced an undivided half of the land; the second, from Lewis Dela to Neal Dow, covered the whole estate. The respondents, in their answers, denied the complainant's right to dower, setting up in bar thereto, an absolute deed from herself and husband to Jabez C. Woodman, and stating that their possession of the premises was under this deed, through mesne conveyance to one Thayer, who mortgaged the same to them; also, that the mortgages to Pennell and to Dow had been foreclosed. The court found Mrs. Dela barred by the foreclosure proceedings as to that half of the property included in the Pennell mortgage, but entitled to redeem from the Dow mortgage, because the notice of foreclosure was defective, and the deed to Woodman was executed by her while a minor, and before the statutes authorized an infant married woman to bar dower by joining in her husband's deed. The case was sent to a master to state the account. See 61 Maine, 51.

At the April term, 1873, the parties agreed to waive any report from the master, and to submit to this court upon the facts appearing upon the bill, answers and proof, and in the additional state-

ment then made, to decide whether any, and if so what, sum was to be paid by Mrs. Dela in order to redeem her dower in an undivided half of the premises. She made her demand for an account upon Mr. Stanwood, May 31, 1867, and upon the other defendant June 3, 1867. The amount of the Dow mortgage, with the interest accrued thereon, was, on the second day of January, 1873, two thousand seven hundred and forty-one dollars and twenty cents. If the respondents were to account for rents and profits for the time the titles to all the mortgages, and the right of redeeming the premises therefrom, were acquired by them, viz.: October 23, 1863, then the Dow mortgage is fully paid; but if the defendants were to account for rents and profits only since the demand for an account, there would remain due on said mortgage, on the second day of January, 1873, the sum of nine hundred and fifty-two dollars and thirty-eight cents. The defendants took possession of the premises October 7, 1863, but the Dow mortgage was not assigned to them till the tenth day of October, 1863.

Butler & Fessendens, for the complainant.

Two points the court have settled: First, That Mrs. Dela is entitled to her dower; Second, That the respondents must account upon the Dow mortgage for half the net profits of the premises. This liability to account must commence October 10, 1863, when the Dow mortgage was assigned to the respondents, then in possession of the premises. All the titles obtained by the defendants are under mortgage deeds assigned to them within a few days of each other, as part of one transaction, this Dow mortgage being the eldest and prevailing title to this half in which dower is now claimed. For whatever purpose the defendants entered, they must be considered as in under this mortgage. *Gibson v. Crehore*, 5 Pick., 157 and 159; *Saunders v. Frost*, Id., 273.

There is no other point of departure from which the rents and profits can be reckoned. Certainly, not from the date of demand, as that presupposes a reception of them; nor from the date of the decree, for the same reason. The liability commences when they were first in possession under the mortgage; or, what amounts to

the same thing, when they were first in possession, owning the mortgage. "The question is, what is due on the mortgage?" *Gibson v. Crehore*, 5 Pick., 158.

The complainant is entitled to full relief in this court; that is to say, to an assignment of dower, with damages for its detention, from the date of her demand of an account. 4 Kent's Com., 71; 1 Story's Eq. Jur., c. 12; *Curtis v. Curtis*, 2 Brown's Ch., 620; *Swaine v. Perine*, 5 John's Ch., 482; *Bell v. Mayor of New York*, 10 Paige's Ch., 70; *Wood v. Wallace*, 30 N. H., 484; *Herbert v. Wren*, 7 Cranch, 370; *Woodman v. Freeman*, 25 Maine, 531. Demand for an account and offer to redeem are equivalent to a demand for dower. Damages for its detention should then commence. *Bell v. Mayor of New York*, 10 Paige's Ch., 74, 75. The respondents' solicitor confounds our right to an account, with our claim for damages for the detention of dower.

William L. Putnam, for the respondents.

The court has found our title absolute, under the Pennell mortgage, to one undivided half of the premises. That throws the whole of the Dow mortgage upon the other half, in which the complainant is entitled to dower. She must pay all there is due on that mortgage. *Wing v. Ayer*, 53 Maine, 138; *Simonton v. Gray*, 34 Maine, 50. How much is due? Must she pay the whole amount of the notes and interest? or is she entitled to have the rents and profits deducted? If the latter, from what time are they to be deducted; from our first entry into possession, or from the date of her demand? There were no relations to compel us to account to Mrs. Dela before demand, for two reasons. First, A demand is necessary by statute to give her any interest in the rents and profits, except when the husband dies seized. R. S., c. 103, § 21; *Bolster v. Cushman*, 34 Maine, 428. Until then she has a mere right, and no estate. *Purinton v. Pierce*, 41 Maine, 532. In *Gibson v. Crehore*, 5 Pick., 147, the husband died seized. If, then, any other tenant of land conveyed by the husband is not holden to account for rents and profits till demand, the rights of the widow are not enlarged by the fact that we are tenants who

have been compelled to purchase a mortgage against which her husband should have protected us. Her rights to rents and profits depend upon her own title and acts, and have no logical connection with the nature of our title, unless we derived it from her husband's heirs.

Second. The answer denies that we have ever been in possession under the Dow mortgage. This is in no way disproved. Hence, we are under no equitable obligations to the complainant. *Pitts v. Aldrich*, 11 Allen, 40. We say, therefore, she must pay to redeem, $952.38, being the amount due upon the mortgage less the rents and profits since her demand, if she is entitled to any deduction. The court, in *Simonton v. Gray*, 34 Maine, 51, recognized this doctrine, directing an ascertainment of the amount due "at the date of the demand of dower."

RESCRIPT.

This is a bill to redeem a mortgage brought by the widow of the mortgagor against the assignees of the mortgagees. The only question presented is: "When did the respondents become liable to account for rents and profits?" The answer admits that they took possession October 7, 1863, and received the rents from that date; and that upon the tenth day of October, 1863, they received the assignment of the Dow mortgage, which is sought to be redeemed by this bill; *held*, that, although the complainant's husband did not die seized, the respondents should account for rents and profits from October 10, 1863. *Decree accordingly.*

DANIEL F. EMERY *vs.* FRANK O. L. HOBSON.

Check. Action for money paid—when it lies. Demand. Indorser.

Daniel F. Emery made a loan of $6000 to Joseph Hobson, receiving therefor the latter's check, which, at Emery's request, was made payable to the order of the defendant. Subsequently to obtaining the money, Joseph Hobson told his son Frank, (the defendant) what had been done, and requested Frank to go to Emery's office and indorse the check, which he did. After Frank had made the indorsement, the plaintiff asked him to put over it, the words "waiving demand and notice," and he did so. The check was retained by Emery more than a year before presenting it to the bank upon which it was drawn, during which time the maker withdrew his funds from the bank and became insolvent. *Held*, that, upon this state of facts, the payee of the check could maintain an action for money paid against the indorser, without showing any notice to him, or to the maker, that the check had been presented to the bank and payment refused, and without any demand upon either before bringing suit. The loan was a sufficient consideration for the signatures of both the maker and indorser of the check.

To support a count for money paid, it is not necessary that the defendant be relieved from any liability by the payment.

ON FACTS AGREED.

ASSUMPSIT. The writ, dated March 21, 1872, contained only this count: "in a plea of the case, for that the said defendant, at said Portland, on the day of the purchase of this writ, being indebted to the plaintiff in the sum of six thousand dollars, for so much money before that time paid and expended by the plaintiff to the use of the defendant, and at the defendant's request, and interest thereon, from June 11, 1870, in consideration thereof, then and there promised the plaintiff to pay him said sum on demand." Below the count was this specification:

"Mem. The claim on which this suit is based, is a check of Joseph Hobson, dated June 11, 1870, for $6000, to order of defendant, and by him indorsed to plaintiff, on First National Bank of Portland, indorsed waiving demand and notice, payment of which has been refused. W. L. PUTNAM, plaintiff's attorney."

To support his declaration, the plaintiff offered the check named in his specification. It was given under these circumstances: The maker, Joseph Hobson, desiring to obtain a loan from Mr. Emery, went to that gentleman's office for that purpose, on the eleventh day of June, 1870. Emery agreed to lend the money, but required to have Joseph Hobson's check for the amount made payable to the defendant's order, and indorsed by him; accordingly it was so written, and signed by Joseph Hobson, as evidence of the loan, in Mr. Emery's office; and in exchange for it, at the same time and place, and upon Joseph Hobson's agreement that Frank should indorse as required, the check of Mr. Emery, payable to Joseph Hobson, was delivered to the latter, who carried it immediately to the First National Bank of Portland, where it was deposited, and credited to Joseph Hobson's account. Mr. Joseph Hobson then went to his own office, where he saw his son, the defendant, and told him he had obtained this loan of Mr. Emery, and given this check payable to Frank's order, agreeing with Emery that Frank should indorse it, and requested that he should go to Mr. Emery's office and do so.

This was the first knowledge Frank O. L. Hobson had of the matter, or of the check in suit. He acceded, however, to his father's request, went to Mr. Emery's office, and there indorsed the check. Immediately after Frank made his indorsement, Emery asked him to put over his name the words "waiving demand and notice;" this he also did, which was all that was ever said by any party to the paper about the nature of the indorsement.

Frank O. L. Hobson had no pecuniary interest in the check, but indorsed it solely for his father's accommodation and upon his request, as aforesaid, as the plaintiff well knew.

The check was never presented to the bank upon which it was drawn till July 14, 1871, when its payment was there demanded by the plaintiff's attorney and payment refused. In the mean time Joseph Hobson had failed, and been obliged to compromise with his creditors; the plaintiff and some others refusing to enter into such compromise, and still holding their claims against him.

The defendant objected to the admission of the check in evidence; but it was agreed that if it were admissible to support the plaintiff's declaration, and the action could be maintained upon the facts above stated, and the inferences a jury might properly deduce therefrom, the defendant is to be defaulted; otherwise, judgment was to be entered in his favor and for his costs.

William L. Putnam, for the plaintiff.

I. Joseph Hobson obtained money for this check upon consideration that the defendant was to indorse it; and, for this reason, it was made payable to the order of the defendant, who was fully informed that it was part of the consideration that he should indorse it. He assented and did indorse it. It might have been shown that if he had not done so, the plaintiff would have been entitled to return the check to Joseph Hobson, and demand the money paid for it; and that, probably relying upon the defendant's assent to the arrangement, he did not do this. So, the defendant is estopped.

This, however, is not necessary; as in law, this was all one transaction, and is of the same effect as though all parties were actually present, and the indorsement completed simultaneously with the rest of the transaction.

II. The delay in demand of payment was expressly waived by defendant; and was clearly the desire of all concerned. While parol evidence may not be admissible to turn this check into a note, yet the fact that it was regarded as a loan by all the parties, is admissible to shut the mouth of a surety on the question of laches, even had there not been an express waiver.

III. The form of action is proper. The defendant, being an accommodation indorser, the check is evidence of money paid at the joint request of the maker and of the indorser. Independently of this, while the early practice in relation to the money counts was to regard the letter of the pleadings, lately the money counts are used indiscriminately in suits upon negotiable paper. Chitty on Bills, (eleventh Am. Ed.,) *579—*582; *Wild v. Fisher*, 4 Pick., 421; *Cole v. Cushing*, 8 Pick., 48.

Edwin B. Smith, for the defendant.

Upon the facts stated, two questions present themselves:

First. Is the evidence offered by the plaintiff admissible under this form of declaration?

Second. If admitted, is the defendant liable under the circumstances of this case, as reported?

I.

I. If the check be not admissible, ordinarily, to support this count, the specification cannot make it so, any more than if a judgment, or claim for unliquidated damages, were specified.

"Although a specification, when it describes a cause of action consistent with the declaration, and one that can properly be proved under it, becomes and is treated as part of the declaration, yet a specification cannot enlarge, alter, or amend a declaration." *Pickering v. DeRochemont*, 45 N. H., 67.

It limits the proof to the cause of action specified, Id., *Parker v. Emery*, 28 Maine, 492; *Gooding v. Morgan*, 37 Maine, 423; *Butler v. Millett*, 47 Maine, 492; *Lapham v. Briggs*, 1 Wms. (Vt.) 26; *McQuestin v. Young*, 19 N. H., 307; *Man. & Law. R. R. v. Fisk*, 33 N. H., 297; *Starkweather v. Kittle*, 17 Wend., 20; *Bowman v. Earle*, 3 Duer., (N. Y.) 691.

But while it indicates the particular claim to be proved, it does not enlarge the class to which such claim must belong.

II. To recover, the plaintiff must establish his cause *secundem allegatu et probata*. 1 Greenl. on Ev., § 78. *Smith v. Wheeler*, 29 N. H., 334; *Colburn v. Pomeroy*, 44 N. H., 19; *Matthewson v. Eureka Works*, Id., 291; *Child v. Eureka Works*, Id., 358; *Young v. Woodward*, Id., 250.

As said in *Smith v. Wheeler*, "the consideration of the contract must be truly stated and proved as laid." 29 N. H., 334. Same language in 44 N. H., 19.

The count here is "for money paid," &c.; what does this legally import? The essential elements are: (1) a payment, (2) of money, (3) by the plaintiff, (4) for (or at request of) the defendant.

I. It must be *money* that is paid; otherwise this count will not

lie. 2 Bouv. Law Dict., 185, citing *Morrison v. Berkey*, 7 S. & R., 246; *Slaymaker v. Gundacker*, 10 S. & R., 75; *Doubler v. Fisher*, 14 S. & R., 179; *Taylor v. Higgins*, 3 East, 169.

We do not contend that Emery's check was not the same as money; we admit it was; but we only wish to show what must be proved under this declaration, and the strictness of proof required.

II. There must be a *payment* of money.

So, while we concede the check given by Emery to be equivalent to money, we say it was delivered as a *loan* to Joseph Hobson, and not as a *payment* on account of this defendant.

What is a payment? Webster defines "to pay" thus: "1, To discharge a debt; to deliver to a creditor the value of a debt, either in money or goods to his acceptance or satisfaction, by which the obligation of the debtor is discharged." Webst. Dict., h. t. Bouvier says, 2 Law Dict., 820, (1 Inst., 313, § 807,) "By payment, is understood, every way by which the creditor is satisfied, or ought to be, and the debtor liberated."

There must have been a *liability on the part of the defendant* to the recipient of the money, existing prior to its delivery to sustain this action. *Spencer v. Parry*, 3 Ad. & El., 331—S. C., 4 N. & M., 771, cited *infra;* 1 Stephn's N. P., 317, citing *Alcinbrook v. Hall*, 2 Wils., 309; *Moore v. Pyrke*, 11 East, 53; *Power v. Butcher*, 10 B. & C., 346; 1 Chit. on Pl., *350; *Taylor v. Higgins*, 3 East, 169.

It must have been a payment by plaintiff to cancel a debt of the defendant's, and have this effect. See authorities *supra* and *passim*. So, "where the sum which plaintiff has paid is in the nature of unliquidated damages or costs, and cannot be considered as strictly paid in discharge of a debt due from the defendant," &c., &c., the declaration must be special. 1 Stephn's N. P., *317.

III. Such payment must have been made not only "to the defendant's use," but "at *his* request." "Assumpsit lies to recover money paid for another at his request." 1 Stephn's N. P., *317, citing 2 Wils., 309. The next sentence is, "To sustain the com-

mon count for money paid by the plaintiff to the defendant's use, and at his request, it is essential that the plaintiff should have paid his money for the defendant." 3 Stephn's N. P., *317, citing 11 East, 53, &c., &c.

Chitty, to the same effect, says: "If money be lent to a third person at defendant's request, and both be liable to repay it, the one on a loan, and the other in respect of his collateral engagement, which must be in writing, the count against the latter must be special." 1 Chitty on Pl., *350, citing 1 Saund., 211, b, &c., &c.

Mr. Chitty continues, in the next succeeding paragraph: "To sustain the common count for money paid by the plaintiff for the defendant's use and at his request, it is essential, first, that the plaintiff should have paid money for the defendant; and secondly, that such payment should have been made at the defendant's request, express or implied." Id., citing 10 B. & C., 346, and other cases cited *supra*.

In *Spencer v. Parry*, 3 A. & E., 331, before mentioned, the defendant took a house from the plaintiff agreeing to pay certain taxes for which the landlord was liable by statute; the plaintiff having been obliged to pay those taxes through defendant's default, sued him for "money paid." It was held that the action could not be maintained, but should have been upon the special agreement. "The plaintiff's payment," (said the Lord Ch. Just., in the opinion,) "delivered the defendant from no liability except what arose from the contract between them." [Here defendant was delivered from *no* liability.] "The tax remained due by his default, which would give a remedy upon the agreement, *but it was paid to one who had no claim upon him, and, therefore, not to his use.*" [MEM. The words italicised here are italicised in 1 Smith's Lead. Cas., 534—*74]

To the same effect is the case of *Lubbock v. Tribe*, 3 M. & W., 607. Tribe gave his check for money due from him to the K. Co., the plaintiffs receiving it as the company's agents. It was afterward lost, and the plaintiffs agreed with the defendant that

he should give a new check, on their indemnifying him. No new check was given, but the plaintiffs, having been obliged to pay the amount, brought this action for money paid, which was held not sustainable. "On the special agreement," (said Parke, Baron) "I think an action might be maintained, but not for money paid, because the payment of the money did not exonerate the defendant from any liability at all. It is not money paid to his use," &c., &c., in 1 Smith's Lead. Cas., 234. Here, it was merely a loan for Joseph Hobson's use.

Where the plaintiff, a broker, agreeing to buy stock for an undisclosed principal—who, owing to a rise, refused to complete the bargain—paid the difference, it was held he could not recover it as money paid. *Child v. Morley*, 8 T. R., 610.

The American cases of similar purport are numerous.

"Assumpsit for money paid does not lie for moneys paid by plaintiff to remove an incumbrance upon land which defendant has represented and undertaken to be free from incumbrance." *Conant v. Dewey*, 21 N. H., 353.

A. promised B. to pay part of expenses of suit against B.; *held*, that B. could not recover for moneys advanced in defence as paid to A.'s use. *Knox v. Martin*, 8 N. H., 154.

A. and B. were bound, as principal and surety, to C. B. married C.'s daughter, and C. gave B. the bond. *Held*, B. could not maintain assumpsit for money paid, against A. *Butterworth v. Ellis*, 6 Leigh., 106.

S. acted with B. and F., as trustee, but no part of the trust-moneys ever actually came into S.'s hands; *held*, not liable under count for money had and received. *Stowe v. Bowen*, 99 Mass., 194.

In *Mariot v. Lister*, 2 Wills., 141, cited in 1 Dane's Ab., ch. 9, art. 18, § 1, it is said: "The word "lent" is a technical term, and can only be for money lent to the defendant himself, and not for money loaned to a third person. If it be advanced or paid to a third person, it is not money lent." The word "paid" is equally technical, and the argument the same.

Unless the defendant's request be alleged, the declaration is demurrable. *Burdick v. Glass Co.*, 11 Vermont, 19; *Wharton v. Franks*, 9 Porter, (Ala.) 232. Not only ought the request "to be averred in terms, but proved." *Victors v. Davies*, 12 M. & W., 758.

The necessity of a request is recognized in those cases which hold that all volunteer payments of one man's debts by another, have been held to create no liability, and to imply no promise of repayment. *Jones v. Wilson*, 3 Johns., 434; *Menderback v. Hopkins*, 8 Johns., 436; *Beach v. Vandenburgh*, 10 Johns., 361; *Wallkill v. Mamakating*, 14 Johns., 87.

Though the action for money had and received has been declared to be in effect a bill in equity, (2 Greenl. on Ev., § 117; *Moses v. McFarland*, 2 Burr., 1012,) yet it will not lie in favor of a surety who has been compelled to pay the debt of his principal. Of course, money paid will lie in such case. This shows the distinction to be observed. *Ford v. Keith*, 1 Mass., 139. To same effect, *Child v. Eureka, &c.*, 44 N. H., 354, cited *ante*.

We think no case can be found where a promissory note has been introduced under the count for "money paid," even against the maker; for though it can be introduced to show that the defendant has "had and received" money which he should equitably refund to the plaintiff under a count of that description, yet it is only so admissible against some person who has actually received the money the note represents. Indeed, many cases restrict it to immediate parties between whom money actually passes. Per Lord Ellenborough, in *Waynam v. Bend*, 1 Camp., 175; *Thompson v. Morgan*, 3 Camp., 101.

Where the defendant signed as surety for the other maker, the plaintiff cannot resort to the money counts. *Wells v. Girling*, 3 Moore, 79; same case, 8 Taunt., 737.

Nor is a note admissible under them if it express no consideration. *Saxton v. Johnson*, 10 Johns., 418. Nor a premium note. *Atlantic &c. Co. v. Sanders*, 36 N. H., 252, 270.

Accordingly, the supreme court of the United States held that,

"Though an indorser of a negotiable note may ordinarily be declared against in an action for money had and received, yet if the plaintiff's evidence shows that he was a mere accommodation indorser, this action will not lie; he can be charged *only upon a special count* on the note." *Page's Admrs. v. Bank of Alexandria*, 7 Wheat., 35.

If our court assent to the same reasoning which convinced the minds of Marshall and Story, Washington and Livingston, then the defendant's objection must be held fatal to the maintenance of this action.

To hold differently would be an abuse of language, and do violence to common sense.

After reading the agreed statement of facts, can anybody say that Daniel F. Emery really paid and expended any money for the use of Frank O. L. Hobson; when the evidence is undisputed that there was no payment at all, but merely a loan; that it was lent to Joseph Hobson and never benefited this defendant in any way; and all was done before he ever knew of the loan; so he did not request it. To say that this declaration satisfies that rule in assumpsit on a contract, which the New Hampshire court declares has no exception, that "the consideration must be truly stated and proved as laid," would be to make the truth a lie.

Equity does not require this distortion of the facts into a falsehood.

Frank Hobson never had a dollar of this money. It was never understood by anybody that he was to derive any benefit from the loan of it. Nor is it true that plaintiff let it go upon the credit of Frank's name, for Emery had delivered his check to Joseph Hobson, who had cashed it before Frank ever knew of the existence of the check in controversy. At most, Emery only let his money go in the faith that Frank would indorse if asked to do so by Joseph Hobson. It is not the case of a man lending a friend his name that he may obtain credit; but Emery leads this young man into assuming the indorsement of this check. There is no reason, then, why the defendant should be held beyond the fair

limits of the legal responsibility he was thus induced to incur—the letter of his bond. That he must and will meet, whatever it may be, but does object to its being extended, by strained inferences, the perversion of plain terms, or a legal construction contradictory to conceded facts.

II.

If the check supports this declaration yet we claim that no recovery can be had upon it against Frank Hobson, since the loan by Emery to Joseph Hobson had been effected prior to the indorsement, which, therefore, was based upon a past consideration.

If the consideration had passed, the act must have been done at the request of the defendant in order to hold him. *Comstock v. Smith*, 7 Johns., 87; *Hicks v. Burhans*, 10 Johns., 243; *Parker v. Crane*, 6 Wend., 647; *Chaffee v. Thomas*, 7 Cow., 358.

An executed consideration will support no other promise than that implied by law, viz: that he for whom it is executed will pay on request. *Bailey v. Bussing*, 29 Conn., 1.

There is an obvious and recognized distinction between *motive* and consideration. *Philpot v. Gruninger*, 14 Wall., 570, 576 & 7. The court there say that the defendant's agreement "was the consideration,—not its performance." So here, Emery's reliance upon Joseph Hobson's promise that Frank would indorse, and his expectation that the latter would do so—and not the indorsement itself—was really the consideration for the loan. The indorsement was not the consideration of the loan, for it had been made before the defendant knew of it; nor, then, could the loan in law, be the consideration of the indorsement, though it might be a motive for making it. The real motive, or inducement, no doubt, was to gratify Joseph Hobson by complying with his request, without particular inquiry about reasons for asking it, or thought about results.

Suppose the defendant had refused to sign; Joseph Hobson would have had the loan all the same, and the plaintiff would have held this check as evidence of it. It was problematical whether he would indorse or not; if he consented or refused Joseph Hobson's

legal liability remained unchanged. Frank Hobson was under no obligation, legal or moral, to affix his name to this paper. No money was parted with by reason of any promise of his; and any promise to assume a legal liability for a loan already perfected and past, (as much so as if made a year before), without any new consideration therefor, was *nudum pactum* and void.

If the transaction between the parties had been put in writing would it not have read, substantially, thus:

"Whereas, Daniel F. Emery has heretofore lent Joseph Hobson six thousand dollars, in the expectation that I would become surety therefor, (led so to believe by Joseph Hobson's promise that I should do so), I now hereby guarantee payment to said Emery of that loan, in case Joseph Hobson's check given therefor be not paid by him, or at the bank on which it is drawn."

Would not this show the guarantee to be based upon a previous, and not a contemporaneous, loan? Can there be any true statement of the transaction that does not disclose the promise of the defendants to be founded upon a past and fully executed consideration.

Then compare it with adjudicated cases!

Where the defendant gave the plaintiffs a writing to this effect: "In consideration of your having indorsed the undermentioned notes drawn by S. & Co., in your favor, we hereby hold ourselves accountable to you for them in the same manner as though said notes were drawn by us," it was held *nudum pactum*, as stating a past consideration. *Bulkley v. Landon*, 2 Conn., 404.

In a suit to recover the purchase money of a farm, the declaration based the promise upon the "consideration that the plaintiff had there, before that time, sold &c., unto the defendants a certain farm" &c; *held*, bad as stating a past consideration, and judgment was arrested. *Comstock v. Smith*, 7 Johns., 87.

The only exception is where the past consideration was executed at the defendant's previous request, or where it placed him under some moral obligation; neither of which exceptions applies in the present instance. Frank Hobson, so far from making a

prior request, had no previous knowledge of the loan to Joseph, derived no benefit whatever from it, and was not placed under any moral obligation with relation to it.

Comstock v. Smith was the case of land conveyed directly by the plaintiff to the defendant.

In *Chaffee v. Thomas*, 7 Cowen, 358, the same court made a similar decision upon a written promise of the defendant to pay for land previously conveyed by the plaintiff to a third person.

Where A., after drawing a bill of exchange on B., who accepted it, indorsed it to C., who re-indorsed it to A., in pursuance of an agreement (without consideration) that he should do so as a security for the payment of it by the acceptor and to add to its negotiability; on demurrer to a declaration against C., upon the bill, stating these special circumstances under which the defendant became indorser; *held*, that the indorsement was void for want of consideration. *Britten v. Webb*, 2 B. & C., 483.

The previous indebtedness of A. to B., is not sufficient to support C.'s promise to pay the debt. *Bingham v. Kimball*, 17 Ind., 396.

Where a consideration is past and executed, it is essential to its validity that it arose at the request of the defendant. *Hatch v. Purcell*, 21 N. H., 544.

Nor will subsequent assent bind a party unless upon a consideration beneficial to him. Id., 546. *Doty v. Wilson*, 14 Johns., 378.

Even where the defendant was under a moral obligation, if there never existed any legal liability antecedent to the promise. *Mills v. Wyman*, 3 Pick., 207; *Dodge v. Adams*, 19 Pick., 429; *Shepherd v. Young*, 8 Gray, 152; *Cook v. Bradley*, 7 Conn., 57.

In the famous old case of *Hayes v. Warren*, Strange's Reports, 933, where the declaration alleged that the plaintiff had worked for the defendant who, in consideration thereof, afterwards promised, &c., a judgment rendered thereon upon default was held erroneous.

This case has been much criticised, but Judge Metcalf says: "It will be found, however, upon an examination of the history of

the doctrine in question, that there has been no relaxation of it; and that the case of *Hayes v. Warren*, stands on precisely the same grounds as the other cases, and could not have been decided differently without violating long established principles." And a comparatively recent case in New Hampshire is precisely similar in its decision and results to *Hayes v. Warren*.

The declaration setting out that the defendant on the day of the purchase of the writ, being indebted, &c., after, to wit, on the same day, promised to pay, was held bad, as basing the promise upon a past consideration. The judgment rendered on default (as in the case in Strange) was reversed and it was held no new judgment could be given thereon. *Johnson v. Greenough*, 33 N. H., 396. The same form of declaration was held bad in *Livingston v. Rogers*, 1 Caines, 583.

If it be fatal to *allege* the promise to be subsequent to the consideration, can it be any less fatal to *prove* it so?

Chitty, treating "of the consideration in regard to time," says: "In respect of time, a consideration is either: 1st, executed, or something done before the making of defendant's promise; 2d, executory, or something to be done after such promise; 3d, concurrent, as in the case of mutual promises; and 4th, continuing." Chitty on Cont., (6 Am. Ed.), *61.

As to executed considerations, he then goes on to state the necessity for a precedent request, and an allegation of it, and to lay down the law as established by multitudinous cases.

Now, was not all done, by way of consideration therefor, that ever was done, before Frank O. L. Hobson made any promise?

Judge Metcalf, (in his essay in the Am. Jur., No. XLII, page 271) says: "When a promise is made to pay the already existing debt of another, there must be some new consideration, or the promise will be void. The original consideration, which supports the principal's contract, cannot be made to operate upon the new promise. Such promise is *nudum pactum*."

That such is the case where one not party to a note, after its delivery, puts his name upon the back, see *Tenney v. Prince*, 4

Pick., 385; *Courtney v. Doyle*, 10 Allen, 122; *Greene v. Shepherd*, 5 Allen, 589.

How does the case of this check differ from such an one?

The plaintiff will probably say that it was originally agreed that the defendant should indorse the check.

But Frank Hobson was not party to such original agreement, if made; nor was Joseph Hobson his agent in making it, nor did he profess to be, or to have any authority from Frank.

The agreement was completed, executed and delivered before Frank saw it: all the difference his indorsement made was that it enabled Emery to sue the maker in his own name.

At all events, the consideration was fully executed and past before the indorsement.

III.

The plaintiff's laches is sufficient to discharge the defendant, even if originally liable. No "grace" is allowed on checks. R. S., c. 32, § 9; Lead. Cas. on Bills, &c., 716; *Morrison v. Bailey*, 5 Ohio St. R., 13.

So that, to hold an indorser, it must be presented on the day of its date; Id.; or next succeeding day. *Smith v. Jones*, 20 Wend., 192; *Mohawk Bank v. Broderick*, 13 Wend., 133, note; *Gough v. Staats*, 13 Wend., 549; *Veazie Bank v. Winn*, 40 Maine, 60; *Down v. Halling*, 4 B. & C., 330.

The words "waiving demand and notice," on an instrument of this kind are senseless, and must be wholly disregarded.

A check, as to its negotiability and some other incidents, is similar to a bill of exchange; so that some courts, when treating of them with reference to particulars wherein they agree, have carelessly spoken of them as the same; but Judge Story quotes, "*nullum simile est idem*," and clearly distinguishes them. *In re* Brown, 2 Story's Reports, 502, citing 4 Kent's Com., 549, note,* 4 Ed.

It is an instrument *sui generis*, appropriating the amount in the hands of the bank to the holder of the check; while a note or bill of exchange does not charge any particular fund. 2 Story's Reports, 516, 517.

There is no express promise to pay. Joseph Hobson directs the First National Bank, out of his funds there deposited, to pay six thousand dollars; the law therefore implies a promise on his part to pay if the bank does not pay; but certainly, he would not be liable to a suit upon this promise, until the check had been presented at the bank and payment refused, and he notified of the refusal. Can it be that the indorser is subject to a greater liability than his principal? Can Frank Hobson be held when, upon the same state of facts, Joseph Hobson would not be?

Is there a particle of evidence in this case to show that Joseph Hobson (or this defendant either, for that matter,) was informed of the bank's refusal before the bringing of this action? and without such proof how can the plaintiff expect to recover?

"Waiving demand and notice" upon a note has a fixed meaning. It is an agreement to dispense with a "demand upon the maker of the note at the time and place where he (and not another) undertakes to pay it personally, and "notice" of his failure to do so.

Either these words must be treated as surplusage in their present use, (as they were in *Malbon v. Southard*, 36 Maine, 147; *Lowell v. Gage*, 38 Maine, 35,) or else the phrase is to be taken in its ordinary acceptation, and the demand upon the maker, after the bank's refusal, and notice of his delinquency, were all that were waived.

Presentment of the check at the bank for payment was not waived. As above remarked, Joseph Hobson never became liable himself, till after presentment at the bank; then presentment was not waived by the defendant, and by reason of non-presentment he is released. "Waiver of notice is not waiver of demand." R. S., c. 32, § 10. *Drinkwater v. Tebbetts*, 17 Maine, 16; even if preceded by the words, "I hold myself accountable," &c. *Burnham v. Webster*, 17 Maine, 50; *Bank v. Jones*, 6 Mass., 524.

Nor does it make any difference that this was an accommodation indorsement; nor would it even if Joseph Hobson had no funds at the bank, (though he evidently had.) *Warder v. Tucker*, 7 Mass., 449.

Mr. Parsons, in 1 Parsons on Notes, 569, note k, says that, prior to being fixed by demand and notice, an indorser is only an indorser; by these steps, (or by a waiver of them, we say,) "he becomes a surety." Then he is entitled to the usual rights of sureties, and can claim that the creditors shall use "due diligence" in applying the designated funds to the satisfaction of the debt, the check putting them entirely at the holder's disposal for this purpose; therefore, he cannot sleep over it, and, through gross laches, allow them to be taken out of his reach and charge the surety. *Down v. Halling*, 4 B. & C., 330, 333, cited *supra.*

To maintain an action on the guaranty of a note, the plaintiff must show the use of due diligence. *Isett v. Hoge*, 2 Watts, (Penn.) 128; *Oxford Bank v. Haynes*, 8 Pick., 423, 430, note 1.

It will be noticed this is the case of a guarantor, (in 8 Pick.,) and not of an indorser. If strict punctuality were waived by the indorsement on this check, yet (we say) it cannot be pretended that a presentment at the bank was dispensed with entirely. This would be to make the instrument *felo de se;* and Frank Hobson assuming for Joseph a greater responsibility than the latter did for himself. If these words had any relation at all to presentation at the bank—which we deny—they could only be construed as a consent to its being made at a later date than June 11, or 13, 1870, without fixing any other day for it, but leaving it to be done within a "reasonable time."

The twelfth day of June, 1870, was Sunday; it is probable that it was past the bank hours of Saturday, the eleventh, when the indorsement was made, and that suggested this waiver to Mr. Emery's mind.

Where there is no express contract as to the time wherein an act is to be done, it must be in a reasonable time. *Atwood v. Clark*, 2 Maine, 249.

Thirteen months was not a reasonable time for presentment of the check. In the interim, Joseph Hobson, from having sufficient funds in the bank to meet it, had come to have no deposit, and become insolvent.

APPLETON, C. J. This is an action of assumpsit against the defendant, for so much money paid and expended by the plaintiff to the use of the defendant, at his request. To support the declaration, the plaintiff introduced a check, signed by Joseph Hobson, payable to the defendant or his order, and by him indorsed "waiving demand and notice," payment of which had been refused.

The check was given for a loan of money by the plaintiff, to Joseph Hobson, in which the defendant had no interest.

It is objected that here was not a payment, but a loan, and that no prior existing liability was thereby discharged, and, therefore, that this action is not maintainable.

In *Lewis v. Campbell*, 14 Jur., 396, it was held, in order to maintain an action for money paid, that it is not necessary that the defendant should be relieved, by the plaintiff's payment, from a liability to a third person. In *Brittain v. Lloyd*, 14 M. & W., 762, it was argued that this form of action could not be maintained unless the effect of the payment was to relieve the defendant from some liability for the amount to the party to whom payment was made, and that otherwise it could not be "money paid for the defendant's use;" and reliance was placed upon the case of *Spencer v. Parry*, 3 Adol. & Ell., 331, to sustain this proposition, and we have been referred to the same authority by the learned counsel for the defendant in the present case. Referring to that case, Pollock, C. B., says: "This proposition, however, is not warranted by the decision of *Spencer v. Parry*, though some expressions in the report of the judgment give a countenance to the argument of the learned counsel; nor can the proposition be maintained; for it is clear, that, if one requests another to pay money for him to a stranger, with an express or implied undertaking to repay it, the amount, when paid, is a debt due to the party paying from him at whose request it is paid, and may be recovered as a count for money paid; and it is wholly immaterial whether the money is paid in discharge of a debt due to the stranger, or as a loan or gift to him; on which two latter suppositions the defendant is relieved from no liability by the payment. * * In every case, therefore,

in which there has been a payment of money by a plaintiff to a third party, at the request of the defendant, express or implied, on a promise, express or implied, to repay the amount, this form of action is maintainable."

The payment to Joseph Hobson is fully proved. The request to pay, and the promise to repay is inferable from the defendant's indorsement. The indorsement was made with a full knowledge of all the facts, and before the plaintiff received the check as a completed contract. The loan to the maker of the check is alike the consideration for his signature as for that of the indorser. No other consideration is necessary than the loan to the maker thus made, upon the joint credit of the parties to the check. *Bickford v. Gibbs*, 8 Cush., 154; *Colburn v. Averill*, 30 Maine, 310; *Simons v. Steele*, 36 N. H., 73.

The defendant indorsed the check "waiving demand and notice." An indorser who waives demand and notice is not entitled to any demand on the maker and notice of non-payment. *Woodman v. Thurston*, 8 Cush., 157. *Defendant defaulted.*

WALTON, DICKERSON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

APPENDIX.

Opinions of the Justices of the Supreme Judicial Court.

Constitutional law. A female cannot hold an office established by the constitution.

Under the constitution and laws of this State a woman cannot be lawfully appointed and qualified as a justice of the peace, nor legally perform the acts pertaining to that office. Walton, Dickerson and Barrows, JJ., dissenting.

It is competent, however, for the legislature to authorize the appointment of a married or unmarried woman to administer oaths, take the acknowledgment of deeds, or solemnize marriages, so that the same shall be legal and valid.

Upon questions proposed by the executive council.

Within the past four or five years there have been some instances of the appointment and confirmation of women to be justices of the peace. Doubts having arisen as to the constitutionality of these appointments, the following order,—under art. 6, § 3, of the constitution,—was passed by the executive council and approved by the governor on the sixth day of February, A. D., 1874.

"Ordered, That the opinion of the Supreme Judicial Court be requested as to the following questions:—

First. Under the constitution and laws of this State, can a woman, if duly appointed and qualified as a justice of the peace, legally perform all acts pertaining to such office?

Second. Would it be competent for the legislature to authorize the appointment of a married or unmarried woman to the office of a justice of the peace, or to administer oaths, take acknowledgment of deeds, or solemnize marriages, so that the same shall be legal and valid?"

The court responded to the order in the following opinions:—

BANGOR, July 16, 1874.

To the questions proposed we have the honor to answer as follows:

Whether it is expedient that women should hold the office of justice of the peace is not an inquiry proposed for our consideration. It is whether, under the existing constitution, they can be appointed to such office, and can legally discharge its duties.

By the constitution of Massachusetts, of which we formerly constituted a portion, the entire political power of that commonwealth was vested, under certain conditions, in its male inhabitants of a prescribed age. They alone, and to the exclusion of the other sex, as determined by its highest court of law, could exercise the judicial function as existing and established by that instrument.

By the act relating to the separation of the district of Maine from Massachusetts, the authority to determine upon the question of separation, and to elect delegates to meet and form a constitution, was conferred upon the "inhabitants of the several towns, districts and plantations in the district of Maine qualified to vote for governor or senators," thus excluding the female sex from all participation in the formation of the constitution, and in the organization of the government under it. Whether the constitution should or should not be adopted was, specially, by the organic law of its existence submitted to the vote of the male inhabitants of the State.

It thus appears that the constitution of the State was the work of its male citizens. It was ordained, established and ratified by them, and by them alone. By it the powers of government were divided into three distinct departments; Legislative, Executive and Judicial. By art. 6, § 4, justices of the peace are recognized as judicial officers.

By the constitution, the whole political power of the State is vested in its male citizens. Whenever in any of its provisions, reference is made to sex, it is to duties to be done and performed by male members of the community. Nothing in the language of the constitution or in the debates of the convention, by which it was formed, indicates any purpose whatever of any surrender of

political power by those who had previously enjoyed it or a transfer of the same to those who had never possessed it. Had any such design then existed, we cannot doubt that it would have been made manifest in fitting and appropriate language. But such intention is no where disclosed. Having regard, then, to the rules of the common law as to the rights of women married and unmarried, as then existing; to the history of the past; to the universal and unbroken practical construction given to the constitution of this State, and to that of the Commonwealth of Massachusetts upon which that of this State was modelled; we are led to the inevitable conclusion that it was never in the contemplation or intention of those forming our constitution, that the offices thereby created should be filled by those who could take no part in its original formation, and to whom no political power was intrusted for the organization of the government then about to be established under its provisions, or for its continued existence and preservation when established.

The same process of reasoning, which would sanction the conferring judicial power on women under the constitution, would authorize the giving them executive power by making them sheriffs and major generals.

But while the offices created by the constitution are to be filled exclusively by the male members of the State, we have no doubt that the legislature may create new ministerial offices, not enumerated therein and, if they deem expedient, may authorize the performance of the duties of the offices so created by persons of either sex.

To the first question proposed, we answer in the negative.

To the second, we answer that it is competent for the legislature to authorize the appointment of a married or unmarried woman to administer oaths, take acknowledgment of deeds, or solemnize marriages, so that the same shall be legal and valid.

JOHN APPLETON,
JONAS CUTTING,
CHARLES DANFORTH,
WM. WIRT VIRGIN,
JOHN A. PETERS.

DISSENTING OPINION *per* WALTON and BARROWS, JJ. We, the undersigned, justices of the supreme judicial court, concur in so much of the foregoing opinion as holds that it is competent for the legislature to authorize the appointment of women to administer oaths, take the acknowledgment of deeds, and solemnize marriages. But we do not concur in the conclusion that it is not equally competent for the legislature to authorize the appointment of women to act as justices of the peace.

The legislature is authorized to enact any law which it deems reasonable and proper, provided it is not repugnant to the constitution of this State, nor to that of the United States. A law authorizing the appointment of women to act as justices of the peace would not, in our judgment, be repugnant to either. We fail to find a single word, or sentence, or clause of a sentence, which, fairly construed, either expressly or impliedly, forbids the passage of such a law. So far as the office of justice of the peace is concerned, there is not so much as a masculine pronoun to hang an objection upon.

It is true that the right to vote is limited to males. But the right to vote and the right to hold office are distinct matters. Either may exist without the other.

And it may be true that the framers of the constitution did not contemplate—did not affirmatively intend—that women should hold office. But it by no means follows that they intended the contrary. The truth probably is that they had no intention one way or the other; that the matter was not even thought of. And it will be noticed that the unconstitutionality of such a law is made to rest, not on any expressed intention of the framers of the constitution that women should not hold office, but upon a presumed absence of intention that they should.

This seems to us a dangerous doctrine. It is nothing less than holding that the legislature cannot enact a law unless it appears affirmatively that the framers of the constitution intended that such a law should be enacted. We cannot concur in such a doctrine. It would put a stop to all progress. We understand the correct rule to be the reverse of that; namely, that the legislature may enact any law they think proper, unless it appears affirma-

tively that the framers of the constitution intended that such a law should not be passed. And the best and only safe rule for ascertaining the intention of the makers of any written law is to abide by the language which they have used. And this is especially true of written constitutions; for in preparing such instruments it is but reasonable to presume that every word has been carefully weighed; and that none are inserted, and none omitted, without a design for so doing. Taking this rule for our guide, we can find nothing in the constitution of the United States, or of this State, forbidding the passage of a law authorizing the appointment of women to act as justices of the peace. We think such a law would be valid.

C. W. WALTON,
WM. G. BARROWS.

DISSENTING OPINION *per* DICKERSON, J. I am unable to find anything to prevent women from holding the office of justice of the peace, in the nature of that office, the statutes or the constitution.

It is a public office with judicial functions which are clearly within the sphere of woman's capacity.

The proficiency which women, in recent times, have acquired in various departments of industry, the arts, education, literature, works of benevolence, and in some of the learned professions, vindicate and establish their capacity and fitness to discharge the simple and well defined duties of justice of the peace.

The possibilities of woman's nature which have been disclosed in these new spheres of usefulness warrant and demand the extension and multiplication of her opportunities. The ability of women to elicit, quicken and purify the activities of humanity, is one of the most important factors in modern civilization. Wise statesmanship and enlightened jurisprudence alike seek to enlarge the scope of such instrumentalities, without regard to race, color, sex or previous condition of servitude, either of race or sex.

By ancient usage women were regarded as inferior beings, and treated as the servants or slaves of men; married women were subject to personal chastisement from their husbands without any

adequate right of redress; the church denied all women the right of speech in the sanctuary; and even the common law gave the husband all the wife's personal property upon marriage, and, also, that which should subsequently fall to her during coverture; her legal identity became merged in her husband, so that in fact her person, property, earnings and children belonged to him; the husband and wife were one, and the husband was the one. Even at the present time there is but one State in the Union in which the wife living with her husband has equal right to their children with him. But, thanks to an advancing civilization, by usage or law, some of these relics of a less enlightened age, have been swept away, and women in a far greater and more just degree have come to be esteemed as the peers of men in both capacity and right. To deny to women the right to hold office upon the ground of usage would be to set back the clock of time and substitute reaction for progress.

This, however, is not merely a question of usage, but of constitutional right. The exclusion of one half of the people of the State from participation in the administration of the laws, by the dominant half, however long continued, neither implies, nor confers the right to enforce such exclusion. A usage originating in contravention of the constitution, does not become obligatory by lapse of time. The constitution and not usage is the touchstone of civil and political rights.

The statutes relating to justices of the peace, for the most part refer to their powers, duties and jurisdiction. Whoever legally holds that office, be it man or woman, is entitled to exercise the jurisdiction and powers, and to discharge the duties appertaining thereto.

The disability of women to hold office, if any there is, arises from some express provision of the constitution, or some necessary implication therefrom. The constitution does not, in terms, create such disability, nor does it by implication. No adverse implication, in this respect, arises from the use, in the constitution, of words importing the male sex and not the female sex, that does not also lie against the claim of women to the natural rights predi-

cated in terms only of "men" by sections one, three and six of the declaration of rights. If women are ineligible to office for this reason, they are, also, denied the rights of enjoying and defending life, liberty and property, of religious freedom, and the right to be heard by themselves or counsel in criminal prosecutions.

Such a construction is not only unreasonable, but it is contrary to the meaning of the word "men," as used in the constitution. The primary signification of the word man is a human being. It is used in a generic sense to denote the human race, including both sexes. It is only by giving the word "men" this signification, that women have any rights under the constitution that men are bound to respect. The word "men" found in the constitution, is synonymous with "people" and "persons," and includes all persons, as well women as men.

The implications of the constitution are in harmony with this construction. The objects and purposes of its establishment, as set forth in the preamble, are as applicable and necessary for women as men, and the rights enumerated in the declaration of rights are affirmed of both women and men.

The words "citizens" and "people," found in the constitution, are synonymous. Women are citizens under the constitution no less than men. The language of the clause regulating suffrage, "every male citizen of the United States," implies that there are other citizens than male citizens. The word male is used in contradistinction from the word female to show that male citizens only, and not female citizens are qualified electors of the officers named.

Previous to the decision of the Supreme Court of the United States, in the Dred Scott case, the constitution of the United States did not define the meaning of the word citizen.

A majority of the court in that case say that "the words 'people' and 'citizens' describe the political body, who, according to our republican institutions, form the sovereignty, and who hold the power, and control the government, through their representatives." This definition makes the qualified voters of the country alone citizens of the United States, and the sole constituent members of

the national sovereignty, and also places not only persons of African descent, but white women too, without the pale of citizenship.

But the fourteenth amendment of the constitution of the United States, article one, which was evoked by that decision, abrogates and annuls that definition, by declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside."

Women are thus made citizens by the supreme law of the land, and as such, are entitled to all the rights, privileges and immunities predicated of citizens, and its synonym "people," in the constitution which are not therein specifically denied to them; and we have seen that eligibility to office is not of that number. It should not be forgotten that we live under the fourteenth amendment, and not under the Dred Scott decision, if we would avoid falling into the error of following the doctrine in that case, instead of obeying the supreme law of the land.

If, by the common law, women are ineligible to the office of justice of the peace, by the common law also, married women have no right to make contracts, or control their personal property during coverture, and parties are not competent witnesses, and yet I am not aware that any court has held, or any jurist maintained that our statutes, removing such disabilities are unconstitutional because they conflict with the common law. Moreover, if the rules of the common law prevent women from holding the office of justice of the peace, they also preclude the legislature from the right to alter or amend the jurisdiction and powers of such officers which are also derived from the common law. Thus the fallacy of the argument against the right of women to hold office because of the rules of the common law, might be shown in numberless instances.

It by no means follows, that women are ineligible to the office in question, because by the act of separation they were not permitted to take part in the formation of the constitution, and, by the organic law itself, were excluded from voting upon its adop-

tion. I have always understood, and still understand, that the convention that formed the constitution of this State, was an independent body, and perfectly free to propose a framework of government upon a broader and more liberal basis than that of the parent commonwealth, though it should provide for woman suffrage, and allow the eligibility of women to office. They did not do the former, and whether or not they did the latter, in certain specified cases, depends upon the constitution they framed, and not upon the government which that superseded, or the act or manner of separation.

The constitution restricts the right of suffrage to male citizens, but does not confine eligibility to office to males. In the one case words importing a sexual qualification are inserted in the constitution; in the other, they are omitted. This distinction is of great significance, as it shows that the framers of the constitution placed eligibility to office upon a broader basis than suffrage, else they would have expressly restricted it within the same limits, when their attention was called to that subject.

To hold that these rights are co-extensive is, in my judgment, to disregard a plain distinction made in the constitution, and to interpolate into it a clause that would debar one half of the citizens of the State from their right to participate in the administration of the laws.

Impressed with the conclusiveness of this reasoning, a majority of my brethren seek to impair its force by dividing offices into two classes, judicial offices and other offices enumerated in the constitution, and offices not judicial and not therein enumerated, excluding women from the former, and admitting them to the latter class of offices. While it is practicable to make this division, no sufficient reason is perceived, nor, indeed, is any given, why the distinction alleged should attach to such classifications. Certain it is, no such distinction is found in the constitution; it is in fact arbitrary, and has rather the flavor of dogmatism than argument.

What is there, it may be not inaptly asked, in judicial offices, and other offices named in the constitution, that invests them with such importance and sanctity, inherently, or because they happen

to be thus mentioned, that none but male citizens can hold them? What good reason can be assigned why women are eligible to the office of State superintendent of common schools, railroad commissioner, register of deeds, and like offices, or members of boards of health, or trustees of State institutions, or of the bar, and not eligible to the office of justice of the peace? If satisfactory answers can be given to these questions, it is confidently maintained that they must be found outside of the constitution; they cannot proceed from within it.

It is not quite accurate to affirm that "the universal and unbroken practical construction given to the constitution of this State," is adverse to the eligibility of women to the office in question, as it is understood that women have been commissioned justices of the peace in this State in several instances, and are to-day acting in that capacity. It does not appear that women, in any considerable numbers, have applied for that office, or that the proportion of unsuccessful female applicants exceeds that of such males. The omission to claim a right, especially by the subordinated class of citizens, does not prove its non-existence, nor would acquiescence even, by such a class, in a denial of right, have that effect, unless to that is also superadded, the force of judicial sanction, which is wanting in this case.

The eligibility of women to office does not depend upon the common law or the usages, laws and constructions of the commonwealth of Massachusetts, prior to the adoption of the constitution, unless they are specifically made a part of it, and it is not pretended that they are for this purpose. The meaning and intent of the framers of the constitution are not to be learned from such recondite sources, but are to be ascertained from their own language, interpreted by the tribunal they established for this purpose, in accordance with the objects and purposes of the great charter of liberty, equality, justice and progress, which those masters of political science framed.

If the meaning of the constitution is to be ascertained from extrinsic sources, how are we to determine what considerations ought, and what ought not, to control its construction? Why may not

laws authorizing the punishment of spiritual manifestations, so called, as witchcraft, or the erection of the whipping post in our public squares, as a legitimate mode of punishment, receive the sanction of the constitution? The history of the parent commonwealth furnishes precedents for such enactments, even under the domain of the common law. How long would our statutes, removing the disabilities of married women and of parties to be witnesses, and our prohibitory liquor law, stand the test now relied upon to debar women from the right to hold the office of justice of the peace? What advantages, in fine, has our written constitution thus construed over the unwritten constitution of England? It is obvious that they are more mythical than real, ever liable to vanish from their grasp when the people approach them for protection.

If such a principle of construction upon so vital a question is allowed to obtain, there is great reason to fear that written constitutions will soon come to be of little value, and the experiment of setting limitations to power speedily prove abortive. Indeed, the history of jurisprudence, unfortunately, is not without such example. The precedent of outlawing freedmen, because, by such a rule of construction, their race had no rights that the dominant race was bound to respect, is no less repugnant to the judicial than the philanthropic mind, and deserves to be shunned as a perversion of the law, rather than followed as authority. The constitution is itself the rule for testing the validity of customs, usages and laws, and not they the rule for interpreting the constitution.

This principle of interpretation is in strict conformity with the rule laid down by Chief Justice Marshall in *Gibbon v. Ogden*, 9 Wheat., 189. "We know of no rules," says that eminent jurist in that case, "for interpreting the extent of the powers conferred by the constitution, other than is given by the language of the instrument that confers them, taken in connection with the purposes for which they were conferred."

It will not answer to strain, subordinate and dwarf the constitution of this State. That instrument does not bind the people to the perpetual observance of pre-existing customs, usages, con-

structions and laws which form no part of it, but it rather emancipates them from the exclusiveness, monopolies, inequalities and injustices, if any there be, that arise therefrom. Aside from the single discrimination in respect to suffrage, in certain specified cases, the constitution does not determine the rights of the people, according to caste, color or sex, but leaves them free, within specified limitations, to secure the objects stated in its preamble in the best possible manner. The plain people need no judicial handbook to enable them to learn their rights under the organic law of their government; it is so plain, in this respect, that he that runs may read and understand his rights.

There is, in fine, one brief and conclusive answer to the questions propounded to the members of the court; it is, that the burden is upon those who deny the right of women to hold the office in question, to show affirmatively that the constitution prohibits them from so doing. This they certainly have not done. There being no constitutional inhibition, the right to hold that office attaches alike to both female and male citizens.

I therefore answer the first question in the affirmative, and the second also, though I am of the opinion that no further legislation is necessary to authorize the appointment in question.

I have the honor to be,

Yours faithfully,

Belfast, 1874. J. G. Dickerson.

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AMENDMENT.

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APPROPRIATION OF PAYMENTS.

The court cannot apply a payment to an unsecured note, instead of one secured by mortgage, if the parties have made no such appropriation, and the existence of such unsecured note is not established by admission or evidence. *Cary* v. *Herrin*, 16.

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ARBITRATION AND AWARD.

Gerry contracted in writing with Eppes to furnish at a certain ship-yard, all the timber of certain descriptions, and some other materials described in the contract, at a stipulated price, on or before a day named, necessary to build a vessel of a certain size. Eppes agreed by the same contract, on his part, to build the vessel in a workmanlike manner, and to have her finished in the following August, and to pay Gerry for the timber and materials thus furnished by a part of the vessel at her cost. Gerry furnished timber which was used by Eppes in the construction of a vessel, which he caused to be enrolled in the names of himself and others, giving Gerry no part thereof.

Held, that the mutual claims and demands of the parties under the contract were a proper subject of submission to arbitration under R. S., c. 108, § 1;

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BURDEN OF PROOF.

1. Where the holder of a note, given for spirituous liquors, shows that he purchased the same for value, in due course of business and under circumstances not calculated to awaken suspicion, it will be presumed that he had no notice of the illegality till the contrary is shown.

Swett v. *Hooper*, 54.

2. In an action on a promissory note between the original parties thereto, where a want of consideration is relied upon as a defence, and evidence is given on the one side in the affirmative, and on the other in the negative, of the fact of consideration, the burden of proof is on the plaintiff to satisfy the jury upon the whole evidence, of that fact. *Small* v. *Clewly*, 155.

3. The burden is upon a telegraph company to show that an error in a dispatch was caused by some agency for which it is not liable.

Bartlett v. *W. U. Tel. Co.*, 209.

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CASE.

1. The defendant having dug his well on his own land, in good faith, for the obtaining of water for his own domestic uses, is not liable for any damage which incidentally resulted to the plaintiff by reason of thereby diverting the water which had been accustomed to percolate or flow, in an unknown subterranean current, into the plaintiff's spring.

Chase v. *Silverstone*, 175.

2. Where the evidence tended to show that the defendants negligently piled their boards in the travelled path of a public highway;—that a wagon loaded with barrels was driven over these boards causing a rattling noise which frightened the plaintiff's well broken and carefully driven horse;—that the horse being frightened by the noise, suddenly started and threw the plaintiff, while carefully driving, out of his wagon, whereby he was seriously injured;—it was held that a nonsuit could not properly be ordered—and that it was for the jury to determine whether or not the defendants' acts were the proximate cause of the plaintiff's injury, *Lake* v. *Milliken*, 240.

3. Every wrong-doer is at least responsible for all the mischievous consequences that might be reasonably expected under the circumstances to result from his misconduct. *Ib.*

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CONSTITUTIONAL LAW.

1. The act of 1872, c. 9, assuming to authorize the land agent to seize and sell without legal process, the teams and supplies of those found cutting timber upon the public lands without authority, is unconstitutional and void. *Dunn* v. *Burleigh*, 24.
2. It is for the legislature to determine what property, real and personal, shall be subjected to, or exempted from taxation; nor can this power constitutionally be delegated to municipalities. *Brewer Brick Co.* v. *Brewer*, 62.
3. The statutes, assuming to delegate to towns the power of determining whether or not certain manufacturing corporations therein shall be exempted from taxation, are unconstitutional and void. *Farnsworth Co.* v. *Lisbon*, 451.
4. Under the constitution and laws of this State a woman cannot lawfully be appointed and qualified as a justice of the peace, nor legally perform the acts pertaining to that office. *Opinion of the Justices*, 596.
5. It is competent for the legislature, however to authorize the appointment of a female to administer oaths, take the acknowldgment of deeds, or solemnize marriages, so that the same shall be legal and valid. *Ib.*

See CONTRACT, 7. OFFICER, 5. TAKING OF LAND.

CONTRACT.

1. April 23, 1867, the inhabitants of Unity voted to take stock in the plaintiff company, provided its railroad should be located through that town. June 29, 1868, the directors so established the line of the road as not to pass through that town, and March 15, 1869, the inhabitants rescinded their vote to take the stock. *Held*, that there never was any such proposition by one party, accepted unconditionally by the other, as to constitute a completed contract. *B. & M. L. R. R.* v. *Unity*, 148.
2. Where the law requires the assent of a town to be indicated by a two-thirds vote, a majority of the voters may recall such assent before it has become binding by acceptance of the town's proposal by the party to whom it is

DECREE.

See EQUITY, 6, 11, 30.

DEED.

1. When the lines of a deed beginning at a road, run thence to an artificial pond; thence by the side of the same a specified distance; thence by a line parallel with the first line to the road; thence to the place of beginning;—the grant is to the centre of the pond. *Mansur* v. *Blake*, 38.
2. When the line on such pond begins at the middle of a bridge; thence by land joining the pond to the corner of another lot which extends to the centre of the same pond—the grant reaches to the middle thread of the stream. When a lot of land is bounded by a pond artificially created by the flowing of a stream by a mill-dam, the same rule applies to the pond as was applicable to the stream before the dam was built. *Ib.*
3. If in a deed the land thereby conveyed is described as the lot set off and run off by a particular person for a designated purpose, the grantees are confined to the bounds established by such survey, even although the lot thus restricted, be found to contain a much fewer number of acres than that mentioned in the conveyance. *Clark* v. *Scammon*, 47.
4. A deed signed in blank may be avoided when the blanks are filled by one not duly authorized, as against a grantee with full knowledge of the facts. *Cooper* v. *Page*, 192.

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The defendants were sued for not delivering to the Eastern Express Company a box which the plaintiff had directed them to take to the early train. It was taken to the depot and put upon the platform with other baggage intended for that train; *held*, a compliance with the plaintiff's directions. *Manheim* v. *Carr*, 473.

See DIVORCE, 1, 2. PERSONALTY, 1, 2.

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1. Notes of hand given by a libellee to a libellant, during the pendency of proceedings for divorce, in settlement of the claim for alimony, deposited before, to be delivered after a decree of divorce, should one be granted, are valid, if there be no collusion to procure the divorce. *Burnett* v. *Paine*, 122.

See EXECUTION, 5.

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DOWER.

1. The dower of a surviving wife is not barred by a conveyance executed by the husband and wife which is set aside as fraudulent as against the creditors of the husband. *Richardson* v. *Wyman*, 280.
2. Where a creditor avoids a deed from the husband to his wife on the ground that it is fraudulent and void as to him, the wife is nevertheless entitled to dower. *Ib.*
3. A widow is entitled to a third of the rents and profits of real estate prior to the assignment of her dower therein, under R. S. c. 103, § 4, only when her husband died seized. *Wyman* v. *Richardson*, 293.
4. Though entitled to dower, she has no claim to occupy any portion of the estate until it has been duly assigned. *Ib.*
5. A dowress seeking to redeem mortgaged premises is entitled to an account of the rents and profits from the time the mortgagee took possession, not merely from the time she demanded an account. *Dela* v. *Stanwood*, 574.

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1. The rents and profits of the real estate of a deceased insolvent debtor, until it is sold for the payment of debts, belong to his heirs at law. *Kimball* v. *Sumner*, 305.
2. An administrator, who, without any agreement or understanding with the heirs, has collected such rents, may be sued for them by the heirs, jointly or severally, upon a count for money had and received. *Ib.*
3. In an action so brought the administrator cannot deduct from the rents collected by him, sums paid by him for insurance, or to discharge mechanics' liens, since these are charges upon the real estate itself, and not on the rents and profits. Nor, for the same reason, can he deduct any part of annuities paid by him. *Ib.*
4. Though the heirs may sue severally, or all may join, two or more cannot sue jointly, if there be other heirs not joined in such action. *Ib.*

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1. The dower of a surviving wife is not barred by a conveyance executed by the husband and wife, which is set aside as fraudulent as against the husband's creditors. *Richardson* v. *Wyman*, 280.
2. Where a creditor avoids a deed from the husband to his wife, upon the ground that it is fraudulent as to such creditor, the wife is nevertheless entitled to dower. *Ib.*

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In 1865 plaintiff built a barn for defendant's husband, which the defendant subsequently promised to pay for; *held*, that a verdict for the plaintiff could not be sustained because it did not affirmatively appear that this promise was made subsequently to the passage of Public Laws of 1866, c. 52, empowering married women to contract generally, this promise not relating to any business carried on by defendant under Public Laws of 1862, c. 148. *Rollins* v. *Crocker*, 244.

See CONSTITUTIONAL LAW, 5. CONTRACT, 6. EQUITY, 21, 22, 24.

MASTER AND SERVANT.

1. The rule that a servant, who is injured by the negligence or misconduct of his fellow-servant, cannot maintain an action against his master for such injury, is not altered by the fact that the servant guilty of negligence is a servant of superior authority whose lawful directions the other is bound to obey. *Lawler* v. *And. R. R. Co.*, 463.
2. The master of men employed in dangerous occupations is bound to provide for their safety, and this obligation extends alike to the providing of good and sufficient machinery, and to the procuring skilled and judicious workmen by whom it is to be controlled. *Ib.*
3. When the servant injured seeks to hold the master for negligence in failing to procure suitable and proper servants, by whose incompetency the injury was caused, the charge of negligence should be distinctly set forth in an appropriate count. *Ib.*
4. Master and servant cannot be joined in an action for the latter's negligence. *Campbell* v. *Portland Sugar Co.*, 552.

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NEGLIGENCE.

Company, whose general agents were the firm of J. B. Brown & Sons, the other defendants. Portions of the wharf, and among them the place where the plaintiff was injured, had been let by them to a mercantile house some months previously by a verbal arrangement, and were used by the tenants for the storing of merchandise, principally lumber and cooperage stock and for the loading and unloading of vessels, many of which were dispatched from the wharf, and among them the brig to which the plaintiff was going with the chest. The way from the business streets of the city down the wharf, as far as the sheds near the foot of it, was open and much frequented. To reach vessels lying where the brig was, it was necessary, on account of piles of lumber, &c., to go through the shed, the doors of which, on the wharf side, had been removed, and on the water side were kept open during business hours, thus affording free passage for all who had business with the vessels lying there. Mariners' chests were always carried through there to vessels lying at that part of the wharf. The plaintiff, with the chest on his shoulder, after passing through the shed, when near the gangway of the brig, stepped into an old hole, worn through the covering of the wharf, which had been there a long time, and received severe injuries. As between the merchants who hired this part of the wharf and the defendants, it was specially agreed that the defendants should do all needful repairs, and their wharfinger spent most of his time on the wharf, and occasionally made repairs on the parts thus let. Upon this state of facts, it was *held*, that the plaintiff could not be regarded as a mere licensee; that all persons who were induced to go upon the wharf for the transaction of business, or the performance of work connected with the purposes for which the wharf was used and rented, might hold the owners responsible for negligence in the construction and maintenance of the wharf, as for the breach of a duty; that the liability of the owners would be the same with respect to one going on business to a vessel lying at a part of the wharf which was thus rented, as with respect to one going on those portions of it more immediately in the owners' possession, and under their control; that it made no difference, under the circumstances above stated, whether the passage through the shed was held out to the plaintiff by the owners or their tenants, inasmuch as the tenants were making no use of the property except what the varying exigencies of the business for which the property was hired might require; that so long as the owners leased the property for such purposes they were bound to strict care to make it safe and free from pitfalls and traps; that the corporation was responsible for the negligence of its agents, on the principle, *respondeat superior;* that the agents were responsible as for personal negligence; that the action cannot be maintained against the corporation which owned the wharf, and their agents jointly, though both are responsible in several suits; that a verdict having been rendered against both, upon the refusal of the presiding judge to rule that the action could not be maintained against the owner and agents jointly, it is necessary before the exceptions can be overruled that the plaintiff should enter a discontinuance at *nisi prius* against the owners of the wharf or the agents; that in the present case, by reason of certain testimony admitted, he must discontinue against the owners; that when such discontinuance is entered the

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1. Bodily presence must concur with intention to enable a single woman to establish a home, the continuance of which for five years will give her a settlement under the sixth mode prescribed in R. S., c. 24, § 1. *Fayette* v. *Livermore*, 229.

2. Even when she has long been a member of the family of a brother who has supported her, and designs with his knowledge and consent to remove with him to another town, but is delayed upon the road by bodily ailments, and he with his family arrives at such town some weeks before she does, she cannot be said to have her home in such town, within the meaning of the pauper law, until she actually comes there. *Ib.*

3. If the brother, being under no legal obligation, by contract or otherwise, to support her, before the lapse of five years calls upon one of the overseers of the poor of such town and informs him when the five years will expire and refuses to support her any longer without compensation trom the town, and her pecuniary circumstances and bodily condition are such as to make her stand in need of immediate relief when such support is withdrawn, and thereupon the overseer directs the brother to supply her and he will see to it, and upon the same day communicates these facts to another overseer who assents thereto, and they forthwith make a notice to the town where she has her settlement in the ordinary form that she has become chargeable, &c., such notice is not invalid as being premature, although no bargain is made with the brother as to the price of her board per week, until some days later, and it does not appear at the time of making the notice that the pauper has consumed or received any supplies under the order thus given. *Ib.*

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1. The amount of compensation received by a special administrator upon an estate cannot affect the amount to which the administrators upon the same estate, subsequently appointed, are entitled; hence, the inventory returned and the account rendered by such special administrators are not admissible upon the hearing of an appeal from a decree of the judge of probate allowing a certain sum by way of compensation to the administrators. *McLoon* v. *Spaulding*, 315.

2. Upon an appeal from such allowance in a second account of administration, the compensation allowed in their first account is not properly subject to revision; and exceptions to a ruling that such first account, having been passed upon by the judge of probate and not appealed from, could not properly be reviewed, with a view to fixing the compensation of the administrators in the second account, cannot be sustained when neither of the accounts is brought up with the exceptions, and there is nothing tending to show that the excepting party was injured thereby. *Ib.*

3. If the word "reviewed" is to be understood in a technical sense the ruling is correct; but such first account may and should be referred to, and it is competent evidence between the parties upon such hearing so far as the facts exhibited therein have a bearing upon the questions raised by the reasons of appeal. *Ib.*

4. The burden of proof is upon the administrators, upon such an appeal, to establish their claim to the amount allowed therein as compensation by the judge of probate, and they have the right to open and close. *Ib.*

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See INTOXICATING LIQUORS, 2, 3. MUNICIPAL COURT OF LEWISTON, 1, 2, 3, 4. PRACTICE, 14. SEARCH WARRANT.

SEARCH WARRANT.

A search warrant commanded the search for intoxicating liquors, upon "certain premises and their appurtenances, &c., occupied by Michael Neagle, &c." Then followed the description by metes and bounds of a block of two dwelling-houses, each separated from the other by a partition wall, with no means of communication on the inside—one occupied by Michael Neagle and the other by Flaherty. In trespass for ale seized in Flaherty's house; *held*, that the warrant did not authorize the search of Flaherty's house. *Flaherty* v. *Longley*, 420.

[MEM. See last paragraph of opinion in *State* v. *Spencer*, 38 Maine, 32.
REPORTER.]

See INTOXICATING LIQUORS, 2, 3. MUNICIPAL COURT OF LEWISTON, 1, 2, 3, 4. PRACTICE, 14.

SELECTMEN.

See MUNICIPAL OFFICERS.

SERVANT.

See MASTER and SERVANT.

SET-OFF.

See TRUSTEE PROCESS, 2.

SETTLEMENT.

Bodily presence must concur with intention to enable a single woman to establish a home, the continuance of which for five years will give her a settlement under the sixth mode prescribed in R. S., c. 24, § 1.
Fayette v. *Livermore*, 229.

See PAUPER, 2, 3, 4.

SPIRITUALISM.

The court declines to determine, as matter of law, that a belief in modern spiritualism, (so called) if proved to exist in the mind of the testator, is, *ipso facto*, evidence of insanity, or of insane delusion, or of an undue influence. *Robinson* v. *Adams*, 369.

See INSANITY, 2, 3, 4. PROBATE LAW, &c., 10. UNDUE INFLUENCE.

STATUTE.

See CONSTITUTIONAL LAW.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES OF THE UNITED STATES.

CONSTITUTION OF MAINE.

STATUTES OF THE STATE.—REVISED STATUTES.

PUBLIC LAWS OF MAINE.

SPECIAL LAWS OF MAINE.

SUNDAY.

1. The scale bill of a person agreed upon by the parties is admissible, though part of the logs were measured, reckoned up and a memorandum of them left with one of the parties, on Sunday. *Bailey* v. *Blanchard*, 168.

2. It is no legal objection to the proceedings that one of the four days during which a collector kept distrained property was Sunday.
Carville v. *Additon*, 459.

See EVIDENCE, 8. TAX, 10.

TAKING OF LAND.

TAX.

TRAVELLER.

See WAY, 6.

TRESPASS.

See EVIDENCE, 15. INTOXICATING LIQUORS, 2, 3 4. MUNICIPAL COURT OF LEWISTON, 1, 2, 3, 4. SEARCH WARRANT.

TROVER.

WATERCOURSE.

WAY.

WITNESS.

See EVIDENCE, 2, 5, PROMISSORY NOTE, 3.

WORDS.

"*Day's Work*," see that title. "*Reasonable Doubt*," see EXCEPTIONS, 7.

WRIT.